



**POLICE BODY CAM FOOTAGE:
JUST ANOTHER PUBLIC RECORD**

**A WHITEPAPER
BY
THE MEDIA FREEDOM &
INFORMATION ACCESS CLINIC**

DECEMBER 2015

Acknowledgements

The primary authors of this report are Yale Law School students Josh Divine '16, John Ehrett '17, Vera Eidelman '15, Raymond Lu '17, Divya Musinipally '16, and Rebecca Wexler '16, who are members of the Media Freedom & Information Access Clinic, a program of the Abrams Institute for Freedom of Expression.

The Clinic would also like to express appreciation for the contributions of staff at the Reporters Committee for Freedom of the Press, particularly Hannah Block-Wehba, who laid the groundwork for this report and gave us valuable insight throughout the drafting process.

This project has been generously supported by the Yale Law School, the Information Society Project, and the Abrams Institute for Freedom of Expression. This whitepaper does not reflect the institutional views, if any, of Yale Law School or Yale University.

The Floyd Abrams Institute for Freedom of Expression

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. The Abrams Institute was made possible by a gift from Floyd Abrams, one of the country's leading experts in freedom of speech and press issues, who both graduated from and has taught at Yale Law School. It is administered by the Information Society Project, directed by Jack Balkin, Knight Professor of Constitutional Law and the First Amendment.

Media Freedom and Information Access Clinic

The Media Freedom and Information Access Clinic (MFIA) is a legal services clinic dedicated to increasing government transparency, defending the essential work of news gatherers, and protecting freedom of expression through impact litigation, direct legal services, and policy work. The Clinic is a project of the Yale Information Society Project and is supervised by Clinical Lecturer David Schulz and Abrams Fellow Jonathan Manes.

Information Society Project

The Information Society Project (ISP) at Yale Law School is an intellectual center that explores the implications of the Internet and new information technologies for law and society. The ISP is guided by the values of democracy, development, and civil liberties. The project's work includes copyright, media law and policy, transparency, and privacy.

Inquiries:

David.Schulz@yale.edu
Divya.Musinipally@clinics.yale.edu
Yale Law School
127 Wall Street
New Haven, CT 06511

To download copies of this report, please visit the website of the Media Freedom and Information Access Clinic at <http://isp.yale.edu/media-freedom-and-information-access-clinic>. This report may be downloaded and reproduced free of charge and without the need for additional permission. All rights reserved.

INTRODUCTION

Numerous salient, tragic deaths of unarmed black men at the hands of police in recent months have led to a public outcry. In many cities and towns, demands for police reform have led to the implementation of police body worn camera (“body cam”) programs. Following the killing of teenager Michael Brown by Ferguson police officer Darren Wilson, Brown’s mother called for body cam programs, and Senator McCaskill of Missouri suggested that federal funding to police departments should be conditioned on the departments instituting body cam programs.¹ In the interim report of the President’s Task Force on Twenty-First Century Policing (“Task Force Report”),² the White House proposed investing \$75 million in body cameras for local police departments.³ As of April 2015, between one-fifth and one-third of police departments nationwide have implemented body cam programs.⁴

The recent deaths did not themselves create a need for increased use of body cameras; they merely highlighted an already existing problem that extends back far further than the past year. The FBI Supplementary Homicide Report shows that police have been responsible for at least 12,000 deaths since 1982. To make matters worse, the available data is “terribly incomplete;” many high population areas—such as the State of Florida and New York City—don’t currently report police homicide statistics to the FBI. Thus, the number is likely higher.⁵

Policymakers, law enforcement officials, and public commentators argue that body cams can limit the risk of police abuse in three ways:

1. Knowing their actions are being recorded, police officers will be less likely to deviate from proper procedure;

¹ See Andrea Peterson, *President Obama Wants to Spend \$75 Million to Buy Police Bodycams*, WASH. POST (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/>. Similarly, the North Charleston mayor responded to officer Michael Thomas Slager fatally shooting Walter Scott by announcing that all patrol officers will now be outfitted with body cams. See Wesley Lowery & Elahe Izadi, *Following “Horrible Tragedy,” South Carolina Mayor Pledges Body Cameras For All Police*, WASH. POST (Apr. 8, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/04/08/following-horrible-tragedy-south-carolina-mayor-pledges-body-cameras-for-all-police/>.

² PRESIDENT’S TASK FORCE ON TWENTY-FIRST CENTURY POLICING, INTERIM REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 31-36 (2015), http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf.

³ OFFICE OF THE PRESS SECRETARY, WHITE HOUSE, FACT SHEET: STRENGTHENING COMMUNITY POLICING (Dec. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

⁴ Zusha Elison & Dan Frosch, *Police Body Cameras Bring Problems of Their Own*, WALL. ST. J. (Apr. 9, 2015), <http://www.wsj.com/articles/police-cameras-bring-problems-of-their-own-1428612804>.

⁵ Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), <http://www.propublica.org/article/deadly-force-in-black-and-white>.

2. The footage will expose community members to the hard decisions police face and improve civilian-police relations as a result;
3. The footage will provide a means for the public to work toward accountability and change after a troubling encounter.

Body cam programs can only fulfill this promise, however, if the public has access to the footage. Without public access, police officers lose the incentive to improve their behavior, abuses remain unseen or contested, and, at worst, the footage turns into a tool of surveillance. With public access, on the other hand, observers can monitor police conduct, the media can serve as a watchdog, the public can encourage police departments to adopt reasonable policies regarding video footage retention, and the nation as a whole can identify and stop entrenched systems of misconduct or abuse.

Recent events highlight the critical role that video footage can play in exposing and changing police practices. In the cases of Eric Garner, Tamir Rice, and Walter Scott, video footage provided evidence of police brutality that contradicted official accounts, generated media attention, and in some cases enabled prosecution of police officers.⁶

Rather than ensure transparency for body cam footage, however, at least 30 states across the country are considering new statutes to limit public access to the footage.⁷ These bills seek to exempt body cam footage from established public records laws, removing them from the traditional Freedom of Information Law framework. Several states have already passed legislation that exempts access to body cam footage for the general public entirely,⁸ some states have established committees to study body cams and draft policies about public access, and many states have left it up to local police commissions to determine their own access policies. The President's Task Force also encourages states to modify public record laws which allow public access to body cam footage to protect individual privacy.⁹

The efforts in some states to limit access to body cam footage are misguided. Our national experience over the last fifty years has established well-grounded principles that define the “public right to know.” This white paper demonstrates that the implementation of body cam programs should not disturb these settled principles. Current concepts embedded in most freedom of information laws are fully capable of addressing the concerns raised by access to body cam footage. Any legislation that limits access to body cam footage—whether by removing

⁶ Matt Apuzzo and Timothy Williams, *Video of Walter Scott Shooting Reignites Debate on Police Tactics*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/us/video-of-fatal-shooting-of-walter-scott-reignites-debate-on-police-use-of-force.html>.

⁷ Kathy A. Bolten, *Iowa Bill Would Require Police Body Cameras for Officers*, DES MOINES REGISTER (Feb. 25, 2015), <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/02/25/police-body-cameras-iowa-legislation/24024853>.

⁸ NEB. REV. STAT. § 44-04-18.7(1) (2015); S.C. CODE ANN. § 23-1-240 (G)(1) (2015).

⁹ INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 2, at 36.

body cam footage from the definition of a public record or by amending freedom of information law (FOIL) exemptions to treat the new technology differently—constitutes a serious step in the wrong direction. Issues regarding body cam footage are adequately addressed through non-exemption safeguards and new technology solutions. State legislatures should not amend their existing Freedom of Information (FOI) laws to restrict access to body cam footage. Body cam footage should be treated the same as other public records.

I. TRANSPARENCY IS CRITICAL TO THE LEGITIMACY AND SUCCESS OF POLICE BODY CAMS

A. Democracy Requires Government Transparency

Government transparency is vital to a legitimate, functioning democracy. The Freedom of Information Act and equivalent state laws help promote this by enabling access to public records

When the government shrouds its operations in secrecy, the American people are uninformed about how their government functions and are unable to make informed decisions when voting. Recognizing the risk that government secrecy poses for democracy, Congress enacted the Freedom of Information Act (FOIA) in 1966. In 1974 Congress overrode a presidential veto to establish FOIA enforcement mechanisms that were intended to chip away at the “traditional bureaucratic secrecy of the federal establishment.”¹⁰ Thirty years later, Congress expressly re-affirmed FOIA’s core transparency mandate through the Act’s 1996 Amendment.¹¹ The Senate Committee Report for that amendment explained that government transparency “is consistent with our democratic form of government by furthering the interests of citizens in knowing what their Government is doing.”¹² As the Supreme Court explained in *Department of Air Force v. Rose*, the Act embodies “a general philosophy of full agency disclosure.”¹³

FOIA requires federal agencies to disclose records to individuals who request them, unless the records fall within one of the limited exemptions.¹⁴ The Supreme Court “has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide maximum access.”¹⁵ As a result, FOIA enhances government accountability

¹⁰ 120 Cong. Rec. S19806-823 (Nov. 21, 1974).

¹¹ The 1996 Amendment to FOIA through the Electronic Freedom of Information Improvement Act of 1995 included a “purpose” section that was not codified into FOIA’s text.

¹² S. REP. NO. 104-272, at 5 (1996), http://nsarchive.gwu.edu/nsa/foialeghistory/104_cong_reports_efoia_senate.pdf.

¹³ 425 U.S. 352, 360 (1976); *see also* N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978).

¹⁴ *See* 5 U.S.C. § 552(b)(1)–(9).

¹⁵ *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

or, as Congress has declared, reveals and prevents government “waste, fraud, abuse, and wrongdoing.”¹⁶

Because local government agencies usually create and control body cam footage, state open records laws are likely to be more relevant for access to such footage than federal FOIA. Thus this white paper will focus on state statutes. But states frequently model their own statutes after the federal FOIA, and every state has enacted a FOI law. The motivation behind all FOI statutes – both state and federal – are the same: these laws aim to improve government functioning and enable democratic transparency at a more local level through public access to government records.¹⁷

B. Transparency is Particularly Important for Body Cam Footage

Body cam footage can dramatically improve accountability within government. Accordingly, public access to this footage is necessary to realize the advantages of enhanced public awareness.

Public oversight is particularly important in the law enforcement context, where government officials have arrest, imprisonment, and even death as tools at their disposal. Transparency around police activities is particularly important to maintain public confidence, which is essential to the continued legitimacy of law enforcement. According to data police departments submitted voluntarily to the FBI, police killed 404 people in the United States in 2011.¹⁸ This number is tragic in its own right, but it becomes especially troubling when compared to the number of people killed by police in other countries: six in Australia, two in England, and six in Germany.¹⁹

Legislatures and police departments have created body cam programs to promote transparency, enable accountability, and improve relationships between police and communities. One of Attorney General Loretta Lynch’s first statements in office concerned the importance of body cams for improving policing in America: “Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve.”²⁰ Elected officials and police chiefs at the local level also believe in the accountability-enhancing promise of body cams. New Haven

¹⁶ Pub. L. No. 104-231, 110 STAT. 3048.

¹⁷ See, e.g., *Fink v. Lefkowitz*, 47 N.Y. 2d 567, 571 (1979) (“the public is vested with an inherent right to know and . . . official secrecy is anathematic to our form of government.”).

¹⁸ Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, AM. CIVIL LIBERTIES UNION (Mar. 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>.

¹⁹ *Id.*

²⁰ Mark Berman, *Justice Dept. Will Spend \$20 Million on Police Body Cameras Nationwide*, WASH. POST (May 1, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras>.

Mayor Toni Harp echoed this theme when expressing support for a pilot body cam program in the city: “Let’s underscore our commitment to the idea that municipal police officers, sworn to prevent crime as well as enforce the law, are an extension of our community, accountable to all its members, and willing to be on record about it.”²¹

Accomplishing this accountability goal requires public access to body cam footage. Unlike most categories of public records, which serve some function even if they cannot be released to the public, body cam footage serves no legitimate purpose without public oversight. Without an affirmative right of public access, police departments would have a strong incentive to only release footage in which they appear sympathetic—law enforcement officials have succumbed to such temptation in the past.²² Furthermore, body cams could devolve into a system of mass surveillance—likely of the most heavily policed, under-resourced communities—increasing the unchecked policing they were developed to eradicate.

In addition, public access to body cam footage can help bolster and legitimate the use of body cams by police departments to *defend* themselves. Given recent events, it is easy to think of public access to body cams as a promising method to achieve greater levels of police accountability. But the very presence of body cams can have civilizing effects on the individuals with whom police are dealing.²³ Agitated individuals frequently calm down when they realize they are being recorded.²⁴ Body cams also have the potential to speed up the process of exonerating police officers who have not committed misconduct²⁵ and to reduce the frequency of frivolous complaints because those complainants will know that officers have good information with which to exonerate themselves. Dashboard cameras have been found to exonerate police in 93% of complaints.²⁶

²¹ Stephanie Addenbrooke, *CT Lawmakers Propose Body Cameras for Cops*, YALE DAILY NEWS (Feb. 19, 2015), <http://yaledailynews.com/blog/2015/02/19/ct-lawmakers-propose-body-cameras-for-cops>.

²² See Ruben Castaneda, *U-Md. Officials Seek Inquiry of Campus Video in Beating Case*, WASH. POST (Apr. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042005093.html> (noting that, in response to a subpoena from lawyers for a student who was beaten by school officers, the University of Maryland released 60 hours of footage but mysteriously did not include the relevant 90 minutes of the attack). See also Stanley, *supra* note 18 (“In the case of dashcams, we have also seen video of particular incidents released for no important public reason, and instead serving only to embarrass individuals.”).

²³ David O’Reilly, *Evesham Police Chief Calls Cameras a ‘Game Changer,’* PHILA. INQUIRER (Aug. 7, 2014), http://articles.philly.com/2014-08-07/news/52519341_1_body-cameras-security-cameras-evesham-police-chief (“[T]he visible presence of a camera [can] . . . compel highly agitated people to calm down more quickly.”).

²⁴ POLICE COMPLAINTS BD., *ENHANCING POLICE ACCOUNTABILITY THROUGH AN EFFECTIVE ON-BODY CAMERA PROGRAM FOR MPD OFFICERS* 3 (2014).

²⁵ *Id.* at 3-4.

²⁶ INT’L ASSOC. OF CHIEFS OF POLICE, *The Impact of Video Evidence on Modern Policing* 15, <http://www.theiacp.org/portals/0/pdfs/IACPIn-CarCameraReport.pdf>.

In order for police to effectively use body cams for their own protection, a policy of footage transparency is necessary. If the body cam footage is available to the public through straightforward procedures, then police will be shielded from claims that the footage they use defensively is deceptively edited or otherwise without context. In addition, public access to footage will ensure that police use body cams correctly. Several notable incidents have arisen where police officers turned off their cameras. If police are required to employ body cams, public access of footage can help uncover incidents where police violate department or state policy. As a corollary, those states and departments that are routinely found to be in compliance with their policy procedures will likely be viewed as more credible departments.

Public officials have recognized that body cam programs will work only if police departments release the content they collect. Delroy Burton, Chairman of the D.C. police union, explained, “We want to provide people with the ability to view what we do.”²⁷ Similarly, Baltimore County Executive Kevin B. Kamenetz noted, “The quicker we can get [body cam footage] out to the public to clarify what we perceive to be the facts, the better it is.”²⁸

Notwithstanding the necessity of public access for the success of body cams, many state legislatures and local police departments are resisting disclosure. Under the framework in most FOI statutes, policymakers can do this in two ways: first, they can exclude body cam footage from the definition of public or agency records to which FOIs apply; second, they can broaden the exemptions that agencies can use to override the presumption of disclosure. Both measures are unnecessary and are discussed in turn below.

II. BODY CAM FOOTAGE IS—OR SHOULD BE—A PUBLIC RECORD

The Freedom of Information Act (FOIA) makes public records broadly available to citizens, journalists, and policymakers. Video footage from police body cams should be treated according to this expansive access standard. Creating new exemptions to the access privileges conferred by FOIA risks undermining the goal of public transparency.

FOIA’s presumption of disclosure applies to all federal agency records, which should include federally-held body cam footage. The Supreme Court has defined “agency records” as any records that an agency 1) creates or obtains and 2) has control of at the time of the FOIA request. Body cam recordings should qualify for the first prong: public officials create them while performing public duties. Data retention policies may affect the second prong because law

²⁷ Peter Hermann & Aaron C. Davis, *As Police Body Cameras Catch On, a Debate Surfaces: Who Gets to Watch?*, WASH. POST (Apr. 17, 2015), http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html.

²⁸ *Id.*

enforcement may limit access through shorter retention periods. But as long as the footage remains in the department’s control, it should qualify as an agency record.

That body cam footage is audiovisual does not exempt it from the definition of an agency record. In fact, the 1996 amendment was passed specifically to preserve access to public records as they were increasingly created and stored in electronic formats. As the statute specifies, “record” includes information maintained by an agency in “any format, including an electronic format.”²⁹ Thus, FOIA presumes that video and audio are subject to disclosure.³⁰

Dash camera (“dash cam”) footage provides a helpful analogy for how states have dealt with audiovisual recordings. Dash cams are video cameras placed on the dashboard of a police car. They similarly capture police actions to promote accountability and implicate privacy concerns for the people captured in them. An Oklahoma case from 2013 affirmed that dash cam video falls under the meaning of Oklahoma’s FOI law.³¹ The State of Washington also subjects dash cams to public disclosure.³² The Washington court held that the privacy exemption only applies where the videos are part of pending litigation, and the exemption dies when the litigation ends.

State FOIs—more relevant for body cam purposes—generally apply to “public” rather than “agency” records.³³ Instead of looking to courts for interpretation, state legislatures often actually define “public records” in their FOIs. These definitions generally declare that a record is presumptively public regardless of physical form or medium.³⁴ Some statutes specifically include video in their definition of “public records.”³⁵ Thus, body cam footage should also be accessible via state FOIs. And court cases support this conclusion: while courts may limit access to video

²⁹ 5 U.S.C. § 552(f)(2)(A) (2009).

³⁰ *See, e.g.*, Int’l Counsel Bureau v. U.S. Dep’t of Def., 864 F. Supp. 2d 101, 104 (D.D.C. 2012) (holding that videos related to treatment of detainees in Guantanamo Bay are subject to presumption of disclosure); Am. Civil Liberties Union v. U.S. Dep’t of Def., 389 F. Supp. 2d 547, 568–69 (S.D.N.Y. 2005) (same); Prison Legal News v. Executive Office for U.S. Attorneys, 2009 WL 2982841, at *1 (D. Colo. 2009) *judgment aff’d, appeal dismissed in part*, 628 F.3d 1243 (10th Cir. 2011) (holding that videos of murder in prison cell and government’s treatment of prisoners afterward are subject to presumption of disclosure).

³¹ Ward & Lee, P.L.C. v. City of Claremore, 316 P.3d 225 (Okla. Civ. App. 2013).

³² Fisher Broadcasting-Seattle LLC v. City of Seattle, 326 P.3d 688 (Wash. 2014).

³³ *See, e.g.*, ARIZ. REV. STAT. § 41-151.18; CAL. GOV’T CODE § 6252; CONN. GEN. STAT. § 1-200; D.C. CODE § 2-502.

³⁴ *Id.*

³⁵ *See, e.g.*, ARK. CODE § 25-19-103 (definition of “public record” includes “recorded sounds, films, tapes, [and] electronic or computer-based information”); COLO. REV. STAT. § 24-72-302 (4) (definition of “criminal justice record” includes “tapes, recordings, or other documentary materials”).

footage, they generally do so not because of the medium but, rather, under an exemption that applies to all mediums.³⁶

However, the content of body cam footage may prove problematic for the definition of “public record” in some states. For example, certain states specifically carve criminal justice records out of their definition of “public records.”³⁷ While these states nevertheless tend to provide a statutory scheme for disclosure of such records, these separate schemes downplay the importance of access, highlight other state concerns related to disclosure, and/or flip the presumption toward secrecy.³⁸

States that provide a separate statutory scheme for criminal justice records often do so to highlight the interests that agencies must balance against transparency in the criminal or investigatory context. The Colorado Supreme Court explains that its “General Assembly enumerated not just ‘access and dissemination’ but ‘sealing’ of criminal justice records as ‘matters of statewide concern.’”³⁹ As a result, “records of ‘official actions’ [such as arrests, releases from custody, and court decisions] *shall* be open to the public for inspection, while ‘all other records of criminal justice agencies’ *may* be open for inspection subject to certain exceptions.”⁴⁰ Some states, like Florida, go even further, making certain records related to criminal justice, including anything that reveals the identity of victims of child abuse or the identity or body of a victim of sexual crimes, presumptively confidential.⁴¹

Exempting body cam footage from the definition of “public” or “agency” records in state FOIs is misguided. In doing so, legislatures ignore the crucial oversight function for which FOIL was designed—and they ignore it in precisely the realm of government functioning that most requires accountability. Furthermore, exempting body cam footage from the definition of a public record contradicts the stated purposes of body cams—improving police performance, easing community-police relations, and enabling accountability, all of which are impossible without public access.

³⁶ Courts have denied access to video for reasons that would also apply to other types of public records. For instance, in *Fisher Broadcasting-Seattle LLC v. City of Seattle*, journalists sued for access to dashboard camera videos under the Public Records Act. 326 P.3d 688, 694 (Wash. 2014). The Washington Supreme Court denied access under a state statute that exempted records in pending litigation for privacy concerns, but cabined that exemption only to videos that are part of pending litigation and noted that the exemption dies when the litigation ends. *Id.* These issues are not unique to the technological medium.

³⁷ See, e.g., COLO. REV. STAT. § 24-72-202(6)(b) (excluding “criminal justice records”); FLA. STAT. § 119.071(h); Okla. Stat. tit. 51, § 24A.8.

³⁸ See, e.g., Colo. Rev. Stat. § 24-72-302(4); Fla. Stat. § 119.071(h).

³⁹ *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1171 (Colo. 2005).

⁴⁰ *Id.*

⁴¹ FLA. STAT. § 119.071(h).

III. EXISTING EXEMPTIONS ADDRESS LAW ENFORCEMENT CONCERNS

Not all government records can be disclosed at all times. Current FOI policies allow for reasonable access limitations. What matters is that new limitations not be created in the context of body cam footage; existing restrictions on disclosure are sufficient.

While public access to body cam footage is essential to the ultimate purpose of body cams, it does implicate legitimate concerns about the integrity of law enforcement proceedings, discussed in this section, and personal privacy, discussed in Section IV below.

Defining body cam footage as a public record does not mean that all body cam footage will—or should—be disclosed. Existing FOI laws already enable agencies to withhold records that could jeopardize investigations or personal privacy. The apparent novelty of body cams should not obscure the fact that legislatures and courts have already grappled with these issues in cases involving similarly sensitive records and have laid down well-established principles. Lawmakers and judges have balanced secrecy and transparency with respect to photos of crime scenes and dash cam footage of arrests or traffic stops. In many states, existing statutory language and case law contain broad exemptions for records that would compromise personal privacy or criminal investigations if released.

Legislators in a few states have expressed concerns that body cam footage could hurt law enforcement investigations and proceedings.⁴² These concerns are unfounded, however, as both federal and state FOI laws include exemptions that are more than adequate to protect investigations.⁴³ Current exemptions already allow agencies not to disclose records that would compromise law enforcement investigations or proceedings, or that would expose the identity or endanger the safety of witnesses or informants.

While state FOIs typically require police departments to disclose basic arrest information, such as the identity of someone arrested and the charges on which he is being held, body cam footage goes beyond such information. Instead, in most states, body cam footage that could be used in an investigation or prosecution, including of the police officer attached to the body cam, would qualify as an investigative record subject to exemption. Such exemptions tend to be categorical, meaning that agencies can withhold information that qualifies as an investigatory record automatically, without any consideration of the public's interest in that information. As a

⁴² *State Bills Would Limit Access to Officer Body Cam Videos*, N.Y. TIMES (Mar. 20, 2015) <http://www.nytimes.com/aponline/2015/03/20/us/ap-us-body-cameras-public-access.html>.

⁴³ Under Exemption 7 of the federal FOIA, authorities can withhold law enforcement records that would interfere with enforcement proceedings, deprive an individual of his right to a fair trial or impartial adjudication, invade an individual's personal privacy, expose confidential informants, reveal non-public investigative techniques or procedures, or otherwise endanger the safety of others.

result, the law enforcement exemption has the potential to exclude a large swathe of body cam footage from public access.

This danger is particularly pronounced in states that give police departments the discretion to withhold body cam footage even after an investigation is closed, including California, Colorado, and Texas, which explicitly shield records from inactive investigations as well as active ones.⁴⁴ These states should amend their FOIs to exempt only investigatory records that may taint prospective or ongoing investigations, as the Connecticut and Washington FOIs do.⁴⁵ Connecticut courts require police to make an evidentiary showing that “the records are to be used in a prospective law enforcement action” and that disclosure would be “prejudicial to such action.”⁴⁶ Federal FOI law similarly exempts only information related to a specific pending or prospective investigation.⁴⁷

Some legislatures have also expressed concerns that body cam footage would expose the identities of witnesses, informants, or others, putting them in danger.⁴⁸ But, like federal FOI law, virtually all state FOIs already exempt records that would reveal the identity of confidential informants and other third parties. These exemptions operate even after an investigation is over.⁴⁹ As a result, amending the statutes to address this concern is unnecessary. Kansas provides a useful example of why it is unnecessary to amend state FOIs to protect witness identities. Though Kansas legislators have cited potential threats to witnesses or informants to justify excluding body cam footage from the definition of public records, the state’s FOI law already allows agencies to withhold information that would reveal the identity of confidential informants or undercover agents, or that would endanger the life or physical safety of any individual.⁵⁰

Legislatures should avoid creating additional law enforcement exemptions for body cams. Not only do such exemptions constitute an unnecessary reaction to the novelty of body cams, but more importantly, they impede body cams from achieving their core accountability function. Instead, state legislatures should rely on well-settled “right to know” principles that allow for greater access. Given the unique need for accountability in policing—and the fact that policymakers established and the public supported body cams because they expected public access to body cam footage—states should consider limiting law enforcement exemptions to

⁴⁴ REPORTERS COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER’S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS 7, 8, 21 (2006), <http://www.rcfp.org/rcfp/orders/docs/POLICE.pdf>.

⁴⁵ CONN. GEN. STAT. § 1-210 (b)(3); *id.* at 10.

⁴⁶ Dep’t of Pub. Safety, State Police v. Freedom of Info. Comm’n, 720 A.2d 268, 271 (Conn. App. 1998).

⁴⁷ U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 7(A) 524-25 <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption7a.pdf>.

⁴⁸ *State Bills Would Limit Access to Officer Body Cam Videos*, *supra* note 42.

⁴⁹ *See, e.g.*, POLICE RECORDS, *supra* note 44, at 13.

⁵⁰ KAN. STAT. ANN. § 45-221.

only apply to active investigations and mandating that information from closed or inactive investigations be disclosed.

Washington: A Case Study in Limiting the Law Enforcement Exemption

The law enforcement exemption in Washington's FOIL features several bounding provisions that other states should consider. Washington's example incorporates both pro-access statutory language and pro-access construction by the courts.

- **Specific Investigative Records:** Washington exempts only “specific investigative records.”⁵¹ Courts have construed this narrowly, ordering police to disclose routine reports because they were not tied to specific investigations or sanctions.⁵²
- **Essential to Effective Law Enforcement:** Washington allows withholding investigate records only when it is “essential to effective law enforcement.” Courts have limited the stages of investigation during which exemption may be essential. While police can withhold records until they have referred the matter to a prosecutor,⁵³ withholding records is no longer an option once a suspect has been arrested and referred for prosecution.⁵⁴ Accordingly, courts have protected records from a decades-old investigation into the killing of a civil rights leader,⁵⁵ while ordering police to release investigatory records of a confrontation between an off-duty cop and a citizen that did not result in charges. This exemption is not likely to apply to most police encounters.
- **Actual, Pending Litigation:** Records that would allegedly prejudice legal proceedings can only be withheld when there is actual, pending litigation.⁵⁶ Though Washington law bars police from releasing sound or video recordings until “the final disposition of any criminal or civil litigation which arises from the event or events which were recorded,”⁵⁷ courts have held this statute does not create a blanket exemption of all videos that are the subject of litigation.⁵⁸ For instance, police departments could not withhold a trove of dash cam videos without producing a list of the videos and showing their relation to actual, pending litigation.⁵⁹ Under this exemption, police can delay, but not permanently withhold, the release of body cam footage of incidents that resulted in litigation.

⁵¹ WASH. REV. CODE ANN. § 42.56.240 (West 2015).

⁵² *Cowles Pub. Co. v. City of Spokane*, 849 P.2d 1271, 1275 (Wash. Ct. App. 1993)

⁵³ *Sargent v. Seattle Police Dep't*, 314 P.3d 1093, 1099 (Wash. 2013).

⁵⁴ *Id.*

⁵⁵ *Newman v. King Cnty.*, 947 P.2d 712, 716 (1997).

⁵⁶ *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 326 P.3d 688, 695 (Wash. 2014).

⁵⁷ WASH. REV. CODE ANN. § 9.73.090 (West 2011).

⁵⁸ *Fisher Broad.-Seattle TV LLC*, *supra* note 56, at 695 (“We hold that RCW 9.73.090(1)(c) may exempt specific videos from public disclosure during the pendency of litigation but does not create a blanket exemption for any video that might be the subject of litigation.”).

⁵⁹ *Id.*

California: A Case Study in Overly Broad Investigatory Records Exemptions

California's public records law provides a near-categorical exemption for records of police investigations and records compiled for correctional, law enforcement, or licensing purposes.

- **No Right of Access:** California does not grant a right of access to investigatory records, though it does require that police publish certain minimal arrest information, such as the identity of and charges against a suspect,⁶⁰ and release records, such as witness statements, to victims.⁶¹
- **Concluded Investigations:** Critically, California allows agencies to withhold records related to closed investigations.⁶² The California Supreme Court has held that the investigatory records exemption does not die when an investigation terminates, and it has used this rule to uphold the police department's withholding of records of officers' disciplinary proceedings after the officers had been sanctioned⁶³ and of records of a traffic stop after the individual was released and no charges were filed.⁶⁴
- **Abstract Investigations:** The California Supreme Court has also allowed agencies to withhold investigatory records even where there was no "concrete or definite" likelihood of enforcement.⁶⁵ Records can be withheld as long as any investigation is undertaken.

Police departments will likely use this exemption to withhold body cam footage of police shootings or alleged police brutality indefinitely. The San Diego Police Department, for instance, has used the exemption to reject requests for body cam footage of a high-speed chase that ended after multiple officers fired on the driver⁶⁶ and of a standoff where police shot and killed an armed and mentally ill veteran.⁶⁷ Similarly, the LAPD, which plans to buy 7,000 body cams, has announced that it considers body cam footage investigatory records and will not release footage to the public unless required by a civil or criminal proceeding.⁶⁸

⁶⁰ CAL. GOV'T CODE § 6254 (West 2014).

⁶¹ Police are required to disclose to victims the "names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses . . ." *Id.*

⁶² *Williams v. Super. Ct.*, 852 P.2d 377, 384 (Cal. 1993).

⁶³ *Id.*

⁶⁴ *Haynie v. Super. Ct.*, 31 P.3d 760, 765 (2001) ("Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it.").

⁶⁵ *Id.* at 1071.

⁶⁶ Liam Dillon, *Police Body Camera Videos Will Stay Private—At Least for Now*, VOICE OF SAN DIEGO (Mar. 19, 2014), <http://www.voiceofsandiego.org/2014/03/19/police-body-camera-videos-will-stay-private-at-least-for-now>.

⁶⁷ *Id.*

⁶⁸ *A Fight over Access to LAPD Body Cameras Is Shaping Up*, LOS ANGELES TIMES, Feb. 5, 2015, <http://www.latimes.com/local/crime/la-me-lapd-cameras-20150205-story.html>.

IV. STATES SHOULD NOT, AND NEED NOT, ADOPT ADDITIONAL “PRIVACY” EXEMPTIONS

Privacy concerns arising from public access to body cam footage can be addressed under existing FOIA legal doctrine. Since courts already have experience dealing with these types of issues, there is no need to create additional disclosure exemptions.

Body cam footage also raises serious privacy concerns. In any given case, legitimate privacy interests may butt heads with the public interest in disclosure of body cam footage, and those privacy interests may be asserted by particularly vulnerable or sympathetic individuals, including victims, survivors, and witnesses. State legislatures are particularly concerned with footage shot in homes, hospitals, or schools, as well as footage depicting juveniles, survivors of sexual assault, and other victims.

But existing statutes and case law already protect the privacy interests of victims, certain third parties, and police officers in many states. For example, federal FOIA and most state FOIs protect personnel and medical records as well as law enforcement records that would result in an “unwarranted invasion of personal privacy” if released.⁶⁹ Critically, these exemptions tend to require agencies and courts to balance the public interest in disclosure against the agency’s reason for withholding in a given case.

Disclosure would not be automatic or assured, as existing statutes and caselaw provide ample protection for records involving law enforcement investigations and personal privacy. But creating categorical privacy exemptions for body cam footage—as some states are threatening to do—would bar agencies and courts from considering the public interest in transparency when deciding whether or not to release body cam footage in a given case.⁷⁰

While the audio and visual footage inherent in a body cam record may increase the privacy harm inherent in releasing it, courts have already been dealing with issues concerning other records that implicate varying levels of privacy interest. In *New York Times v. NASA*, for example, the court recognized that audio recordings of astronauts on the space shuttle Challenger in the minutes before it crashed presented privacy interests distinct from those implicated by transcripts of the same audio; the court required disclosure of the transcripts but not the audio.⁷¹

⁶⁹ 5 U.S.C.A. § 552(b)(6); 5 U.S.C.A. § 552(b)(7)(C). *See, e.g.*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN NEW YORK 8 (6th ed. 2011), <http://www.rcfp.org/rcfp/orders/docs/ogg/NY.pdf>.

⁷⁰ *See, e.g.*, *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

⁷¹ *New York Times v. NASA*, 782 F. Supp. 628, 631 (D.D.C. 1991) (“[T]he ‘intimate detail’ that underlies the privacy interest in this tape is the sound of the astronauts’ voices. . . . *What* the astronauts said may not implicate privacy interests But *how* the astronauts said what they did, the very sound of the astronauts’ words, does constitute a privacy interest.”).

Similarly, courts have recognized that a visual image—such as a mug shot of a defendant—in a criminal proceeding that is already public can also engage additional privacy interests.⁷² Thus, courts would be able to discern the unique privacy interests implicated by visceral or disturbing body cam footage.

Limiting access to individuals who appear in the video—as legislatures in states such as Iowa, Kansas, Minnesota, and Washington have proposed⁷³—would similarly ignore the interest the broader public has in the footage, including the democratic function the footage can serve. Such efforts appear to be motivated by understandable concerns to give individuals control over footage in which they appear. Yet these restrictions could prevent media organizations or watchdog groups from obtaining even redacted footage of violent police encounters in cases where victims lack immediate surviving relatives or other legal representatives. Instead, states should hew to existing arrangements, which allows courts to balance the public interest in accountable policing with privacy concerns. Subjects of recordings could still exercise a degree of control over body cam footage, as they are often afforded even greater access than the general public to footage in which they appeared. When agencies decide to prevent broader disclosure of the record, subjects of recordings could authorize the disclosure of legally exempt recordings by giving written consent or by releasing the footage into the public domain.⁷⁴

As discussed below, currently existing privacy-related exemptions make enacting new ones redundant, and even current exemptions may themselves be overbroad. Non-exemption alternatives can address legitimate privacy concerns.

A. Privacy of Law Enforcement Officers is Protected Through Existing Personnel Records Exemptions

State legislatures may be tempted to protect the identities of police officers through new exemptions for law enforcement privacy. Police departments in particular may fear that releasing the identities of officers involved in violent encounters will endanger their safety; the Ferguson Police Department, for instance, initially refused to release the identity of the officer responsible for shooting Michael Brown, citing fears of retaliation.⁷⁵ While this fear reflects, in part, fear of

⁷² See, e.g., *Times Picayune Pub'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (exempting a defendant's mug shot from disclosure despite the fact that the defendant's criminal proceedings were public because "a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings.").

⁷³ *State Bills Would Limit Access to Officer Body Camera Videos*, FREDERICKSBURG FREE LANCE-STAR (Mar. 20, 2015), http://www.fredericksburg.com/news/national/state-bills-would-limit-access-to-officer-body-camera-videos/article_ae292f1a-cf15-11e4-895f-e7cb92eb9b7a.html.

⁷⁴ OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN NEW YORK, *supra* note 70, at 9.

⁷⁵ Bill Chappell, *Ferguson Police Release Name of Officer Who Shot Michael Brown*, NPR (Aug. 15, 2014), <http://www.npr.org/blogs/thetwo-way/2014/08/15/340594634/ferguson-police-release-name-of-officer-who-shot-michael-brown>.

the precise accountability mechanism this paper argues is necessary for optimal government functioning, it also reflects reaction to real threats of retaliation and reputational harm.

Yet statutory exemptions already protect police officers, making new exemptions unnecessary. Common exemptions allow the government to withhold officers' personnel records, including records used to investigate officer misconduct,⁷⁶ and records that would infringe upon officers' personal privacy. The breadth of personnel exemptions varies, but even the narrowest exemptions give authorities broad discretion to withhold body cam footage where evidence of police misconduct is weak. The nearly one dozen states that have enshrined broad personnel exemptions into law⁷⁷ should consider narrowing their exemptions.

In New York, for example, sweeping protections have allowed departments to withhold the names of officers involved in violent or deadly encounters.⁷⁸ But other states offer narrower exemptions that nevertheless protect officers' privacy interests. Washington, for instance, protects personnel records only to the extent that disclosure would violate an employee's right to privacy, allowing withholding where disclosure would be highly offensive to an ordinary person and not of legitimate public concern.⁷⁹ But courts in Washington are still able to protect the identities of public employees, including police officers, when allegations of wrongdoing against them are unsubstantiated.⁸⁰ Such states withhold records where evidence of misconduct is weak⁸¹ but are more likely to release records where evidence of misconduct is strong, thereby balancing the police's interest in privacy against the public's interest in transparency.

Court decisions regarding police privacy exemptions highlight the important role that courts play in balancing the public interest against police privacy in specific cases. Existing rulings suggest that courts would likely require police departments to release records related to the most serious police conduct—in other words, police conduct most in need of public oversight—including records of police shootings. The Supreme Court of California, for instance, held the public's interest in knowing the names of officers involved in shootings over a five-year

⁷⁶ Dartunoro Clark, *State Law Keeps Police Files Shrouded in Secrecy*, ALBANY TIMES UNION (Mar. 15, 2015), <http://www.timesunion.com/tuplus-local/article/State-law-keeps-police-files-shrouded-in-secrecy-6134788.php>.

⁷⁷ *Id.*

⁷⁸ J. David Goodman & Al Baker, *New Challenges to Secrecy That Protects Police Files*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/05/nyregion/new-challenges-to-secrecy-that-protects-police-files.html>.

⁷⁹ WASH. REV. CODE ANN. §42.56.050 (West 2006).

⁸⁰ *Bainbridge Island Police Guild v. City of Puyallup*, 259 P.3d 190 (Wash. 2011); *City of Tacoma v. Tacoma News Inc.*, 827 P.2d 1094 (Wash. Ct. App.), *rev. denied*, 119 Wash.2d 1020 (Wash. 1992).

⁸¹ *See, e.g., Demers v. City of Minneapolis*, 486 N.W.2d 828, 832 (Minn. Ct. App. 1992) (holding that complaints alleging excessive force were properly withheld because they did not give rise to an investigation into a criminal or civil wrong, and thus constituted protected personnel data).

period outweighed individual privacy interests and general fears of retaliation.⁸² Similarly, a Michigan appellate court ordered police to release video of an officer assaulting a citizen during an arrest because the public's interest in seeing how police treat those arrested and detained outweighs the privacy interests of those in the video.⁸³

Yet the courts have not ignored potential risks to the privacy and safety of officers. Courts are likely to allow police departments to withhold or redact body cam footage where individual officers face a serious threat of retaliation. The California Supreme Court, for instance, suggested that a "particularized showing" of threats to the safety of a specific officer could justify withholding his identity.⁸⁴

Thus, existing police privacy exemptions sufficiently protect police privacy. Legislatures with broad personnel record exemptions should consider narrowing those exemptions to cover records from only unsubstantiated investigations of misconduct.

⁸² Long Beach Police Officers Ass'n. v. City of Long Beach, 325 P.3d 460, 470 (Cal. 2014).

⁸³ Rataj v. City of Romulus, 858 N.W.2d 116, 125 (Mich. Ct. App. 2014).

⁸⁴ Long Beach Police Officers Ass'n, *supra* note 82, at 463.

New York: A Case Study in Overbroad Exemptions

In contrast with Washington, New York illustrates how sweeping privacy exemptions can obstruct transparency in high-profile police encounters of public concern.

- **Personnel Records:** New York allows agencies to withhold any personnel records used to evaluate the performance of police and correctional officers for continued employment or promotion.⁸⁵ The law was enacted to prevent personnel records from being used in criminal prosecutions “to degrade, embarrass, harass or impeach the integrity of the officer.”⁸⁶ In practice, it has given police departments carte blanche to deny access to records of alleged misconduct. For instance, the Schenectady police department successfully withheld all records of disciplinary action taken against 18 off-duty officers who pelted a car with eggs.⁸⁷ Police also have withheld interviews with officers involved in a high-speed chase that killed a teenage bystander.⁸⁸ And although a state court ordered the New York Police Department to release weapons discharge reports dating back to 1997, it required redaction of any identifying details of officers.⁸⁹ As a result, departments have sought to withhold the identities of officers involved in shootings.

This airtight seal on personnel records shields police conduct from public oversight by forcing requestors to litigate even basic requests.⁹⁰ Tellingly, Daniel Pantaleo, the NYPD officer who put Eric Garner in a chokehold, was sued *three times* prior to Garner’s death for allegedly subjecting individuals to illegal strip searches.⁹¹ Officers in Albany suspended for felony assault or convicted of domestic violence have also had their records successfully withheld.⁹²

Body cam footage could easily fall within this sweeping exemption, particularly in high-profile cases where departments are likely to launch disciplinary investigations. In those cases, body cam footage of shootings might surface only after extensive litigation, and in redacted form. The public would have to rely on individual departments to voluntarily release video of incidents involving excessive or deadly force—an unlikely outcome. New York and other states with broad personnel records exemptions should consider limiting the exemption to records that only consider unsubstantiated allegations, or to allegations of less serious misconduct.

⁸⁵ N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014).

⁸⁶ Daily Gazette Co. v. City of Schenectady, 710 N.E.2d 1072, 1077 (N.Y. 1999).

⁸⁷ *Id.*

⁸⁸ Carnevale v. City of Albany, 891 N.Y.S.2d 495 (N.Y. App. Div. 2009).

⁸⁹ New York Civil Liberties Union v. New York City Police Dep’t, 2011 WL 675562 (N.Y. Sup. Ct. 2011).

⁹⁰ C.J. Ciaramella, *Secrets of the NYPD*, SALON (May 8, 2013), http://www.salon.com/2013/05/08/why_is_ray_kellys_schedule_more_secret_than_president_obamas/.

⁹¹ Kevin McCoy, *Choke-Hold Cop Sued in Prior Misconduct Cases*, USA TODAY (Dec. 4, 2014), <http://www.usatoday.com/story/news/nation/2014/12/04/choke-hold-cop-pantaleo-sued/19899461>.

⁹² Clark, *supra* note 76.

B. Exemptions for Victims and Other Vulnerable Groups Should be Limited

Some states proposing new restrictions on body cam footage have cited a desire to protect victims and families who may be re-traumatized by the release of footage, as well as other vulnerable groups such as juveniles.

In many states, these additional exemptions would be unnecessary as existing exemptions already protect the privacy of juveniles and particularly vulnerable individuals, such as survivors of sexual assault.⁹³ Florida legislators, for example, have proposed additional exemptions to limit footage depicting minors or survivors of sexual assault,⁹⁴ but state laws already contain robust provisions that protect juvenile records and bar the release of any images or recordings of sexual assault victims, regardless of whether the information is sufficient to identify them.⁹⁵ As important as it is to protect victims, legislators should avoid redundant or excessive exemptions in this area.

Given the significant public interest in these records, states should instead consider limiting existing exemptions. While the danger of re-traumatizing victims, or simply forcing them into the public eye, is real and significant, courts should be given the discretion to weigh that harm against the public benefit from transparency and accountability. Disclosing one person's trauma may prevent the trauma of another. For example, a categorical exemption of footage involving minors would have allowed Cleveland police to withhold footage showing the shooting of 12-year old Tamir Rice.⁹⁶

Furthermore, existing FOILs and caselaw go further than most privacy law by providing ample protections for surviving family members whose privacy may be threatened by visceral images or footage of a victim's death. In *National Archives and Records Administration v. Favish*, the Supreme Court exempted death-scene images as a result of the privacy interests of close relatives.⁹⁷ New York courts have held that disclosure of crime scene photographs would invade the privacy of surviving family members.⁹⁸ Under an exemption added to Connecticut's FOI law in the aftermath of the Newtown school shooting, authorities can withhold photos, films, videos, or other visual images depicting homicide victims to the extent that such records could reasonably be expected to constitute an unwarranted invasion of the privacy of the victim

⁹³ See, e.g., CONN. GEN. STAT. § 1-210.

⁹⁴ Toby McIntosh & Lauren Harper, *Backlash Develops Over Release of Body Cam Footage*, FREEDOMINFO.ORG (Feb. 26, 2015), <http://www.freedominfo.org/2015/02/backlash-develops-over-release-of-body-cam-footage>.

⁹⁵ REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN FLORIDA 13, 31 (6th ed. 2011), <https://www.rcfp.org/rcfp/orders/docs/ogg/FL.pdf>.

⁹⁶ McIntosh & Harper, *supra* note 94.

⁹⁷ *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004).

⁹⁸ *Edwards v. New York State Police*, 843 N.Y.S.2d 729 (N.Y. App. Div. 2007).

or their family.⁹⁹ And under Florida law, video, photo, or audio depicting the killing of a person is exempt from public disclosure, and can only be viewed by a surviving spouse or family member.¹⁰⁰ Such laws would significantly limit the disclosure of body cam footage of police shootings if victims' families are unable or unwilling to disseminate them. This would also completely exempt the press and watchdog organizations from access to footage. While, again, these exemptions represent an attempt to be sensitive to the needs of victims and their families, they may actually discount the desires of the victims themselves and could prevent the disclosure of particularly important footage, showing the excesses of police abuse.

C. Third Party Privacy Can Be Protected Without Exempting Body Cam Footage Access

States have also sought to protect the privacy of third parties other than the officer and direct subject of a recording—particularly individuals in more private spaces such as homes, schools, or medical facilities who may be bystanders and wish to avoid the limelight.

Yet most states already have statutory language or case-law that protects the privacy of students, hospital patients, or other individuals in private spaces. Florida legislators have proposed additional restrictions on footage shot in mental hospitals or schools, despite the fact that existing laws already bar authorities from releasing school records that would identify students without their authorization, or medical or hospital records without the consent of patients.¹⁰¹ Specific provisions that protect the anonymity of juveniles, students, or patients would likely lead courts to order police to redact most body cam footage shot in hospitals, schools, or other sensitive spaces. Legislatures should consider whether this result is optimal and consider revising such exemptions if they believe that police encounters in hospitals, schools, and homes need to be subject to public accountability mechanisms as well.

Current exemptions would also be sufficient to protect the general privacy interests of ordinary citizens. New York, for instance, allows the withholding of information that would cause economic or personal hardship to the individual whose records would be disclosed if the records are not relevant to the work of an agency requesting or maintaining it. Connecticut offers a similar, but somewhat narrower exemption, permitting the withholding of information that does not pertain to legitimate matters of public concern and disclosure of which would be highly offensive to a reasonable person—not simply the party attempting to quash disclosure.¹⁰² This

⁹⁹ CONN. GEN. STAT. ANN. § 1-210.

¹⁰⁰ Christine Beckett, *Expanding Personal Privacy*, THE NEWS MEDIA AND THE LAW 23 (2011), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2011/expanding-personal-privacy>.

¹⁰¹ OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN FLORIDA, *supra* note 95, at 11, 14.

¹⁰² REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN CONNECTICUT (6th ed. 2011), <https://www.rcfp.org/rcfp/orders/docs/ogg/CT.pdf>.

narrow exemption was nevertheless sufficient to protect the home addresses of retirees, because the information was not available in public directories.¹⁰³

Given the protections that states have already extended to names, addresses, and other identifying information of private citizens, courts would likely order the redaction or withholding of most footage showing individuals inside their own homes. However, a general, categorical exemption for recordings in private homes would rob courts of the ability to consider the value of transparency in a given instance, preventing disclosure in controversial encounters such as the shooting of former NFL player Jermaine Green, which occurred inside the player's residence.¹⁰⁴

D. Non-Exemption Solutions to the Privacy Problem

Instead of enacting new exemptions or applying existing exemptions too broadly, states can look to four other mechanisms to ensure privacy protection in body cam footage. First, technological solutions for blurring videos automatically and cost-effectively have emerged and continue to be improved. Second, where automatic blurring is not sufficient, police departments can enlist the help of private companies or funding from the state or federal government to manually redact footage. Third, fee-shifting provisions in FOI laws can enable a police department to allow access to redacted footage without bearing the high cost of processing requests. Finally, police departments can decide not to use body cams or to only deploy them in public places. State legislatures do not need to restrict access through their FOI laws in order to adequately protect privacy.

i. Auto-Blurring Technology. Existing technological solutions can protect certain privacy interests. Automatic video blurring tools can help police departments protect privacy and reduce the cost of redactions. YouTube has featured an automated facial-blurring tool for videos since 2012, and this technology has become increasingly well-tuned over time.¹⁰⁵ The Guardian Project and the human rights activist organization WITNESS have collaborated to produce ObscuraCam, a free and open source software tool with similar aims.¹⁰⁶ Affordable proprietary software is also available. For example, the NVeiler Video Filter plug-in applies automated face detection and blur for video at a cost of approximately \$32.¹⁰⁷ Finally, police departments may

¹⁰³ *Town of West Hartford v. FOIC*, 588 A.2d 1368 (Conn. 1991).

¹⁰⁴ Ian Cummings, *Bill Would Guard Some Body Camera Footage*, SARASOTA HERALD-TRIBUNE (Apr. 14, 2015), <http://politics.heraldtribune.com/2015/04/14/bill-would-guard-some-body-camera-footage>.

¹⁰⁵ *Face Blurring: When Footage Requires Anonymity*, YOUTUBE GLOB. BLOG (July 18, 2012), <http://youtube-global.blogspot.com/2012/07/face-blurring-when-footage-requires.html>.

¹⁰⁶ *ObscuraCam: Secure Smart Camera*, GUARDIAN PROJECT (2015), <https://guardianproject.info/apps/obscuracam/>.

¹⁰⁷ *NVeiler Video Filter*, NEUROTECHNOLOGY (2015), <http://www.neurotechnology.com/nveiler-video-filter.html>.

choose to produce their own automated redaction tools. The Seattle Police Department has written its own free and open source facial blurring software consisting of five lines of code.¹⁰⁸

ii. Manual Redactions. To be sure, existing technologies have limits. Some manual tracking of faces and human review for automation omissions may still be necessary. But, with technology increasingly able to perform the heavy lifting of video redaction, lawmakers need not be concerned that privacy-protective redactions will become cost prohibitive. Compared to the expense of redaction for other sensitive information, such as classified national security documents requiring detailed review by senior government officials, some manual video processing is a minimal expense. Federal funds may even become available to help finance disclosure.¹⁰⁹

iii. FOI Fee-Shifting. Offering another solution to the cost of redaction, some states have FOI fee-shifting provisions that could enable agencies to charge requestors for unreasonable expenses from access requests. Fee-shifting provisions require requestors to pay for the materials and personnel time expended to process requests.¹¹⁰ Rather than exempting body cam footage entirely from public access, states could adopt fee-shifting provisions to address the cost of redacting body cam footage requests for privacy protection, especially in cases of abusive requests.

iv. Departmental Policy Adjustments. Finally, many privacy-protective measures can be adopted at the collection stage, before access even becomes an issue. Rather than limit public access to footage that police already have, state legislatures can encourage police departments to

¹⁰⁸ David Kravets, *Seattle Police Unveil Blurred, Soundless Body Cam YouTube Channel*, ARS TECHNICA (Mar. 2, 2015), <http://arstechnica.com/tech-policy/2015/03/seattle-police-unveil-blurred-soundless-body-cam-youtube-channel/>.

¹⁰⁹ See, e.g., Peter Hermann & Rachel Weiner, *Issues Over Police Shooting in Ferguson Lead Push for Officers and Body Cameras*, WASH. POST (Dec. 2, 2014), http://www.washingtonpost.com/local/crime/issues-over-police-shooting-in-ferguson-lead-push-for-officers-and-body-cameras/2014/12/02/dedcb2d8-7a58-11e4-84d4-7c896b90abdc_story.html (“President Obama . . . proposed reimbursing communities half the cost of buying cameras and storing video — a plan that would require Congress to authorize \$75- million over three years to help purchase 50,000 recording devices.”).

¹¹⁰ See, e.g., ALASKA STAT. ANN. § 40.25.110(c) (West 2015) (“ If the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks”); CAL. GOV’T CODE § 6253.9 (“the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record”); DEL. CODE ANN. tit. 29, § 10003 (2) (“Administrative fees shall be levied for requests requiring more than 1 hour of staff time to process.”); FLA. STAT. ANN. § 119.07 (d) (“the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be . . . based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service”).

consider privacy at the collection stage. Legislatures should not restrict access to account for scenarios that could be addressed through police discretion or data retention policies.

Connecticut: A Case Study in Appropriately Protective Access Laws

The Connecticut legislature and courts have generally crafted exemptions that protect the personal privacy of officials, victims, and third parties without eroding the public's fundamental right of access. Though the law would likely enable agencies to withhold body cam footage involving homicide victims or other vulnerable groups, courts could still order the release of footage—likely redacted—if the public interest was overwhelming. Connecticut's privacy exemptions may offer a template for states hoping to integrate the privacy concerns of different parties into an access-friendly public records regime.

- **High threshold:** To qualify for an exemption, personnel records must contain information that meets two requirements: it must “not pertain to legitimate matters of public concern” and it must be “highly offensive to a reasonable person.”¹¹¹ The exemption thus sets a high, but not insurmountable, threshold for any effort to quash disclosure. For instance, Connecticut courts required police to disclose internal affairs reports of an officer's alleged use of excessive force, even though the charges were found to be unsubstantiated.¹¹² The fact that an officer was ultimately exonerated by the investigation did not eliminate the public's interest in understanding the fairness of that investigation, particularly as it concerned an officer's alleged abuse of force while performing his official duties.¹¹³ However, police were not required to release records documenting an improper relationship between an officer and the complainant.¹¹⁴ By this logic, body cam footage of an incident of alleged police brutality would almost certainly be disclosed, but videos depicting ordinary citizens caught in compromising situations in private homes might be withheld.
- **Balancing interests:** Connecticut specifically exempts records to protect the privacy of victims and vulnerable groups, including juvenile arrest records, the names and addresses of sexual assault victims, the names and addresses of students without their consent, and contact information of individuals living in senior centers.¹¹⁵ These categorical exemptions could likely be used to shield footage identifying victims or third parties in sensitive spaces such as schools or nursing homes. In the aftermath of the Sandy Hook shootings, Connecticut has also barred the release of photographs, films, videos or other media depicting the victim of a homicide, “to the extent that such record could

¹¹¹ Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 791 (Conn. 1993); see also OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN CONNECTICUT, *supra* note 102.

¹¹² Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n, 698 A.2d 803, 804 (Conn. 1997).

¹¹³ *Id.* at 808.

¹¹⁴ *Id.*

¹¹⁵ OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN CONNECTICUT, *supra* note 102.

reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members.”¹¹⁶ Although the exemption for homicide victims could allow police to withhold video of officer-involved deadly shootings, courts would still be able to determine whether disclosure would constitute an unwarranted invasion of personal privacy—an inquiry that would at least allow a judge to consider whether there was a legitimate public interest at stake.¹¹⁷

¹¹⁶ CONN. GEN. STAT. ANN. § 1-210 (West 2015). *See also Conn. Lawmakers Pass Bill to Keep Sandy Hook Photos Private*, CBS NEW YORK (June 15, 2013), <http://newyork.cbslocal.com/2013/06/05/conn-lawmakers-pass-bill-to-keep-sandy-hook-photos-private>.

¹¹⁷ In crafting the language of the exemption, state legislators drew from the Supreme Court’s decision in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), which held that the surviving family of Vince Foster had a protectable privacy interest in keeping death scene images confidential. Critically, the Supreme Court engaged in a balancing inquiry that weighed the family’s privacy interest against the public interest in disclosure, finding that the former was more substantial than the latter.

CONCLUSION

Body cam technology holds great promise. Public access principles that apply to other public records are equally and appropriately applicable to body cam footage. As such, public access laws should not be restricted to curtail access to the footage obtained from these cameras.

Legislatures and police departments enacted body cam programs to improve police performance, ease police-community tensions, and enable public oversight. Now, legislatures must keep the promise they created with these programs by allowing public access. Video footage—perhaps even more than documents—is a form of government record that the public can engage with and evaluate. Public observers can rely on the footage to form independent accounts of an incident, or to challenge authoritative interpretations of video evidence. As a result, access to this information can facilitate public review of police behavior and promote government accountability.

Legislatures must resist the temptation to respond to the new technology with unnecessary new exemptions. If anything, the widespread adoption of police body cams marks an opportunity for legislatures to expand FOI access to law enforcement records more broadly because the same well-established principles that have led to FOI laws in the first place with regard to other public records are equally applicable to body cam footage. The government has had to respond to overbroad expansion of exemptions in the past—Congress had to rein in application of the federal law enforcement records exemption through amendments that limited withholding to situations where disclosure would result in one of six specifically enumerated harms, for example¹¹⁸—and body cam programs may present a similar moment for states. In particular, states should consider: limiting law enforcement record exemptions to active investigations; mandating disclosure of records from closed investigations; narrowing personnel records exemptions; and limiting privacy exemptions while improving redaction capabilities.

December 2015

¹¹⁸ The federal law enforcement records exemption has undergone near continuous expansion since Congress first enacted it in 1966. Beginning in the 1970s, the D.C. Circuit extended what had been a relatively narrow exemption for “investigatory file[s]” into a *per se* exemption for all files found to be “investigatory” in nature. Harry A. Hammitt, Marc Rotenberg, John A. Verdi, Mark S. Zaid, *Litigation Under the Federal Open Government Laws* 2008, ELECTRONIC PRIVACY INFORMATION CENTER, (Sept. 26, 2008) at 253. Congress sought to correct the courts’ overbroad interpretation by enacting the 1974 exemption, which it again upheld in 1986. *Id.* at 254. Yet a series of subsequent changes have again increased the scope of the government’s withholding discretion. *Id.* at 255-56.