



ACLU of Massachusetts
211 Congress Street, Suite 301
Boston, MA 02110
617-482-3170
www.aclum.org

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Joint Committee on Public Safety and Homeland Security
Sen. Michael Moore & Rep. Harold P. Naughton, Jr., Chairs

ACLU POSITION REGARDING H.2120

OPPOSITION TO EXEMPTING BODY-WORN CAMERA VIDEO FOOTAGE FROM THE PUBLIC RECORDS LAW

Dear Senator Moore, Representative Naughton, and members of the committee:

While the ACLU of Massachusetts would normally support the creation of a taskforce to develop uniform policies for police body cameras and their recordings, we strongly oppose the provision in H.2120 that would exempt body camera video footage from the public records law.¹ Our organization cannot remain silent about legislation that would so severely undermine government transparency and accountability.

It is possible this provision is motivated by an impulse to protect privacy; if so, it wildly misses the mark. The ACLU cares deeply about privacy—but privacy is not the same as secrecy.

For body cameras, public access is the point

Body cameras, if implemented with the right policies and procedures in place, can serve as important oversight and accountability tools. Wholly exempting body camera footage from the public records law undercuts this critical mission, stripping away the core public interest value of the technology.

Video footage from body cameras provides the public with crucial information and serves to protect people on both sides of the badge. These videos have been especially important when there have been allegations of police misconduct. For example, when Milwaukee police officers arrested the N.B.A. player Sterling Brown, footage of the arrest showed police officers acting inappropriately. Thanks to the public dissemination of the footage, the officers were disciplined for violating Mr. Brown's civil rights.² In a Texas case, body cameras played a crucial role in the conviction of a police officer who killed an unarmed

¹ The ACLU of Massachusetts was invited to participate in a working group of the Massachusetts Bar Association on this subject, which helped inform the development of the task force aspect of this bill. However, in that setting and others, we have insisted that to be effective body camera footage must be subject to the public records law. Draft legislation reviewed by the MBA task force did not include a public records carve-out.

² See Louis Lucero II, Sterling Brown Arrest Fallout: 3 Officers Are Suspended, The New York Times, May 25, 2018, <https://www.nytimes.com/2018/05/25/us/sterling-brown-video-milwaukee-police.html>

African-American teenager.³ And in Springfield, Massachusetts, in multiple instances just in the past year, body camera footage has led to critically important investigations of police misconduct and brutality.⁴

Body-worn cameras can also help judges better evaluate claims made by defendants and law enforcement in court. In Boston, police officers have found that the footage “protects their members well,” while defense attorneys have won motions to dismiss criminal cases based on body-worn camera footage that contradicts police testimony.⁵

But many of these benefits only accrue if the footage derived from body-worn cameras is widely available to the public.

Unfortunately, Section 7 of the bill would completely exempt video footage from the public records law. The ACLU of Massachusetts strongly objects to this provision and urges the committee to strike it before advancing the bill. In order to fulfill an accountability function, video footage from body-worn cameras must be subject to public inspection. Otherwise, body-worn cameras would simply become another surveillance technology in the hands of the government.

The ACLU of Massachusetts is not alone in opposing the proposed public records law exemption. The Secretary of the Commonwealth, William F. Galvin, issued a powerful statement urging legislative leaders to remove this language.⁶ Other advocacy groups are likewise raising concerns about the impact this provision will have when it comes to fostering trust between law enforcement and the communities they serve.⁷

Eliminating public access to body camera footage is the wrong approach. It does not protect privacy; it simply eviscerates transparency.

Our public records law already protects privacy

Privacy is about individuals’ personal information and who can access, use, and misuse it. The existing public records law is robust enough to protect it. The “privacy exemption” in

³ See Faith Karimi and Emanuella Grinberg, CNN, August 30, 2018, <https://www.cnn.com/2018/08/29/us/texas-jordan-edwards-death-sentencing-phase/index.html>

⁴ See Laura Crimaldi and Shelley Murphy, ‘I could crush your [expletive] skull and [expletive] get away with it.’ A deep look at the Springfield police, The Boston Globe, September 1, 2018, <https://www.bostonglobe.com/metro/2018/09/01/springfield-police-facing-civil-rights-probe/m7xG6NUxwFZ2o0gQwPqHVN/story.html>

⁵ Milton Valenica, “As body camera footage gets used in court, both sides agree on its usefulness,” Boston Globe, March 26, 2018, <https://www.bostonglobe.com/metro/2018/03/26/body-camera-footage-gets-used-court-both-sides-agree-its-usefulness/jlDH0T4TdASK9Bt74QWqHP/story.html>

⁶ Bill would limit public access to police video in Massachusetts, Todd Wallack, July 10, 2019, <https://www.bostonglobe.com/metro/2019/07/10/bill-would-limit-public-access-police-video-massachusetts/OqpSipHyD86yXd1GbAggAM/story.html>

⁷ See Massachusetts bodycam, dashcam footage should be publicly accessible, Reporters Committee, July 11, 2019, <https://www.rcfp.org/rcfp-oppose-ma-bodycam-bill/>

G.L. c. 4, § 7 (26)(c) allows agencies to appropriately redact information that would constitute an “unwarranted invasion of privacy.”

There is abundant caselaw that informs the application of this exemption. Generally, courts interpret that a case-by-case review is required to determine whether an exemption applies. See In re Subpoena Duces Tecum, 445 Mass. 685, 688 (2006)(citations omitted). In particular, the applicability of the privacy exemption requires a balancing between the seriousness of any invasion of privacy that may exist and the public's right to know. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 156 (1979) (citations omitted).

The use of this exemption already allows agencies to appropriately redact video footage to protect the privacy of individuals captured by body-worn cameras. The methods for this are varied and range from blurring faces to distorting voices. Such redaction would be appropriate in those cases where there is a privacy interest that does not yield to the public's right to know.

Courts have examined these issues several times. Among the case-specific factors courts have used to identify whether a privacy interest outweighs transparency requirements are whether disclosure would result in personal embarrassment to an individual of normal sensibilities; whether the materials sought contain “intimate details” of a “highly personal” nature”; and whether “the same information is available from other sources.” Globe Newspaper Co. v. Police Com'r of Boston, 419 Mass. 852, 858 (1995) (citations omitted). It is against these, and other case-specific relevant factors, that a judge must weigh the public interest in disclosure. Id.

Exempting police video from the public records law would create absurd results

Beyond undermining the purpose of body cameras and contradicting the existing scope of the public records law, the proposed public records exception in H.2120 would inevitably lead to absurd results. For example:

- H.2120 would not prevent state and local police from using cameras to surveil political protesters, as has occurred in Massachusetts.⁸ But it could prevent the public from ever finding out.
- H.2120 would not prevent the police from sharing body camera or other videos with federal agencies such as Immigration and Customs Enforcement. It could instead prevent the public, rather than ICE, from obtaining copies of those videos.
- H.2120 would not impose any consequences on officers who provide false testimony that is contradicted by video from their body cameras, as has already occurred in

⁸ See ACLU of Massachusetts, *Policing Dissent* (Oct. 2012) (discussing police videos of peace activists). Although the videos in *Policing Dissent* were created with video cameras rather than body cameras, the proposed exemption to H.2120 would stymie public records requests from any device that is “similar” to a body or dashboard camera.

Massachusetts.⁹ But it could prevent the public from obtaining copies of those videos.

These absurd results are possible because the proposed public records exemption in H.2120 places no restriction on police creation and sharing of videos; it only restricts the public's power to learn what the police have done. This makes no sense.

The experience of cities and towns across America confirms that a good body-worn camera policy can improve police accountability and public trust in law enforcement. This experience, however, is based upon the premise of transparency.

Public accessibility of video footage is crucial to realize the social benefits of body-worn cameras. That is why laws in Connecticut, Nevada, North Dakota, Oklahoma and Texas treat body camera recordings as public records, providing standards and caveats for when police may withhold, redact or obscure specific videos—just like our public records law does.

As a would-be member of the taskforce contemplated by this legislation, our organization is eager to work collaboratively on this issue with community members, police departments, public officials, and other stakeholders to meet community needs and concerns. However, the ACLU of Massachusetts views a broad carve-out of body cameras from the public records law as anathema.

In conclusion, the ACLU respectfully requests that the committee strike Section 7, add language to the taskforce's charge regarding the importance of transparency, and then favorably report the amended legislation. Thank you.

⁹ See Milton J. Valencia, *As body camera footage gets used in court, both sides agree on its usefulness*, Boston Globe, Mar. 26, 2018 (discussing multiple cases in which a judge deemed officer testimony not credible in light of contradictory video from body cameras).