

**COMMENTARY ON RULES AND REGULATIONS ESTABLISHING STATEWIDE
POLICY FOR THE USE AND OPERATION OF BODY-WORN CAMERAS,
110-RICR-10-00-02 and 27-RICR-60-00-2
August 3, 2022**

The ACLU of RI has consistently supported the implementation of police body-worn cameras (BWC) as an important oversight tool for both law enforcement and the public, in recognition of the beneficial role that these devices can play in promoting transparency and accountability. However, they can only serve that role if the policies and regulations governing them enshrine those goals.

To that end, we appreciate that the crafting of these proposed regulations included the solicitation of feedback in advance through the APA's advance notice rulemaking process, and that the current version takes into consideration some of the civil liberties concerns we brought to the agencies' attention last September during that process. However, in regulating a program deployed with the explicit intention of enhancing transparency in policing, we believe there are ways that this proposal could and should be strengthened further. We offer the following commentary with this perspective. Our specific comments follow below:

- **Section 2.5.4(B)(1)**: This section concerns the responsibilities that a BWC officer has at the conclusion of their shift, including a requirement that all BWC footage be uploaded and appropriately flagged for retention. We first note that there appears to an erroneous citation reference to Section 2.5.14. That section deals with violations of the policy, which does not address uploading or flagging standards.

More substantively, this section authorizes extensions for compliance with the upload/flagging requirement "on a case-by-case" basis. We recognize that there may be legitimate circumstances under which the uploading of BWC videos may not be immediately practicable, such as, for example, in the midst of a technological failure or an emergency. But there should be an articulated "for cause" basis for granting an extension,

and one that discourages or prohibits extensions after “use of force” or other controversial incidents, where the video could be critical for a prompt investigation of the event.

- **Section 2.5.5(B)(8)**: This section would require the “Chief of Police or designee(s)” to be responsible for oversight of a BWC program. One provision mandates “ensuring that written directives from the Chief of Police to edit, delete, or alter any BWC Recording are carried out as stated or documented.” However, if any directive is made for an edit, deletion, or alteration of a recording – which seems problematic to begin with – we believe the regulation should also require a written explanation by the Chief as to why maintenance of the unadulterated BWC footage is not feasible or permissible. The regulations already require the BWC officer to request deletion of inappropriately made recordings [Section 2.5.11(B)], so any additional call for deletion or editing of the video by the Chief warrants special scrutiny.
- **Section 2.5.5(C)(1)**: For oversight purposes, this subsection requires supervisors to review at least one BWC recording a month of officers under their command. In order to appropriately ensure meaningful and unbiased oversight of this BWC implementation, we believe that this provision should specify that the review involve a designated time period chosen at random that can capture omissions as well as commissions – i.e., checking for times when a camera should have been activated by the officer but was not.
- **Section 2.5.6(A)(1)**: We appreciate language in this provision which would only allow for delayed activation of a BWC if circumstances made activation “unsafe and impracticable.” This appropriately emphasizes the importance of swift and timely launching of this tool.
- **Section 2.5.6(B)(2)(e)**: This section allows for deactivation of a BWC if “an arrestee is brought to a location within a Department facility that has a functioning surveillance system.” However, if an interaction between a civilian and a law enforcement officer has not officially concluded, we believe that the camera should continue to be activated to ensure that a comprehensive understanding of the interaction is available, regardless of the presence of supplementary camera or recording devices. After all, facility cameras can malfunction or be placed in such a way as to not provide the best perspective. Publicized

incidents of police interactions have often demonstrated the value of multiple viewing positions of a disputed encounter, and that is no less true if it happens to occur in a police facility.¹

- **Section 2.5.7(A):** Because the recordings of BWCs are meant to encourage proper behavior by both officers and members of the public, it is to the advantage of all that the policy require officers to notify individuals they are being recorded except when it is impractical or dangerous. However, this section merely “encourages” officers to notify affected individuals they are being recorded. We urge that this language be strengthened.
- **Section 2.5.10(A)(3):** This provision makes note of areas where recordings should be limited to protect reasonable expectations of privacy. For reasons suggested by Section 2.5.11(A), we would encourage the addition of a provision expressly mentioning “areas where the exercise of First Amendment rights is taking place.”
- **Section 2.5.10(A)(3) [sic]:** This subsection [which should be designated (A)(4)] allows an officer to consider the “presence of individuals who are not the subject of the interaction between the BWC Officer and members of the public” in deciding to “mute,” “stop,” “divert,” or “record only audio.” A recording could also be stopped or muted if “individuals who appear to be minors” are present or if the officer consults with “other members of law enforcement.” These exceptions are confusing and overbroad, as they appear to give extensive authority to officers to stop recordings in situations that do not warrant deactivation, such as when footage would incidentally capture uninvolved bystanders, minors who are part of the interaction with police, or relevant conversations about the incident between officers.² In many of these instances, the presence and use of BWCs would be extremely important for accountability purposes.

¹ To offer a concrete example, we note the assault conviction last year of Cranston police officer Andrew Leonard, whose actions at the police station were captured by the facility’s surveillance cameras. If the officer had a BWC, this proposal would have allowed Leonard to turn off his camera while assaulting the person in his custody.

² As worded, an officer could shut off or mute their BWC if they were effectuating a questionable arrest of a juvenile among a group of teenagers, or turn off the audio while another officer on the scene discusses with them the improper restraint of a suspect.

In some instances, these situations might provide valid reasons for *redacting* a recording when releasing it to the public, but not for failing to record it in the first place for internal investigatory purposes. These exceptions, because of their breadth, could be easily abused. We believe this provision should be much more narrowly crafted and clarified to ensure that the exceptions don't swallow the rule.

- **Section 2.5.10(A)(4):** This section addresses procedures for equipping school resource officers with BWCs. While we support the accountability that BWCs can provide, the ACLU opposes their specific use in the school setting by SROs. Instead, we urge that the regulations instead explicitly ban the use of BWC in schools. Unlike those worn by police officers on the street, we believe that body cameras in schools are unduly invasive of student privacy. To begin with, SROs should rarely be engaging in the type of law enforcement efforts that BWCs are meant to address.

The routine use of BWCs by SROs presents a real threat to students' privacy and could contribute to the creation of an oppressive school environment of pervasive surveillance. Further, we suspect that SRO body camera footage will, more likely than not, be used to document interactions regarding minor disciplinary issues. The more that SROs "document" minor scuffles or other school infractions that would normally be handled by administrative means, the more likely these incidents will instead become law enforcement matters and unnecessarily turn disciplinary disputes into criminal ones.

If officers have been called into a school because of an imminent threat of some kind, and reasonably anticipate needing to use force, that is one thing, but officers for whom a school is their beat should not be wearing cameras day in and day out. Subsection (A)(3)(h) recognizes that special privacy interests are inherent in the school setting, and we believe a ban on state funding of body worn cameras for SROs should be explicitly incorporated in the regulations.

- **Section 2.5.10(B):** This section addresses the recording of victims and witnesses and requires that a BWC officer "weigh any reasonable expectation of privacy in determining whether to activate or discontinue recording." This open-ended authority should be clarified and narrowed, as the comments of these individuals will often be critical to the

investigation of an incident under scrutiny. Further, we appreciate that some of these conversations may very well deserve privacy protection from the general public, but that is a separate issue from recording them in the first place. In almost all instances we assume these recordings will be helpful to the department itself in pursuing criminal investigations, and for the same reasons it has become best practice to record the interrogations of criminal suspects. If there are privacy considerations that warrant discontinuing recordings even for internal purposes, they should be spelled out more clearly.

At the same time, however, in an effort to provide maximum transparency, BWC officers should be required, rather than “encouraged,” as stipulated by Section 2.5.10(B)(2), to notify the victim or witness that they are being recorded.

- **Section 2.5.10(C):** For reasons similar to those we expressed about Section 2.5.10(A)(3) [sic], we are concerned about allowing officers to deactivate BWCs while consulting with other officers “pertaining to criminal investigation” or “law enforcement strategy.” These broadly worded exceptions could be used to hide relevant conversations between police engaged in possible misconduct. We note that the Massachusetts state police policy on BWCs limits muting of recordings to much more specific circumstances, such as protecting the safety of victims or witnesses, revealing confidential strategy, etc. Again, it’s important to differentiate between circumstances when a recording could be redacted from public inspection and when it should not be made at all.
- **Section 2.5.12:** This section allows officers, with one exception, broad authority to review BWC recordings “for the purposes of completing an investigation and/or preparing official reports.” The exception, contained in Section 2.5.12(C), limits access in “certain use of force” situations until after the trooper has provided a recorded statement. However, there are important reasons to limit trooper access to body camera footage in many other instances besides those involving use of serious force.

There are many situations that do not amount to these “certain use of force” situations, but where an officer inadvertently coloring their memory by viewing video prior to documenting the incident may be just as problematic, and therefore also warrants a ban on premature viewing of the recording. We believe subsection (C) should thus be expanded

to apply to videos capturing any use of force, incidents leading to arrest, or any other confrontation with a member of the public that might reasonably lead to filing of a complaint or to an internal or external investigation. The language of this section should also be refined to clarify that this ban on pre-review applies to all officers who were witness to the incident, not just those directly involved in the confrontation or arrest.

- **Section 2.5.13:** This section appropriately subjects BWC footage to the Access to Public Records Act. Independently of this, however, we believe that people who are themselves the subject of BWC footage should be allowed to view the recordings promptly, regardless of whether the recording would otherwise be subject to disclosure. Presently under APRA, a person who is the subject of a police report has no greater right than a member of the general public to obtain a copy of the report. However, we believe the direct subject of video recordings, and their legal representatives, should be entitled to access video involving themselves regardless of any APRA restrictions.
- **Section 2.5.13(D):** This subsection dealing with public access to BWC recordings creates special rules for footage involving serious use of force incidents. While those rules are ostensibly designed to allow access to BWC recordings when APRA would otherwise permit *withholding* the footage from the public, we are concerned that they fail to adequately take into account the public’s strong interest in gaining prompt access to BWC footage in those situations.

Under the proposed language, BWC recordings “from an AG Protocol incident shall be provided to the public...no later than upon the substantial completion of the investigation,” which is further described to mean that “evidence has been collected and witnesses have been interviewed,” with the *expectation* that substantial completion occurs “within thirty (30) days.” While this may be the *expected* timeframe for “substantial completion,” there is not assurance it *will* be, and we thus consider this standard for public release as too broad and imprecise, as it could keep footage of highly publicized incidents secret for months. Rather, we believe that recordings of incidents of alleged police misconduct should be released sooner rather than later and that the policy itself should encourage prompt release in those instances, as there are good reasons for doing so.

Rarely should the disclosure of a recording that has been taken in public in a high-profile incident “be expected to interfere with investigations of criminal activity” so as to qualify for secrecy under APRA. To the contrary, its release may aid in such investigations. Because we believe the time for releasing recordings in such instances should be measured in days, not an indefinite and amorphous period of time which could stretch for months, we urge that this provision more clearly delineate and confine the circumstances warranting disclosure only after “substantial completion” of an investigation.

- **Section 2.5.14:** Under this section, violations of these regulations subject individuals to “appropriate remedial or disciplinary action, in addition to any other consequences outlined in the law.” As the law establishing the statewide BWC program does not contain any such consequences, we are unsure what these consequences are. While certain violations could result in “discipline up to and including termination,” and Supervisors are required to “ensure appropriate remedial action or referral for disciplinary action,” these provisions likely only mean that an officer who violates this policy will, to avoid drawn-out LEOBOR proceedings, receive a two-day suspension. Given the routinely documented incidents of officer noncompliance with BWC activation in Providence, we urge that the regulations be amended to provide that any instances of violations imposed pursuant to this section and any non-compliance found through the audits conducted under Section 2.5.5 be made public on a quarterly basis (without providing individually identifiable information of the officer). This disclosure will provide some minimum level of public oversight and knowledge as to how effectively these regulations are being complied with.
- **ADDITIONAL RECOMMENDATION:** This policy does not restrict the use of BWC facial recognition technology. We believe that it should explicitly prohibit BWCs from utilizing this or similar technologies that BWC manufacturers are promoting that have the potential of bolstering police surveillance. A technology which was designed as a tool for officer accountability should not be twisted into a surveillance system to be used against communities. The rise of biometric surveillance technologies for BWCs gives government an unprecedented power to track, classify, and discriminate against people in myriad ways. The regulations should prevent any such use of BWCs from the start.

The ACLU of RI hopes that that these comments will be given careful consideration in finalizing a policy for a permanent BWC program. If the suggestions we have made are not adopted, we request, pursuant to R.I.G.L. §42-35-2.6, a statement of the reasons for not accepting these arguments.