

Body-Worn Cameras: Privacy, Professionalism, & Protection



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Overview



Basic work place privacy and the 4th Amendment

What a body-worn camera (“BWC”) is

Pros and Cons of BWCs

Management’s concerns

Officers’ concerns

Suggestions

DISCLAIMER



Nothing contained in this Seminar is intended to be legal advice. This Seminar is an overview.

Before making a claim or taking a position under any circumstances a thorough review of all applicable laws, regulations, policies, contract provisions, and any other relevant authorities should be conducted, including consulting with experts and professionals in the jurisdiction for advice and counsel.

Right to Privacy



*U.S. v.
Katz,*
389 U.S.
347 (1967)

The U.S. Supreme Court has ruled that before a 4th Amendment violation can be found in public employment there must be an expectation of privacy that Society is willing to accept as reasonable

The courts have analyzed the “right” to or “expectation” of privacy in a variety of contexts:

Workplace Privacy



O'Connor
v.
Ortega,
480 U.S. 709
(1987)

Established the reasonable suspicion standard for workplace searches by employers

Followed precedent set by *New Jersey v. T. L. O.*, 469 U.S. 325 (1985), which made school student searches permissible based upon a “reasonable belief” of misconduct

Also created the “operational necessity” doctrine:

Workplace Privacy



The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor, rather than a law enforcement official.

Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation ...

Workplace Privacy



An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits.

Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office.

Workplace Privacy



Requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome.

Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is **simply unreasonable.**

Workplace Privacy



U.S. v. Knotts,
460 U.S. 276
(1983)

No expectation of privacy in an automobile travelling on public thoroughfares

Phillips v.
Township of
Cumberland

No expectation of privacy in police cruiser

Quon v. City of
Ontario Police
Department

U.S. S.Ct., allowing for the expectation of privacy in agency issued pager/text message content still found warrantless search of pager transcript reasonable given employer's limited search and legitimate interest in whether employer was being appropriately billed for pager use under its plan w/pager company.

Workplace Privacy



Pennyfeather v. Tessler

No expectation of privacy as to employer re information in personnel file freely given by employee

Greenwalt v. Indiana Dept. of Corrections

4th Amendment not applicable to fitness for duty evaluation

Tort of invasion of privacy more appropriate

Caldarola v. County of Westchester

4th Amendment “seizure of image” occurred when videotape of arrestee was made but the invasion of privacy was minimal

Workplace Privacy



*DeMaine
v.
Samuels*

4th Amendment not violated when trooper's vehicle and personal belonging were searched pursuant to a written published policy putting trooper on notice of employer's asserted right to such searches

IA searches of employees and their property is not measured under probable cause standard because criminal prosecution is not the objective of the search

Since IA search results in discipline only, appropriate standard is reasonableness, a more lenient standard

Expectation of privacy in troopers desk and car found not objectively reasonable

Workplace Privacy



*Lynch v.
NYPD,*
737 F.3d 150
(2nd Cir.
2013).

Post-shooting breathalyzer test falls with the “special needs” exception to the Fourth Amendment, and requires neither probable cause nor a warrant.

Primary purpose of the rule requiring the test was not the enforcement of the law, but rather deterrence of officers working under the influence of alcohol and public assurances.

BODY CAMERAS



Very little case law to date.

Floyd v. City of New York (2013) Judge found NYC's "stop and frisk" tactics unconstitutional and ordered the officers to wear body cameras to deter the unconstitutional risk of stop and frisk.

BODY CAMERAS



*Allen v.
City of
Oakland
(2012)*

In the midst of the “Occupy Oakland” protest, several officers were found to have turned off their lapel cameras while making arrests, in violation of a court order.

Officers disciplined but not held in contempt by the court.

Topics for discussion:



Balancing: potential to invade privacy (of both the officer and the public) versus deterring alleged officer misconduct.

When is the camera on? Continuously running versus activated by the officer.

When is the camera on?



Considerations: Officers do not want to be accused of turning the cameras off to commit misconduct.

However, if there is a continuous recording, it is stressful and oppressive to the officers.

Who owns the video and what do we do with it?



If the cameras are recording hours and hours of video, including innocuous video inside people's homes or of people walking down the street, what is the department supposed to do with all the video?

How long should video be retained?



Departments should develop retention schedules that keep video for short times (weeks) unless “flagged” for issues involving use of force, incidents that lead to arrest or if there has been a citizen or other complaint filed about the encounter.

Topics for discussion:



Should officers be required to notify suspects or members of the public that they are being recorded on a body camera?

Should officers who enter private homes be required to notify the occupants of the camera or give the occupants the opportunity to request it be shut off?

Topics for discussion:



When could video footage be released to the public?

Would even innocuous encounters be subject to public records requests?

Could officers or the public object to the release of video that does not involve a complaint, use of force, etc?

Topics for discussion:



What about sensitive witness statements or victim statements, for instance domestic violence victims who are already reluctant to speak to the police?

Would the continuous recording further deter the most vulnerable witnesses and victims from reporting crimes?

PROs and CONs



There are clearly benefits to both officer and the public when BWCs are used

Conspiracy and cover-up allegations will ALWAYS play a role in our litigious society

Transparency & accountability have always been “slogan-like” terms used in government service

BWCs will NOT answer all questions

BWCs may even lead to additional questions and merely fuel a different debate

PROs



Real-time
evidence
gathering

Efficiency
of prosecution

- Criminal cases
(of suspects & officers)
- Internal Affairs cases

Civil defense of
officers and
agencies

Increased
professionalism

“Impartial
Eye-Witness”
(video doesn’t lie)

Public trust

PROs



The IACP CLAIMS:

In-car cameras
exonerated
officers in 93%
of cases

Many
complainants
dropped their
complaints upon
learning there
was a video

5% of the
complaints were
sustained

Source: The Impact Of Video Evidence On Modern Policing
http://www.cops.usdoj.gov/Publications/video_evidence.pdf

PROs



The IACP also CLAIMS

Rialto, CA PD:
Citizen misconduct
claims fell by 87.5%

59% fewer incidents
of use of force

*Source: End of Program Evaluation: On-Officer Body Camera System,
Axon Flex Program Evaluation and Recommendations, 12/2/13*

CONs



Officers are made to feel as though they cannot be trusted, they are not professionals

Privacy concerns of officers in non-law enforcement contacts (breaks, locker rooms, rest rooms)

CONs



Mistrust among fellow-employees
(surreptitious recordings)

Comments
against
management

Union
meetings

Casual
contact with
supervisors

CONs



The un-recorded incident

Time or emergent conditions not giving officer time to engage the equipment

Defective equipment

- The inevitable conspiracy theory
- An additional policy leading to discipline

CONs



“Routine audits” of videos

Fishing
expeditions for
policy violations

Unreported
conduct caught
on video

Thoughts from Dr. Bill Lewinski of Force Science Institute:



Cameras and eyes see/perceive differently

- Peripheral vision
- Danger cues
- Depth of field
- Speed
- Transition from high to low light (& vice-versa)
- Body parts or objects block the view
- Time stamping
- Angular perspectives
- Instant replay second guessing (*Graham v. Connor*)
- Video should not be a substitute for a thorough investigation.

Source: *10 Limitations of Body Cameras You Need To Know About, A Special Report From Force Science Institute*

The FOP's Concerns



“Always-On” as opposed to officer activated

Responsibility for damaged equipment

Amnesty for self-reporting minor violations

- What is a “Minor Violation?”

- How many bites at the apple?

The FOP's Concerns



Officer privacy

Discussions between officers and investigators

Failing to record

- Intentional or negligent
- Defective equipment

The FOP's Concerns



Storage of videos in an un-editable format

Officers should have unlimited access to their own videos with a discreet user name and password

- Prior to any questions

- Especially after a critical incident

The FOP's Concerns



Policies AND Procedures must be carefully drafted to address ALL of the above

Look to other jurisdictions

Several Cities have begun using BWCs, and there exists a wide variety of policies

Some Cities Using BWCs



New Orleans

Duluth

San Diego

Fort Collins

Albuquerque

Las Vegas

Evansville

Madison

Chicago

Phoenix

Austin

Rialto

Denver

Spokane

NY DNR

Model Policies



One size does not fit all.
It is impossible to draft a policy for all agencies.

Some
models to
consider:

The FOP Proposed Model BWC Policy

www.fop.net or call or email for a copy

LRIS

<http://lris.com/2014/09/12/model-body-camera-policy/>

IACP

www.iacp.org (fee payment required)

Collective Bargaining



*Mountlake
Terrace,*
#11702-A
(Wash PERC 2014)

Employer used recording from “public safety” video camera to discipline an employee.

The disciplinary use of recordings is mandatory for collective bargaining because it is a “substantial change to employee working conditions.”

Collective Bargaining



GPS Systems

*General
Teamsters*

Local 959,

Case No. 11-
1609

(Alaska LRA
2013).

“The parties’ collective bargaining agreement contains a broad management rights clause that gives the employer the authority to decide all equipment and machinery to use in its operations, regardless of the effect on employment.

By agreeing to this clause, the union waived its right to bargain over GPS devices, which are either equipment, machinery, or both.

The union also waived the right to bargain any effects of the devices.”

Contact Information



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THANK YOU

