Memo Explaining the
MLRC's Model Policy on
Police Body-Worn Camera Footage

Across the nation, police departments and other law enforcement agencies have increasingly embraced the technology of body-worn video cameras (BWCs). Several organizations, both within the law enforcement community and various public interest and advocacy groups, have studied when and where law enforcement agents should deploy such technology, and have promulgated "best practices" recommendations regarding the retention of, and right of public access to, recordings made by police BWCs.[1]

[1] *See, e.g.*, Leadership Conference on Civil and Human Rights, *Civil Rights Principles on Body Worn Cameras* (May 2015), http://www.civilrights.org/press/2015/body-camera-principles.html; Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*, (Am. Const. Society May 13, 2015),https://www.acslaw.org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief.pdf ; Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, ACLU (2d ed. Mar. 2015), https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all; Alexandra Mateescu et al., *Police Body-Warn Cameras*, Data & Soc'y Res. Inst. (Feb. 2015), http://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf ; The Constitution Project Committee on Policing Reforms, *The Use Of Body-Worn Cameras By Law Enforcement: Guidelines For Use & Background Paper* (January 28, 2015), http://www.constitutionproject.org/wp-content/uploads/2015/02/TCP-The-Use-of-Police-Body-Worn-Cameras.pdf; Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned,* U.S. Dep't of Justice Office of Community Oriented Policing Programs (2014), http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf; Eugene P. Ramirez, *A Report on Body Worn Cameras*, (2014) http://www.parsac.org/parsac-www/pdf/Bulletins/14-005_Report_BODY_WORN_CAMERAS.pdf; Antonia Merzon, *Police Body-Worn Cameras: A Report for Law Enforcement* (Colo. Best Practices Comm. for Prosecutors 2013); *A Primer on Body-worn Cameras for Law Enforcement*, U.S. Dept. of Justice, Nat'l Inst. of Justice (Sept. 2012), https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf; *see also Considering Police Body Cameras*, 128 Harv. L. Rev. 1794 (Apr. 10, 2015), http://harvardlawreview.org/2015/04/considering-police-body-cameras/.

In 2014 and 2015, a number of state legislatures[2] and other governmental bodies have considered amendments to their open records statutes to address specifically the recordings made by police BWCs.[3] Not surprisingly, the various "stakeholder" groups and public interest organizations have not agreed, and do not, necessarily agree on a single policy for retention of and access to such police BWC recordings. Each organization applies its own mission, function, values and unique perspective in weighing the competing interests of governmental transparency, concerns over individuals' privacy interests, logistical and financial burdens to be borne by police departments, interference with prosecutions and other law enforcement functions, etc. For example, the American Civil Liberties Union, devoted to protecting civil liberties in the Bill of Rights, has balanced its commitment to the "public's right to know" what its government is up to, against private citizens' rights of privacy and freedom from a governmental surveillance state, and has issued a policy statement (revised once)[4] in accordance with its commitment to

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[2] Ryan J. Foley, *State bills would limit access to police body cam videos*, Associated Press (Mar. 24, 2015), http://www.policeone.com/police-products/body-cameras/articles/8481000-State-bills-would-limit-access-to-police-body-cam-videos/, (reporting that "[l]awmakers in at least 15 states have introduced bills to exempt video recordings of police encounters with citizens from state public records laws, or to limit what can be made public."); Mike Cavender, *Police body cams: The new* FOIA *fight*, Radio Television Digital News Ass'n (Apr. 22, 2015), http://www.rtdna.org/article/police_body_cams_the_new_foia_fight#.VT25mLLnYZ4 ("There are at least 18 state legislatures considering bills to regulate (or deny) release of body cam video. And there are many more municipalities which are setting their own rules. Few, if any, are expected to be favorable to open public disclosure."); Susannah Nesmith, *With more police wearing cameras, the fight over footage has begun in Florida*, Columbia Journalism Review (March 9, 2015), http://www.cjr.org/united_states_project/florida_police_body_cameras.php; 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.

[3] The MLRC's State Legislative Developments Committee has compiled state statutes addressing police BWCs at http://www.medialaw.org/committees/state-legislative-affairs-committee/item/2778 (restricted to MLRC members; password required).

[4] *See* Stanley, *supra* n. 1.

promoting those competing values. In contrast, the Radio and Television Digital News Association has recently issued its own position statement with regard to public access to police BWC videos[5], that places a decidedly greater emphasis on the public's right to know than the ACLU policy reflects.

Given the multitude of legitimate positions on these issues, the Media Law Resource Center, on behalf of its members (who include the nation's leading newsgathering and reporting entities), hereby lends its voice and perspective to this ongoing public discussion via the attached "Model Policy on the Retention of, and Public Access to, Police Body-Worn Camera Recordings." First, we offer a few caveats and explanations for what is *not* included in this Model Policy. Then, we offer some explanation and justification for the positions set forth in the Model Policy.

What the Model Policy Does *Not* Address

Unlike some of the previous studies and reports mentioned above, the MLRC's Model Policy takes no position on *when BWCs should be utilized* by police and other law enforcement agencies (nor how the deployment of such cameras and recording devices should be funded, etc.). Recognizing that these issues present significant public policy matters for state legislatures, local governments, and individual law enforcement agencies, the MLRC has never advised law enforcement agencies on which technology to deploy in performing their law enforcement functions, nor on which records to generate or in what format. Nevertheless, MLRC recognizes that some of the personal privacy and other concerns about the *disclosure* of

[5] *See* Cavender, *supra* n. 2.

highly personal and intimate matters can and should be addressed at the "front end," by adopting policies about when BWCs should *not* be used.

Nor does the Model Policy take a position on the logistical details (*e.g.*, storage medium, costs) of maintaining the recordings made by BWCs. Again, the MLRC recognizes that issues concerning costs, logistical and technological challenges, etc., posed by the massive amounts of data that BWCs will inevitably generate, pose significant public policy issues as well. Once again, however, the MLRC respectfully leaves such matters to legislators, and local policymakers to resolve in accordance with multiple competing budgetary and human resources demands.[6] In contrast, the issue of how long such records should be maintained *is* of interest and concern to the MLRC. The MLRC Model Policy states that, as a general rule, the issues of retention and access are best resolved in accordance with states' and local jurisdictions' existing statutory and legal framework for such matters. It is the MLRC's view that these official public records are not, in any *qualitative* way, fundamentally different from any other public records, generated by law enforcement agencies.

Justifications for the MLRC Model Policy on Retention of, and Public Access to, Police Body-Worn Camera Recordings

Turning then to what *is* included in the Model Policy: the MLRC Model Policy addresses only issues of retention of, and public access to, the recordings made by police BWCs. Like the RTDNA's Position Statement, the MLRC believes that recordings made in the course of official conduct, by governmental agents (whether they be police officers, schoolteachers, city council members, mayors, or governors) are, fundamentally, "public records" which the public has a

[6] It is worth noting, however, that the Seattle Police Department has adopted an extremely cost-effective means of storing and providing access to its BWC videos, by posting them on a YouTube channel, at no cost to the Department for storage fees: https://www.youtube.com/channel/UCcdSPRNt1HmzkTL9aSDfKuA.

presumptive right to inspect, pursuant to not only the First Amendment, but various states' and political subdivisions' statutes that provide for access to "public records," including those made, maintained, or kept by law enforcement agencies.[7]

Like the RTDNA's Position Statement, the MLRC's Model Policy is premised on the foundational assumption that all recordings made by police BWCs, in accordance with departmental policies, are subject to states' and local jurisdictions' statutes governing public access to public records. And, like the RTDNA, the **MLRC Model Policy presumes that without further amendments to such state and local statutes, existing exemptions for confidential informants, personal privacy interests, trade secrets, etc., adequately protect the persons and businesses whose activities are captured in such recordings from the harms attendant with disclosure of such material.**

To the extent that legislators consider revising or amending existing statutes providing access to public records, the Model Policy sets forth a **series of principles** to guide any such legislative reform. Once again, these principles begin with the foundational principle that all records generated by any governmental entity that document, capture, and/or memorialize the discharge of public functions, are entitled to a strong presumption of public access for purposes of inspection and copying. *See, e.g.*, *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 283 P.3d 853, 870 (N.M. 2012) ("Transparency is an essential feature of the relationship between the people and their government."); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 518 (1984) ("Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the

[7] *See* Reporters Committee for Freedom of the Press, *Open Government Guide* at Section IV.N.4 "Police Records – Investigatory Records," http://www.rcfp.org/open-government-guide (searchable by outline topic headings).

Framers would be stripped of its substance." (Stevens, J., concurring) (internal marks and citation omitted)); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[O]fficial records and documents open to the public are the basic data of government[].").

Despite this strong presumption of public access to BWC recordings, existing statutes and sound public policy recognize that in particular circumstances, countervailing interests (including ongoing law enforcement investigations, confidential informants, gang-related threats of retaliation, and highly personal and intimate private facts) may, on occasion, appropriately -- and consistent with Supreme Court guidelines suggesting limiting access as narrowly as possible to serve the appropriate privacy interest -- outweigh the right of public access to *portions of*, or, in some cases the entirety of, those recordings.

Unlike the ACLU's Policy Statement, which presumes a legitimate expectation of privacy on the part of non-law enforcement agents when they encounter such peace officers on a public street or other public location, the MLRC Model Policy is grounded on a well-recognized body of law holding that individuals do *not* have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent, when they are visible to the human eye and audible to the human ear, in any public place. Indeed, the Restatement (Second) of Torts declares that for all but the most intimate and personal aspects of one's life, there is no legal liability for intrusion when an individual is photographed in public:

> The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability . . . for observing him or *even taking his photograph while he is walking on the public highway*, since he is not then in seclusion, and his appearance is public and open to the public eye.

§ 652B cmt. c (1977) (emphasis added).[8] In order to recover for an intrusion upon seclusion, "the plaintiffs must show that *some aspect of their private affairs* has been intruded upon," and, therefore, the tort "does not apply to matters which occur in a public place or a place otherwise open to the public eye." *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (emphasis added);[9] *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) ("On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. *Neither is it such an invasion to take his photograph in such a place,* since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see." (emphasis added) (internal marks and citation omitted)); *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988) ("taking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another"); *Salazar v. Golden State Warriors*, No. C-99-4825, 2000 WL 246586, at *2 (N.D. Cal. Feb. 29, 2000) ("There is no intrusion into a private place when the plaintiff has merely been observed, or even photographed *or recorded*, in a public place. The plaintiff must show he had an objectively reasonable expectation of privacy." (emphasis added) (internal marks and citation

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[8] The Restatement does note that "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." *Id.*

[9] The Restatement further recognizes that:

> Those who commit crime **or are accused** of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. **The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed.**

Restatement (Second) of Torts § 652D cmt. f (emphasis added).

omitted)); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13-14 (S.D. Ohio 1983) (dismissing claim based on photographs taken of plaintiff on public sidewalk); *Mulligan v. United Parcel Serv., Inc.*, No. 95-1922, 1995 WL 695097, at *2 (E.D. Pa. Nov. 16, 1995) (holding that "party has no claim for invasion of privacy because of surveillance where he or she is not in a private place or in seclusion," and that plaintiff had no expectation of privacy when he was repairing a walkway in front of his home).

While individuals unquestionably enjoy a reasonable expectation of privacy within their homes or other private quarters, *see, e.g., Wilson v. Layne*, 526 U.S. 603 (1999),[10] the same is not true for the expectations of those in business settings and other private property locations that are generally open to the public. *See, e.g., Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 812-15 (9th Cir. 2002); *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995).

Therefore, in recognition of the case law set forth above, the MLRC's Model Policy extends a presumption of public access to all police BWC footage of individuals filmed on a public street, park, sidewalk, or private business location that is readily accessible to the public. BWC recordings of individuals inside their homes, apartments, places of residence or other private property, in contrast, are not subject to that same presumption of public access, unless the conduct recorded is itself a legitimate matter of public concern.[11] And even in the case of

[10] In *Wilson*, the Supreme Court held that the police had violated the Fourth Amendment when they brought reporters from the *Washington Post* to accompany them in their execution of a search warrant inside a private residence. Notably, however, the court observed, "it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." *Wilson*, 526 U.S. at 613 (citation omitted).

[11] The Restatement also makes clear that when information is contained in a public record (one generated by a government agent documenting the governmental actions and open to the public), its subsequent publication by the media cannot give rise to a claim for "publicity given to private facts." Restatement (Second) of Torts § 652D cmt. b (1977) ("there is no liability to giving publicity to facts about the plaintiff's life that are matters of public record" provided the record is

ordinary, routine executions of warrants or other authorized home entries or entries onto private property, particular circumstances may warrant public disclosure of such recordings; law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted (see below). In addition, the public should be permitted the right to petition a court for an order granting access to such recordings on the same basis, and to challenge the extent of any redactions.

As to the privacy expectations of the peace officers whose actions are captured on the BWC recordings, it is well established that "a public officer has no cause of action [for invasion of privacy] when his . . . activities in that capacity *are recorded*, pictured, or commented on in the press." Restatement (Second) of Torts § 652D cmt. e (emphasis added); *see also Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004) (police officer has no legitimate expectation of privacy in his conduct "while he was on duty performing an official function in a public place"); *Hornberger v. ABC*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (holding that police

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open to inspection). Accordingly, publishing information captured by police BWC in documenting their discharge of official duties, if publicly available, cannot give rise to a claim for "publication of private facts." *See, e.g, Fry v. Iona Sentinel-Standard*, 300 N.W.2d 687, 731 (Mich Ct. App. 1981) (holding, *inter alia*, that information about plaintiff recorded in police incident report could not form basis for invasion of privacy claim); *Lindemuth v. Jefferson Cnty. Sch. Dist. R-1*, 765 P.2d 1057, 1059 (Colo. App. 1988) (holding that information in a public record can never be considered "private" for purposes of an invasion of privacy claim).

In addition, there is no cognizable claim for invasion of privacy by "publication of private facts" if the publication at issue addresses a matter of legitimate public concern. *See, e.g. Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377-79 (Fla. 1989) (child abuse report provided to a member of the press in violation of state statute addressed a matter of public concern); *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 788-89 (3d Cir. 2005) (same with respect to police report that was provided to the press in violation of state statute declaring such records confidential).

officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties).[12]

With respect to certain BWC recordings in which private individuals are captured in private settings or in ways that implicate other legitimate public interests warranting withholding that information from public inspection, the Model Policy – consistent with both the federal FOIA and most states' Open Records Act – calls upon release of such records in redacted form, to eliminate such legitimate privacy concerns while allowing the public the maximum amount of access to information concerning the operation s of government.[13] The records requester should have the right to challenge the extent of redactions in a court of law. The Seattle Police Department is reported to be developing a technological means to facilitate such redaction, and will share that technology with other law enforcement agencies.[14]

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[12] This is true because "a public official . . . has no right of privacy as to the manner in which he conducts himself in office." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (emphasis added); *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (holding that public official enjoys a right of privacy only with respect to government-held information concerning "matters of personal life *unrelated to any acts done by them in their public capacity*" (emphasis added)).

[13] *See, e.g., Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008) ("By providing the custodian of records with the power to redact names, addresses, social security numbers, and other personal information, disclosure of which may be outweighed by the need for privacy, the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary.").

[14] Lizzie Plaugic, *Seattle's police department has a Youtube channel for its body camera footage*, The Verge (Feb. 28, 2015), http://www.theverge.com/2015/2/28/8125671/seattle-police-body-cameras-youtube-channel.

The MLRC's Model Policy
on the Retention of and Public Access to
Police Body-Worn Camera Recordings

- Recordings made by police body-worn cameras (BWCs) should generally be made available for public inspection and copying in accordance with each jurisdiction's existing statutes governing public access to "public records," including those of law enforcement agencies.

- Such existing statutes have a host of exemptions from disclosure of "public records" that adequately protect individuals' privacy and other societal interests, that may be implicated by public release of BWC recordings, on a case-by-case basis.

- To the extent that any jurisdiction considers adopting statutes, rules, or regulations that are specifically directed to police BWC recordings, such laws should include the following:

    - § There should be a *strong presumption* of public access to *all* such recordings made in public places and other non-private areas (areas in private property open to the public). Neither citizens nor law enforcement agents generally have a "reasonable expectation of privacy" in the recordings of their interactions in non-private venues.

    - § Recordings of home searches or other lawful entries into private property are not subject to the same presumption of public access, but should nonetheless be available as public records if the requester demonstrates a legitimate public interest in the subject matter of the events that occurred inside the home or other private property.

    - § Even in cases of ordinary, routine and lawful home entries (where the event is not of unusual public interest), particular unique circumstances may warrant public disclosure of such recordings; law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted. In addition, the public should be permitted the right to petition a court for an order granting access to such recordings on the same basis.

    - § Highly personal and intimate details recorded by police BWCs during interactions with civilians in a private place may be redacted or blurred prior to those recordings being made available for public inspection and copying. The public should be permitted the right to petition a court for an order granting access to any redacted material on a showing that such material is subject to legitimate public interest.

    - § Police, sheriffs, etc. should retain all BWC recordings for a period of several weeks (not days), unless a citizen complaint or a request to inspect the tape has been filed, in which case the recording should be retained until the matter is fully resolved, including exhaustion of all appeals.

- The cost to the public of accessing the non-confidential and/or redacted recordings made by police BWCs should not be so high as to discourage or prohibit citizens from accessing these public records.