



# NYCLU

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## **Comments of the New York Civil Liberties Union In Regard to the New York Police Department's Proposed Body-Worn Camera Policy**

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The New York Civil Liberties Union (“NYCLU”) respectfully submits the following comments regarding the New York Police Department’s (“NYPD”) proposed body-worn camera policy. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across New York State and 80,000 members and supporters. Our mission is to defend and promote the fundamental principles, rights, and values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York.

A key component of the NYCLU's work is to promote transparency and accountability for police departments. In this role, we have advocated for the establishment of civilian complaint and officer discipline mechanisms that are accessible, transparent, and effective in holding police accountable for their actions. We have worked to ensure police department policies and data about police activities are publicly available. We have represented individual clients and experienced firsthand how difficult it is to achieve accountability for officer misconduct, particularly in cases where the only evidence is one person’s word against an officer’s.

In August 2013, U.S. District Court Judge Scheindlin issued a joint opinion in *Floyd v. City of New York* and *Ligon v. City of New York*, which had challenged the NYPD’s stop-and-frisk practices in street encounters and in private apartment buildings enrolled in Operation Clean Halls, respectively. The court found that these practices routinely violated people’s constitutional rights and issued an opinion outlining the remedies that the NYPD would be required to pursue under the supervision of a court-appointed monitor. Among the remedies ordered by Judge Scheindlin was a one-year NYPD body-worn camera (“BWC”) pilot under the supervision of a court-appointed monitor to determine “the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks.”<sup>1</sup>

We are hopeful that BWCs can represent a step in the direction of reforming police practices, furthering transparency and accountability, and making street policing safer and more just for both officers and the public. It has been suggested that knowing a BWC is in use can actually improve the behavior of police and civilians in street encounters.<sup>2</sup> If evidence following the

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<sup>1</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013)

<sup>2</sup> OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, DEPARTMENT OF JUSTICE & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014), at 2, available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

court-supervised pilot program indicates this effect is real and that BWCs do play a role in reducing the incidence of unconstitutional stops, then investment in BWCs could represent enormous progress in improving police-community relations and officer accountability. If they can also be used to achieve meaningful accountability for abuse by police officers without undue infringement on privacy rights, they will be one of the most valuable reform steps we can take.

Despite their potential promise as an accountability tool, the use of BWCs also raises important and sometimes competing privacy and transparency interests. The draft NYPD BWC policy appears to attempt a balance between some of these interests, but it is noticeably lacking in establishing accountability mechanisms, which are essential if BWCs are to have a positive impact on police-community relations. Additionally, the draft language could be strengthened in order to better protect people's privacy and to ensure that the NYPD is committed to meaningful transparency and public oversight with regard to public access to BWC footage.

### **I. The NYPD's Body-Worn Camera Policy Must Maximize Officer Accountability**

The single biggest threat to the effectiveness of BWCs in reducing police misconduct is the enormous level of control officers and departments have over the devices and the information captured. Efforts must be made to ensure officer compliance with the BWC policy, minimize opportunities for officer interference with cameras, and ensure footage cannot be manipulated or deleted improperly.

#### **A. The draft policy must be amended to prohibit officer viewing of footage prior to completing required reports or providing an official statement.**

The potential value of BWCs as an accountability tool will be substantially undermined by language in the draft policy that allows officers to review recordings of incidents prior to writing an initial report or providing an official statement. As the Inspector General for the NYPD ("IG") noted in his July 2015 report on an earlier, separate BWC pilot program, this raises serious concerns about the integrity of internal investigations. As the IG pointed out:

BWC footage has no limitation on focus, attention, or recollection, and may capture events that officers themselves did not perceive, did not observe, or could not reasonably recall . . . [E]ven officers' honest recollections of an incident may be altered inadvertently by viewing video footage, leading them to omit events they recall but which were not captured on camera.<sup>3</sup>

The IG also expressed concerns that allowing officers to view footage related to an incident under investigation would undermine the credibility of that investigation, noting that "[e]xposing officers to events to which they may not have been privy at the time of the incident affects the ability of investigators to assess the officer's contemporaneous appraisal of the circumstances which led him or her to take the actions under investigation."<sup>4</sup>

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<sup>3</sup> OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, N.Y.C. DEP'T OF INVESTIGATION, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY (2015), at 28, available at <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

<sup>4</sup> *Id.*

The risks that enabling officers to view footage prior to completing a report or providing a statement would, at best, color officers' recollection of events or, at worst, provides officers with the opportunity to deliberately tailor their statements based on the footage strongly counsel against this provision. The NYPD's policy must be modified to include a prohibition on viewing BWC footage until after the completion of any required reports or the providing of an official statement related to an investigation. These changes are necessary in order to prevent further erosion of public trust in the credibility and effectiveness of NYPD disciplinary investigations.

**B. Officers who violate the body-worn camera policy must be subject to disciplinary actions.**

BWC's are only one tool, and outside the context of a just, effective, and transparent officer discipline system, they will fail to make a difference in community-police relations. In fact, if video evidence exists and the system still fails to achieve accountability, community faith in law enforcement will continue to erode. Without a fair, transparent, and independent way to hold officers accountable for misconduct, video evidence will add little to the status quo.

Entirely absent from the draft NYPD policy itself is a clear statement that officers who violate the policy (including by failing to activate BWCs when required or by activating BWCs when prohibited) will be subject to discipline. The NYPD notes that "[i]t is difficult to specify a discipline system as there are many variables," but the policy nevertheless *does* include language that assures officers that they will *not* be disciplined for minor violations observed during supervisory review of footage.

It is not necessary to spell out the full scope of a discipline system that seeks to address each and every variable in the use of BWCs. However, a general warning to officers that violations of the policy will result in discipline is appropriate and will demonstrate that the NYPD takes seriously the potential value to the community of BWCs as an accountability tool.

The NYPD must demonstrate a commitment to impose meaningful consequences when for violations of the policy, including a statement in the language of the policy that officers who consistently and unjustifiably violate its provisions will be subject to discipline up to and including termination. In order to counter officers' powerful motivation to not record when they behave improperly, we further recommend that the Department's disciplinary rules create a rebuttable presumption against an officer when accused of misconduct relating to an incident in which the officer was required to activate the BWC but failed to do so.

**II. The NYPD's Body-Worn Camera Policy Must Protect Against Privacy Intrusions**

The NYCLU is acutely aware of the need to balance the promise of BWCs with the protection of New Yorkers' privacy rights. BWCs can record inside a home, hospital room, restroom, and any other sensitive location where a police officer enters. They can record nearly any type of interaction, from interviews with sexual assault victims to officers blowing off steam with their colleagues.

We recognize the risk that BWCs could be used to gather surveillance of innocent people, that footage of street stops could be used to create a database of “usual suspects,” or that recordings of people in sensitive situations could be used to coerce cooperation with law enforcement. In conjunction with recently-announced “predictive policing” technologies, BWC footage could be used to create a total police state. Enforceable privacy protections are therefore essential to the success of this program.

Any policy that seeks to navigate this complex privacy landscape must be guided by three overarching principles that we believe can greatly reduce the potential for privacy intrusions.

**A. BWCs should only be used to record police interactions with the public that have an investigative or law enforcement purpose.**

Community members need to be able to trust that they can speak to officers privately and to not have every casual interaction with or mere observation by officers be recorded.<sup>5</sup> Investigative and enforcement encounters carry with them the greatest potential for hostility and confrontation and must be the focus of mandatory activation provisions.

The draft NYPD policy could be strengthened to better comport with this principle. While the proposed language on mandatory activation appears to recognize that BWCs should primarily be used to record investigative and enforcement encounters, it does not capture the full range of such encounters. Specifically, the draft policy only requires activation in Level 2 (common law right of inquiry) and Level 3 (*Terry* stop) encounters and above.

The NYCLU recommends mandating activation for Level 1 (request for information) encounters and above. Although Level 1 encounters are meant to be brief and non-threatening, a request by an officer to produce identification<sup>6</sup> or an officer approaching a person with his or her hand on a holstered gun<sup>7</sup> can be perceived as threatening or intimidating to the person being approached, and such encounters have the potential to quickly escalate. Given this inherent risk for escalation, the NYPD's policy should mandate activation of BWCs for all Level 1 encounters and above.

**B. Members of the public must be on notice that they are being recorded.**

As written, the draft BWC policy *encourages* officers to advise members of the public that their interaction is being recorded but does not *require* such notice. The NYCLU recognizes that there may be certain circumstances in which verbal notice is impractical (e.g., an active pursuit). However, in routine encounters, the BWC policy should require officers to provide such notice as close to the inception of the encounter as is reasonably possible. Not only will such a requirement reduce the potential for privacy intrusions, but requiring notification can be a mechanism for improving overall transparency and communication during police encounters.

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<sup>5</sup> This requires that individual officers retain the ability to de-activate the camera, making it even more important that the NYPD establish an effective accountability regime to ensure officers comply with recording requirements, as discussed in section I, *supra*.

<sup>6</sup> *People v. Hollman & Saunders*, 79 N.Y.2d 181 (1992).

<sup>7</sup> *People v. Reyes*, 83 N.Y.2d 945 (1994); *People v. Diaz*, 80 N.Y.2d 950 (1992).

**C. Absent exigent circumstances, such as a police raid or execution of a warrant, people should be able to refuse consent to be recorded.**

The proposed policy would give NYPD officers discretion to deactivate BWCs upon a request by a member of the public. Absent exigent circumstances, we believe that officers should be required to honor such requests, provided that the request to deactivate the BWC is, itself, recorded.

Further, the draft policy generally advises officers to record initial encounters with witnesses and victims (other than victims of sex crimes). The draft rightfully notes that there are unique concerns about sensitivity in these situations but ultimately still leaves officers with ultimate discretion to determine whether and for how long to record such interactions. Given the sensitive nature of such encounters and the heightened safety, vulnerability, and privacy interests at stake, the policy should be revised to require officers to ask victims and witnesses if they would like the BWC to be turned off during an interaction and require the officer to discontinue use of BWCs if so requested. Where the victim or witness requests that the BWC remain on, the officer must be required to continue recording until the encounter has concluded.

**III. The NYPD's Body-Worn Camera Policy Must Promote Transparency and Oversight**

Body-worn cameras cannot become just another tool for mass surveillance that enables law enforcement to compile and maintain a database containing footage of millions of New Yorkers without providing for access to and oversight of that footage. It is essential that footage be made available to individuals pursuing CCRB or civil complaints against officers arising out of an encounter captured on BWC footage, as well as to criminal defendants.

For BWCs to be effective in rebuilding trust and improving police-community relations, there must also be a straightforward and responsive mechanism for members of the public to obtain and review BWC footage. The NYCLU appreciates the NYPD's stated intent to treat BWC footage as agency records subject to release under the New York State Freedom of Information Law ("FOIL"), and we encourage the Department to apply exceptions to FOIL's disclosure requirements narrowly so as to maximize public access to BWC footage.

The public's interest in accessing BWC footage must, of course, be balanced against the privacy interests of people who appear on that footage. In order to guard against unwarranted invasions of personal privacy, the NYCLU recommends that the NYPD require blurring of faces and other personally identifiable characteristics such as tattoos prior to the release of such footage. Where such redactions would enable release of footage that would otherwise be exempted from FOIL's disclosure requirement, the NYPD's policy should affirmatively require that the redactions be made in order to allow for release.

We recognize that new technologies present new challenges and that the NYPD has already cited the limitations of its redaction technology in response to FOIL requests.<sup>8</sup> However, the NYPD's policy on public disclosure of BWC footage cannot be limited by the current state of an otherwise rapidly evolving and improving technology. Rather than writing and employing a FOIL access policy that is based on the limitations of the tools it currently utilizes, the NYPD must remain responsive to new technological developments that will maximize public access to BWC footage while minimizing overly burdensome costs and procedures.

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The growing use of BWCs has the potential to improve accountability of police officers to the communities they serve. However, without the right policies in place, BWCs will fail to improve police behavior or hold officers accountable, and could themselves become tools of abuse. A strong policy that maximizes accountability, privacy, and transparency can have a vital, positive impact on police-community relations. We thank the NYU Policing Project for soliciting public feedback on the NYPD's draft BWC and urge the NYPD to strengthen its policy to promote these principles.

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<sup>8</sup> Bobby Cuza, *Manhattan Judge to Decide if NYPD Must Publicly Release Body Camera Footage in Response to NY1's Lawsuit*, NY1, June 7, 2016, <http://www.ny1.com/nyc/all-boroughs/politics/2016/06/7/manhattan-judge-to-decide-if-nypd-must-publicly-release-body-camera-footage-in-response-to-ny1-s-lawsuit.html>.