

**Testimony of Michael Sisitzky
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committee on Public Safety
Regarding the NYPD's Body-Worn Camera Program**

November 18, 2019

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony today regarding the New York Police Department’s (“NYPD”) body-worn camera program. We also express our qualified support for Intro. 1136 and offer suggestions intended to enhance this reporting measure’s utility in evaluating the NYPD's use of body cameras.

The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.

Defending New Yorkers' right to be free from discriminatory and abusive policing is a core component of the NYCLU’s mission. 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. In representing individual clients, we have 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. And we have offered cautious support for the use of police body-worn cameras as a means of producing objective video evidence of officers’ actions during police encounters.

With the right policies in place governing their use, police body-worn cameras can be a powerful tool of transparency and accountability. But without clear commitments to those principles, body-worn cameras become just another tool for police surveillance and another shield for departments to use to protect abusive officers from public scrutiny.

The NYPD has yet to demonstrate a truly sincere commitment to using body cameras as a tool for repairing relationships with communities. Policymakers must continue to demand greater transparency from the NYPD regarding its use of body-worn cameras, including through the legislation before the committee today. But this must be part of an ongoing and broader examination as to whether the public is actually receiving the promised benefits from the thousands of cameras now deployed in our communities.



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I. Brief History of the Department's Use of Body-Worn Cameras

In August 2013, U.S. District Court Judge Scheindlin issued a sweeping ruling declaring unconstitutional the NYPD's policy of stopping and frisking hundreds of thousands of New Yorkers each year. As part of her ruling, the judge ordered the NYPD to conduct a pilot study on the use of body cameras in order to evaluate "the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks."¹ Before this court-ordered and court-supervised pilot program could begin, the NYPD conducted its own, much smaller pilot program beginning in December 2014 as an initial test of their functionality and reception to their use by patrol officers.²

Prior to formally launching the court-ordered pilot program, the NYPD solicited public input on a draft policy.³ Although the Department made a number of changes based on public comment, clear problems remained in the program that was ultimately rolled out. As one example, the NYPD did not require the recording of all investigative encounters by its officers, instead setting the threshold for mandatory camera activation at encounters where the person is "suspected of criminal activity."⁴ As a result, many low-level investigative encounters that can (and too often do) quickly escalate will not be recorded. Little changed between the pilot policies and the rules that now govern the devices being worn by all uniformed patrol officers following the NYPD's complete rollout of body-worn cameras in March 2019.⁵

By far the biggest area of concern was and remains the amount of control the Department exercises over the body camera program, including control of the individual cameras by officers themselves and the control being exercised by the NYPD more broadly in managing the vast amounts of footage and public requests for access. We address these concerns in detail below.

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

² Tina Susman, "New York City Police Officers to Wear Body Cameras in Pilot Program," *Los Angeles Times*, Dec. 3, 2014, <https://www.latimes.com/nation/nationnow/la-na-ny-police-cameras-20141203-story.html>

³ The NYCLU provided comments in response to the draft policy. NYCLU, Comments of the New York Civil Liberties Union in Regard to the New York Police Department's Proposed Body-Worn Camera Policy, Aug. 2016,

https://www.nyclu.org/sites/default/files/releases/NYCLU_Comment_NYPD_BWC.pdf

⁴ NYPD, NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy, Apr. 2017,

https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

⁵ Bobby Cuza, "All NYPD Officers Are Now Equipped with Body Cameras," NY1, Mar. 6, 2019, <https://www.ny1.com/nyc/all-boroughs/news/2019/03/06/nypd-finishes-body-camera-rollout-for-nyc-patrol-officers>

II. The NYPD's Complete Control Over BWC Footage Undermines Their Value as Transparency Tools

The single biggest threat to the effectiveness of body-worn cameras is the enormous level of control officers and departments have on the devices and the information captured. During police encounters, this means the public must rely on individual NYPD officers to actually turn the cameras on—and keep them on—when required, and on the back end, the public is asked to put their trust in the Department to provide meaningful access to the footage recorded by its officers.

A. Officer Control and Potential for Misuse

Because some of what takes place during an officer's shift should not be recorded—including conversations with confidential informants, undercover officers, or child victims—the NYPD's policy gives officers the ability to turn the cameras on and off and describes the rules for when cameras must be activated. The policy also clearly directs officers to continue recording until the conclusion of the encounter.⁶

It's difficult to know beyond anecdotal experiences the extent to which officers are recording required encounters without interruption, which is where the reporting contemplated by Intro. 1136 can be helpful. But one widely reported incident shows the danger in placing too much reliance on body camera footage to tell the complete picture of a police encounter given this large degree of officer control in the moment.

In February of 2018, two NYPD officers arrested a Staten Island man on a marijuana-related charge after stopping and searching his car.⁷ Both officers were wearing body cameras, but after an initial search of the car produced no evidence, one of the officer's cameras stopped recording for more than four minutes, reactivating just moments before the officer discovered marijuana in an area of the car that had previously been searched. Though the officer blamed the interruption on a technical difficulty, lawyers for the defendant alleged that the officer deactivated the camera in order to conceal the planting of evidence, and prosecutors ultimately dismissed the charges, citing the gap in the camera footage of the search. The NYPD reported that it investigated the incident but found no wrongdoing on the part of the officer.

It is worth noting that nowhere in the NYPD's policy is there any mention of potential disciplinary consequences for failure to adhere to the

⁶ NYPD Patrol Guide 212-123, *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf.

⁷ Joseph Goldstein, "Teenager Claims Body-Cams Show the Police Framed Him. What Do You See?" N.Y. Times, Nov. 19, 2018, <https://www.nytimes.com/2018/11/19/nyregion/body-cameras-police-marijuana-arrest.html>





requirements of the body-worn camera program, including the requirement to keep the cameras on for the entire duration of an encounter. Although such a statement, by itself, would be insufficient to guarantee that the Department would actively pursue disciplinary consequences for non-compliance, it would remind officers that the public expects the rules for body camera use to be taken seriously, both during the encounters and once the footage is uploaded into the NYPD's database.

Once an officer's recordings have been uploaded into the NYPD's video management system, there is still a risk that an individual officer may utilize the recordings in a way that undermines their effectiveness as accountability tools. The NYPD's policy expressly permits officers to view their own recordings prior to providing any official statement regarding an incident, even if that officer is under investigation for potential misconduct and even if the investigation is related to the use of deadly force.⁸ In a 2015 report examining the earlier NYPD pilot program, the Inspector General for the NYPD pointed out the potential problems with such a provision, noting:

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.⁹

The Inspector General 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."¹⁰

The NYPD continues to permit this level of access in its current body-worn camera policy. At best, this provision risks scenarios in which an officer's recollection of events is inadvertently colored by what they see on the footage. At worst, this provision provides officers under investigation with the opportunity to deliberately tailor their statements based on what the footage reveals.

This provision, and the lack of any clear commitment in the policy to hold officers accountable for failing to adhere to what the policy requires of

⁸ NYPD Patrol Guide 212-123.

⁹ 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>.

¹⁰ *Id.*

them undercut the public's confidence that the NYPD accepts body-worn cameras as tools meant for enhancing police accountability.

B. Civilian Complaint Review Board Access to body camera footage

The Civilian Complaint Review Board's ("CCRB") has repeatedly noted the value of video evidence in its investigations into allegations of NYPD misconduct. However, the CCRB has also reported that it has been encountering significant delays in obtaining this evidence when CCRB requests it from the NYPD. In the agency's November 2019 report, the CCRB reported having 574 pending requests for NYPD body-worn camera footage. Of these requests, 57.5% have been pending for at least 30 days, with 16.4% of requests remaining pending for 90 or more days.¹¹ It is worth emphasizing that CCRB charges are generally subject to a 180 day statute of limitations that runs from the date of the alleged misconduct, which these delays seriously cut into.¹² As the November report notes, "The timeliness of the response to BWC footage request has a direct impact on the length of time it takes to complete an investigation."¹³



The NYPD attributes these delays to their need to review and, in some cases, apply redactions to recordings prior to sharing them with the CCRB. Unlike the Department's protocols with prosecutors, who receive complete, unedited footage from body cameras through "a proprietary management system used by the NYPD that automatically transmits footage once an officer plugs their camera into a docking station and registers an arrest," the agency tasked with civilian oversight over the police force is forced to endure excessive delays before obtaining footage that is critical to resolving misconduct complaints.¹⁴

The CCRB has acknowledged the possibility that redaction or withholding may be appropriate in individual cases, including potentially in cases where the arrest record is sealed.¹⁵ However, the CCRB also notes that the question of whether body camera footage is subject to sealing is unresolved, and that the NYPD regularly allows officers access to this footage prior to CCRB interviews, while telling the CCRB investigators conducting the

¹¹ Civilian Complaint Review Board, Executive Director's Monthly Report, Nov. 2019, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/monthly_stats/2019/20191113_monthlystats.pdf.

¹² N.Y. Civil Service Law § 75(4).

¹³ CCRB, *supra* note 11 at 12.

¹⁴ Ethan Geringer-Sameth, "Vast Difference in NYPD Provision of Body Camera Footage to District Attorneys Versus Police Watchdog," Gotham Gazette, Nov. 12, 2019, <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>.

¹⁵ Civilian Complaint Review Board, Memorandum Re: BWC and Document Request Issues with the NYPD, July 5, 2019, https://brooklyneagle.com/wp-content/uploads/2019/07/20190710_boardmtg_BWC_memo-2-1.pdf.



interview that the recordings cannot be shared because they are part of a sealed case.¹⁶ As a government investigative and oversight agency, the CCRB should generally be afforded direct access to unredacted footage, as is the case in places like San Francisco, New Orleans, and Washington, DC.¹⁷ To the extent that the NYPD is limited by state law on accessing or sharing sealed records, the Department must apply those rules equally, and not just use them as a shield against record-sharing with oversight agencies.

With all of its resources and technical expertise, the NYPD can and must produce body-worn camera footage more quickly. The disconnect between the speed with which the Department provides footage to prosecutors for use as evidence against civilians and the sluggishness with which the Department responds to requests for footage that could shed light on official misconduct undercuts the promise of body cameras as a tool for accountability and suggests that the NYPD views the technology primarily as just another gadget to collect evidence for use in criminal prosecution.

C. Release of Footage Related to Critical Incidents

An essential purpose of body-worn cameras is their potential for increasing public understanding of events surrounding the most severe and tragic police encounters, as well as providing an objective accounting of events to facilitate investigations into excessive force. But for this benefit to be realized, the NYPD needs to do a better job of producing body camera footage of such incidents in their entirety.

The first incident involving a fatal police shooting recorded on NYPD body cameras occurred on September 6, 2017. Officers, responding to a wellness check in the Bronx, shot and killed Miguel Richards, who was apparently experiencing a mental health crisis. The eight officers who were present were all wearing body cameras. A week later, the NYPD released edited and redacted footage taken from body cameras worn by four of the eight officers on the scene, which included some of the events leading up to the shooting and the shooting itself, but not the aftermath.¹⁸

Seeking to gain a more comprehensive understanding of the circumstances that led to Mr. Richard's killing and its aftermath, New York Lawyers for the Public Interest ("NYLPI") submitted a FOIL request for unedited body camera footage from all of the officers involved. The NYPD invoked a number of objections in response, including that the recordings constituted personnel records under 50-a, that release of the unredacted footage would constitute an unwarranted invasion of Mr. Richards' and his

¹⁶ *Id.*

¹⁷ Cindy Rodriguez, "When it Comes to Police Misconduct, Body-Worn Camera Videos Are Slow to Come," WNYC, July 22, 2019, <https://www.wnyc.org/story/police-misconduct-body-worn-camera-videos-slow-come/>.

¹⁸ *New York Lawyers for Pub. Interest v. New York City Police Dep't*, 64 Misc. 3d 671, 673, 103 N.Y.S.3d 275, 278 (N.Y. Sup. Ct. 2019).

family's personal privacy, that it would endanger the life and safety of witnesses, and that portions of the recordings were exempt as inter/intra-agency materials.¹⁹

These arguments were rejected by a court in June 2019. In reaching its decision, the court found that “[t]here is significant public interest in disclosing the reacted footage as it would illuminate the officers’ immediate response after the shooting and their interactions with Mr. Richards.”²⁰ It is worth quoting at length from the court’s opinion discussing how the release of footage in this case fits within the purported objectives of the NYPD’s body camera program overall:



Transparency is one of the key objectives of the BWC pilot program. The fact that respondents have released almost all the pre-shooting footage demonstrates the public's interest in the information and diminishes the expressed privacy concerns. To argue that the post-shooting record is no longer subject to disclosure because the interaction with Mr. Richards ended after shots were fired, is belied by the redacted footage. It is clear from the redacted footage that the officers continued to interact with Mr. Richards and public disclosure of this footage will contribute to a greater understanding of the incident and simultaneously promote the key objectives of the BWC pilot program. Indeed, shielding the post-shooting footage from public disclosure, violates the statute's stated requirement of providing maximum public access to government records, and frustrates the key objectives of the BWC pilot program.²¹

It is not clear that the Department has fully internalized these ideas as it relates to the release of footage in incidents like the shooting of Miguel Richards. Until October 2019, the NYPD did not have a written policy governing the Department’s proactive release of body-worn camera footage to the public. Last month, the Department released a policy to specifically govern the release of footage related to “critical incidents,” which are defined to include encounters involving the use of force resulting in death or serious physical injury and/or “[a]ny incident which the Police Commissioner determines the release of BWC footage will address vast public attention, or concern, or will help enforce the law, preserve peace, and/or maintain public order.” For such incidents, the policy states, in relevant part, that:

[T]he Department will decide when to publicly release BWC footage...within 30 calendar days, excluding any non-disclosure period(s), provided that the force investigation review is completed. The Department will release representative samples of the BWC video(s)

¹⁹ *Id.* at 675.

²⁰ *Id.* at 679.

²¹ *Id.* at 679–80 (internal citations omitted).



depicting the critical incident, as well as any salient events leading up to the event. Extraneous and/or redundant material may be omitted.²²

The policy goes on to note that the footage released to the public will be redacted but that the unedited footage will be maintained and available to “an appropriate investigating authority” and that the Department may release unreacted footage to the media in the interest of transparency. It also provides that the Department will give consideration to requests from prosecutors to delay public release of footage by an additional 30 days.

This policy does little to allay concerns about excessive delays and unchecked discretion. The Department must commit to a greater degree of transparency for footage of critical incidents, which means a commitment to the expeditious release of footage that is clearly in the public interest and less selectivity in determining how much to release. As the court in the NYLPI case noted, there is a strong public interest in having the complete picture of what happens during and in the aftermath of critical incidents. A policy that frames the release of footage in terms of “representative samples” and “salient events leading up to the event” is not enough to inspire public confidence, especially when it is the NYPD itself who will be deciding which samples are representative and which events salient. At worst, it suggests more of a concern about controlling the narrative in the aftermath of critical incidents than it does a commitment to providing the public with a full and objective accounting of the actions taken by NYPD officers. And given the court’s reasoning in the NYLPI case, the likely outcome is that these recordings will eventually become public through FOIL, with the narrative in the interim likely being that the NYPD has something to hide.

D. The (Mis)Application of Section 50-a

The NYPD’s initial invocation of 50-a in response to the NYLPI request discussed above was alarming, if to be expected at the time. The NYPD and Mayor de Blasio’s administration have been the driving force behind 50-a’s shameful expansion in recent years, enabling police departments across the state to hide vitally important records concerning police accountability from public view. To their credit, the Department has reconsidered this position, announcing in April 2019 that they will no longer cite 50-a as a justification for withholding footage from its officers’ body cameras.²³

But the Department’s initial position lent some credence to a challenge by the Police Benevolent Association’s 2018 lawsuit seeking to block the release of any body camera footage, claiming that these records could be used

²² NYPD Operations Order 46, Oct. 18, 2019, *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/oo-46-19-bodyworn-camera-footage.pdf.

²³ Alison Fox, “NYPD Will Stop Citing Legal Loophole to Deny Freedom of Information Law Requests,” *amNewYork*, Apr. 2, 2019, <https://www.amny.com/news/nypd-foil-domestic-abuse-1-29257412/>

to evaluate officer performance and that they were therefore personnel records within the meaning of 50-a.²⁴

While this lawsuit was pending, the NYPD was barred from releasing any body camera footage to the public, effectively denying the public one of the key promised benefits of body cameras: greater transparency.²⁵ That lawsuit resulted in a decision from the Appellate Division holding that body camera recordings are not personnel records covered by 50-a.²⁶ As the Appellate Division correctly noted, “To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability.”²⁷

Although the Appellate Division opinion remains controlling, this issue is almost certain to resurface as more police departments throughout the state adopt body camera programs. It is critical that the NYPD not go back on their commitment to stop invoking the wide sweep of 50-a in responding to requests for body camera footage – and it is equally imperative that the City Council express its support for full repeal of this worst-in-the-nation police secrecy law.



III. Intro. 1136 – Qualified Support

In light of this history and the principles underpinning the use of body-worn cameras, the NYCLU expresses qualified support for Intro. 1136, which would provide detailed reporting on the NYPD's use of body-worn cameras. This type of data can prove helpful to understanding whether officers are using the cameras as they should, and for the public and policymakers alike to assess whether these cameras remain a worthwhile investment.

However, we note a potential issue in that the categories for which the bill mandates *reporting* are not coterminous with the categories for which NYPD policy mandates that cameras be *recording*. The section defining “law enforcement activity” appears to largely borrow language from the local law requiring officers to identify themselves and provide business cards in the course of specified law enforcement activities.²⁸ The legislation appears to make an effort to cover non-overlapping categories by also requiring reporting on “qualified incidents,” defined as law enforcement activities that, in accordance with department policy, require officers to activate their cameras. But to the extent that “law enforcement activity” is limited to the definition provided in the legislation itself, it may not succeed in filling those gaps. Further, the reference to circumstances that “require” recording in the

²⁴ *Patrolmen's Benevolent Ass'n of City of New York v. De Blasio*, 171 A.D.3d 636, 101 N.Y.S.3d 280 (N.Y. App. Div. 2019)

²⁵ Victoria Bekiempis, “State Appeals Court Temporarily Blocks Release of NYPD Body Cam Footage,” N.Y. Daily News, July 3, 2018, <https://www.nydailynews.com/new-york/ny-metro-body-cam-footage-20180703-story.html>.

²⁶ 171 A.D.3d at 637.

²⁷ *Id.* at 638.

²⁸ See N.Y.C. Admin. Code § 14-174.

definition of qualified incidents potentially overlooks those encounters for which officers have *discretion* to activate cameras pursuant to Step 9 of the NYPD's policy but are under no directive to do so.²⁹

The legislation should be amended to more clearly specify the types of activities that will be reported to the public. Simply permitting the NYPD to disaggregate its reporting based on the categories as defined in the NYPD's policy itself would cede to the NYPD the power to define the scope of its reporting obligations by revising its own policy. The Council should instead more explicitly state the precise categories of encounters for which it seeks reporting and ensure that this list is comprehensive, including all levels of investigative and enforcement encounters and use of force incidents. The list of law enforcement activities provided in the legislation should not be based on Admin. Code § 14-174, which became law over the objection of advocates including the NYCLU because of its failure to include level one investigative encounters and traffic stops, both of which merit inclusion in the categories of data to be reported.³⁰



Additionally, given the concerns we raise above regarding the NYPD's failure to expeditiously provide body camera footage to the CCRB and to FOIL requesters, we recommend that the bill also include a requirement for the NYPD to report on the number of days it takes the Department to respond to such requests, including whether such requests are denied or granted. Where the NYPD denies requests or makes redactions, the Department should also be required to report on its justification for so doing.

IV. Conclusion

We thank the Committee for the opportunity to provide testimony today. The NYCLU remains hopeful that body cameras can be a tool for greater transparency and accountability. But this must be an ongoing conversation. If it becomes apparent that these cameras are primarily focused on surveillance and tools for prosecution, New York City must be open to reconsidering whether the substantial sums currently spent on this NYPD program could be better invested in our communities.

²⁹ NYPD Patrol Guide 212-123.

³⁰ It should be noted that although the NYPD body camera policy does not mandate activation of cameras during level one encounters, it permits discretionary activation.