



Governor's Advisory Council for Exceptional Citizens (GACEC) 516 West Loockerman St., Dover, DE 19904
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January 28, 2022

Council on Police Training
Attn: Susan McNatt
P.O. Box 430
Dover, DE 19903

Re: Department of Safety and Homeland Security Delaware Council on Police Training Body Worn Cameras Reg. [25 DE Reg. 673 (January 1, 2022)]

Dear Ms. McNatt:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Department of Safety and Homeland Security's Delaware Council on Police Training (COPT) proposal to amend 1 Del. Admin. C. §801, by adding §801.26, which will set mandatory standards for the use, activation, electronic storage and dissemination of body worn cameras (BWC). Council **supports** the development of a comprehensive policy regarding body worn cameras; however we strongly urge the COPT to convene opportunities prior to finalization of the regulations for people with disabilities and their families to expand on some additional considerations. We would like to share our concerns and observations with you.

The proposed regulations do not explicitly touch upon the disability community; however, it is undeniable that individuals with disabilities, especially those with developmental or mental health related disabilities, are at an increased risk for both fatal and non-fatal police interactions. This reality also holds true for students with disabilities. A 2021 American Psychological Association article indicates that two separate studies found that “[s]ince 2015, close to a quarter of people killed by police officers in the United States had a known mental health condition and...that 20% to 50% of law enforcement fatalities involved an individual with a mental illness.” Also, a report by the Treatment Advocacy Center finds that “people with untreated mental illness are 16 times more likely to be killed during a police encounter[.]”

BWCs, when implemented properly, can be a *win-win* for both law enforcement and communities. BWCs have been shown to strengthen the accountability and transparency of law enforcement agencies – a positive for both law enforcement and the communities in which they serve. Despite the benefits of BWCs, their use also raises several concerns which include, most notably, the intrusion into the privacy of citizens in the community as well as the impact on the relationship between law enforcement and the community.

There are numerous recommended best practices which are absent from the proposed regulations. While the proposed regulations do recommend that law enforcement agencies expand upon and customize these standards to their particular needs, the GACEC would like to recommend that the following suggested changes be adopted across the board and included in COPT's proposed regulations to protect the rights and privacy of individuals with disabilities.

- 1. The proposed regulations must include a requirement that, where feasible, officers announce and/or notify individuals when they are recording.**
This not only helps address privacy concerns but has also been shown to improve the interactions between law enforcement and community members. As explained by many of the recommended policies, this notification does not need to be verbal, but can also be accomplished by other means such as an easily visible pin or sticker indicating that a camera is in operation or a red blinking light. This would help in situations where it is not safe or practical to verbally notify as well as for interactions with individuals who are deaf, hard of hearing, or are otherwise unable to process verbal information.
- 2. The proposed regulations must include a requirement that, where feasible, officers obtain consent prior to recording (1) in a private home during non-exigent circumstances; (2) interviews with crime victims and witnesses; and (3) interviews with community members wishing to report or discuss criminal activity in the neighborhood. This consent should be recorded by the BWC or in writing. Where consent is not obtained upfront, officers must stop recording when requested by the individual.**
- 3. The proposed regulations must expand its list of instances and locations where BWC activation is prohibited, to include mental health treatment facilities (e.g., in- and out-patient treatment facilities, counseling centers) and medical treatment facilities (e.g., hospitals, in- and out-patient treatment centers) unless the officer is lawfully present (such as the instances enumerated in proposed §§ 26.4).**
The proposed regulations at § 26.13.7 do include a prohibition on recordings where “law or regulation provides for confidentiality,” which includes the Health Insurance Portability and Accountability Act (“HIPAA”) and conversations between medical treatment providers and patients. However, the proposed regulations, as written, fail to contemplate or consider those instances where bystanders, such as other patients, could be captured on BWC recordings. Including more specific prohibitions around the use of BWCs in medical and mental health treatment facilities will help individuals with disabilities, especially those hospitalized, retain their privacy rights. Council recommends that the COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an example.
- 4. The proposed regulations must explicitly and unequivocally prohibit the activation of BWCs in childcare or educational settings where minors are present (e.g., elementary, middle, and high schools) unless the officer is responding to an imminent threat to life or health.**

The proposed regulations at §26.3.3 require that “School Resource Officers [(SROs)] performing in a law enforcement capacity and not an educational capacity shall follow Section 26.0 of this regulation.” There are several privacy and community-relations concerns, which arise with the proposed use of BWCs by SROs. First, the use of BWCs in schools contributes to the already over-surveilled environment in which students are educated. Most, if not all, Delaware public schools have surveillance technology installed. Secondly, the risk of recordings of childhood mistakes being shared online outweighs any conceivable benefits – and as is now well known, it is essentially impossible to remove anything from the Internet. Furthermore, many of the BWC recordings of students currently circulating around the Internet are of children with disabilities – including those in the middle of a behavioral crisis. It is imperative that we create policies, which protect our most vulnerable, not put them on display for the world to see. It should be noted that BWCs *do* provide the benefit of being able to identify where students with disabilities have been improperly restrained or otherwise abused by SROs; however, as noted above, the costs do not outweigh the benefits. Thirdly, the U.S. Department of Education exempts BWC recordings by SROs from the privacy protections of the Family Educational Rights and Privacy Act (FERPA) because it is considered a “law enforcement unit record.”

In support of restricting or otherwise prohibiting the activation or use of BWCs by SROs, it should be noted that the Police Executive Research Forum’s (PERF’s) publication on recommendations for BWCs is completely silent on the use of BWCs by SROs or in school settings; there is no mention of it anywhere. The use of BWCs by SROs is also absent in a report by the U.S. Department of Justice Office of Community Oriented Policing Services which recommends ten actions to improve school safety. Instead, the recommended actions focus on building a positive school climate, which encourages students to come forward with concerns – an action which BWCs have repeatedly been shown to discourage. The GACEC recommends that the COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an example.

Council would suggest researching the best practices and policies put forth by the following entities:

1. (ABA) American Bar Association, [ABA Principles on Law Enforcement Body-Worn Camera Policies](https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/604.pdf),
<https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/604.pdf>
2. (PERF) Police Executive Research Forum, [Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned](https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf),
<https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>
3. (ACLU) American Civil Liberties Union, [POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL](https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all),
<https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>
4. (FOP) Fraternal Order of Police, [BWC RECOMMENDED BEST PRACTICES](https://files.fop.net/wp-content/uploads/2021/03/nfop-body-worn-camera-recommended-best-practices.pdf),
<https://files.fop.net/wp-content/uploads/2021/03/nfop-body-worn-camera-recommended-best-practices.pdf>
5. (NACDL) National Association of Criminal Defense Lawyers, [POLICING BODY CAMERAS: Policies and Procedures to Safeguard the Rights of the Accused](https://www.nacdl.org/Document/PolicingBodyCamerasPoliciesToSafeguardRights),
<https://www.nacdl.org/Document/PolicingBodyCamerasPoliciesToSafeguardRights>

6. (DPCC) Delaware Police Chiefs' Council, [Body Worn Cameras-Model Policy](https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf), <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf>

It should be cautioned that not every recommendation listed was or is endorsed by every entity; for most suggestions, at least a majority has put it forth as a best practice or policy for adoption.

1. The proposed regulations must include an officer statement on camera, where feasible, when deactivating the BWC during an encounter.
2. The proposed regulations must include a requirement that all BWCs be equipped with, and at all times have activated, a pre-event buffering mode.
3. The proposed regulations must include a specified timeframe in which the officer has to download and tag the BWC recordings.
4. The proposed regulations must prohibit officers from using privately-owned BWCs while on duty.
5. The proposed regulations must include a prohibition on activating cameras to gather evidence based on First Amendment protected speech, associations, or religion.
6. The proposed regulations must include a clear and unequivocal ban on using BWC recordings with facial and biometric recognition technologies.
7. The proposed regulations must include disciplinary measures for officers who fail to comply with the regulations and their agency's policies around the use of BWCs. The proposed regulations merely indicate that enforcement of the policies is within the discretion of the law enforcement agencies. There should be more concrete consequences for an officer's violation of the proposed regulations and their departmental policies concerning BWCs. "[R]esearchers report that compliance rates with body camera policies are as low as 30%."
8. The proposed regulations must include a requirement for the creation and maintenance of an audit trail documenting any editing, redaction, or deletion of BWC data as well as the identity of any individual who viewed, accessed, copied, transmitted, redacted, or deleted any BWC data and the date of such action.
9. The proposed regulations must require prompt deletion of BWC recordings following the retention period unless preservation is required for litigation or other appropriate purposes.
10. The proposed regulations must include a requirement for no less than annual re-training on the use of BWCs.
11. The proposed regulations must include a requirement that all Delaware law enforcement agencies publish their policies and guidance concerning BWCs and recordings in a way that is easily and readily accessible by the community.
12. The proposed regulations must provide for the public release of BWC recordings where relevant to the public interest (e.g., incidents of police use of force or if the subject of a police complaint), with exceptions for specific circumstances. These would include circumstances such as interviews with children, victims of sexual assault, and individuals experiencing a mental health crisis (unless consent is provided).
13. The proposed regulations must include a requirement that agencies collect statistical data concerning the use of BWCs.

As mentioned earlier, the GACEC does support the development of a comprehensive policy regarding body worn cameras. However, there does not appear to have been adequate input from the disability

community, a community that has a higher rate of contact with law enforcement than the general citizenry and whose members may have unique needs relative to privacy as well as the protections afforded through the use of body worn cameras. Recordings generated by body worn cameras may provide important data protecting people with disabilities who cannot recount their experience adequately because of cognitive, communicative or behavioral challenges and those whose accounts of circumstances may not be deemed credible by others due to the nature of their disability. Examples of the need for such protections are provided in the article entitled: [Don't shoot, I'm disabled - BBC News](#).

We strongly urge the COPT to convene opportunities for people with disabilities and their families to expand on these considerations prior to finalization of the regulations. In order to secure adequate input, we recommend an extension of 30-60 days to allow for additional public input and consideration of the issues raised as a result.

Thank you for your consideration of our observations and request for additional time for input. Please contact Pam Weir or me at the GACEC office if you have any questions.

Sincerely,

Ann C Fisher

Ann C. Fisher
Chairperson

ACF: kpc