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Testimony for the House Judiciary Committee

SB 40 - Public Information Act - Inspection of Records From Body-Worn Digital Recording Devices

April 4, 2023

OPPOSED

The ACLU of Maryland urges an unfavorable report on SB 40, which seeks to significantly limit public access to police body-worn camera footage.

Despite testimony over the many years this bill has been proposed characterizing it as a victim's rights bill, the primary effect of this bill has nothing at all to do with victim's rights, and the provisions of the bill dealing with body worn camera (BWC) footage of victims of domestic violence, sexual assault, and abuse of minors and vulnerable adults are not what we oppose in the bill, nor have we ever opposed those provisions. If the bill were modified to address only those provisions, in the proposed §§ 4-357(b)(1)(i) – (iii) (p. 5, lines 16-27), §§ 4-357(b)(2)-(3) (p. 6, lines 7-17), and §§ 4-357(c)(2) – (3) (p. 7, line 1-12), then we would not be opposing the bill.

The bill's most significant effect, however, has nothing to do with protecting the victims of certain crimes from their abusers, and are why we have consistently opposed the bill from the time of its introduction in 2016. The bill's primary effect is to prohibit public access to BWC footage of ALL *police* activity, unless it falls within certain insufficiently inclusive categories, something the Chiefs and Sheriffs have been unsuccessfully trying to do since 2015. BWC footage is one of the single most effective ways of holding police accountable, revealing time and time again that the police version of events was simply not true. The General Assembly should not be restricting access to such footage, particularly where the asserted justifications lack any basis in reality, as is true here.

The bill's largest effect is contained in § 4-357(b)(1)(iv) (p. 5, line 28 – p. 6, line 4). Those provisions, combined with the exception in § 4-357(c)(1) (p. 6, lines 18-31), ***REQUIRES***, and does not simply permit, police to deny inspection of ***ALL*** BWC footage, except to the subject of the footage (or their representative), unless the footage depicts one of the specific things listed in § 4-357(b)(iv). And contrary to what proponents say, that list of permitted disclosures ***DOES NOT*** encompass every type of police activity in which the public has an important and legitimate interest. Moreover, denying access to such footage has *nothing* to do with protecting victims, or privacy, both of which are, without a doubt, important and legitimate goals (as we have consistently said).

Existing law already explicitly allows custodians to consider the privacy implications of the release of police investigatory records, and to balance those implications on a case-by-case basis against the public interest in disclosure of the particular record. Md. Code, Gen. Prov. §§ 4-343, 4-351(a)-(b) [check cites]. Custodians have been doing that for all kinds of police records, that contain all kinds of extraordinarily sensitive information, for decades, without any demonstrated problem. The proponents of this bill have *never* been able to give an example of even a single instance in which police have improperly released a record (much less a BWC record) that they shouldn't have. The reason is obvious: police have every institutional incentive and opportunity to redact records to protect legitimate privacy and investigatory interests, when those outweigh the public interest in disclosure, as anyone who has ever requested police records knows. The idea that police cannot be trusted with this responsibility, when they have had it for decades without any demonstrated problem (other than improperly withholding records), is simply ridiculous.

But equally importantly, under current law, the denial of access to police investigatory records, other than those that part of an open investigation, is subject to judicial review, and the police characterization of the records, or the interests involved, is not left to their unfettered discretion, nor should it be. Because the denial of access to BWC footage in this bill is mandatory, not permissive, it would give police unfettered and unreviewable discretion to characterize their conduct as falling outside of the permitted disclosure, leaving requestors without any ability to challenge

those characterizations (because they would never learn of the record's existence, or anything about it). This is dangerous because the terms used in the bill (like search, detention, arrest) are not self-defining, and are indeed contested on literally a daily basis in criminal cases throughout the state. Unlike the provisions dealing with recordings of victims, the provision mandating broad denials of access to BWC footage was NOT among the recommendations of the Commission Regarding the Implementation and Use of Body Cameras by Law Enforcement, which proponents have cited (and on which the ACLU served).

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What Records Would Not be Disclosed?

The list of permitted disclosures in the bill omits the myriad police directives that people do, or not do, a particular act, where the directive is not accompanied by an arrest, detention, search, use of force, or injury, such as improper orders to move along, cease panhandling, police questioning, etc. And all of these activities are a frequent source of police-community tensions. Being able to document this police conduct is crucial, and one of the key reasons to have BWCs in the first place. For example, the ACLU requested BWC video that should have been recorded by officers working the perimeter of the unprecedented five-day police cordon that sealed off parts of the Harlem Park neighborhood following the death of Det. Suiter. For the vast majority of the encounters between officers and residents, the City argued that there was no "detention" (because simply living in the neighborhood or visiting the neighborhood would not have been a lawful basis for any detention), and was instead a "voluntary encounter," and so none of those videos would have, or even *could have,* been released, had this bill been in effect. Fortunately, the law was not in effect, and the City has released a subset of the videos, which documented significant misconduct by the BPD, as discussed in detail in the Court Monitor's First Semiannual Report (https://static1.squarespace.com/static/59db8644e45a7c08738ca2f1/t/5b4f83b070a6ad75b5b8adb9/1531937719069/BPD+-+First+Semiannual+Report+7-18-18.pdf).

More broadly, the permitted disclosures in the bill omits ALL searches of property (as opposed to persons). So a vast amount of police investigatory behavior (for which Maryland law requires the

BWC to be activated), including searches of buildings, vehicles, exterior land, personal effects (such as backpacks) etc. would all be *prohibited* from being released. And, again, this type of police activity, when done improperly, illegally, or discriminatorily, may also be a significant source of police-community tension. For example, several years ago multiple videos came to light showing Baltimore police officers planting or "recreating" the discovery of evidence in searches of property, not persons. All of those videos (were they not already introduced as evidence in a case, as they would not be if the State's Attorney dismissed charges based on what was shown in the video) would have been categorically barred from disclosure by this bill (because the victim of such improper behavior would not be seen in the video, and thus would not be a person in interest, and may not even know of them).

The bill also does not permit the disclosure of BWC records of police *failures* to act (because such a failure is not an arrest, detention, search, etc. of a person). And we have seen, time and time again, including, tragically, in the last week, that footage of police failing to act, either to restrain their fellow officers, or to render aid, has been critical to documenting the fundamental problems in policing in America today.

The fundamental problem of the bill is that it tries to create categories of disclosure, and fails to recognize that life (and police action or inaction or misconduct) does not fit into neat categories, and fails to recognize that sometimes the public interest in disclosure can outweigh whatever interest in non-disclosure may also exist. Existing law allows for a balancing of those interests in appropriate cases, with judicial review if necessary, but this bill would short circuit that.

The provision allowing release of BWC videos to the subject of the footage does not solve any of the problems noted above, because the person filmed is not the only person with a legitimate interest the BWC footage, and because it will often be impossible, or prohibitively expensive, to identify each person who may be in the footage so that they can make the request (as would have been true for the Harlem Park footage, for example). The bill would mean that the press, community organizations, and the public at large

cannot get access to the BWC footage noted above (and all often request footage not knowing who the subjects might be).

Proponents have, in the past, suggested that the bill would somehow save records custodians time and money in responding to records requests, because the bill would set clear standards for what footage can be released. But this assertion is, at best, untrue, because, regardless of the standards that the bill sets, the primary burden and expense with respect to responding to requests for BWC footage is the time necessary to review stored footage to see what is, and is not responsive to the request, and releasable. And the amount of footage that will have to be reviewed for any given request will not change, regardless of the standards in the bill, because all of the footage will need to be reviewed to see what is and is not releasable. Moreover, if as proponents falsely say, the bill will not result in the denial of access to any footage in which there's a legitimate public interest, then it is inconsistent to also say that the bill could save substantial time and money (particularly given the inability to point to any prior video footage that arguably shouldn't have been released).

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The provision regarding death of law enforcement officers

SB 40 also *prohibits* the release of footage showing the death of a police officer in proposed § 4-357(b)(1)(v) (p.6, lines 5-6). While we understand the intent behind this provision, but believe the categorical prohibition sweeps too far. There is no doubt that it is horrifying and traumatic for families to see the death of a loved one replayed on television. But that is true whether the death is captured on BWC or elsewhere (such as surveillance cameras or cell phones). And it is equally true for all families, not just the families of police officers.

Just as importantly, this trauma is by no means the only context in which our desire to shield someone from harm is at least in tension with other fundamental and equally important goals of our justice system, or our commitment to open government. For example, it is also deeply traumatic to have to testify in open court about a rape case, for example, but of course victims must do that every day because of the importance of having a transparent

justice system, and the dangers of dispensing justice behind closed doors.

In the context of BWC videos that depict the death of an officer, one can, of course, imagine cases in which there is little public interest in the public airing of the video. But, as with almost all things involving police (and life in general), that is not categorically or always the case. For example, there have been situations where undercover or off-duty police have, tragically, been killed by their fellow officers who were unaware that the person they were shooting was a police officer (and many more cases where they have been shot or assaulted, but not killed). And there have frequently been concerns that such shootings were and are more likely to happen because the undercover officer was black. See, e.g., https://www.washingtonpost.com/dc-md-va/2022/05/11/settlement-undercover-police-officer-shot/, https://www.nytimes.com/2019/11/24/us/st-louis-race-police.html, https://www.theguardian.com/us-news/2017/jun/24/black-st-louis-police-officer-shot-white-colleague. In such cases, a provision prohibiting BWC video from being released will exacerbate those concerns, and does not take into account the tremendous public interest in having as clear a view as possible of the events that lead to the shooting.

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And police shootings of fellow officers are not the only context in which there may be an overriding public interest in disclosure. Many people in Baltimore and beyond believe that Det. Suiter did not commit suicide, and was instead shot by a fellow officer (or on instructions from corrupt police) in an attempt to keep him from testifying in the GTTF corruption case. If there had been a BWC video depicting his death, and demonstrating it to have, in fact, been a suicide, surely there would be a vital public interest in making that available to dispel the concern that Baltimore police would murder a fellow officer. But with this provision in the bill, the City would be powerless to release it.

Finally, this provision, however well-intentioned, goes against the General Assembly's declared commitment to the equal sanctity of ALL lives, without prioritizing the lives of law enforcement officers, contained in your 2021 bill reforming police use of force, SB 71.

How to fix the bill?

There are multiple ways to fix the problems noted above. First, the bill could be amended to strike the problematic broad prohibition on release of BWC footage in § 4-357(b)(1)(iv) (p. 5, line 26 – p. 6, line 3), and the provision prohibiting the release of footage depicting the death of a police officer in § 4-357(b)(1)(v) (p.6, lines 5-6). Alternatively, our concerns could all be addressed by a simple amendment changing "shall" in 4-357(b)(1) (p.5, line 17) to "may," making these denials permissive, but not mandatory. That would provide the guidance to custodians about presumptive releases that custodians claim to desire, but a requestor could argue for the release of footage that is not specifically exempted in § 4-357(b)(iv) in appropriate cases. If such an amendment were made, the statutory language would have to also be moved to a new subsection in Part IV of Subtitle 3 of the MPIA, which contains the provisions authorizing discretionary denials of certain information in public records, rather than in Part II, as the current bill does, which pertains only to required denials of entire records, rather than redacting portions of public records.

For the foregoing reasons we urge an unfavorable report on SB 40 unless the bill is amended to remove the problematic provisions discussed above.

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