



BODY CAMERAS IN LAW ENFORCEMENT: LEGISLATIVE UPDATE

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In recent months, several states have passed legislation offering funding and/or rendering mandates to local law enforcement agencies for the purchase, deployment and use of body cameras. This article will analyze two of these statutes—one from Texas and the other from South Carolina.

Each of these statutes will be examined distinctly in the following key areas:

- #1: whether the adoption of body cameras is mandatory
- #2: the availability of state assistance in purchasing of body camera hardware
- #3: the availability of state assistance in financing the retention of body camera footage
- #4: policy guidance for the utilization of body cameras in the field
- #5: guidance regarding the treatment of body camera footage under state open records laws

This article does not seek to offer a fully comprehensive summary of each statute, but to take a brief look at some of these fundamental statutory elements. This review is for the benefit of agencies across the country looking for guidance as to how to pay for and administer body camera programs in light of state-specific legal issues.

Texas

In June of 2015, Texas passed Senate Bill 158, amending the state Occupations Code related to Law Enforcement and Security. The full text of the statute can be found here: <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=SB158#>

- The law does not require that all law enforcement agencies adopt body cameras—rather, a local agency “may apply to the office of the governor for a grant to defray the cost of implementing” body cameras. However, the law seems to indicate that certain policy requirements apply not only to agencies that receive funding under the statute but also to any agency “that otherwise operates a body worn camera program”. This issue will likely require future clarification.
- The law states that agencies “may apply to the office of the governor for a grant to defray the cost” associated with implementation. It would seem reasonable to assume that this language indicates that the costs of both hardware and data storage are considered costs associated with implementation, but

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the language does not state that clearly. Also, agencies applying for funding would be required to match 25 percent of the grant money they receive. But the language is unclear as to what amount of funding an agency may expect to receive.

- Officers equipped with body cameras are offered, in part, the following guidance with respect to when and how a camera should be utilized in the field:

...(b) A peace officer equipped with a body worn camera may choose not to activate a camera or may choose to discontinue a recording currently in progress for any non-confrontational encounter with a person, including an interview of a witness or victim.

(c) A peace officer who does not activate a body worn camera in response to a call for assistance must include in the officer's incident report or otherwise note in the case file or record the reason for not activating the camera.

(d) Any justification for failing to activate the body worn camera because it is unsafe, unrealistic, or impracticable is based on whether a reasonable officer under the same or similar circumstances would have made the same decision...

The most striking unanswered question presented by this language may be: what type of discipline is advisable in the event that an officer fails to comply with agency policy and/or cannot reasonably articulate a justification for not recording on a call for service? In other words, are agencies expected to reprimand, suspend or even terminate officers who fail to meet recording standards? Officers are consistently required to make reasonable decisions based upon the totality of circumstances. It is the obligation of administrators to hold officers accountable if those decisions are continuously deemed to be unreasonable. The Texas statute offers policy guidelines but clearly stops short of making any recommendations for the internal enforcement of those guidelines. This may well be left to the discretion of individual agencies.

- The otherwise broadly construed provisions of the Texas open records act are severely limited by this law in the context of body worn camera recordings. Unless the footage contains “[i]nformation that is or could be used as evidence in a criminal prosecution”, it is not subject to the state’s open records act. It is also noteworthy that those members of the public requesting footage as an open record must state with particularity the footage that they wish to obtain—the who, what, where and when.

Also, footage recorded in a manner that tends to trigger heightened privacy concerns is addressed by the provision stating that “[a] law enforcement agency may not release any portion of a recording made in a private space, or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest” without the written consent of the individual recorded or his/her next of kin if that individual is deceased. However, there seems to be an ill-defined relationship between this provision and the one stating that “[i]nformation that is or could be used as evidence in a criminal prosecution is subject to the requirements of” the state’s open records act. If the footage was recorded in a “private space” and “could be used as evidence in a criminal prosecution”, does one provision supersede the other? It seems possible that, due to the fact that the “private space” provision stands alone that it may not subject such footage to the open records act. This issue will likely require future clarification.

Lastly, footage that “does not relate to a law enforcement purpose” is not subject to the disclosure requirements of the Texas open records act.

South Carolina

Also in June of 2015, South Carolina passed Senate Bill 45, under the title of: SO AS TO PROVIDE THAT ALL STATE AND LOCAL LAW ENFORCEMENT OFFICERS MUST BE EQUIPPED WITH BODY-WORN CAMERAS. The full text of the statute can be found here: http://www.scstatehouse.gov/sess121_2015-2016/prever/47_20150604.htm

- Clearly stated in the bill's title, and unlike the Texas statute, the adoption of body cameras by all law enforcement agencies will be mandatory. However, the terms of that mandatory adoption are unclear.
- As in the Texas statute, the South Carolina law states that state funding will be available to local agencies but the amount of funding is unclear. A "Body-Worn Cameras Fund" is established within the Department of Public Safety but the manner in which funding will be accomplished is not described in any detail.
- What is clear with respect to funding is that the intent of the statute is to fund all aspects of implementation costs to the extent that actual funding is ultimately made available.

A 'Body-Worn Cameras Fund' is established within the Department of Public Safety for the purpose of assisting state and local law enforcement agencies, the Attorney General's office, solicitors' offices, and public defenders' offices in implementing the provisions of this section, including, but not limited to, the initial purchase, maintenance, and replacement of body-worn cameras and ongoing costs related to the maintenance and storage of data recorded by body-worn cameras. The Public Safety Coordinating Council shall oversee the fund, and shall, within one hundred eighty days of the effective date of this act, establish a process for the application for and disbursement of monies to state and local law enforcement agencies, the Attorney General's office, solicitors' offices, and public defenders' offices. The Public Safety Coordinating Council shall disburse the funds in a fair and equitable manner, taking into consideration priorities in funding.

- Unlike Texas, South Carolina has not—as of yet—provided substantive policy guidance to local agencies regarding the day-to-day utilization of the body cameras which they will be required to wear.
- The statute plainly states that “[d]ata recorded by a body-worn camera is not a public record subject to disclosure under the freedom of information act.” Thereby, as in Texas, the South Carolina law apparently lays to rest concerns that any and all recorded encounters would be subject to public disclosure under the state’s broadly construed Freedom of Information Act.

Texas and South Carolina are not alone in addressing this issue. Several others have passed legislation and in many others, legislation is pending. It is important for law enforcement agencies take the time to look beyond the headlines and signing ceremonies to sort out what a new statute says and what it does not say. The body camera laws throughout the country are not uniform in their language and they are not uniform in their impact on agency operations.

The aforementioned statutes represent an effort on the part of state legislatures to address the many unanswered questions that accompany the massive deployment of body cameras in their respective states. In light of the fact that many agencies are adopting body cameras on an agency by agency basis with or without state government action, this effort to offer guidance may very well be a commendable one. These statutes may also offer insight to departments across the country looking for some indication of things to come in their own states.

However, even in states like Texas and South Carolina, further clarification will inevitably be required. The plain language contained in the statutes raises some new questions even as others are answered. And as “the rubber meets the road”, the often broadly-written policies crafted in state houses will be assessed in light of the realities of officers’ day-to-day interactions with the public and the scrutiny that accompanies those interactions.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*