



NORTH CAROLINA LAW REVIEW

Volume 94 | Number 1

Article 7

12-1-2015

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Recommended Citation

Brian Liebman, *The Watchman Blinded: Does North Carolina Public Records Law Frustrate the Purpose of Police Body Worn Cameras*, 94 N.C. L. REV. 344 (2015).

Available at: <http://scholarship.law.unc.edu/nclr/vol94/iss1/7>

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The Watchman Blinded: Does the North Carolina Public Records Law Frustrate the Purpose of Police Body Cameras?*

INTRODUCTION

A man lies dead in the middle of the street, shot by a police officer. Before the body is even taken away, two distinct accounts of the shooting emerge. The officer claims that the shooting was legitimate, done in self-defense after the man reached for the officer's gun, started to run away, and then turned and charged the officer through a hail of bullets. However, the dead man's friend claims that the officer initiated the contact, reaching through his cruiser's window to choke and batter the man, who ran and was shot while attempting to surrender. Forensic evidence generally supports the officer's account, but is not dispositive. Witness testimony is unreliable—stories change, accounts vary between witnesses, and no consensus emerges. With no definitive evidence on either side, the grand jury declines to indict the officer and the community explodes in outrage. Anyone who followed the news in 2014 will recognize in this scenario the features of the Michael Brown shooting, which dominated the news between August, when the shooting occurred,¹ and late November, when the grand jury declined to indict Ferguson police officer, Darren Wilson.²

In the wake of the Brown shooting and other incidents of alleged police misconduct,³ high-profile public officials and advocacy groups have called for police officers across the nation to begin wearing body

* © 2015 Brian Liebman.

1. *In News Conference, Police Speak of Struggle Before Officer-Involved Shooting*, KMOV (Aug. 10, 2014, 1:09 AM), <http://www.kmov.com/story/28461350/in-news-conference-police-speak-of-struggle-before-officer-involved-shooting> [<http://perma.cc/KXZ7-MNGS> (dark archive)].

2. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0 [<http://perma.cc/2N3X-HH99>].

3. A few days after the grand jury declined to indict Darren Wilson, police in Cleveland shot and killed a twelve-year-old boy who was armed with only an air gun. Jane Onyanga-Omara & John Bacon, *Police: Video Clearly Shows Shooting of Ohio Boy, 12*, USA TODAY (Nov. 24, 2014, 6:14 PM), <http://www.usatoday.com/story/news/nation/2014/11/24/cleveland-shot-boy/19471925/> [<http://perma.cc/HRB6-QY6H>]. A few days later, a New York City grand jury declined to indict a police officer in the death of Eric Garner, who died after being put in a chokehold. Larry Celona, Kirstan Conley & Bruce Golding, *Cop Cleared in Chokehold Death of Eric Garner*, N.Y. POST (Dec. 3, 2014, 2:15 PM), <http://nypost.com/2014/12/03/cop-cleared-in-eric-garner-chokehold-death/> [<http://perma.cc/W8JP-8AZE>].

cameras⁴ in an effort to document and eventually root out most police misconduct.⁵ States and cities across the country have responded to the call; by November 2014, forty-one of the one hundred largest cities in America equipped at least some of their officers with body cameras.⁶ Another twenty-five large cities have plans to begin use of body cameras in the future.⁷ New Jersey and South Carolina have already introduced legislation requiring law enforcement officers to wear body cameras.⁸ Additionally, Maryland, Connecticut, Texas, Illinois, Oregon, Michigan, and New York have either passed legislation or are considering expanding, regulating, or otherwise encouraging the use of body cameras.⁹

4. See, e.g., Doug Oakley, *In Oakland Meeting, Attorney General Eric Holder Calls for Body Cameras*, CONTRA COSTA TIMES (Feb. 6, 2015, 6:43 AM), http://www.contracostatimes.com/breaking-news/ci_27469077/oakland-meeting-attorney-general-eric-holder-calls-body [<http://perma.cc/33BG-4MG4>]; Thomas Vick, *Barber Expected To Lead State NAACP Support Effort for Police Body Camera Mandate in NC General Assembly*, GOLDSBORO DAILY NEWS (Dec. 12, 2014), <http://goldsbordailynews.com/blog/2014/12/12/barber-expected-lead-state-naacp-support-effort-police-body-camera-mandate-nc-general-assembly/> [<http://perma.cc/HX4T-SMR8>]; *White House Urges Body Cameras for Police After Ferguson*, FOXNEWS.COM (Dec. 1, 2014), <http://www.foxnews.com/politics/2014/12/01/white-house-encourages-use-body-cameras-for-police-after-ferguson/> [<http://perma.cc/FESH-RL7L>].

5. JAY STANLEY, ACLU, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL 1 (2013), https://www.aclu.org/files/assets/police_body-mounted_cameras.pdf [<https://perma.cc/SM7X-CHV5>]; Timothy B. Lee, *Here's Why Cops Should Be Required To Wear a Lapel Camera While on Duty*, WASH. POST: THE SWITCH (Oct. 10, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/10/heres-why-cops-should-be-required-to-wear-a-lapel-camera-while-on-duty/> [<http://perma.cc/XR2L-VWPS>].

6. Abigail Tracy, EJ Fox & Ryan Walsh, *Is Your Police Force Wearing Body Cameras?*, VOCATIV (Nov. 15, 2014, 10:11 AM), <http://www.vocativ.com/usa/justice-usa/police-force-wearing-body-cameras/> [<http://perma.cc/W9AC-CGXL>].

7. *Id.*

8. See, e.g., Geoff Mulvihill, *All New Jersey Troopers To Get Body Cameras Within a Year*, ASSOCIATED PRESS (July 28, 2015, 4:24 PM), <http://bigstory.ap.org/article/5916b323ff0244379ab023828c2cb8ac/new-jersey-troopers-getting-body-cameras-under-new-policy> [<http://perma.cc/J85Q-Z6H8>]; Lindsay Tuman, *South Carolina Body Camera Law Takes Effect with No State Guidelines*, WRDW (July 2, 2015, 12:14 AM), <http://www.wrdw.com/home/headlines/South-Carolina-body-camera-law-takes-effect-with-no-state-guidelines-311358381.html> [<http://perma.cc/77PB-4VH3>].

9. Maxine Bernstein, *Oregon House Votes 50-9 To Support Police Body Camera Bill*, OREGONLIVE (June 15, 2015), http://www.oregonlive.com/politics/index.ssf/2015/05/oregon_house_votes_49-10_to_su.html [<http://perma.cc/H3HX-UMYE>]; Will Bredderman, *Democrats Push Bill To Make Cop Body Camera Footage Available to Public*, N.Y. OBSERVER (Aug. 6, 2015, 4:55 PM), <http://observer.com/2015/08/democrats-push-bill-to-make-cop-body-camera-footage-available-to-public/> [<http://perma.cc/L23M-LZAV>]; Michael Dresser, *State Begins Drafting Rules for Police Body Cameras*, BALT. SUN (Aug. 4, 2015, 7:47 PM), <http://www.baltimoresun.com/news/maryland/politics/blog/bs-md-body-camera-panel-20150804-story.html> [<http://perma.cc/UKF2-Z5QZ>]; Kathleen Gray, *Police Body Cams: Bill Would Exempt Footage from FOIA*, DET. FREE PRESS (Apr. 14, 2015, 5:22 PM), <http://www>

In North Carolina, state Rep. Cecil Brockman has introduced a bill requiring all law enforcement officers to wear body cameras.¹⁰ Proponents of this requirement point to studies indicating that body cameras effectively reduce the number of violent police encounters, decreasing the likelihood that either the officer or the citizen will resort to violence.¹¹ Others in favor of the requirement claim that body cameras will provide a sense of accountability and transparency between police and the public that is currently lacking.¹² A first-person¹³ video record of an incident provides the best possible

.freep.com/story/news/local/michigan/2015/04/14/emerging-body-camera-technology-prompts-privacy-concerns/25778495/ [http://perma.cc/A4A2-7VDJ]; Jessie Hellmann, *Illinois Senate Sends Rauner Police Body Camera Measure*, CHI. TRIB. (May 30, 2015, 4:53 PM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-police-body-camera-20150530-story.html> [http://perma.cc/6QNK-LNJV]; Eva Hershaw, *Senate Approves Body Camera Legislation*, TEX. TRIB. (Apr. 23, 2015), <http://www.texastribune.org/2015/04/23/senate-oks-bill-creating-statewide-police-body-cam/> [http://perma.cc/5QQR-3CWU]; Mark Pazniokas, *Legislators Approve 'Second Chance,' Body Camera Bills*, CONN. MIRROR (June 29, 2015), <http://ctmirror.org/2015/06/29/house-approves-police-accountability-bill/> [http://perma.cc/AQN9-GSNZ].

10. H.B. 395, 2015–2016 Gen. Assemb., Reg. Sess. (N.C. 2015); Amanda Lehmert, *Bill Calls for Police Body Cameras*, GREENSBORO NEWS & REC. (Dec. 7, 2014, 5:15 AM), http://www.news-record.com/news/bill-calls-for-police-body-cameras/article_68c1e520-7d94-11e4-9047-4bd147b13002.html [http://perma.cc/LQG4-YMC9].

11. See *infra* Section II.A; see also Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 526–27 (2015) (highlighting the results of a twelve-month study that found that body cameras resulted in fewer use-of-force incidents and fewer citizen complaints in Rialto, California); Stav Ziv, *Study Finds Body Cameras Decrease Police's Use of Force*, NEWSWEEK (Dec. 28, 2014, 2:31 PM), <http://www.newsweek.com/amidst-debate-study-finds-body-cameras-decrease-polices-use-force-295315> [http://perma.cc/HX8R-B5TC] (same).

12. For the proposition that the relationship between police and the public has soured, see TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 5 (2002). On the perceived benefits of body cameras among politicians and community leaders in this respect, see David Hudson, *Building Trust Between Communities and Local Police*, WHITEHOUSE.GOV: THE WHITE HOUSE BLOG (Dec. 1, 2014, 8:25 PM), <http://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police> [http://perma.cc/8V87-7TZU]; Marc Santora & Nikita Stewart, *Police Body Cameras Could Come to New York Soon*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/new-york-city-police-speeding-up-effort-to-give-officers-body-cameras.html?_r=0 [http://perma.cc/3FES-4VPJ] (dark archive)] (“With communities across the nation wrestling with questions about police conduct and struggling to bolster public trust in law enforcement after the unrest in Ferguson, Mo., Mayor de Blasio said the cameras would provide a sense of accountability and transparency.”).

13. Because the decision to use force can hinge upon behavior not readily visible from a distance or from another person's viewing angle, a first-person viewpoint will usually be superior. For an example of how different perspectives can completely change the perception of an incident, see *Police Shooting from Two Different Views*, YOUTUBE (Nov.

evidence as to what the officer heard and saw, allowing justice to be meted out as necessary.¹⁴

However, many observers note that body cameras also pose a substantial threat to privacy.¹⁵ Police see people at the “worst moments of their lives,”¹⁶ and footage of such events could easily be used for “titillation and gawking” if broadly available to the public.¹⁷ With an activated camera constantly documenting everything a police officer sees and does, such sensitive content as the interior of private residences, interviews with victims, and discussions with confidential informants will be painstakingly documented and potentially preserved for public inspection.¹⁸ Moreover, there are concerns that filming such sensitive encounters could compromise legitimate police work because witnesses may be less willing to cooperate with police or provide information if they know they are going to be on camera.¹⁹

Thus, in order for body cameras to both increase police accountability and protect privacy rights, relevant footage—video of shootings, controversial arrests, and other uses of force—must be available for public review, while footage of private material unrelated to police misconduct (“privacy-sensitive material”) must be kept confidential. But North Carolina’s public records law, as it currently stands, allows for neither.²⁰ The Public Records Act provides access to all documents “made or received pursuant to law . . . in connection with the transaction of public business.”²¹ While the law is very broad, it provides an exemption for records of criminal investigations: any recording made “in an effort to anticipate,

2, 2009), <https://www.youtube.com/watch?v=Mv6I-3ETfhM> [<http://perma.cc/BF3D-KLZP>] (due to violent content, login and age verification are required to view this video).

14. See Richard E. Myers II, *Challenges to Terry for the Twenty-First Century*, 81 MISS. L.J. 937, 967–70 (2012).

15. See, e.g., STANLEY, *supra* note 5, at 1–3; Matt Pearce, *Growing Use of Police Body Cameras Raises Privacy Concerns*, L.A. TIMES (Sept. 27, 2014, 6:00 AM), <http://www.latimes.com/nation/la-na-body-cameras-20140927-story.html> [<http://perma.cc/767Z-QZX2>].

16. Pearce, *supra* note 15.

17. *Id.*

18. See, e.g., Tami Abdollah, *Officers Fear Body Cameras Raise Privacy Concerns*, POLICEONE.COM (Mar. 15, 2014), <http://www.policeone.com/police-products/body-cameras/articles/6976369-Officers-fear-body-cameras-raise-privacy-concerns/> [<http://perma.cc/YD7N-MKXB>]; Matthew Feeney, *Police Body Cameras Raise Privacy Issues for Cops and the Public*, CATO INST. (Feb. 12, 2015, 1:27 PM), <http://www.cato.org/blog/police-body-cameras-raise-privacy-issues-cops-public> [<http://perma.cc/VPD2-BW7J>]; Conor Friedersdorf, *Who Should See Recordings from Police Body Cameras?*, ATLANTIC (Feb. 6, 2015), <http://www.theatlantic.com/national/archive/2015/02/who-should-get-to-see-the-video-from-police-bodycams/385236/> [<http://perma.cc/RU2C-3NDM>].

19. Abdollah, *supra* note 18.

20. See N.C. GEN. STAT. § 132-1.4 (2013).

21. *Id.* § 132-1(a).

prevent, or monitor possible violations of the law”²² can be released only at the discretion of the police department that created it.²³ In other words, any footage captured will not be publicly available unless and until the police decide to release it. Moreover, the law fails to protect privacy-sensitive material, instead giving the police discretion to release footage that may constitute an extreme invasion of privacy for victims, suspects, and bystanders alike.²⁴

This Recent Development argues that unless the public records law is changed to allow the public, rather than the police, to decide when footage of potential police misconduct should be released, the beneficial effects of body cameras will be frustrated. Therefore, if any widespread implementation of body cameras in North Carolina is to be effective, the state’s public records law should be revised in two key ways. First, the law should provide a carve-out from the criminal investigations exemption to give the public a right of access to footage of potential police misconduct. Second, the law should exclude privacy-sensitive material from public records entirely so that there is no threat of compromising the privacy of victims, witnesses, and bystanders. This Recent Development suggests an approach to drafting legislation that strikes the right balance by adopting these dual carve-outs.

Analysis proceeds in four parts. Part I explains the state of affairs in North Carolina concerning public records law and body cameras. It first describes the state’s current public records law and then details the efforts thus far to equip the state’s law enforcement officers with body cameras. Part II examines the proper balance between privacy and accountability by evaluating what footage must be made public, what footage must be kept private, and what footage should remain within the existing criminal investigation exception. Part III argues that the current language of North Carolina’s public records law is ill suited to facilitate a body camera program. Finally, Part IV examines proposals to mandate and regulate body cameras statewide, as well as amendments to the public records law. In addition, Part IV suggests a reformulation of the public record law’s language to ensure the effective use of body cameras in North Carolina. The bill introduced by Representative Brockman will be used as a guide.

22. *Id.* § 132-1.4(b)(2).

23. *Id.* § 132-1.4(a). Section 132-1.4 does not specifically bar release of records of criminal investigations; it merely states that they are “not public records as defined by G.S. 132-1.” *Id.*; see also *infra* notes 190–94 and accompanying text.

24. See *infra* Section II.B.

I. PUBLIC RECORDS LAW AND BODY CAMERAS IN NORTH CAROLINA

Before delving into the proper balance of accountability and privacy or an analysis of how body camera footage would be classified under the existing law, this Part will first examine the text of North Carolina's public records law. Next, this Part will describe the extent to which body cameras have been employed in the state of North Carolina in order to explain why this issue can no longer be ignored.

A. *North Carolina's Public Records Law*

The current incarnation of the state's public records law is codified in chapter 132 of the North Carolina General Statutes.²⁵ This chapter states that public records are "the property of the people"²⁶ and gives the public wide latitude to access any record, except where "otherwise specifically provided by law."²⁷ Section 132-6 lays out the "basic right of public access[,]"²⁸ which consists of the dual rights to inspect (meaning read, view, or otherwise examine) and copy any material that falls under the definition of "public record."²⁹ While there are limits as to what can be released, there are almost no limits as to who can receive released materials. A request may be made by any "person,"³⁰ thereby opening access to any natural person or corporation.³¹ Going further, the motives of the person making the request are irrelevant to the right of access.³² While public records laws may have been passed to promote good governance and public accountability, a request need not be made in this vein.³³ Public records may be used for any purpose, including for commercial purposes, to build a contact list, or to find missing persons.³⁴ Custodians of public records are advised not to even inquire into the motives for the request.³⁵

This broad right of access is accompanied by an equally broad definition of "public record." The statute includes under its umbrella:

25. N.C. GEN. STAT. §§ 132-1 to -10.

26. *Id.* § 132-1(b).

27. *Id.*

28. DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 5 (2d ed. 2009).

29. *Id.*

30. N.C. GEN. STAT. § 132-6(a).

31. LAWRENCE, *supra* note 28, at 35.

32. *Id.* at 36.

33. *Id.* at 35.

34. *Id.*

35. *Id.* at 37.

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.³⁶

Furthermore, the Supreme Court of North Carolina has repeatedly found that the “legislature intended to provide that, as a general rule, the public would have liberal access to public records,”³⁷ giving a broad construction to an already expansive term.

However, this broad definition of “public record” is subject to several exemptions, chief among them the exemption for criminal investigations.³⁸ Under section 132-1.4(a), all “records of criminal investigations” and all “records of criminal intelligence” created or held by any law enforcement agency are not public records.³⁹ Like other definitions in this chapter, these terms are broadly defined. “Records of criminal investigations” include “all records . . . that [are] compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.”⁴⁰ In a similarly broad manner, the statute defines “[r]ecords of criminal intelligence information” as “records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.”⁴¹

The justifications for these exemptions echo the concerns privacy advocates have about body cameras. Chief among these concerns are the desire not to interfere with legitimate police work, the need to

36. N.C. GEN. STAT. § 132-1(a) (2013).

37. *E.g.*, *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992); *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984).

38. N.C. GEN. STAT. § 132-1.4.

39. *Id.* § 132-1.4(a).

40. *Id.* § 132-1.4(b)(1).

41. *Id.* § 132-1.4(b)(2).

protect the confidentiality of informants, and the privacy interests of individuals interacting with the police.⁴²

Public records are subject to another relevant exemption. North Carolina General Statutes sections 153A-98 and 160A-168 outline the required contents of and the protections given to county and city employees (including police officers).⁴³ Personnel files consist of all information gathered by the county or city relating to the employee's performance, disciplinary actions, or termination.⁴⁴ Both county and city employees are provided the same protections.⁴⁵ Their files "are subject to inspection and may be disclosed" only under a limited set of circumstances.⁴⁶ Among other things, the content of personnel files may not be used "for the purpose of assisting a criminal prosecution of the employee,"⁴⁷ and may only be released to the public pursuant to a written release by the employee that specifies the information to be released and the institutions or persons to whom it may be released.⁴⁸ Information regarding alleged police misconduct is also included in the officer's personnel file.⁴⁹

B. Body Cameras in Use Across the State

While body cameras have only recently attracted public attention, they have been on police and privacy advocates' radar for some time. In North Carolina, two of the state's largest police departments have been using body cameras for several years.⁵⁰ The Charlotte-Mecklenburg Police Department began a trial period of

42. LAWRENCE, *supra* note 28, at 196; *see also News & Observer Publ'g Co. v. State*, 312 N.C. at 282-83, 322 S.E.2d at 137-38 (discussing the "universal recognition [given] to certain reasons for excluding police and investigative records from the operation of statutory rights of public access").

43. N.C. GEN. STAT. § 153A-98 (county employees); § 160A-168 (city employees).

44. *See id.* §§ 153A-98(a), 160A-168(a) (applying to county and city employees, respectively).

45. *See id.*

46. *Id.*

47. *Id.* § 160A-168(c)(5).

48. *Id.* §§ 153A-98(c)(6), 160A-168(c)(6).

49. Confidentiality of Letters from Internal Affairs Dep't of Mun. Police Dep't to Private Individual Concerning Investigation of a Complaint Against a Police Officer, 1995 N.C. Op. Atty. Gen. 182 (May 22, 1995), <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/182.aspx> [<http://perma.cc/2D6P-T4LX>].

50. *See U.S. Census Bureau Delivers North Carolina's 2010 Census Population Totals*, U.S. CENSUS BUREAU (Mar. 2, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn61.html [<http://perma.cc/T589-RSAX>] [hereinafter *N.C. 2010 Census Population Totals*]. Charlotte, with a population of almost 750,000 people, is the state's largest city. *Id.* Greensboro, with a population of almost 270,000, is the third-largest city in the state. *Id.*

body cameras in August 2013⁵¹ and the city council voted to equip all officers with body cameras by October 2015.⁵² After a two-year trial period,⁵³ the Greensboro Police Department has required all of its officers to wear cameras since October 2013.⁵⁴ Other departments already using the cameras include Fayetteville, Greenville, Kinston, Mt. Olive, Spring Lake, and the Hoke County Sheriff's Office.⁵⁵

In addition, several other large law enforcement agencies in the state plan to begin introducing body cameras. The Forsyth County Sheriff's Department recently was awarded an \$88,000 grant to begin outfitting some of its deputies with body cameras during 2015.⁵⁶ Police departments in Carrboro, Chapel Hill, Durham, Garner, and Knightdale all have plans to test body cameras, as does the Wake County Sheriff's Department.⁵⁷ Bucking the trend, the Raleigh Police Department and the Durham County Sheriff's Department are not "sold on body cameras" and have no plans to begin trials.⁵⁸

Although body cameras have been implemented across the state, the status of the recordings as public records is unclear. The language

51. Mark Becker, *Charlotte Police To Deploy Body Cameras to Uniforms*, WSOC-TV (Aug. 22, 2013, 6:02 PM), <http://www.wsoc.com/news/news/local/charlotte-police-deploy-body-cameras/nZZTj/> [<http://perma.cc/MPD4-Q5BQ>].

52. Cleve R. Wootson Jr., *Charlotte City Council Votes To Spend \$7M on Body Cameras for CPD*, CHARLOTTE OBSERVER (Jan. 26, 2015), <http://www.charlotteobserver.com/2015/01/26/5472398/charlotte-city-council-to-vote.html> [<http://perma.cc/U2J8-8HN2>].

53. Jasmine Spencer, *Greensboro Police To Start Using Body Cameras*, FOX8 (Mar. 1, 2013, 7:05 PM), <http://myfox8.com/2013/03/01/greensboro-police-to-start-using-body-cameras/> [<http://perma.cc/4TCD-M3R5>].

54. Tanya Rivera, *Greensboro Police Wear Body Cameras*, WFMY NEWS 2 (Oct. 29, 2013, 6:14 PM), <http://archive.digtriad.com/2wantstoknow/article/304316/443/All-Greensboro-Police-Patrol-Officers-Are-Wearing-Cameras> [<http://perma.cc/8K7S-BP6D>].

55. Brandon Goldner, *Police Body Cameras a Growing Presence in Eastern North Carolina*, WVTM-TV (Dec. 24, 2014, 11:46 PM), <http://wvtm.membercenter.worldnow.com/story/27543422/police-body-cameras-a-growing-presence-in-eastern-north-carolina> [<http://perma.cc/2GNH-NV6U> (dark archive)]; Brandon Herring, *Spring Lake Police Equips All Officers with Body Cameras*, WVTM-TV (May 6, 2015, 5:03 PM), <http://wvtm.membercenter.worldnow.com/story/27872510/spring-lake-police-equips-all-officers-with-body-cameras> [<http://perma.cc/KD96-JY5Z> (dark archive)]; Nichole Manna, *Spring Lake Police Get Body Cameras*, FAYETTEVILLE OBSERVER (Jan. 21, 2015, 12:15 PM), http://www.fayobserver.com/news/local/spring-lake-police-get-body-cameras/article_88714234-4fc7-5c79-88f6-5ec12b3f1bc1.html [<http://perma.cc/PP7Q-8HN4>].

56. *Forsyth County Gets Almost \$88K for Body Cameras*, WASH. TIMES (Jan. 1, 2015), <http://www.washingtontimes.com/news/2015/jan/1/forsyth-county-gets-almost-88k-for-body-cameras/> [<http://perma.cc/X7RR-JHQY>].

57. Thomasi McDonald, *Triangle Law Agencies Testing Body Cameras*, NEWS & OBSERVER (Raleigh Dec. 10, 2014), <http://www.newsobserver.com/news/local/crime/article10189664.html> [<http://perma.cc/NGC5-5YE3>].

58. *Id.*; see also *N.C. 2010 Census Population Totals*, *supra* note 50 (reporting that Raleigh is the state's second-largest city and capital, and that Durham is the state's fourth-largest city).

of the public records law does not explicitly refer to body cameras,⁵⁹ and no case law has yet clarified the issue,⁶⁰ leading individual departments to set their own policies.⁶¹ For example, in Greensboro, the police have not released a single body camera video in over two years,⁶² classifying any footage captured as belonging to an officer's confidential personnel record.⁶³ The department has refused to budge from this position, even in the face of public scrutiny surrounding a controversial March 2014 police shooting of a woman armed with a knife.⁶⁴ The officer involved in the shooting was later cleared of criminal charges.⁶⁵ It appears that Charlotte will follow a similar path of refusal to release, although former police chief Rodney Monroe has stated that the department is seeking an exemption from the public records law to allow anyone who has made a complaint against an officer to view the relevant footage.⁶⁶

59. See N.C. GEN. STAT. §§ 132-1 to -10 (2013).

60. Joe Gamm, *Panel Debates Access to Body-Camera Videos*, GREENSBORO NEWS & REC. (Oct. 1, 2014, 3:30 AM), http://www.news-record.com/panel-debates-access-to-body-camera-videos/article_eb0eae2a-1f2e-50dc-8309-604d3bd9b183.html?TNNoMobile [<http://perma.cc/S5JB-HW69>].

61. See *Greensboro To Discuss Releasing Body Camera Video Tuesday*, WFMYNEWS (Sept. 29, 2014, 12:30 AM), <http://www.wfmynews2.com/story/news/local/2014/08/29/greensboro-discuss-release-body-cam-video/14842365/> [<http://perma.cc/E826-WCZD>] (“Right now, the city doesn’t really know if or when it should release video to the public because there are no specific state laws addressing it.”).

62. Gamm, *supra* note 60.

63. See, e.g., Joe Gamm, *City Won’t Yield on Release of Police Body Camera Video*, GREENSBORO NEWS & REC. (Aug. 23, 2014, 3:26 AM), http://www.news-record.com/city-won-t-yield-on-release-of-police-body-camera/article_70dc1548-d7d7-5027-aae0-4a71bc14964a.html [<http://perma.cc/346Y-7K5W>]; Gamm, *supra* note 60; Eric Ginsburg, *Panel Tackles Privacy, Transparency of Greensboro Cop Cameras*, TRIAD CITY BEAT (Oct. 1, 2014), <http://triad-city-beat.com/panel-tackles-privacy-transparency-of-greensboro-cop-cameras/> [<http://perma.cc/63V4-AYCT>]; see also *supra* notes 38–49 and accompanying text (describing the breadth of exemptions from public disclosure under the public records law).

64. Gamm, *supra* note 63.

65. *Id.*; see also Sarah Newell Williamson, *Greensboro Family Says ‘Game’ Turned Deadly*, GREENSBORO NEWS & REC. (May 25, 2014, 12:16 AM), http://www.greensboro.com/news/greensboro-family-says-game-turned-deadly/article_4e02fece-e3c3-11e3-8a8d-001a4bcf6878.html [<http://perma.cc/SM6K-US6E>]. In this case, Officer T.J. Bloch shot and killed a bipolar Vietnamese woman, Chieu-di-Thi Vo, who did not speak much English. Vo had been seen threatening her mother with a kitchen knife. When ordered to drop the knife, Vo refused and instead advanced toward Officer Bloch. Vo’s family claimed that she was not dangerous and did not understand Officer Bloch. *Id.* For Officer Bloch’s perspective and a final confirmation that footage of the shooting will not be released, see Joe Gamm, *Former Greensboro Police Officer Talks About Shooting that Changed His Life*, GREENSBORO NEWS & REC. (Jan. 4, 2015, 5:00 AM), http://www.greensboro.com/news/former-greensboro-police-officer-talks-about-shooting-that-changed-his/article_1aed2308-9394-11e4-9362-bfde408d1473.html [<http://perma.cc/83PJ-RDT9>].

66. Wootson, *supra* note 52.

In the face of this patchwork of policies governing use of body cameras and public access to the footage, state Rep. Cecil Brockman has introduced a bill⁶⁷ that would require any county in the state with a population over 200,000 people to outfit all of its law enforcement officers with body cameras.⁶⁸ The bill, which would add a new article to chapter 15A of the North Carolina General Statutes, requires officers to wear and, after giving notice to whomever they are interacting with, activate a body camera during “any recordable interaction,”⁶⁹ including traffic stops, arrests, searches, interrogations, interviews with victims and witnesses, and pursuits.⁷⁰ The bill exempts certain sensitive circumstances from the requirement, allowing officers to turn off the camera during interactions with confidential informants and undercover officers, when entering a private residence under non-exigent circumstances, during strip searches, during interactions with a victim or witness, during training exercises, and when the officer is engaged in “routine, non-law enforcement related activities.”⁷¹ Private citizens, victims, and witnesses covered by these exemptions may still be recorded if they give written or on-camera consent.⁷²

The bill also provides a basis for releasing footage gathered by body-worn cameras, stating that “[n]otwithstanding G.S. 132-1.4, 153A-98, 160A-168, or any other provision of law to the contrary, a law enforcement agency *may* disclose or provide a copy of any recording captured by a body-worn camera under this section to any person who submits a written request to the law enforcement agency.”⁷³ Such releases may be redacted if the footage contains exempted material, as defined above, or anything that “is otherwise

67. Lehmert, *supra* note 10. The bill was filed on March 31, 2015, and referred to the Committee on Appropriations. *House Bill 395*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H395> [<http://perma.cc/XB4S-JH62>]. As of August 2015, no further action has been taken. *Id.*

68. H.B. 395, sec. 1, § 15A-202(a), 2015–2016 Gen. Assemb., Reg. Sess. (N.C. 2015). The bill determines population by the decennial census, and thus applies to the ten counties in North Carolina that were home to more than 200,000 people in 2010. *See id.* These counties were: Mecklenburg (919,628), Wake (900,993), Guilford (488,406), Forsyth (350,670), Cumberland (319,431), Durham (267,587), Buncombe (238,318), Gaston (206,086), New Hanover (202,667), and Union (201,292). *North Carolina Population by County*, INDEXMUNDI.COM, <http://www.indexmundi.com/facts/united-states/quick-facts/north-carolina/population#table> [<http://perma.cc/59SE-TBN4>].

69. H.B. 395, sec. 1, § 15A-202(a).

70. *Id.* sec. 1, § 15A-201(6).

71. *Id.* sec. 1, § 15A-202(b).

72. *Id.* sec. 1, § 15A-202(b)(5)–(7).

73. *Id.* sec. 1, § 15A-202(e) (emphasis added).

prohibited by law from being disclosed.”⁷⁴ Persons denied their request or receiving redacted footage would receive a written statement explaining the rationale for denial or redaction.⁷⁵ The bill goes on to provide those who have been denied a request the opportunity to seek a court order compelling the release of the material.⁷⁶ The court “*may issue*” such orders where the proponent shows “good cause” and there are otherwise no legal impediments to release.⁷⁷

While the proposed legislation would put body cameras on many law enforcement officers in the state, it does little to address the underlying law governing the collection and release of footage. Changes to the bill’s language are necessary to achieve increased transparency without violating the privacy of those who appear in body camera footage.

II. THE PROPER BALANCE BETWEEN ACCOUNTABILITY AND PRIVACY

Writing legislation is often an exercise in properly balancing competing interests. With respect to body cameras, a tension exists between the public’s right to access and to inspect public documents and the individual’s right to privacy.⁷⁸ Thus, if a potential statewide police body camera mandate is to succeed, it is important to determine where society should set the boundary between what must be made public and what must be kept private.⁷⁹ The purpose of a statewide mandate is to increase accountability and transparency between the police and the public with the additional benefit of providing the best possible evidence for use in court when police allegedly use improper force.⁸⁰ The need for transparency does not require, however, that every minute of every police officer’s day must be made available for public viewing. Further, there are significant privacy concerns involved with such a massive gathering of information.⁸¹ The point of widespread use of body cameras is to allow “public monitoring of the government instead of the other way

74. *Id.*

75. *Id.*

76. *Id.* (“[T]he court may issue an order compelling disclosure or copying of portions or all of a recording captured by a body-worn camera under this section.”).

77. *Id.* (emphasis added).

78. *See infra* Section II.C.

79. *See infra* Section II.C.

80. *See supra* notes 11–14 and accompanying text.

81. *See* Abdollah, *supra* note 18.

around.”⁸² Thus, before implementing a statewide mandate, the general assembly must develop a calibrated regulatory scheme that retains the beneficial aspects of body cameras while adequately protecting privacy.⁸³

Before attempting to balance these competing interests, however, it is necessary to understand the policies underlying both sides. Section A of this Part will discuss the benefits of extensive body camera surveillance, Section B will examine the attendant privacy concerns, and Section C will use these understandings to break body camera footage into three categories: what must be released to the public, what may be released at the discretion of the police, and what must be kept strictly confidential.

A. *Improving the Relationship Between the Police and the Public*

The presence of a constantly recording camera, while intrusive for both the police and the public, can reduce violence, improve evidence gathering, and increase police legitimacy. The use of cameras ensures that both the police and the citizens they interact with are “on their best behavior.”⁸⁴ Although the use of body cameras is still in its infancy, studies have shown that the mere presence of a body-worn camera can reduce use-of-force incidents.⁸⁵ Departments that have begun using body cameras report that informing a hostile person that a camera is running, even when the camera is not recording, is “often enough to deescalate the situation.”⁸⁶ One recent study⁸⁷ found that cameras reduced the likelihood of the use of force

82. STANLEY, *supra* note 5, at 1.

83. See, e.g., *id.* at 1–2; Jay Stanley, *Police Officer Discretion in the Use of Body Worn Cameras*, ACLU (Feb. 2, 2015, 12:30 PM), <https://www.aclu.org/blog/criminal-law-reform-immigrants-rights-technology-and-liberty-free-speech-national-security/poli> [<http://perma.cc/XYH8-7PTP>].

84. LINDSAY MILLER & JESSICA TOLIVER, POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM 5 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<http://perma.cc/ER3A-G9VC>].

85. See, e.g., *id.* at 5–6; MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 20–22 (2014), <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> [<http://perma.cc/D3LP-AC6H>]; Ariel et al., *supra* note 11, at 531.

86. MILLER & TOLIVER, *supra* note 84, at 6.

87. See Ariel et al., *supra* note 11, at 510–11. The methodology of the study was unique. The authors of the study partnered with the Rialto, California Police Department for one year, beginning February 13, 2012. *Id.* Using the twelve-hour shift as the primary unit of analysis, the researchers assigned body cameras to approximately half of the shifts and used the other half as control shifts. *Id.* at 520. The results were compared with a baseline derived from the previous three years of complaint and use-of-force statistics. *Id.* at 511, 523.

by half and also generally reduced the number of complaints filed by the public.⁸⁸ Another study found that use of body cameras reduced total complaints by forty percent and use-of-force complaints by seventy-five percent.⁸⁹

When police do use force, body cameras are expected to provide reliable evidence as to the necessity and reasonableness of the officer's actions. Unlike dashboard cameras, which are fixed and thus susceptible to missing the action out of frame, body cameras will capture almost everything an officer sees and does.⁹⁰ This can be particularly helpful when the use of force involves furtive movements by a suspect that may not be visible from a police cruiser or to a bystander.⁹¹ On the other hand, critics note that image quality can be a problem, especially where there is low light, the camera is improperly positioned, or the wearer is involved in strenuous physical activity.⁹² Despite these critiques, and even if some incidents are imperfectly captured, body cameras are expected to sharply reduce the number of incidents where police misconduct goes unpunished for lack of evidence,⁹³ as well as those times when officers are falsely accused of misconduct.⁹⁴ Accordingly, such video will allow the justice system to weed out meritless allegations of misconduct and confirm allegations implicating guilt.⁹⁵

88. *Id.* at 523–24.

89. MILLER & TOLIVER, *supra* note 84, at 6.

90. *Id.* at 9.

91. See Martin Kaste, *Police Departments Issuing Body Cameras Discover Drawbacks*, NPR (Jan. 22, 2015, 6:57 PM), <http://www.npr.org/sections/alltechconsidered/2015/01/22/379095338/how-police-body-camera-videos-are-perceived-can-be-complicated> [<http://perma.cc/BGB3-RY6H> (dark archive)] (stating that while the overall effectiveness of body cameras is undetermined, the video can be helpful in certain situations).

92. See, e.g., Mark Gillispie, *Cleveland Police To Launch Use of Body Cameras*, COLUMBUS DISPATCH (Feb. 9, 2015, 6:42 AM), <http://www.dispatch.com/content/stories/local/2015/02/09/cleveland-police-to-launch-use-of-body-cameras.html> [<http://perma.cc/QC9T-CB89>] (noting the concerns of Steve Loomis, the president of Cleveland Police Patrolmen's Association, about picture quality and creating more confusion); Nancy La Vigne, *Five Myths About Body Cameras*, WASH. POST (May 29, 2015), https://www.washingtonpost.com/opinions/five-myths-about-body-cameras/2015/05/29/5756c7be-0544-11e5-a428-c984eb077d4e_story.html [<http://perma.cc/5HR2-RS2H>] (discussing the low quality video of both body cameras and other forms of surveillance cameras).

93. See WHITE, *supra* note 85, at 23. The typical fact pattern involves a complaint dismissed or a charge not brought because there were no witnesses to the incident, and the complaint involved only the word of the citizen against that of the officer. With a camera recording most encounters, such “he-said-she-said” complaints should be drastically reduced.

94. Myers, *supra* note 14, at 968.

95. See *id.* at 969 (noting the general potential for cameras to improve evidence gathering and streamline the justice system).

Finally, by reducing violence and bringing clarity to citizen complaints, body cameras are strongly positioned to improve the legitimacy of the police in the public mind.⁹⁶ Legitimacy entails a perception that legal authority is “entitled to be obeyed” and that individuals should “defer to [police officers’] judgments.”⁹⁷ These attitudes are fostered when officers are seen as treating people fairly and respectfully.⁹⁸ Body cameras allow the public to lift the veil on police operations and come to a better understanding of police tactics.⁹⁹ While better understanding police tactics is no panacea for the increasingly toxic relationship between the public and the police,¹⁰⁰ more transparency leads to an increased perception that the police “aim to act in a fair and just manner.”¹⁰¹ As legitimacy is strongly tied to public cooperation,¹⁰² the widespread use of body cameras could lead to increased crime reporting and citizens’ increased willingness to follow the law.¹⁰³ This is particularly important in the majority-minority¹⁰⁴ neighborhoods where crime tends to be the greatest, and where residents are much more likely to have developed a strong distrust of the police.¹⁰⁵

96. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 264 (2008) (claiming that legitimacy is shaped by “the fairness by which the police exercise their authority” as perceived by those encountering police).

97. TYLER & HUO, *supra* note 12, at xiv.

98. Michael D. Reisig, Jason Bratton & Marc G. Gertz, *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. & BEHAV. 1005, 1006 (2007).

99. See MILLER & TOLIVER, *supra* note 84, at 5.

100. See *547: Cops See It Differently, Part One*, THIS AM. LIFE (Feb. 6, 2015), <http://www.thisamericanlife.org/radio-archives/episode/547/cops-see-it-differently-part-one> [<http://perma.cc/F63D-Z2J2>] (noting that there is often a mutual lack of trust between citizens and police that is exacerbated by their widely differing perceptions of controversial subjects such as stop-and-frisk and the disparate impact of policing on minority communities).

101. WHITE, *supra* note 85, at 19.

102. See David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 162–63 (2009); Tyler & Fagan, *supra* note 96, at 236, 239, 264–65.

103. Tyler & Fagan, *supra* note 96, at 250–52.

104. The term “majority-minority” is borrowed from the election law concept of the majority-minority electoral district, and refers to the fact that racial or ethnic minorities constitute a majority of the population in a given area. *E.g.*, Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208 (2003).

105. See Ben Brown & Wm Reed Benedict, *Perceptions of the Police: Past Findings, Methodological Issues, Conceptual Issues and Policy Implications*, 25 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 543, 547–50 (2002).

Thus, extensive use of body cameras is expected to reduce the frequency of violence between police and citizens, improve evidence gathering, and, consequently, improve police legitimacy. However, this technology has the potential to infringe upon the privacy of every person who comes into contact with an officer.

B. Body Cameras Create Serious Privacy Concerns

Despite the benefits to transparency and police legitimacy, ubiquitous body cameras pose serious privacy concerns for victims, witnesses, and others who interact with the police. Dashboard cameras, which have been used for more than a decade, have foreshadowed some of these concerns.¹⁰⁶ While the video from dashboard cameras was intended to act in much the same way as body camera footage—providing direct video evidence of traffic stops or police chases¹⁰⁷—“dashcam” footage has become almost a cottage industry for online entertainment. Video of embarrassing DUI stops, celebrity encounters, and anything else caught on a dashcam has the potential to end up on the Internet, with TMZ and YouTube serving as repositories.¹⁰⁸ Body cameras carry similar concerns. By placing a camera on an officer, the universe of potential YouTube videos expands well beyond what can be seen through the windshield of a car. Now, body cameras allow anything visible by an officer on foot to be potentially broadcast to a global audience.¹⁰⁹ Thus, before body cameras reach widespread use, the general assembly must implement procedures to protect personal privacy.

106. See INT'L ASS'N OF CHIEFS OF POLICE, *THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING* 5 (2003), <http://www.theiacp.org/portals/0/pdfs/IACPIn-CarCameraReport.pdf> [<http://perma.cc/6SG6-ZVMY>].

107. See Mike Argento, *Police Say Dashboard Cameras a 'Vital' Tool when Assessing Misconduct Claims*, YORK DAILY REC. (Mar. 16, 2013, 8:49 PM), http://www.ydr.com/ci_22806033/police-say-dashboard-cameras-vital-tool-when-assessing [<http://perma.cc/2B53-7A2D>].

108. While there are too many dashcam videos online to cite here, prime examples of the exploitation of dashcams for entertainment include: *Dashcam Shows Cops Fighting—Bergen County Police vs. NJ State Police on Turnpike, 2013*, YOUTUBE (Aug. 30, 2013), <https://www.youtube.com/watch?v=3-SynJskIPQ> [<http://perma.cc/DLW6-CZ69>]; *Reese Witherspoon Dash Cam Footage—'I'm Reese Witherspoon . . . This Will Be National News'*, TMZ (May 3, 2013), http://www.tnz.com/videos/0_c0x4umxb/#ixzz3T5FsYhs8 [<http://perma.cc/92K2-4JSG>]; *Young Lady No Pants Does Field Sobriety Test—Police Dash-Cam Viral Video*, YOUTUBE (Nov. 25, 2013), <https://www.youtube.com/watch?v=LvuWci2eoE8> [<http://perma.cc/7ZGQ-T9H4>].

109. MILLER & TOLIVER, *supra* note 84, at 28–29.

Although the Fourth Amendment search and seizure implications of body camera footage are not the focus of this paper,¹¹⁰ that framework is helpful in determining where and when body cameras begin to intrude on privacy. Fourth Amendment protections often hinge on the defendant's reasonable expectation of privacy, which is greatest in the home.¹¹¹ A person might not take issue with being recorded while out on the street but would likely have serious concerns should a high-definition video depicting the interior of his home enter the public domain. Such a recording need not be displayed on YouTube to be problematic; the very fact that footage of the interior of a person's home could be subject to a public records request is a threat to personal privacy. Potential burglars could use a public records request to obtain footage to see if the home has a security system and what valuables are available to be taken.¹¹² Neighbors could use video to embarrass an unpopular person in the neighborhood.¹¹³ An unscrupulous merchant could request video to gauge who might have interest in his product.¹¹⁴ The potential for abuse reaches as far as the imagination can take it. Thus, any legislation regulating the use of body cameras should provide protection for video of the interior of private residences.¹¹⁵

Police are not merely exposed to privacy-sensitive *places*. They also see *people* whose very identities are extremely sensitive, such as confidential informants, undercover officers, or key witnesses in criminal investigations.¹¹⁶ Officers also deal with people at the lowest point of their lives.¹¹⁷ People being arrested and victims giving emotional and graphic statements are almost certain to have their images and words captured by body cameras under the existing proposed rule.¹¹⁸ Accordingly, video of such encounters deserves the

110. It should be noted, however, that federal law “blocks the warrantless capturing of photo or video images of people where they have an expectation of privacy, and most states have similar laws.” WHITE, *supra* note 85, at 27 (quoting NAT’L INST. FOR JUST., A PRIMER FOR BODY-WORN CAMERAS IN LAW ENFORCEMENT 7 (2012)).

111. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

112. MILLER & TOLIVER, *supra* note 84, at 15.

113. See *id.*; Pearce, *supra* note 15.

114. Cf. LAWRENCE, *supra* note 28, at 35–37 (noting that in North Carolina, the official in charge of public records requests is not required, or even advised to inquire as to the rationale for the request).

115. See, e.g., MILLER & TOLIVER, *supra* note 84, at 15; STANLEY, *supra* note 5, at 4; Feeney, *supra* note 18; Pearce, *supra* note 15.

116. See, e.g., WHITE, *supra* note 85, at 27; Pearce, *supra* note 15.

117. See, e.g., WHITE, *supra* note 85, at 27; Pearce, *supra* note 15.

118. See, e.g., OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., FIRST RESPONSE TO VICTIMS OF CRIME 2–3 (2010), www.ojp.usdoj.gov/ovc/publications/infores/pdf.txt

same kind of protection as video of a private residence.¹¹⁹ Protection is particularly important for two reasons. First, victims' privacy must be paramount because having their stories publicized can be extremely traumatic.¹²⁰ Moreover, the act of sharing their experiences with the public "re-victimizes them and doesn't serve justice."¹²¹ Second, cameras can be a threat to legitimate police work by frightening off witnesses who may be reluctant to speak on camera due to fear of retaliation¹²² or by compromising the identities of confidential informants or undercover officers.¹²³

Victims, suspects, and witnesses are not the only subjects captured by a recording body camera. Body cameras can potentially record all of the daily conduct of the police officers wearing them, potentially putting the privacy and job security of officers at risk. Beyond the obvious concerns that body cameras would record intimate details of an officer's life—such as use of the restroom or locker room and private conversations with family—police officers are at risk that body camera footage would be used to capture minor rule infractions that could result in damage to or even termination of their careers.¹²⁴ Profanity, often used to accentuate a command when under stress, could be used against an officer,¹²⁵ as could a conversation between partners that contains negative comments about a superior.¹²⁶ Even the American Civil Liberties Union ("ACLU"), not usually the first group to jump to the defense of the police,¹²⁷ has noted "sympathy for police" as "continuous recording

/2010FirstResponseGuidebook.pdf [http://perma.cc/39WC-F7Z2]; STANLEY, *supra* note 5, at 1, 3.

119. See, e.g., MILLER & TOLIVER, *supra* note 84, at 12; STANLEY, *supra* note 5, at 3; Friedersdorf, *supra* note 18; Pearce, *supra* note 15.

120. See OFFICE FOR VICTIMS OF CRIME, *supra* note 118, at 3, 45, 68 (noting that victims in general need to feel safe, and that victims of certain crimes, such as sexual assault and mass casualty events, are particularly sensitive to their privacy).

121. Friedersdorf, *supra* note 18.

122. MILLER & TOLIVER, *supra* note 84, at 12; Friedersdorf, *supra* note 18.

123. MILLER & TOLIVER, *supra* note 84, at 41; Friedersdorf, *supra* note 18.

124. Abdollah, *supra* note 18.

125. Mark W. Clark, *On-Body Video: Eyewitness or Big Brother?*, POLICE MAG. (July 8, 2013), <http://www.policemag.com/channel/technology/articles/2013/07/on-body-video-eye-witness-or-big-brother.aspx> [http://perma.cc/U3A6-57ZB].

126. Abdollah, *supra* note 18.

127. The ACLU specializes in aggressively rooting out police brutality and advising people as to their rights in encounters with the police. See, e.g., *Police Excessive Force*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/police-excessive-force?redirect=blog/tag/police-brutality> [http://perma.cc/NF6Z-53BV]; *What To Do if You're Stopped by the Police, Immigration Agents or the FBI*, ACLU, <https://www.aclu.org/drug-law-reform-immigrants-rights-racial-justice/know-your-rights-what-do-if-you> [http://perma.cc/PNE4-QP7Y].

might feel...stressful and oppressive” and could disrupt normal human behavior such as “getting to know each other...[or] discussing precinct politics.”¹²⁸ Thus, any legislation requiring the use of body cameras by law enforcement must provide protections that either give officers discretion over when the camera is recording or allow recordings of immaterial footage to be destroyed quickly and completely.

C. Transparency and Accountability Versus Privacy: Striking the Proper Balance

Body cameras promise great returns in increasing the transparency and legitimacy of the police but also threaten to violate the privacy of suspects, victims, witnesses, and police alike.¹²⁹ However, a properly nuanced regulatory scheme can retain the beneficial aspects of body cameras while protecting privacy.¹³⁰ While accountability may be better served by making all video available by default and exempting only certain categories, the privacy interests of both citizens and police are too great to allow such expansive public access.¹³¹ Moreover, such a commitment would likely overwhelm the ability of most police departments to process, store, and release footage.¹³² Therefore, any law that mandates or otherwise purports to regulate the use of body cameras must draw clear lines between what must be made public, what must be kept confidential or even be destroyed, and what may be released at the discretion of the police.¹³³

The goal of equipping police officers with body cameras is not to expose a police officer’s eating habits or to get a look into a neighbor’s living room. Nor is the goal to watch an officer routinely pull over speeders on the interstate. Instead, the primary function of body cameras is to provide a record of hostile encounters between police and citizens.¹³⁴ Thus, the only recordings that must be publicly available on demand are recordings in which a police officer either

128. STANLEY, *supra* note 5, at 2.

129. *See supra* Sections II.A–B.

130. *See* STANLEY, *supra* note 5, at 1–2.

131. *Cf.* WHITE, *supra* note 85, at 27–29.

132. *See id.* at 33–34.

133. *See* STANLEY, *supra* note 5, at 1–2.

134. Naturally, body camera footage may also capture evidence of misconduct by non-officers. However, the recent push to equip officers with body cameras is focused not on reducing crime, but on reducing police misconduct. *See, e.g.,* Peter Hermann & Rachel Weiner, *Issues over Police Shooting in Ferguson Lead Push for Officers and Body Cameras*, WASH. POST (Dec. 2, 2014), http://www.washingtonpost.com/local/crime/issues-over-police-shooting-in-ferguson-lead-push-for-officers-and-body-cameras/2014/12/02/dedcb2d8-7a58-11e4-84d4-7c896b90abdc_story.html [<http://perma.cc/T5FT-Q3BM>].

uses force or otherwise engages in abusive misconduct.¹³⁵ It is here that the public's interest in transparency is greatest and the benefit of relevant, accurate evidence outweighs the individual's privacy interest.¹³⁶ Modern society expects that "dramatic event[s]" will be recorded and released for public viewing.¹³⁷ Thus, body cameras should be activated for encounters likely to escalate, such as stops, frisks, searches, arrests, or consensual encounters that have a hostile tone.¹³⁸ Police should not be given the discretion to choose whether to release footage of encounters that indeed turn hostile and require the use of force.¹³⁹ If the decision to record or release rests with the police, the possibility will always remain for police to cover up misconduct by deciding to turn the camera off or refusing to release the footage.¹⁴⁰ Transparency, legitimacy, and trust cannot flourish without addressing suspicions. Therefore, the better question is how to properly define and flag such footage so that it is available for release.

Of the remaining footage, a distinction may be drawn between what can be released at the discretion of the police department and what should remain confidential. The privacy-sensitive material discussed in Section II.B—witness statements, victim interviews, footage of the interior of homes, private behavior of officers—should be confidential.¹⁴¹ Here, the individual's privacy interest is at its greatest, outweighing the public's interest in accountability and transparency.¹⁴² Releasing this sensitive footage could compromise investigations, traumatize victims, or invade citizens' privacy.¹⁴³

135. See STANLEY, *supra* note 5, at 5. These situations are distinct from trivial misconduct, such as infractions of dress code or bad language. See *id.*

136. Cf. MILLER & TOLIVER, *supra* note 84, at 11–29; STANLEY, *supra* note 5, at 1–3; Pearce, *supra* note 15.

137. MILLER & TOLIVER, *supra* note 84, at 28–29; Jay Stanley, *Private Cameras Will Hurt Privacy—But Is There a Solution?*, ACLU (Jan. 23, 2014, 11:09 AM), <https://www.aclu.org/blog/free-speech-national-security-technology-and-liberty-criminal-law-reform/video-revolution> [http://perma.cc/3PVF-VEM2]; Jay Stanley, *The Video Revolution in Policing*, ACLU (Sept. 4, 2014, 1:39 PM), <https://www.aclu.org/blog/video-revolution-policing> [http://perma.cc/3A8Z-XPXR].

138. Stanley, *supra* note 83.

139. See STANLEY, *supra* note 5, at 2.

140. See Stanley, *supra* note 83.

141. Cf. MILLER & TOLIVER, *supra* note 84, at 11–29; STANLEY, *supra* note 5, at 1–3; Pearce, *supra* note 15.

142. Cf. MILLER & TOLIVER, *supra* note 84, at 11–29; STANLEY, *supra* note 5, at 1–3; Pearce, *supra* note 15.

143. See *supra* Sections II.B.

Moreover, privacy advocates are skeptical of the ability to completely and permanently delete body camera footage.¹⁴⁴ In a world where malicious public-information requests, hacking, data leaks, and eternal data are all relevant technological issues, it seems unrealistic to expect that any electronic data can completely and permanently disappear.¹⁴⁵ Additionally, police observe that victims and witnesses will be reluctant, if not completely unwilling, to speak on camera out of fear of retribution or embarrassment.¹⁴⁶ Thus, when speaking with individuals with privacy concerns or entering private residences, police cameras should be turned off,¹⁴⁷ completely eliminating the risk that a recording of the encounter could ever be released. In those circumstances where such footage is accidentally gathered and preserved, it should be exempt from public records requests as confidential, not merely restricted at the discretion of the department. The only exception to this policy should be where police misconduct occurs in a confidential setting. In these situations, recordings should be released only after an aggrieved party files a complaint and all parties prominently featured in the video consent.¹⁴⁸

144. See Stanley, *supra* note 83.

145. For instance, in September 2014, the Seattle Police Department (“SPD”) was stymied by a public records request, made anonymously by activist Timothy Clemons, for all of its body and dash-camera footage. Mark Harris, *The Body Cam Hacker Who Schooled the Police*, BACKCHANNEL (May 22, 2015), <https://medium.com/backchannel/the-body-cam-hacker-who-schooled-the-police-c046ff7f6f13> [<http://perma.cc/RK6X-J9R5>]. The SPD was holding over 1.6 million individual videos, gathered over six years, containing 360 terabytes of data. *Id.* Under Washington’s expansive public records law, the city had no legal recourse to turn down the request, but found it humanly impossible to redact all sensitive information from the entire footage stock. *Id.* Clemons and the SPD eventually reached a compromise, where he was allowed to work on automatic redaction algorithms for the department in exchange for dropping the request. *Id.*

It is not hard to imagine, however, a situation where, confronted with a less creative police department, a “hactivist” simply breaks into the files and releases the footage. Peter Ludlow, *What Is a ‘Hactivist’?*, N.Y. TIMES: OPINIONATOR (Jan. 13, 2013, 8:30 PM), <http://opinionator.blogs.nytimes.com/2013/01/13/what-is-a-hactivist/> [<http://perma.cc/85Q5-GCEF>]. Body cameras and their back-end infrastructure are computers with the same vulnerabilities as the average server or desktop, and they can be hacked. See Shirley Li, *Cloud Control: The Trouble with Body Cameras*, WIRE (Sept. 24, 2014, 1:03 PM), <http://www.thewire.com/technology/2014/09/cloud-control-the-trouble-with-body-cameras/379068/> [<http://perma.cc/M4ZQ-MQVH>].

At the same time, even where sensitive data are deleted from hard drives, it still may not be destroyed. Simply hitting “delete” will not destroy the data; the part of the hard drive containing the data must be overwritten or physically destroyed. See Mark Pomerleau, *How Hard Is It to Permanently Delete Data?*, GCN (Mar. 31, 2015), http://gcn.com/articles/2015/03/31/deleted-emails.aspx?admngarea=TC_SecCybersSec [<http://perma.cc/RNC3-89DC>].

146. See MILLER & TOLIVER, *supra* note 84, at 11–13.

147. See *id.*; Stanley, *supra* note 83.

148. Images of bystanders and others unrelated to the complaint may be digitally obscured to limit privacy concerns. See Harris, *supra* note 145.

This leaves the middle ground between the two extremes, where the interests of accountability and privacy begin to balance each other. However, a new interest, that of protecting ongoing investigations,¹⁴⁹ comes into play in this space. This area of overlap encompasses footage that might be “compiled . . . for the purpose of attempting to prevent or solve violations of the law”¹⁵⁰ without including hostile or sensitive encounters with the public. Here, police departments should use their discretion to balance the nature of the footage against the demonstrated need for disclosure.¹⁵¹ This requires no change of policy for North Carolina, as police already have discretion over whether to release records of criminal investigations.¹⁵² Retaining this default rule assures some accountability and transparency while also allowing for the protection of privacy and the preservation of the integrity of ongoing investigations.

III. APPLYING CURRENT NORTH CAROLINA PUBLIC RECORDS LAW TO BODY CAMERAS

North Carolina’s public records law, unfortunately, does not draw any of the lines mentioned above, and if left unchanged, would largely frustrate the accountability aspect of body camera use. Worse, the current language of the law would leave unaddressed the privacy concerns of individuals, victims, and witnesses.

Body camera footage, by its very nature, will end up capturing many elements of an officer’s investigation.¹⁵³ As mentioned above, events such as interviews with victims and witnesses, discussions with other officers, and encounters with a suspect will be recorded and stored on video.¹⁵⁴ Police have gone as far as to state that body cameras can raise evidence gathering to a new level, as cameras can capture a crime scene on video in a way that officer memory, written reports, and even photographs cannot replicate.¹⁵⁵ However, as

149. See LAWRENCE, *supra* note 28, at 196; see also *News & Observer Publ’g Co. v. State ex rel. Starling*, 312 N.C. 276, 282–83, 322 S.E.2d 133, 137–38 (1984) (discussing the “universal recognition [given] to certain reasons for excluding police and investigative records from the operation of statutory rights of public access”).

150. N.C. GEN. STAT. § 132-1.4(b)(1) (2013).

151. See MILLER & TOLIVER, *supra* note 84, at 17–18, 46.

152. See *supra* Section I.A.

153. Cf. Abdollah, *supra* note 18. See generally MILLER & TOLIVER, *supra* note 84 (discussing the integration of body cameras into departmental regulations governing, among other things, investigations).

154. See *supra* Section II.B.

155. See MILLER & TOLIVER, *supra* note 84, at 9.

discussed, North Carolina General Statutes section 132-1.4 broadly exempts from disclosure all “[r]ecords of criminal investigations” compiled by law enforcement agencies for “the purpose of attempting to prevent or solve violations of the law,” as well as any “[r]ecords of criminal intelligence information” compiled to “anticipate, prevent, or monitor possible violations of the law.”¹⁵⁶ Thus, under this language, all or nearly all body camera recordings will likely fall under the exemptions of section 132-1.4,¹⁵⁷ putting footage out of reach of a public records request and into the hands of the police—to be released at their discretion.¹⁵⁸

Moreover, the key terms of section 132-1.4 are very broadly defined. Whether or not something is a record of criminal investigation depends on whether it has been gathered by a “public law enforcement agency,” and whether it contains information gathered for the purpose of preventing or solving “violations of the law.”¹⁵⁹ As an example of the expansive breadth of this language, the North Carolina Court of Appeals recently found that even a city attorney’s office qualifies as a “public law enforcement agency,” allowing the City of Raleigh to withhold documents from a corporation gathered as part of an investigation into its violation of zoning ordinances.¹⁶⁰ In doing so, the court noted that section 132-1.4 applied to “all ‘crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1,’ ”¹⁶¹ and could be invoked by any “organizational unit” that is “responsible for enforcement of a statute, ordinance, or regulation” and is therefore “capable of generating records that are covered by the [public records] statute.”¹⁶²

156. N.C. GEN. STAT. § 132-1.4(b)(1) to (b)(2) (2013).

157. *Id.* § 132-1.4(a).

158. See LAWRENCE, *supra* note 28, at 214.

159. N.C. GEN. STAT. § 132-1.4(b)(1) to (b)(2).

160. See *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 466, 596 S.E.2d 431, 435 (2004). The court’s definition of “violations of the law” rested largely on scholar David Lawrence’s definition: “if violation of a statute, ordinance, or regulation can cause the violator to be answerable in a criminal proceeding or in an infraction proceeding, it is a violation of the law as defined in G.S. 132-1.4.” *Id.* (emphasis omitted) (quoting DAVID LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 108 (1st ed. 1997)).

161. *Id.* North Carolina General Statutes section 14-3.1 defines “infraction” as “a noncriminal violation of law not punishable by imprisonment.” N.C. GEN. STAT. § 14-3.1. This definition would include such picayune violations of the law as covering the license plate of a car to avoid automatic toll taking, *see id.* § 20-63(g), and speeding. *See id.* § 20-141.

162. *McCormick*, 164 N.C. App. at 466, 596 S.E.2d at 435 (quoting LAWRENCE, *supra* note 160, at 108).

Absent action by the state legislature, these exemptions are set in stone.¹⁶³ The criminal investigations exemption has survived several attempts to judicially narrow or overturn it since the 1980s. In 1983, the North Carolina Court of Appeals ruled in *News & Observer Publishing Co. v. State ex rel. Starling*¹⁶⁴ that State Bureau of Investigation's records could be made available.¹⁶⁵ The trial court had used a balancing test, weighing the public interest in "having information as to the actions of their officials" against the state's interest in keeping investigative reports private.¹⁶⁶ The court of appeals held this was not an abuse of discretion.¹⁶⁷ However, a year later, the state supreme court reversed, holding that the criminal investigations exemption was grounded in "the rights of privacy of individuals mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports."¹⁶⁸ Additionally, the court cautioned that:

[I]f investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.¹⁶⁹

While section 132-1.4 had not yet been passed at the time of the supreme court's ruling, the court of appeals has faithfully applied the holding to the language on "[r]ecords of criminal investigations" and "[r]ecords of criminal intelligence information."¹⁷⁰ An attempt to

163. *Cf. Gannett Pac. Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 159, 595 S.E.2d 162, 165 (2004) ("The principles governing statutory construction are well established: where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe a statute using its plain meaning.").

164. 65 N.C. App. 576, 309 S.E.2d 731 (1983), *rev'd*, *News & Observer Publ'g Co. v. State ex rel Starling*, 312 N.C. 276, 322 S.E.2d 133 (1984).

165. *Id.* at 577, 309 S.E.2d at 732.

166. *Id.*

167. *Id.*

168. *News & Observer Publ'g Co. v. State*, 312 N.C. at 283, 322 S.E.2d at 138.

169. *Id.* at 282–83, 322 S.E.2d at 138.

170. *See McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 464–65, 596 S.E.2d 431, 434–35 (2004); *Gannett Pac. Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 156–59, 595 S.E.2d 162, 163–65 (2004).

return to a balancing test, as initially upheld by the court of appeals in *News & Observer Publishing Co.* was rejected in 2004.¹⁷¹ Although seemingly sympathetic to the idea, the court “decline[d] to create exceptions to a statute where none exist[.]” noting, “we are but jurists and not members of the General Assembly.”¹⁷²

Thus, absent an amendment to the law by the general assembly, all body camera footage, be it of a police shooting, the inside of someone’s home, or of a rape victim, will fall within one non-transparent bucket: records of criminal investigations.¹⁷³ Any police department using body cameras is not statutorily required to release footage, and no court in North Carolina is likely to force the issue.¹⁷⁴ This lack of disclosure would preclude many of the applications of body camera footage that proponents have discussed.¹⁷⁵ For instance, applying North Carolina law to a scenario similar to the Michael Brown case, any video of the shooting would be considered a “record of criminal investigation,” tied to the investigation into the shooting itself or into any antecedent crime committed by the suspect. The footage would therefore be available for release only at the discretion of the police department.¹⁷⁶ Given this choice, the police could withhold potentially incriminating footage.¹⁷⁷ But unable to see the shooting from the officer’s point of view, public opinion would once again be shaped by potentially inconsistent witness testimony, rather than by actual footage of the event, and the relationship between the police and the public would once again suffer.¹⁷⁸

171. *Gannett Pac. Corp.*, 164 N.C. App. at 161, 595 S.E.2d at 166.

172. *Id.*

173. See N.C. GEN. STAT. § 132-1.4(b) (2013).

174. See *Gannett Pac. Corp.*, 164 N.C. App. at 161, 595 S.E.2d at 166.

175. See *supra* Section II.A.

176. See N.C. GEN. STAT. § 132-1.4(b)(1); see also *infra* notes 190–93 and accompanying text.

177. See Cory Shaffer, *Cleveland Releases Extended Footage of Tamir Rice Shooting*, CLEVELAND.COM (Jan. 8, 2015, 9:36 AM), http://www.cleveland.com/metro/index.ssf/2015/01/cleveland_releases_extended_fo.html [<http://perma.cc/HH37-UG2C>]. Cleveland police refused to release the footage of the Tamir Rice shooting, despite the fact that it was captured by a public surveillance camera. *Id.* The police did not release the footage until a media company threatened a lawsuit. *Id.* Police in Greensboro, North Carolina similarly refused to release body camera footage of a controversial shooting, even after an internal investigation cleared the officer of wrongdoing. See, e.g., Gamm, *supra* note 63; Williamson, *supra* note 65. But see Sam Clancy, *Police Release Video Moments Before Ferguson Shooting*, KDSK.COM (Aug. 11, 2015, 10:41 PM), <http://www.ksdk.com/story/news/local/ferguson/2015/08/11/ferguson-officer-involved-shooting-video-released/31488297/> [<http://perma.cc/M485-2RY8>] (stating that police released surveillance video of a police shooting that occurred in Ferguson almost a year to the day after the Michael Brown shooting).

178. Reactions to unrecorded incidents of police violence since Ferguson bear out this conclusion. For example, just a year after the Michael Brown shooting, St. Louis police shot

Going further, the exemption does not end disclosure at the close of an investigation. North Carolina law draws no distinction between open and closed investigations.¹⁷⁹ The plaintiffs in *Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*¹⁸⁰ hoped to persuade the court of appeals to allow information to be released in cases where “investigations are complete and no action is pending.”¹⁸¹ But the court was not persuaded and stood on the plain meaning of the statutory language.¹⁸² Thus, even when no “prevent[ing] or solv[ing]”¹⁸³ has taken nor will take place, records of criminal investigations continue to be exempt from the public records law.¹⁸⁴

The rulings in *News & Observer Publishing Co.* and *Gannett* do not completely foreclose the release of records of criminal investigations. Section 132-1.4(a) allows for a “court of competent jurisdiction” to order the release of such records.¹⁸⁵ However, North Carolina courts have narrowly construed this provision. Records of criminal investigations may be released under the discretion of a trial court only when the requesting party is “otherwise entitled by statute to access.”¹⁸⁶ The only applicable alternate statutory access is found in

and killed Mansur Ball-Bey in an unrecorded incident, sparking violent protests. Erin McClam, *Protests Erupt After St. Louis Officers Fatally Shoot Mansur Ball-Bey*, NBC NEWS (Aug. 20, 2015, 7:58 AM), <http://www.nbcnews.com/news/us-news/protests-erupt-after-st-louis-police-fatally-shoot-mansur-ball-n412921> [<http://perma.cc/96AK-HPCX>]. Police claim that Ball-Bey was armed and pointed a gun at them after fleeing out the back of a house where the police were serving a search warrant. *Id.* Ball-Bey’s family claims that he was an innocent bystander who lived down the block, and was merely watching a police raid on a nearby house. Rebecca Rivas, *Mansur Ball-Bey Was Innocent Bystander in Police Raid, Family Attorneys Say*, ST. LOUIS AM. (Aug. 24, 2015, 7:06 PM), http://www.stlamerican.com/news/local_news/article_17276a36-4abd-11e5-9b05-df0bf77f9387.html [<http://perma.cc/9L55-LSBS>]. The evidence, which shows that there was indeed a gun belonging to Ball-Bey at the scene, but that Ball-Bey was shot in the back, does not fully support either side’s account. *Teen Killed by St. Louis Police Was Shot in Back, Autopsy Shows*, CBS NEWS (Aug. 21, 2015, 9:32 AM), <http://www.cbsnews.com/news/mansur-ball-bey-report-autopsy-shows-man-killed-st-louis-police-shot-in-back/> [<http://perma.cc/VJ8Z-THA4>].

179. See N.C. GEN. STAT. § 132-1.4(b) (lacking any distinction between a completed investigation and one in progress); see also *Gannett Pac. Corp.*, 164 N.C. App. at 161, 595 S.E.2d at 166 (refusing to read such a distinction into the statute).

180. 164 N.C. App. 154, 595 S.E.2d 162 (2004).

181. *Id.* at 161, 595 S.E.2d at 166.

182. *Id.*

183. N.C. GEN. STAT. § 132-1.4(b)(1).

184. *Gannett Pac. Corp.*, 164 N.C. App. at 160–61, 595 S.E.2d at 166.

185. N.C. GEN. STAT. § 132-1.4(a).

186. *News & Observer Publ’g Co. v. State ex rel Starling*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984).

the discovery procedures for civil and criminal cases.¹⁸⁷ Thus, while a criminal defendant or civil plaintiff may have access to a recording of his own arrest through the discovery statutes,¹⁸⁸ it is unlikely that a court would otherwise release records of a criminal investigation to anyone but a party to a lawsuit.¹⁸⁹

While disclosure is not required, there is no indication that it is prohibited. Neither section 132 nor any ruling of a state court bars police from releasing criminal investigation records at their own discretion.¹⁹⁰ As an example, police departments routinely release such records when they think that doing so will help solve a crime.¹⁹¹ When a department chooses to release such records, there is usually no risk of liability.¹⁹² Suits are rarely brought for such releases, and those that have been allowed to proceed featured egregious violations of privacy.¹⁹³ Thus, it is possible that body camera footage of privacy-sensitive information, such as described in Section II.B, could be released with the purpose of aiding the investigation without regard to its impact on the subject.¹⁹⁴ Under such a scenario, a rape victim might find her description of the attacker played on the radio, or a private citizen might see his bedroom displayed on television for all to see. As long as there is a legitimate reason for the release, legal recourse to the person whose privacy was violated may be unavailable.

187. *Id.* at 283–84, 322 S.E.2d at 138; *see also* McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467–68, 596 S.E.2d 431, 436 (2004); *Gannett Pac. Corp.*, 164 N.C. App. at 157, 595 S.E.2d at 164.

188. N.C. GEN. STAT. § 15A-903(a)(1) (criminal discovery); N.C. R. CIV. P. 26–37 (civil discovery).

189. *News & Observer Publ'g Co. v. State*, 312 N.C. at 283–84, 322 S.E.2d at 138 (noting that the News & Observer sought the public records request not in an effort “reasonably calculated to lead to the discovery of admissible evidence to be used in the trial of any pending action,” but “only due to its desire to know and publish the contents”).

190. LAWRENCE, *supra* note 28, at 214.

191. *Id.* For a recent example, see *Photos Released of Robbery at Raleigh Bank*, WTVD (Jan. 20, 2015), <http://abc11.com/news/photos-released-of-robbery-at-raleigh-bank/475178/> [<http://perma.cc/8U7U-SSR7>].

192. LAWRENCE, *supra* note 28, at 110.

193. LAWRENCE, *supra* note 28, at 110–11 (citing *Anderson v. Blake*, 469 F.3d 910 (10th Cir. 2006) (allowing a suit to proceed where police released graphic video of a rape to a local television station, which aired it, albeit blurred to obscure the victim); *Sheets v. Salt Lake Cty.*, 45 F.3d 1383 (10th Cir. 1995) (allowing a suit to proceed where police released details of the plaintiff’s deceased wife’s diary, which was given to police under assurances of confidentiality, to an author writing about the crime); *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. Dist. Ct. App. 1991) (allowing a suit to proceed where a police officer showed autopsy photos and video to friends)).

194. *See supra* Section II.B.

IV. AMENDING THE PUBLIC RECORDS LAW TO ADDRESS BODY CAMERAS

As the law currently stands, all body camera footage, be it of a police shooting, the inside of someone's home, or a rape victim's statement, will fall within the "records of criminal investigations" exemption to the state's public records law.¹⁹⁵ With a limited exception for civil or criminal discovery, body camera footage will only be released at the discretion of police departments.¹⁹⁶ As a result, the goals of police accountability and transparency cannot be effectively realized, and the privacy of individuals, victims, and witnesses is subject to the potentially biased decisions of the local police chief.¹⁹⁷

If police departments in North Carolina continue or expand their use of body cameras, the general assembly should make changes to the public records law to better balance the interests of privacy, transparency, and accountability that underlie body camera legislation. In order to ensure that the goals of a statewide body camera mandate are realized, the enabling law should clearly define what footage must be released and what footage must remain confidential and provide a practical means to ensure that both types of footage are properly categorized by the police. Most importantly, there must also be an amendment to section 132 clarifying the public's right of access to footage of police misconduct captured on body cameras. Without such changes, a statewide mandate not only will fail to advance the interests of transparency and accountability, but will also create a privacy menace outweighing any benefit that might be realized.

A. Defining Potential Hostile Encounters

While it sounds simple enough, making footage of hostile encounters between the police and public available to the community is quite complicated. From a statutory perspective, legislators must define these encounters so that no relevant material slips through the cracks, while also ensuring that no more material is released than necessary. From a practical perspective, this will require police departments to develop a procedure for flagging the appropriate encounters for preservation. As a result, when defining the categories,

195. See N.C. GEN. STAT. § 132-1.4(b) (2013).

196. See *supra* notes 190–94 and accompanying text.

197. See *supra* Part III.

legislators must take into consideration the practical concerns of police, who must abide by the lines the legislature draws.

Advocates of body cameras have noted that the “ideal policy would be for officers’ cameras to run throughout their entire shift,” as a result such an approach would eliminate any possibility of misconduct “accidentally” being left off film.¹⁹⁸ However, even these advocates recognize that this rule would create too many privacy problems to be feasible.¹⁹⁹ Thus, the consensus among those who have used and studied body cameras is that cameras should be activated under certain circumstances by the officers wearing them.²⁰⁰ Accordingly, the debate turns on how broad or narrow the language defining those circumstances should be.

The bill introduced by North Carolina Representative Brockman follows the recommended approach of the Police Executive Research Forum.²⁰¹ The proposed bill gives a police officer statutory discretion to keep his or her camera off until beginning an “interaction . . . in his or her official capacity [with] the public”²⁰² and gives police departments latitude in determining what “official capacity” means.²⁰³ The bill does not completely define “official capacity,” but notes that it includes core functions such as “traffic stops; arrests; searches; interrogations not covered under General Statutes 15A-211; interviews with victims and witnesses; and pursuits.”²⁰⁴ Under this approach, police departments can then either explicitly augment the list of situations in which recording must take place, or simply give their officers the general directive to otherwise record when in doubt.²⁰⁵ However, while officers are given some discretion on when to film, the statutory leash is not very long. After a recordable interaction, officers must note in the incident report whether a recording was made.²⁰⁶ Failure to comply with the recording or retention requirements would be admissible evidence for the defense in a criminal prosecution or for any “party opposing the law enforcement” officer or agency in a civil action.²⁰⁷

198. Stanley, *supra* note 83.

199. *Id.*

200. MILLER & TOLIVER, *supra* note 84, at 12–14; Stanley, *supra* note 83.

201. See MILLER & TOLIVER, *supra* note 84, at 12–14.

202. H.B. 395, sec. 1, § 15A-201(6), 2015–2016 Gen. Assemb., Reg. Sess. (N.C. 2015).

203. See MILLER & TOLIVER, *supra* note 84, at 13.

204. H.B. 395, sec. 1, § 15A-201(6).

205. See MILLER & TOLIVER, *supra* note 84, at 13.

206. H.B. 395, sec. 1, § 15A-202(a).

207. *Id.* sec. 1, § 15A-202(g).

The bill's language provides an effective solution to the problem of defining, sorting, and flagging footage for release. It would be unworkable to post facto apply a definition covering the many encounters that might draw a complaint to a sea of footage in order to flag such encounters as eligible for release. Here, the bill creates a broad definition isolating the core law enforcement functions, and requires filming only during the execution of those functions, while allowing individual officers the discretion to film during other situations that might prove problematic.²⁰⁸ Thus, police departments may simply retain footage for a statutorily defined period, during which an encounter is flagged and preserved for release only if it results in a complaint or is needed as evidence.

When to film in this fringe area, which includes consensual encounters, is best left to individual officers. Police know their patrols and are experienced enough to know when a consensual encounter may suddenly and unexpectedly turn hostile. While organizations such as the ACLU have argued that transparency and accountability are best served when officers have as little discretion as possible,²⁰⁹ it is impractical for a state or department to properly define every conceivable situation where filming is required. To do so would likely lead to an overly detailed list that officers would fail to memorize or simply ignore. Furthermore, the bill's language provides a strong incentive for police to film when in doubt. Until the contours of the requirement and its exceptions have been fully defined through litigation, officers will likely feel some trepidation about turning off their cameras in any questionable situation. On the other hand, if it becomes obvious that officers are using their discretion to flout transparency goals, the state can amend the law, either by expanding the definition of "official capacity" or by "guiding" officer discretion by strengthening the "rebuttable presumption" against an officer who is involved in some kind of hostile encounter that is not filmed.²¹⁰

B. Carving Out Privacy Exemptions

Privacy is less of a concern under a statutory framework that limits recording to official encounters as compared to a law requiring continuous filming. Certainly, this resolves most officers' privacy concerns since the bulk of their daily routines will not be filmed. However, victim statements, witness interviews, and filming of private

208. *See id.* sec. 1, § 15A-201(6).

209. *See* STANLEY, *supra* note 5, at 2–3.

210. *See id.* at 4–5.

residences still may occur during periods of required filming and should therefore be statutorily protected. Two approaches are possible here: the law may either require filming but offer increased protection so that such footage is never released, or the law may statutorily define the situations in which an officer may turn his camera off to prevent filming of sensitive material.

If the statute requires filming, privacy-sensitive information may be protected by classifying it as confidential material under section 132-1.2.²¹¹ The general assembly could add language to this section classifying as confidential body camera footage of interviews with witnesses and victims, any interaction with confidential informants, and footage of private residences. This limit would not only protect privacy-sensitive information from public records requests, but also remove it from the category of records that may be released by police departments.²¹²

Alternatively, the statute could give officers discretion to turn off their cameras when they may encounter privacy-sensitive information. This is the method endorsed by the Police Executive Research Forum²¹³ and employed by Representative Brockman's bill.²¹⁴ Under the bill's language, police are not required to activate their cameras when they are (1) "[i]nteract[ing] with confidential informants and undercover officers;" (2) engaging in "routine, non-law enforcement related activities[.]" including personal conversations, use of the restroom, or dressing or undressing in a locker room; (3) providing training or making a public presentation; (4) entering a private residence under "non-exigent circumstances" without written or on-camera consent of the homeowner; (5) when conducting a strip search without written or on-camera consent; and (6) when interacting with a victim or witness without written or on-camera consent.²¹⁵

Merely restricting the release of footage already filmed is inadequate for several reasons. First, an insistence on filming privacy-sensitive encounters can have negative effects on police work—

211. See N.C. GEN. STAT. § 132-1.2 (2013). Section 132-1.2 limits "confidential material" to trade secrets and other information relating to a person's identity (such as social security numbers, bank account numbers, and images of signatures) that has been entrusted to the government. See *id.* As it stands, it seems unlikely that the language could be interpreted to reach body camera footage. See *id.*

212. N.C. GEN. STAT. § 132-1.2 (stating that "[n]othing in [chapter 132] shall be construed to require or authorize" disclosure of confidential material).

213. MILLER & TOLIVER, *supra* note 84, at 12–13.

214. H.B. 395, sec. 1, § 15A-202(b), 2015–2016 Gen. Assemb., Reg. Sess. (N.C. 2015).

215. *Id.*

witnesses and victims, given the choice between cooperating on film and not cooperating at all, may prefer the latter.²¹⁶ This would potentially thwart one of the benefits of body cameras, which is increased cooperation stemming from rehabilitated police legitimacy in minority communities.²¹⁷ Second, even should a nervous witness or victim speak on camera, classifying such footage as confidential offers no protection against unintentional release or malicious release by hackers or insiders.²¹⁸ With the increased prevalence of hacking, this is a serious concern.²¹⁹ While those breaking the law to release footage might face legal liability, the consequences for the physical and mental wellbeing of exposed witnesses and victims may be irreparable. Adjusting retention statutes to quickly delete such footage may provide protection, but the vagaries of deleting digital information may make complete destruction of privacy-sensitive footage impossible.²²⁰

Thus, the approach proposed by the Police Executive Research Forum and Representative Brockman is the better of the two. Giving the police officer discretion to turn the camera off poses risks to accountability and transparency goals. But these risks are effectively mitigated by statutory definitions mandating that cameras remain on during the encounters that are most likely to turn hostile, by giving the officer an avenue to record even in privacy-sensitive contexts with consent, and by allowing the failure to record a hostile incident to be used as evidence against an officer in court. As a result, the majority of relevant incidents should be captured. Again, should off-camera misconduct begin to erode the benefits of transparency and accountability, it is reasonable to believe that strengthening the presumption against the officer when misconduct is not taped would lead to a more judicious application of these exceptions. A rebuttable presumption against the officer would also serve as a powerful deterrent to misconduct when the camera is off.

216. MILLER & TOLIVER, *supra* note 84, at 12–13; *see also* STANLEY, *supra* note 5, at 3.

217. *See supra* Section II.A.

218. *See* Li, *supra* note 145.

219. *See e.g.*, Li, *supra* note 145; Tom Risen, *Companies Unprepared as Hacking Increases*, U.S. NEWS & WORLD REP. (May 28, 2014, 4:33 PM), <http://www.usnews.com/news/articles/2014/05/28/companies-unprepared-as-hacking-increases> [<http://perma.cc/N28B-ZEGR>] (noting that in 2014 approximately half of all adults in the United States had their information stolen).

220. *See* John Parkinson, *Old Data Never Die*, CIO INSIGHT (July 7, 2011), <http://www.cioinsight.com/c/a/Expert-Voices/Old-Data-Never-Dies-760898/> [<http://perma.cc/EP28-587G>].

C. *Releasing Records to the Public*

The entire enterprise of purchasing and equipping officers with body cameras and defining how and where they may be used rests on a few short sentences governing the public's right to access the recordings. As the law currently stands, outside of a discovery right for criminal defendants and civil parties,²²¹ the public has no right of access to footage gathered by state law enforcement officers.²²² There have been two main approaches suggested to remedy this lack of access. The first, preferred by advocates of body cameras, is a policy that allows “[p]ublic disclosure of any recording . . . with the consent of the subjects,”²²³ and strong policies of redaction and audio distortion to protect the privacy of those involved.²²⁴ The second, favored by police groups such as the Police Executive Research Forum, would retain the statutory exemptions for records of criminal investigations from public records laws, such as section 132-1.4, while fostering “by policy and practice” a prudent application of the discretion to release video.²²⁵ However, while both of these approaches have their merits, this Recent Development provides a third option that better advances transparency and accountability while protecting privacy.

Representative Brockman's bill closely reflects the Police Executive Research Forum's approach to release, as it does in many other areas. The text of the bill suggests that body camera footage may be released.²²⁶ Nevertheless, these requests may still be denied by the police.²²⁷ While language such as “[n]otwithstanding G.S. 132-1.4, 153A-98, 160A-168, or any other provision of law to the contrary”²²⁸ appears to carve out body camera footage from the “records of criminal investigations” exemption, the subsequent allowance that “a law enforcement agency *may* disclose” a recording indicates discretion.²²⁹ Further, the text provides for issuing a written statement

221. See, e.g., N.C. GEN. STAT. § 15A-903(a)(1) (2013); N.C. R. Civ. P. 26–37; see also *supra* notes 185–89 and accompanying text.

222. N.C. GEN. STAT. § 132-1.4(a).

223. STANLEY, *supra* note 5, at 7.

224. *Id.*

225. MILLER & TOLIVER, *supra* note 84, at 17–18.

226. See H.B. 395, sec. 1, § 15A-202(e), 2015–2016 Gen. Assemb., Reg. Sess. (N.C. 2015).

227. See *id.*

228. *Id.* North Carolina General Statutes section 132-1.4 refers to the records of criminal investigations exemption, N.C. GEN. STAT. § 132-14 (2013), while sections 153A-98 and 160A-168 refer to protections given to the personnel files of county and city employees, respectively. §§ 153A-98, 160A-168.

229. H.B. 395, sec. 1, § 15A-202(e) (emphasis added).

to the person requesting access that explains the reasons for declining to disclose a copy of the recording.²³⁰ The statute clearly contemplates that requests will be denied, presumably at the discretion of the law enforcement agency. The bill gives those denied access a right to petition state courts for an order compelling disclosure, which effectively confirms this interpretation.²³¹

Thus, although the bill seems like a step in the right direction, it circuitously preserves the status quo. Allowing a right of request with no right of access continues to allow the police to control the flow of information. Even though denial of a request may be appealed to a state court under the bill's language, this is still a substantial barrier for those who seek police accountability, particularly those who lack the means to litigate. Considering the lengths that the rest of the bill's language goes to isolate relevant footage and prevent the recording of privacy-sensitive material, there is little reason to maintain absolute police discretion on public records access. Moreover, continuing to allow police discretion to release material without providing for any means to protect privacy-sensitive footage does nothing to address lingering privacy concerns of victims, witnesses, and private citizens.

While the bill offers a good start, a better solution is needed to advance the interests of transparency and accountability while still protecting privacy. This could be achieved by adding to the bill a statutory right of access to body camera footage for those who have filed a complaint regarding an on-camera incident and can prove that they were involved in the incident.²³² This limitation would preserve the goals of transparency and accountability by giving an absolute right of access only to those with the strongest interest in the footage. Further, it would limit privacy issues by restricting access to persons intimately involved in the incident. Police interests in limiting public access to footage of investigatory techniques would gain substantial protection because this policy would require only releasing footage to a very limited segment of the population. At the same time, the more limited carve-out already included in the bill should be maintained to address access for interested third parties. With the appropriate protections for sensitive material in place,²³³ allowing police discretion to fulfill or deny public records requests under judicial

230. *Id.*

231. *See id.*

232. Proof of involvement could be satisfied by reference to the police report, hospital records, or equivalent documentation. Where none of these records are available, an affidavit should suffice.

233. *See supra* Section IV.B.

oversight would provide a more appropriate right of access for those who are interested in the outcome, such as the press or advocacy groups, but have no direct tie to an incident.

CONCLUSION

Body cameras present many challenges to our existing body of law. The ramifications for Fourth Amendment law alone are staggering.²³⁴ However, from the perspective of North Carolina's public records law, body cameras can be made to work with a few modifications to the proposed body camera bill.²³⁵ The use of body cameras must be governed by a statute that clearly defines the times and places when filming is required and when it is forbidden. This statute should be paired with amendments to the public records law to ensure a clear right of access to recordings of misconduct for the victims of such abuse, while also providing privacy protections for victims, witnesses, and private residences that appear on camera. The bill proposed by Representative Brockman does provide for most of these crucial changes to the law, but must go further in providing a right of public access to recordings while protecting the privacy of those who need it most.²³⁶ By doing so, North Carolina can help realize the legitimate and much needed goal of improving the relationship between the police and the public.

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234. See, e.g., Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1363 (2004) (discussing, in the context of surveillance cameras, the difficulties in extending Fourth Amendment protection to “open and observable activities” in public); David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools For Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. 357, 369 (2010) (noting that body cameras can help induce police compliance with the Fourth Amendment's strictures); Myers, *supra* note 14, at 969 (“There is plenty of doctrinal room within current Fourth Amendment jurisprudence for the use of digital video as a supplement to, or substitute for, police testimony.”).

235. See *supra* Part IV.

236. See *supra* Part IV.

** I would like to thank Anthony Ponikvar, Alison Templeton, and all the editors of the *North Carolina Law Review* for their help in editing and publishing this Recent Development. Special thanks also go to Dean Frayda S. Bluestein at the North Carolina School of Government for her crucial insights into public records law. Finally, I would like to thank my mother, Lorraine, because without her help, support, and sacrifice over the years, I could never have gotten here.