

**Comments from the Maryland Office of the Public Defender
for Baltimore City
Recommendations to Policy 824: Body-Worn Camera
January 2020**

The Maryland Office of the Public Defender provides this comment on Draft Policy 824: Body-Worn Cameras. As the policy notes, body-worn camera (BWC) data is an important tool in evidence collection and furthering the core principles of professionalism, transparency and accountability. We commend the BPD for highlighting that BWC data is subject to discovery and public information (MPIA) requests and for providing specific language for members to use when informing individuals that they are recording. However, the policy can better further its core principles by clearly requiring BWC activation for all investigative activities and by incorporating accountability and disciplinary measures for noncompliance. Our comments below predominantly focus on these themes.

Recommendation 1: Require BWC use by all officers who conduct investigative tasks in the field.

All members who conduct investigative activities in the field should be required to wear a BWC and activate them when interacting with the public, interviewing witnesses, collecting evidence, and otherwise engaging in investigative functions. Exempting members of investigative units (e.g., DDU, Homicide, Pawn Shop, Sex Offense, Child Abuse, etc.) from wearing BWC, unless they are participating in enforcement activity, is counter to the core principals laid out in the BWC policy, specifically that of Evidence Collection. It also provides a mixed message on transparency and accountability, suggesting that documenting investigative activities is only important for patrol officers, rather than the Department at-large. Interactions with potential witnesses, collection of evidence, interrogation of suspects, and other investigative efforts outside of desk duty should be recorded by any member conducting these functions.

Suggested action: In the Directives, Issuance and Utilization section (page 3), add Investigative to the subsection on Patrol, Enforcement, and Support Units (Patrol, Enforcement, **Investigative**, and Support Units) and review the Administrative/Investigative Units subsection as follows:

Administrative/**Investigative** Units

Members assigned to units whose primary duties are administrative (e.g., Communications, ECU, Quartermaster, RMS) **or investigative (e.g., DDU, Homicide, Pawn Shop, Sex Offense, Child Abuse, etc.)** are not required to wear the BWC during the normal course of their duties, unless:

1. The member anticipates participating in **investigative or** enforcement activity (e.g., **interviewing a witness, interrogating a suspect, collecting evidence**, serving an arrest warrant, executing a search warrant etc.), or
2. The member is detailed to work a uniformed assignment where citizen/police interaction is occurring, or is likely to occur (e.g., patrol, parade, baseball game, Artscape, Inner Harbor Detail, uniformed secondary employment, etc.), or
3. The member is directed to wear the BWC by a permanent-rank supervisor.

Recommendation 2: Require mandatory recording whenever in the field, with only clearly delineated exceptions.

Overall, the policy rightly seeks to encourage reporting of most encounters and provides limited exceptions for when it is not appropriate to do so. The Mandatory Recording section of the Directives (page 4-5) muddies this effort by providing an enumerated list of activities where recording is required, suggesting that the exceptions are not the only instances in which recording is not needed. Given the fluidity of police interactions, attempting to distinguish between activities requiring recording (terry stop, field interview) from the observations and interactions leading up to those moments (voluntary interaction, determination of reasonable suspicion) can be difficult and invites problematic discretion by members to determine when they choose to record. Moreover the activities noted for mandatory reporting are, at times, confusing and not wholly consistent with other policies.

Examples of our concerns with the list include:

- When a voluntary encounter becomes a field interview (¶2) is a subjective determination by the officer over the course of an interaction that will allow for key investigative activities that should be recorded to occur while the BWC is not activated. Members should generally have their BWC activated while in the field so that voluntary encounters are automatically recorded throughout interactions likely to lead to an interview or stop.
- What is considered a confrontational encounter with the public (¶3) requires subjective assessment on the level of conflict warranting activation. In addition, the act of activating the BWC at this moment (as opposed to already being on when a confrontation arises) may negatively affect other BPD priorities, such as de-escalation. It is also unclear whether interactions with non-BPD criminal justice players, such as OPD staff in their professional capacity, would be

considered “public.” All interactions with individuals who are not officials acting in a law enforcement or prosecutorial capacity should be considered public.

- Waiting to activate a BWC until obtaining reasonable suspicion for a stop (§ 5) precludes the circumstances establishing reasonable suspicion from being recorded, which is counter to the core principals laid out in the BWC Policy.
- Requiring activation when present on the scene with prisoners (§5) potentially conflicts with the exception to recording when at CBIF or other detention facilities (page 6).

The policy would be clearer and more consistent with its core principles if use of BWC was presumed to be the default practice when in the field, with only exceptions defined, rather than providing a list of activities where recording is required.

Suggested language: Replace the Mandatory Recording section text with the following:

Unless unsafe or impossible to do so, all members shall have their BWC activated at all times in the field unless an authorized Exception to Recording is present.

To the extent that BPD retains the list of activities where recording is required, we recommend the following changes:

- a. Remove “impractical” from the first sentence of that section.
- b. In § 2, require recording of voluntary encounters, unless the individual refuses to be recorded (which should then be documented).
- c. Define “public” in §3 as anyone outside the BPD or a member of a prosecutorial agency.

Finally, the note regarding exigent circumstances should be considered an exception to recording, and include a definition of exigent circumstance as well as a documentation requirement:

6. Ife Exigent circumstances – an emergency situation with an imminent danger to life or serious damage to property – may prevent a member or supervisor from activating the BWC prior to responding to a call for service or an encounter with the public. In these circumstances, the member shall activate the BWC as soon as the exigency subsides and document the cause of the delay in Administrative Report, Form 95.

Recommendation 3: Require documentation for all instances where the BWC is not activated in response to a call or during any part of any investigation

Authorized exceptions to recording should consistently require documentation. This will both allow for effective supervision and oversight, to ensure that the exception was appropriately applied, and improve transparency, by providing a clear record for why this important evidence collection tool was not used. While contacts with a confidential informant or undercover officer (Exceptions to Recording ¶1), voluntary interactions with an individual who expressly states they do not wish to be recorded (¶2), and exigent circumstances (prior section Note) are permissible instances of non-recording, Administrative Record Form 95 should still be completed to document the interaction with an explanation of why it was not recorded.

Suggested action: Add the following to the conclusion of the Note at the top of page 5, and ¶¶1-2 of the Exceptions of Recording section and:

The member shall document that the BWC was not activated, indicating the type of interaction (i.e., response to call, voluntary interview, etc.) and the reason for not recording (i.e., exigent circumstance, CI contact, etc.).

Recommendation 4: Incorporate accountability and disciplinary measures for noncompliance with the policy.

To both underscore the importance of activating the BWC when required and to further the core principles of Professionalism, Transparency, and Accountability, the policy should incorporate supervision and accountability efforts. The only mention of accountability comes at the start of the policy, which merely states that a violation of the policy is cause for disciplinary action. This language should be strengthened to make clear the progressive disciplinary measures available up to termination.

The exceptions to recording note that members who do not activate their BWC as directed by the policy, or who interrupt or terminate a recording, must complete Administrative Report, Form 95 but there is no suggestion of any oversight or followup beyond the administrative paperwork. While the documentation is important for the case record, the supervisor should not just scan and file the report, but review the cause for noncompliance for possible disciplinary action. Because the failure to activate the BWC for mandatory recording is especially likely to be a continuing violation, the member should not be permitted out in the field until the policy violation is reviewed and addressed.

Suggested action: Revise the last sentence of the opening policy section as follows:

Violation of this policy is **subject to progressive cause for disciplinary action, up to and including termination, as detailed in Policy 310.**

In the Exceptions to Recording, amend the last sentence of ¶¶ 4-5 as follows:

Upon review, the first-line supervisor **shall assess what follow-up action is required with the member, including disciplinary action, and** shall scan and email the Administrative Report, Form 95 to: BWC@Baltimorepolice.org. **The member shall be limited to desk duty and administrative tasks until the supervisor addresses the BWC policy noncompliance with the member and after appropriate disciplinary measures are imposed.**

Recommendation 5: Prohibit evasion of recording and incorporate accountability and disciplinary measures for obstruction and evasion.

While the policy rightly prohibits obscuring the view of the BWC, it does not explicitly address the similar and well-established issue of evading recording. OPD attorneys have seen countless instances of BWC video where members text investigation-related communications on their cell phone and intentionally position their phone outside the range of the BWC to avoid any recording of the communication's content. While technically not obscuring the view of the BWC, intentional evasion of BWC recording should also be explicitly prohibited.

Both obscuring or evading BWC recording are serious policy breaches that inherently call into question the integrity of the officer's role in the investigation. The policy should underscore the seriousness of these violations by noting that they will be reviewed and considered for disciplinary action.

Suggested action: Amend Wearing the BWC, ¶ 2 as follows:

Members shall not intentionally obscure the view of their BWC **or conduct investigative activities in a manner intended to evade BWC recording. Any member interfering with the recording of activity within the scope of BWC of this policy shall be removed from the field until the interference is reviewed and be subject to the imposition of progressive disciplinary measures in accordance with Policy 310.**

Recommendation 6: Include compliance with subpoena or court order among mechanisms for sharing BWC data

The Review of Recordings section (page 10) addresses access to BWC recordings by law enforcement, prosecutors, and members of the public pursuant to an MPIA request.

Other instances where disclosure may be required by law, such as a subpoena or court order, should also be included.

Suggested action: Add to the Review of Recordings:

1.6 Individuals or entities with a subpoena or court order.

Recommendation 7: Incorporate into the policy the obligation to maintain a list of which member has which BWC.

In our experience, members are often swapping out their BWC due to maintenance issues and the data files are assigned names that are impossible to decipher. As a result, clearly connecting BWC data with the member who recorded it can sometimes be a challenge. While the Department had compiled a list of which member is assigned which BWC, it is not consistently maintained. The policy should require that this list be kept up to date and designate who is responsible for maintaining this list.

Suggested action: Add the following to the Uploading, Categorizing, and Titling BWC Data section (page 10):

4. A list of which member has which BWC shall be maintained and updated by ECU whenever a member exchanges or receives a BWC.

Recommendation 8: When feasible, require charging BWC during extended periods where activation is not anticipated.

Recognizing the importance of ensuring that BWC equipment is fully operational when out in the field, the policy advises members to charge their BWC when they have extended periods where BWC Activation is not anticipated. This provision should be mandatory rather than permissive.

Suggested action: Revise Required Action, BWC Maintenance and Battery Life ¶ 3 (top of page 7) as follows:

During extended periods where BWC Activation is not anticipated (e.g. arrest processing, report writing, etc.) members **shall** ~~may~~ charge their BWC **if it is feasible to do so.**