

August 13, 2015

Re: Acting Attorney General Issues Law Enforcement Directive Regarding Body Worn Cameras

Dear Mayor,

On July 28th, Acting Attorney General John Hoffman released a law enforcement directive regarding the use of body worn cameras (BWC) by law enforcement in the State of New Jersey. It will become effective in 60 days on September 26th. This directive was issued under N.J.S.A. 52:17B-98, a statutory provision which empowers the attorney general with general oversight over law enforcement in the state. While this directive represents mandatory standards that local police departments, if they use BWCs, must satisfy through a policy, standard operating procedure, directive or order, it allows for local agencies to “develop and share best practices as they gain experience in using these devices.”

This notice will: 1) briefly describe the directive; and 2) make you aware of some issues presented by the directive.

### **Brief Description**

A few areas of this directive should be highlighted:

- This directive applies only to BWCs and not dash cams.
- Police departments using BWCs must provide notice on their websites.
- Officers must activate their BWC under twelve separate circumstances listed in the directive.
- Officers must notify civilians that they are activating their BWC and, if requested by the civilian whom they are recording, may cease recording. An officer cannot ask the civilian if they want the BWC recording to cease.
- Prohibits departments from authorizing their officers with the discretion to use subjective factors in determining when to record.
- Provides for special restrictions on the use of BWCs in schools, healthcare/treatment facilities and places of worship.
- Creates a general retention period of not less than 90 days for the recordings, some exceptions included.
- Requires that police departments have the capacity to locate specific BWC recordings and the ability to “tag” recordings that raise special privacy or safety concerns. “Tagged” recordings cannot be accessed under OPRA without permission of the “county prosecutor or designee, or the director of the Division of Criminal Justice or designee.”
- BWC recordings of an event or encounter that involves an “*investigation of a criminal offense*” shall not be disclosed unless disclosure is required by the Rules of Court, a court order or permission to disclose is granted by the “county

prosecutor or designee, or the director of the Division of Criminal Justice or designee.” In other words, these records must be exempt from OPRA.

- “*Investigation of a criminal offense*” is defined as, “any police activity pertaining to the investigation of an indictable crime, disorderly persons offense, or petty disorderly offense, including but not limited to responding to a report of a possible criminal offense; an investigative detention based on or leading to reasonable and articulable suspicion to believe that a criminal offense has been committed; an arrest for a criminal offense; an interview of a potential witness to a criminal offense; or canvassing an area, neighborhood, or premises for potential witnesses to a criminal offense.”

### **Possible Issues Presented by this Directive**

Given that this directive will take effect in September, the League wishes to point out a few issues regarding its implementation. First, this directive would appear to require a longer retention period than what is required currently under state law. Pursuant to the Municipal Police records retention schedule promulgated by the state, routine video recordings may be destroyed after 31 days. *See* Municipal Police Department Records Schedule M900000-006, series 01020003. Because the directive requires that these records be maintained for 90 days, the 31 day requirement is effectively superseded.

Second, it is unclear whether the broad exemption for BWC recordings related to the “investigation of a criminal offense” is a valid exemption pursuant to OPRA. OPRA provides exemptions for records pertaining to an “investigation in progress.” N.J.S.A. 47:1A-3. It is unclear whether the directive’s definition of recordings involved with the “investigation of a criminal offense” can fall within the OPRA’s definition of records pertaining to “an investigation in progress.” Additionally, under OPRA further exemptions can be created by an executive order or by “regulation promulgated under the authority of any statute.” N.J.S.A. 47:1A-1. This directive is not an executive order, nor was it promulgated as a regulation. Also, it does not address any exemption for these recordings due to a citizen’s “reasonable expectation of privacy.” *Id. See Burnette v. County of Bergen*, 198 N.J. 408 (2009) *See also* EO No. 21 (2002). The League will be contacting the Attorney General’s office to provide New Jersey’s municipalities with clarity on these and other issues. Please share this notice with your police department, records custodian, municipal attorney and labor attorney.

Contact: Ed Purcell Esq. at (609) 695-3481 x. 137 or [epurcell@njslom.org](mailto:epurcell@njslom.org)

Very Truly Yours,

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Executive Director

