
Coates' Canons Blog: How Public Are Law Enforcement Vehicle or Body Camera Videos? (Not Very, in North Carolina.)

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[**Update:** Legislation clarifying the status of vehicle and body-worn camera recordings under the North Carolina public records law was enacted in July, 2016. The law is summarized in a blog post [here](#).]

“We may have reached the point where video technology is producing a full-fledged revolution in policing. That revolution has been crystalized, or at least revealed by, the events in Ferguson. The first element of that revolution is a growing *expectation* among Americans that any dramatic event that takes place in public will be recorded on video.”

This statement is from a recent article posted to the ACLU website. The lack of video documentation in the Ferguson shooting has sparked a call for cameras to be a standard requirement for law enforcement in vehicles and on the officers' bodies. A recent U.S. Department of Justice sponsored report “Implementing a Body Worn Camera Program: Recommendations and Lessons Learned” describes the benefits and challenges of body worn cameras. The report includes specific recommendations for implementation, balancing law enforcement, community, and privacy concerns. An introductory comment in the report observes that “A police department that deploys body-worn cameras is making a statement that it believes the actions of its officers are a matter of public record...” It's clear that the call for video documentation of police/citizen interactions is very much about transparency, and that the expectation is that videos will be available to the public. As North Carolina cities and counties prepare to respond to the call for transparency, it's important to consider the limitations that North Carolina law imposes on the release of these types of records.

State public records laws determine what access law enforcement agencies may or must provide to vehicle or body camera videos. Two provisions in North Carolina's public records law control the release of law enforcement video records. First, the public records law allows, but does not require, law enforcement agencies to withhold most law enforcement records from the public. Second, records gathered by a city or county regarding its employees are confidential. A law enforcement video record will likely fall under at least one and possibly both of these provisions.

Video data as a type of public record.

North Carolina's public records law clearly applies to video and audio recordings, whether tape and digital. The definitions in G.S. 132-1 and 121-2(8) include films, sound recordings and magnetic or other tapes, as well as “any other documentary material, regardless of physical form or characteristics” made or received in connection with the transaction of public business. Like paper or email, video and audio are types of media on which many different categories of information may be stored. It is the purpose and content of the record, not the media type, that determines whether a particular record is subject to public access. In the case of a video recording, it's possible that different parts of a single video may be subject to different levels of public access, depending on their content.

Video records under the law enforcement records exception.

Under G.S. 132-1.4, criminal investigation and intelligence records are not public records. This means that the public has no general right of access to these records, but law enforcement agencies are not prohibited from releasing them. G.S. 132-1.4(c) contains a list of information that must be provided to the public, but otherwise, criminal investigation and intelligence records may be released or withheld in the law enforcement agency's discretion.

Criminal investigation records are defined as “all records or any information that pertains to a person or group of persons that is 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.” Criminal intelligence records are “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.”

Law enforcement agencies use vehicle and body cameras for purposes that fall squarely within the definitions of law enforcement records under the exception. These videos document suspected and actual criminal activity, and the presence of cameras may also deter criminal violations of the criminal laws. This means that most video content made from vehicles or body cameras will be subject to the law enforcement records exception to the right of public access and may be withheld by the law enforcement agency.

Of course, some videos may also record content that does not meet the definition of a criminal investigation or intelligence record. An officer might, for example, forget to turn off the body camera while having lunch, or a vehicle camera might record an officer providing assistance to a motorist. In addition, as noted in the DOJ report mentioned earlier, some video may be used for training purposes or to identify agency wide operational issues. Portions of videos containing this type of content may not be protected under the exception. Indeed, content involving purely personal activities (such as having lunch) may not even constitute a public record since it was not made in connection with the transaction of public business. Records of incidents that are of interest to the public and the media, however, will most likely be subject to the exception, which means the agency has no legal obligation to release them.

Video records as part of the confidential personnel file.

Records of incidents that focus on the actions of individual law enforcement officers interacting with citizens may fall within the scope of a second public records law exception, which applies to personnel records. Indeed, the DOJ sponsored report, mentioned earlier, notes the possible application of personnel provisions, specifically mentioning North Carolina law:

“In most state public disclosure laws, exceptions are outlined that may exempt body-worn camera footage from public release . For example, even the broadest disclosure laws typically contain an exception for video that contains evidence or is part of an ongoing investigation . Some state disclosure laws, such as those in North Carolina, also exempt personnel records from public release . Body-worn camera videos used to monitor officer performance may fall under this type of exception.” *Implementing a Body Worn Camera Program*, at p. 17

In North Carolina, the general public records law does not apply to city and county employee records. Instead, access to employee personnel records is governed by separate statutes that govern particular state and local entities. For cities and counties, the personnel privacy statutes are G.S. 160A-168 and 153A-98, respectively. While the criminal investigation statute makes release of records optional, these personnel privacy statutes *prohibit* the release of personnel records, except as specifically authorized in the statute.

As with the criminal records statute, the personnel statute lists certain information that must be released, but otherwise, most records that are created or gathered in connection with a city or county employee are confidential. Employees have access to their personnel records, and may authorize the release of those records to others. Records may also be released under a court order. Cities and counties have authority to allow another governmental agency to inspect personnel records if it is deemed necessary and essential for the inspecting agency to carry out a proper function. But the statutes prohibit the release of personnel records to other agencies for the purpose of assisting in a criminal prosecution of the employee.

It seems clear that some content in law enforcement videos will constitute confidential personnel records under North Carolina law. As noted earlier, it's not possible to characterize all of the content in a video generically, but the law enforcement agency will certainly gather video of employee interactions to evaluate the employee's performance in a particular incident. As such, that footage would be considered to be a part of the employee's confidential personnel file. Even if a video exonerates an employee, the use of that footage in an internal investigation or review would likely make it a confidential personnel record. A 1995 North Carolina Attorney General opinion concluded that an Internal Affairs Division investigation of a police officer was a confidential personnel record and could not lawfully be released to the citizen who called for the investigation. As noted in David Lawrence's book, *Public Records Law for North Carolina Local Governments* , records that simply track or document employee activities, such as routine use of force reports, may not be considered part of the personnel file. But “if a department used such reports in evaluating and disciplining officers, it is likely the court

would hold them to be part of the officers' personnel files." *Public Records*, at p. 155. See also, *McDonald v. Suggs*, 2009 WL 864759, (W.D.N.C. 2009)(granting a protective order for production of a dashboard camera video in a civil case involving a police shooting, citing the need to preserve the confidentiality of the record under G.S. 132-1.4 and 160A-168).

How to interpret records that fall under two exceptions.

Most of the content in video records of law enforcement activities will likely fall within the criminal investigation or intelligence exceptions. Footage that documents an officer's performance may be both a criminal investigation record and a confidential personnel record, if it is used to evaluate the employee's performance. I know of no North Carolina case dealing with records that fall under two exceptions that have different standards for release to the public. Considering, however, that custodians and others can face criminal sanctions for the unlawful release of personnel information, it seems likely that many agencies will be inclined to withhold video records that are used for personnel purposes. If a record is not used for personnel purposes, then its release will be subject to the law enforcement agency's policy or perhaps in its discretion on a case-by-case basis.

Challenges for developing policies on release of video records.

Advocates for transparency have called for wide release of law enforcement video data, especially when the videos document controversial or disputed situations. Developing a policy about when to release these records is complicated by the various interests at stake, and also by the potential application of the personnel privacy statute, as just described.

A policy paper published by the ACLU notes: "Public disclosure of government records can be a tricky issue, pitting two important values against each other: the need for government oversight and openness, and privacy." The paper calls for notice to citizens that recording is happening, short retention periods for recordings that are not flagged – meaning they do not involve an incident that is under investigation – broad access for people who are recorded, and redaction of records that are released to the public to protect the privacy of innocent citizens, images inside private homes, and other private information captured in the recording. North Carolina statutes do not address the kinds of policies law enforcement agencies can adopt for release of criminal investigation or intelligence records. It's not clear, moreover, whether an agency would have the authority to release records only to certain members of the public and not others.

Destruction of videos is governed by state records retention schedules. The municipal records retention schedule requires mobile unit video tapes to be retained for at least 30 days, after which they can be destroyed. (Municipal Schedule, Standard 9, Law Enforcement, #81) **UPDATE: On January 5, 2015, State Archives approved an amendment to the municipal retention schedule, requiring a 30-day retention for "Law Enforcement Video and Audio Recordings." This includes "tapes and digital recordings generated by mobile and fixed audio and video recording devices." The provision includes cross references to different retention periods for records that are made part of a case file, and for records that become part of a citizen complaint or an internal affairs case. The schedule notes the need to comply with G.S. 132-1.4 (law enforcement records) and 160A-168 (personnel records). See this post on The G.S. 132 Files blog to review and download the new standard.**

Some local governments may have local policies requiring a longer retention period, and records that become part of a case file or personnel file will have longer required retention periods under the applicable schedule provisions. Since the records retention schedules provide the legal authority for destruction of records, local governments cannot legally establish a retention period shorter than 30 days.

The promise of transparency may not be realized.

The call for more use of body cameras is attracting lots of attention and represents an expectation of more documentation and more transparency. Ironically, the content that is most desired – evidence of officer behavior – is the very content the law enforcement agency has the least authority to release. While the law allows (but does not compel) release of most law enforcement video records, it does not clearly authorize redaction to protect privacy or selective release to individuals who appear in the record. The practice of routinely recording law enforcement and citizen interactions may still promote better behavior, but realization of transparency in the process may require legislative changes.



Links

- canons.sog.unc.edu/answers-questions-north-carolinas-body-worn-camera-law/
- www.aclu.org/blog/free-speech-national-security-technology-and-liberty-criminal-law-reform/video-revolution
- s3.amazonaws.com/s3.documentcloud.org/documents/1301037/cops-office-report.pdf
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