
Coates' Canons Blog: The Latest on North Carolina Body-Worn Camera Legislation

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The national debate about body-worn cameras continues as more law enforcement agencies adopt this powerful tool. As I've noted in a previous blog post here, this issue involves numerous competing issues, including safety, privacy, fairness, and transparency. Public expectations of transparency have often been frustrated by laws and policies that limit access to recordings. A recent New York Times piece criticized the City of New York for its reluctance to release recordings of police interactions with citizens and cited North Carolina as an example of a state that is taking steps to limit access to body and dashboard video. The reference was to the latest version of HB 972, a bill under active consideration in the North Carolina General Assembly. This blog post summarizes the most recent version of the proposed legislation, and focuses on the main issue: Who controls disclosure and release of these records?

Summary of Current Law

As I outlined in an earlier blog post, under the current law in North Carolina, most body-worn camera and dashboard camera recordings are not public records. The exception to the North Carolina public records law for criminal investigation records (G.S. 132-1.4) removes these records from public access and leaves it up to the law enforcement agency to decide whether and when to disclose or release them. In addition, under current law, some of these records may be considered personnel records, in which case they are confidential under the county, city, and state personnel privacy statutes (G.S. 153A-98, G.S. 160A-168, and G.S. 126-24). So it's possible that in situations where the performance of an officer is at issue, the personnel records privacy statute may prohibit the agency from releasing the records. Both the criminal investigation and personnel privacy statutes have provisions allowing access to records by court order, but don't they set out any standards or criteria for such a release. So as it stands now, there is confusion about the status of these records, especially as to whether they are personnel records, but it is generally up to the law enforcement agency to decide what public access, if any, will be provided.

Summary of HB 972: First Edition

The first edition of HB 972 stated clearly that body-worn and dashboard camera recordings are not public records. It would have allowed the head of the law enforcement agency to determine whether they are personnel records. It created two levels of access: disclosure and release. Disclosure means viewing and listening to a recording. Release means access to a copy. A person who is depicted would have a presumptive right to disclosure. The first edition set out eight factors the agency could consider in deciding whether to allow disclosure or release. A person who was denied access could seek a court order, and the bill set out the same eight factors for the court to consider, in addition to any others the court deemed appropriate, in deciding whether to order a disclosure or release. For a more complete summary of the first edition see my blog post here.

Summary of HB 972: Second Edition

The second edition includes the language that classifies recordings as "not public records" and adds a statement that they also are "not personnel records" as defined under the state, city, and county personnel privacy statutes. This version continues the dual levels of access: disclosure and release. Only the following people could request disclosure:

1. A person whose image or voice is in the recording.
2. A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure.

3. A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording.
4. A personal representative of a deceased person whose image or voice is in the recording.
5. A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.

The second edition replaces the “presumption” of disclosure with a requirement to respond to a request for disclosure “as promptly as possible” by either providing disclosure or notifying the requestor of the agency’s decision not to disclose. The second edition authorizes an agency to deny a request based on any of the following factors:

1. The person requesting disclosure of the recording is not a person authorized to receive disclosure.
2. The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.
3. Disclosure would reveal information regarding a person that is of a highly sensitive personal nature.
4. Disclosure may harm the reputation or jeopardize the safety of a person.
5. Disclosure would create a serious threat to the fair, impartial, and orderly administration of justice.
6. Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.

The second edition provides an right of appeal to superior court for a person who is denied disclosure, or who has not been provided disclosure more than three days after the request. A court can review the recording in camera and may order disclosure only if it finds that the law enforcement agency abused its discretion in denying the request. In this proceeding, the court is limited to an order for disclosure and cannot order the release of the recording.

The second edition would allow release of recordings *only by court order*. Any custodial law enforcement agency or any person requesting release of a recording would be required to file an action in superior court, stating the date and approximate time of the activities captured in the recording, or otherwise identifying the activity with reasonable particularity to sufficiently identify the recording. In determining whether to release all or a portion of the recording, in addition to any other standards the court deems relevant, the court would be required consider all of eight listed factors. These factors are similar to those in the first edition, but I’ve noted the differences for comparison in the list below.

1. Release is necessary to advance a compelling public interest.
2. The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.
3. The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding. *[First edition version: The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party.]*
4. Release would reveal information regarding a person that is of a highly sensitive personal nature.
5. Release may harm the reputation or jeopardize the safety of a person. *[First edition version: Disclosure may harm the reputation or jeopardize the safety of a person depicted in the recording.]*
6. Release would create a serious threat to the fair, impartial, and orderly administration of justice.
7. Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation. *[First edition version: Confidentiality is necessary to protect an ongoing investigation.]*
8. There is good cause shown to release all portions of a recording.

The second edition would prohibit a court from awarding attorneys fees to any party in an action filed under this statute.

The second edition provides that a law enforcement agency does not have to seek a court order for internal use of these recordings, and has authority to release them to other law enforcement agencies for law enforcement uses. The law enforcement agency would be required to provide recordings to a district attorney for review of criminal charges, in order to comply with discovery requirements in a criminal prosecution, or for any other law enforcement purpose.

The second edition omits the provisions in the first edition that would have required the Criminal Justice Education and Training Standards Commission and the Sheriff’s Education and Training Standards Commission to develop best practices for the use of body-worn cameras by local and state law enforcement officers. Instead, the bill simply requires

that each law enforcement agency that uses body-worn cameras or dashboard cameras must adopt a policy governing their use.

Conclusion

To recap: Under current law, body-worn and dashboard camera records are not public records. A law enforcement agency has broad discretion to decide what recordings will be released, but may be limited by the possible confidentiality of personnel records. The first edition of HB 972 leaves that discretion with the law enforcement agency, but provides presumptive access to disclosure for those who are depicted. It sets out criteria for the law enforcement agency to consider in denying disclosure and deciding when to release. The second edition of HB972 defers to the law enforcement regarding disclosure decisions, and transfers the responsibility for release entirely to the courts.

Who should control disclosure and release of these records? It's not an easy question to answer and it is one the General Assembly is grappling with. If you're interested in seeing how this issue is being resolved in other states, check out this interactive map, which tracks the status of state and local laws and policies regarding access to body-worn cameras.

Links

- canons.sog.unc.edu/law-enforcement-video-camera-records-an-ongoing-national-debate-about-transparency/
- www.nytimes.com/2016/06/19/nyregion/foggy-on-police-transparency.html?_r=0
- www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=HB+972&submitButton=Go
- canons.sog.unc.edu/how-public-are-law-enforcement-vehicle-or-body-camera-videos-not-very-in-north-carolina/
- www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_132/gs_132-1.4.html
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-98.pdf
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- canons.sog.unc.edu/legislative-proposal-regarding-body-worn-cameras/
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