
Coates' Canons Blog: Legislative Proposal Regarding Body-Worn Cameras

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[UPDATE: The bill summarized in this blog post has been significantly revised. Go here for a summary of the most recent edition.]

Many North Carolina law enforcement agencies have invested in body-worn cameras (BWCs). A major selling point is transparency. The cameras will document law enforcement activities and the recordings may be especially important in situations where there are questions about whether officers have performed appropriately. As I noted in my blog post here, the status of these records under the North Carolina public records law is not entirely clear. The criminal investigation records exception in the Public Records Act likely applies to most BWC recordings. Under that exception the recordings are not public records. Some of the recordings may be confidential personnel records under the city, county or state personnel privacy statutes. North Carolina cities and counties have adopted varying policies regarding the release of these recordings.

In the current session of the General Assembly, state legislators have taken a step toward a uniform set of rules with the introduction of House Bill 972. This blog post describes the key provisions of the proposed law and provides comments about how it might be interpreted and implemented if enacted.

Recordings Are Not Public Records

House Bill 972 would create a new section 132-1.4A in the Public Records Act, which would provide that access to recordings of BWCs and dashboard cameras (collectively "recordings") is covered exclusively by this section. The new statute would provide that these recordings are not public records. The bill would give to the head law enforcement officer (hereinafter "HLEO") of the agency having custody of the records the authority to determine "whether, to whom, and what portions of a recording may be disclosed and whether a copy of the recording may be released."

Comment: Under current law most recordings fall within the definition of criminal investigation or intelligence records, and as such, are not public records. Some recordings, however, might not depict information that falls within that exception – such as an officer attending to a motorist with a flat tire. One effect of the change is that all recordings will be exempt from automatic public access regardless of the actual content.

Recordings as Personnel Records

The bill would also allow the HLEO to determine whether particular records will be considered personnel records. The language in the bill is, "If an issue is raised as to whether an individual recording is a personnel record, [the HLEO] shall make that determination." If the HLEO determines that a recording is a personnel record, it is subject to the applicable personnel privacy law, based upon what type of employee (city, county, or state) is involved. The effect of that determination is to make the record confidential. As such, it could be released only as allowed in the applicable personnel privacy statute.

Comment: The bill doesn't set out what factors or standards the HLEO may or must consider when determining whether a record is a personnel record. If the intent is for the HLEO to make the determination based on the definition of personnel records in the personnel privacy statutes then it is basically the same as existing law, except that for the specific designation of the HLEO as the person who interprets the law. The standard in the personnel privacy statutes is quite broad, encompassing a wide range of types records that are "gathered" or "maintained" by the unit with respect to its employees. If, on the other hand, the intent is to give the HLEO discretion to determine

what records are confidential, it may be necessary for the unit or the HLEO to create a standard for making this determination. The discretion the bill appears give to the HLEO may raise concerns that records may be deemed confidential in the most controversial situations that involve questions about the performance of the employee. In addition, employees may have concerns that the law may authorize the HLEO to release records that would otherwise be considered confidential under the personnel privacy statute. In this respect, the new law seems to import – without providing clarification – the issue under existing law about when these records are or should be considered confidential personnel records.

Comment: Recordings that are classified as personnel records will be subject to all of the provisions in the personal privacy statutes. This raises some questions about how the rules for personnel records align with the rules under the proposed new law. For example, under the personnel privacy statutes records may be released by court order. So a question is whether the factors for court release of these recordings that are set out in the bill (see below) would apply to release by court order when they are determined to be personnel records. In addition, the personnel privacy statutes for cities and counties provide authority for the manager to disclose personnel information in certain circumstances. For cities, this may set up a conflict between the authority of the HLEO under the proposed statute, and the authority of the manager under the personnel privacy statute. And finally, the personnel privacy statutes allow release to other agencies, but prohibit release for the purpose of assisting in a criminal prosecution of the employee. This may complicate matters for the agency in cases where there are potential criminal charges against employees depicted in the recordings.

Presumption of Disclosure to Those Depicted

The bill creates a presumption that the HLEO will “disclose a recording or portion of a recording to a person depicted in a recording or portion of a recording, or to the personal representative [as defined in the bill] of that person, upon request, unless the head of the law enforcement agency determines otherwise.” This presumption applies only to “those portions of the recording that are relevant to the person’s presence in the recording.” Disclosure is defined in the statute as making the recording available for viewing, but does not include providing a copy.

Factors for Disclosure or Release

The proposed law sets out eight factors that the HLEO must consider when deciding whether to release or disclose recordings. These factors are not exclusive, however, and the HLEO may also consider other factors he or she may deem to be relevant. The factors are:

1. Disclosure is necessary to advance a compelling public interest.
2. The recording contains information that is otherwise confidential or exempt from disclosure under State or federal law.
3. The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party.
4. Disclosure would reveal information regarding a person that is of a highly sensitive personal nature.
5. Disclosure may harm the reputation or jeopardize the safety of a person.
6. Disclosure would create a serious threat to the fair, impartial, and orderly administration of justice.
7. Confidentiality is necessary to protect an ongoing investigation.
8. There is good cause to disclose all portions of a recording.

Reasons for Redaction or Denial

The bill provides that an HLEO who denies a request for disclosure or release, or redacts portions of a recording, must provide a written statement to the person who requested the records or disclosure, setting out reasons for the redaction or denial of access.

Comment: There does not appear to be any requirement for the HLEO to disclose or describe the basis for a positive decision to disclose or release records. The only documentation specifically required in the bill applies only in the case of redactions or denials of access.

Remedy for Denial of Access/Standards for Court Order

A person who is denied access to recordings may file an action in superior court in any county in which any portion of the recording was made. The person must wait at least 48 hours after making the request before filing the claim with the court. Notice of the action must be provided to the HLEO, and the HLEO or a person designated by the HLEO must be allowed to participate in the proceeding. Provisions in the bill regarding jurisdiction and attorneys fees mirror provisions in the public records law (G.S. 132-9).

The bill requires the court to consider, in addition to any other standards the court deems relevant, the same eight factors that the HLEO is required to consider, as listed above.

Requests Must be Specific

Requests for recordings must include “the date and approximate time of the incident or encounter captured by the [recording] or otherwise identify the incident or encounter with reasonable particularity.” The HLEO is not required to respond to a request that does not meet this requirement.

Fees for Copies

The bill authorizes law enforcement agencies to charge a fee for providing copies or recordings, but limits the amount to the “actual cost of making a copy.” This mirrors the standard in the public records law. (G.S. 132-6.2(b)). There is no authority to charge for requests for disclosure.

Retention Requirements

The bill requires law enforcement agencies to retain recordings for at “least the period of time required by the State Archives schedule for ‘law enforcement video and audio recordings.’” That retention period is currently set at 30 days. Agencies are authorized to retain them for a longer period by local policy.

Best Practices Regarding the Use of BWCs

Section 2 of the bill directs the Criminal Justice Education and Training Standards Commission and the Sheriffs’ Education and Training Standards Commission, in consultation with the School of Government, the Conference of District Attorneys, and any other organizations the commissions deem appropriate, to develop “best practices” for the use of BWCs. The bill identifies three specific areas that must be addressed: officer training requirements, policies about when cameras are activated or deactivated, and practices and procedures for storing recordings. The commissions are to report best practices and recommendations to the Joint Legislative Oversight Committee on Justice and Public Safety by December 1, 2016.

Providing Software to State Agencies

Section 3 of the bill requires law enforcement agencies to provide the software they use for BWCs and dashboard cameras to the SBI and the State Crime Laboratory (if the law enforcement agency uses the lab to analyze recordings), at no cost to these state agencies. This requirement would become effective December 1, 2016.

The rest of the bill would become effective October 1, 2016 and would apply to all recordings made on or after that date.

Links

- canons.sog.unc.edu/latest-north-carolina-body-camera-legislation/
- 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/PDF/BySection/Chapter_132/GS_132-1.4.pdf



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