



**Testimony for the House Judiciary Committee
March 12, 2015**

HB 627 – Public Safety – Law Enforcement Officers – Body-worn Cameras

SUPPORT

The ACLU of Maryland supports HB 627, which modifies Maryland’s Wiretap Act to specifically allow for law enforcement use of body-worn cameras (BWCs), and which establishes certain minimum standards governing the use of these cameras to provide essential privacy protections for the Marylanders who will potentially be filmed.

The tremendous public interest in, and pressure for BWCs reflects the significant concern among large segments of the community about how police exercise their significant power to deprive us of our liberty, and even of our life. BWCs allow us, for the first time, to have a record of what occurred in the significant number of police-citizen interactions that otherwise go unwitnessed, a record that is not subject to accusations of bias, misperception, faulty memory, or deliberate falsehood. But in addition to serving to confirm or rebut allegations of misconduct, BWCs can serve as crucial evidence in a prosecution, can allow departments to more effectively monitor their officers’ behavior and conduct, can be an invaluable training tool, and evidence shows that they have a calming effect on both officer and citizen behavior, which makes both officers and the public safer. They are thus being adopted or considered in jurisdictions throughout the state and the country.

The use of BWCs in Maryland must take into account the provisions of our Wiretap Act, which, with certain exceptions, generally prohibits recording a “private conversation” without the consent of all the parties involved. Cts. Jud. Proc. § 10-402(a)(2)-(3). Although many (and even most) interactions between police and members of the public are probably not “private conversations,” some may be, and it therefore makes sense to specifically allow police departments to use BWCs without fear of liability under the statute, as the legislature previously did with respect to cameras mounted on patrol vehicle dashboards (dash cams). *Id.* § 10-402(c)(4). This bill does that (on p.5), but critically says that BWC use is permissible only with the critically important privacy protections provided by the rest of the bill. We believe the two must be inextricably linked.

For all the good they can do, it is important to acknowledge that which way the camera lens is facing matters, and there is a significant difference between members of the public recording officers engaged in the performance of their official duties, and officers filming the members of the public they encounter. BWCs have the potential to invade privacy – more than dashcams or other surveillance by law enforcement. Police officers enter people’s homes and encounter bystanders, suspects, and victims in a wide variety of sometimes stressful and extreme situations. And stored BWC records provide a vast trove of data that law enforcement could turn into a surveillance tool via data mining. As a result, a clear framework protecting privacy must be part of any law regarding body-worn cameras.

HB 627 provides such a framework. It regulates when recording can and cannot occur, but does so in way that does not give officers unbridled discretion, which would fatally

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
F/410-366-7838

FIELD OFFICE
6930 CARROLL AVENUE
SUITE 410
TAKOMA PARK, MD 20912
T/301-270-2258

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
COLEMAN BAZELON
PRESIDENT

SUSAN GOERING
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

undermine the legitimacy of a BWC program (because citizens would then have no assurance that cameras will be on when officers are exercising their law enforcement authority). And it establishes minimum standards governing the use of BWC data. It is worth noting that these provisions are consistent with the consensus recommendations of the Baltimore Mayor's Working Group on the Use and Implementation of Body-Worn Cameras, <http://mayor.baltimorecity.gov/programs/body-camera-working-group/report> (which was comprised of representatives from the Baltimore Police Department, the City Law Department, local and state legislators, community representatives, and information technology, and budget professionals). The key components are as follows:

When to record

Officer discretion is a central problem for any BWC program. If officers have broad discretion about when cameras must be turned on, citizens will rightly suspect that the camera will be off when misconduct occurs. And the existence of broad discretion means that officers cannot be held accountable if they fail to record something that should have been recorded. In such circumstances, the BWC program will provide none of the hoped-for benefits, to citizens or departments. On the other hand, simply requiring that cameras always be on for the entirety of an officer's shift (to avoid the discretion problem), even if technologically feasible, would have significant privacy implications for both officers and members of the public. Officers should be able to have a private conversation (with coworkers, spouses, etc.) without it being recorded and saved by their employer, and citizens should have the ability to report a crime (either as a victim or witness) or simply have a conversation with an officer about community concerns, without fearing that a permanent record is being kept of that conversation. And if they can't do that, they may be unwilling to cooperate with police, with significant impacts on public safety. HB 627 addresses these problems by requiring that officers turn on the camera when responding to a call for service, or at the initiation of a law enforcement or investigative encounter between an officer and a member of the public.¹ However, the bill also gives citizens who are not subject to an officer's state granted authority discretion to decide whether or not the encounter will be recorded. We believe this strikes the right balance between recording the events that should be recorded for accountability purposes, while ensuring that officers and members of the public can have an unmonitored conversation in appropriate circumstances. Crucially, the discretion is placed in the hands of the citizen, where it belongs, because it exists only when the citizen is free to terminate the encounter in its entirety. And the request that recording cease is itself captured on camera, protecting the officer from an allegation that he or she simply improperly failed to record. Finally, the rule is clear and easy to follow, and not riddled with exceptions, making mistakes less likely to occur.

HB 627 also prohibits an officer from using a camera to record an individual engaged in a constitutionally protected activity, unless the officer has a reasonable suspicion that a criminal activity is occurring. Maryland has an unfortunate history of infiltrating peaceful groups exercising their First Amendment rights, and documenting their activities in law enforcement databases. Police surveillance of constitutionally protected activity inevitably has a chilling effect on people's willingness to engage in that activity, because of a legitimate fear that the government's record of a person's participation in the activity can somehow be used against them. Law enforcement must have clear instructions that these cameras are not to be used for general surveillance of the public – especially during

¹ It is also critical that each agency establish meaningful penalties for officers found to have violated this rule.

constitutionally protected activities, such as attendance at a demonstration or religious function.

Notice to citizens that they are being recorded

Officers should be required to notify people they are being recorded. This is a key component of HB 627: for cameras to have any hope of changing how members of the public behave in interactions with law enforcement, the public must be well informed that they are being recorded during their encounters with police. And members of the public cannot exercise their right to request that recording cease if they don't know recording is taking place. The notification need not be elaborate (an officer could simply say "I am wearing a camera and recording our conversation," and, when appropriate, could add "do you want the recording to continue?"), and the requirement is that the notice occur "as close to the inception of the encounter as reasonably possible" to accommodate the difficulties an officer might face in giving immediate notice.

Access to and use of Recordings

HB 627 carefully lays out who should have access to the recordings and for what purpose the recordings may be used. The subject of the recording always has access.

HB 627 also provides clear guidelines on how the videos may be used. The agency may use the recording for investigations of misconduct, internal auditing, supervising or training purposes, in the event the agency has the reasonable suspicion that the recording contains evidence of a crime, in the investigation, prosecution or defense of criminal or civil actions, and in response to public records requests. They may not be used to create a database of mug shots, used in photo arrays or be searched with facial or voice recognition software.

We think it appropriate that the bill does not seek to alter the Maryland Public Information Act with respect to BWC footage, because we believe that the law currently provides police departments with the ability to protect the privacy interests at stake with respect to BWC data, while maintaining the goal of transparency.

In conclusion, for the ACLU, the challenge of body-worn cameras is the conflict between their potential to invade privacy and their strong benefit when it comes to police accountability. Overall, we think they can be a win-win—but *only* if they are deployed within an appropriate policy framework that ensures they protect the public without becoming yet another system for routine surveillance *of* the public. Without such a framework, their accountability benefits would not exceed their privacy risks. HB 627 lays out the correct balance in all of these instances.

For the foregoing reasons, the ACLU of Maryland supports HB 627.