ACLU Maryland

Testimony for the Senate Education, Health, and Environmental Affairs Committee
February 22, 2018

SB 788 – Public Information Act – Revisions

OPPOSE as drafted

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The ACLU of Maryland opposes SB 788 as currently drafted. The provision in this bill dealing with body worn camera (BWC) video (called "personal surveillance video" here) is virtually identical to legislation that has been proposed for the last two legislative sessions (SB 970 in 2017, and SB 930 in 2016) and heard in the Judicial Proceedings Committee. In 2016 the bill did not get a vote, and in 2017 it received an unfavorable report. While this year's bill has additional, completely unrelated provisions (which we discuss separately below), the provisions relating to BWC footage are the same as the earlier versions of the bill that we have opposed, and that have been previously rejected by the Senate Judicial Proceedings Committee. For the reasons that follow, we urge an unfavorable report, absent a key amendment that would address our concerns.

Denying access to footage transforms body cameras from a tool of accountability to a tool of surveillance

The tremendous public interest in, and pressure for, body worn cameras reflects the significant concern among large segments of the community about how police exercise their considerable authority with respect to the people they serve. Body worn cameras allow us, for the first time, to have a record of what occurred in the large 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 if body worn cameras are to be a tool for accountability and transparency, which is the *entire* reason for their adoption (not as surveillance tools, as the language in this bill suggests), and for the public demand that they be used, the public must have access to the footage. In disputes between police and members of the public, body-worn cameras will provide evidence to show what actually happened. Sometimes the officer's account will be vindicated; sometimes the individual's account will be vindicated; sometimes the truth will be a hybrid of both. But without access to that footage, the truth will not be available.

SB 788 seeks to establish special rules governing inspection of body-worn camera footage. There is no doubt that body-worn cameras will capture some video that should not be released to a third party requestor (someone who isn't the subject of the video). But Maryland's current Public Information Act (MPIA), Gen. Prov. 4-101 et. seq., provides ample authority to law enforcement agencies to deny access to those parts of recordings that all would agree should not be released, including specific protections to protect privacy (a great many of which are not even addressed by this bill). Despite such footage having been available for several years, proponents cannot point to a single problem anywhere in the state.

Current Law has ample safeguards to prevent improper disclosures

Videos recorded by body worn cameras are "investigatory records," subject to special rules under the MPIA. Existing law gives law enforcement agencies broad discretion to withhold investigatory records from disclosure to third parties while an investigation is pending. Md. Code, Gen Prov. §§ 4-343, 4-351(a)(1). However once the investigation is over, law enforcement agencies must make a more particularized showing of why disclosure would not be in the public interest, though they still have broad discretion. *See, e.g., Prince George's County v. Washington Post Co*., 149 Md. App. 289, 333 (2003). Among the factors that an agency *must* consider are whether the disclosure would:

1. Interfere with a valid and proper law enforcement proceeding;
2. Deprive another person of a right to a fair trial or an impartial adjudication;
3. Constitute an unwarranted invasion of personal privacy;
4. Disclose the identity of a confidential source;
5. Disclose an investigative technique or procedure;
6. Prejudice an investigation; or
7. Endanger the life or physical safety of an individual.

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Md. Code, Gen. Prov. § 4-351(b). In short, even when the subject of the video has made the records request, law enforcement agencies have authority to redact portions of what is shown to protect the interests enumerated in the seven factors above.

The most important thing to understand about the existing MPIA structure, however, is that it does not treat investigatory records compiled by law enforcement agencies as *mandatory* denials, i.e. records or information that *must not* be released. Instead, it treats them as *discretionary* denials; that is, records that can be redacted, but only when there is a legitimate public interest in doing so.

Defects in the Proposed Bill

This background is necessary to understand the single biggest problem posed by SB 788. The bill currently creates two categories (of very different sizes, and in very different ways) of body worn camera records that *must* be withheld. First, any records that depict victims of various crimes, or the deaths of certain persons, must be redacted, pursuant to proposed § 4-327.1(b)(1)(i)-(iv), p.6, l.4-19. Second, the bill commands that *every other body worn camera record must* be denied unless the record fits within the exceptions established in proposed § 4-327.1(b)(1)(v), p.6, l.20-27. That subsection seeks, appropriately, but incompletely, to carve out various categories of police behavior that would not be prohibited from disclosure.

Beginning with § 4-327.1(b)(1)(v), the problem is that the list is not sufficiently inclusive. It omits the myriad police directives that people do, or not do, a particular act, where the directive is not accompanied by an arrest, detention, search, use of force, or injury, such as improper orders to move along, cease panhandling, questioning, etc., which are a frequent source of police-community tensions. Being

able to document this police conduct is crucial, and one of the key reasons to have BWCs in the first place. For example, the ACLU has requested BWC video that should have been recorded by officers working the perimeter of the unprecedented five day police cordon that sealed off parts of the Harlem Park neighborhood following the death of Det. Suiter last year. For the vast majority of the encounters between officers and residents, the City would presumably argue that there was no detention (because simply living in the neighborhood or visiting the neighborhood would not have been a lawful basis for any detention), and so none of those videos, in which there is tremendous public interest, and which the City has said it will produce, would be allowed to be released.

The list also omits all police investigatory behavior, including searches of houses, vehicles, etc., which, when done improperly, illegally, or discriminatorily, may also be a significant source of police-community tension. For example, multiple videos have come to light showing Baltimore police officers planting or "recreating" the discovery of evidence in searches of property, not persons. All of those videos (were they not already introduced as evidence in a case, as they would not be if the State's Attorney dismissed charges based on what was shown in the video) would be categorically barred from disclosure (because the victim of such improper behavior would not be seen in the video, and thus would not be a person in interest, and may not even know of them).

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These omissions are critical, because § 4-327(b)(1)(v) begins with a prohibition. Release MUST be denied unless the video is NOT one of the things laid out in that subsection. So, without changes, there are significant categories of police interactions that pose no inherent privacy threat that are categorically barred from disclosure.

These concerns could all be addressed by a single, simple amendment that we have proposed each year the bill has been introduced. If "shall" in 4-327.1(b)(1), p.6, l.5 were changed to "may," making these denials permissive, but not mandatory, a requestor could argue for the release of footage that is not specifically exempted in § 4-327.1 in appropriate cases. If such an amendment were made, the statutory language would have to also be moved to a new subsection in Part IV of Subtitle 3 of the MPIA, which contains the provisions authorizing discretionary denials of certain information in public records, rather than in Part II, as the current bill does, which pertains to *required* denials of entire records, rather than parts of public records.

Another significant problem with the current mandatory structure defining categories of footage that may not be disclosed is that BWC video will frequently not fall neatly into one category or another. For example, one tragically recurring occurrence is for someone to call police because a family member who suffers from mental illness is acting erratically or violently, and when the police arrive, rather than deescalating the situation, they injure or kill the family member the caller was trying, in part, to help. The caller in such cases will often fit the criteria of a victim under proposed § 4-327.1(b)(1)(i)-(iii), triggering a mandatory denial under SB 788. Yet such incidents often generate significant public controversy, and those videos will be the most important to

release, either to reassure the public that police acted appropriately, or to be transparent about police actions and reassure the public that the incident is not being covered up. Changing "shall" to "may," as discussed above, would ensure that the records custodian weighs the public interest in release against the other statutory factors, and determines whether or not to release the video. If "shall" remains the operative word, then even where there is substantial public interest in releasing the video, and even when a police department wants to do so, the video will have to remain secret, and custodians less concerned with the public's interest in transparency and accountability will have a legal shield to hide behind without any possibility of judicial review.

We have similar concerns about § 4-327.1(b)(1)(iv), p.6, l.16-19, the restriction proposed for the first time in this year's bill that prohibits release of the portion of video that depicts the death of any public employee if it occurs within the scope of their employment, as well as the portion of videos that depicts the death of certain public employees, regardless of whether it occurs within the scope of their employment. Under this provision, for example, if the police intentionally or accidentally shoot an off duty police officer (as has tragically happened in the past), no matter how much legitimate public interest there is in the video of the event, no matter how much evidence of potential wrongdoing by the on-duty police, no matter how much the department wants to release the video, the video cannot be released.

Additionally, the bill could be interpreted to allow a custodian to release only the moment of arrest, detention, etc. when dealing with an incident that fits within § 4-327.1(b)(1)(v), rather than the entire incident recording, which is necessary to understand the context for and evaluate the propriety of the police action shown in the video. This is so because the bill requires denial of "that part" of a video that "does not result" in an arrest, etc. Statutory language to ensure that such a result is not permitted (or even mandated) by the law is necessary. A sponsor amendment proposed in 2016 to address this point has been omitted from this version of the bill, making the bill even worse than the earliest version.

The asserted justification for retaining the mandatory denial language does not hold up to scrutiny. Some claim that the mandatory language means that records custodians will have less of a burden to review videos in response to a request. But this is simply not the case. Whether phrased as shall or may, the custodian will still have to review exactly the same volume of footage, and make the same decision about whether it fits into the releasable or redactable category.

Finally, and perhaps most importantly, the jurisdictions supporting this legislation are implicitly (or even explicitly) asserting that they cannot be trusted to exercise their existing discretionary authority (and any discretionary authority that would be granted if the bill were amended as we suggest) to protect the legitimate privacy interests of the people they are sworn to serve, and asserting that they must instead be forced to do so. This is both absurd and extraordinary, particularly in light of the fact that the proponents have never offered even a single example of how they are prohibited from

protecting legitimate privacy interests by current law, or how they would be prohibited from doing so if the bill were amended as we suggest. We are often extremely skeptical of the discretionary authority too often granted to law enforcement agencies, but in our experience as a frequent requestor of public records, we have never encountered a police department that was too eager to release investigatory records, particularly when those records reveal potential misconduct.

In thinking about the propriety of prohibiting law enforcement agencies from releasing records covered by this bill, it is critical to recognize that, under the MPIA, the legislature has already decided that discretionary denials are sufficient for some of the most sensitive records that government possesses, such as those that would "deprive another person of a fair trial;" Md. Code, Gen. Prov. § 4-351(b)(2), "constitute an unwarranted invasion of personal privacy;" id. § 4-351(b)(3), identify confidential law enforcement sources; id. § 4-351(c), "endanger the life or physical safety of an individual; id. § 4-351(b)(7); "facilitate the planning of a terrorist attack;" id. § 4-352(b)(2), or those that contain "intelligence information" of a law enforcement agency, id. § 4-351(a)(3). If "may" is sufficient for these cases, based on the recognition that there are times when the public interest demands that such records be released, it certainly is sufficient for the enumerated cases in SB 788.

It is also important to recognize that proposed § 4-327.1(c)(1) does not adequately protect the public interests in accessibility of body worn camera footage, because it applies only to the subject of a video. But while the person recorded by a body worn camera has an indisputable interest in being able to access that footage, they are not the only person with a potential interest in the footage. The public itself, particularly through the press, also has a legitimate interest in documenting how police act. And neither the public, nor the press, should have to wait for or depend on a person in interest requesting the record and then making it publicly available, and in some cases there will be no person in interest, or that person will be unavailable.

Additional Provisions Unrelated to BWC Footage

We support part of the proposed new § 4-103(d) that prohibits custodians from releasing a person's social security number to anyone other than the person in interest. However, we oppose the provision prohibiting a custodian from releasing a person's date of birth. Records on Maryland's Judiciary Case database currently contain dates of birth, and without them, anyone with the same name as the person in the record could and would be confused with them, leading to unwarranted conclusions or suspicions.

We support the part of this bill that proposes a new § 3-341 that prohibits release of the address, email address, or telephone number of a person who asks to be added to a government distribution list, but note that that provision is also a standalone bill being heard this session, HB 677/SB 477 Public Information Act - Required Denials - Physical Addresses, E-Mail Addresses, and Telephone Numbers.

For the foregoing reasons, the ACLU of Maryland opposes SB 788 as drafted, and urges an unfavorable report.