

Michigan Sets Privacy Standards In The Law Enforcement Body-Worn Camera Privacy Act. Better Know The Victim's Rights Act and FOIA Requirements!

By Gene King, Law Enforcement Action Forum Coordinator



In July of 2017, the Michigan Governor authorized the enactment of PA 85, the Law Enforcement Body-Worn Camera Privacy Act, MCL 780.311 et seq. (Body Camera Act) to take effect January 8, 2018. The Act does the following:

- Mandates that body-worn camera recordings are subject to protections provided to crime victims under the Crime Victim's Rights Act.
- Establishes that body-worn camera recordings, made by a police officer, in a private place, would be exempt from disclosure under the Freedom of Information Act, except under certain circumstances.
- Allows for certain people to request a copy of body-worn camera recording in a private place, but restricts recordings that were exempt from FOIA and the Victim's Rights Act.
- Sets minimum retention periods for body-camera recordings under specific situations.
- Exempts disclosure under FOIA of body-worn camera recordings retained in connection with an ongoing criminal or internal investigation until completion.
- Allows a law enforcement agency to charge a fee for a copy of a body-worn camera recording.
- Requires a law enforcement agency that uses body-worn cameras to develop a written policy regarding the use of the cameras by its officers.

****Attached is a copy of the Body Camera Act for reference as specific Sections are discussed.****

Upon its face, the Body Camera Act seems to be straight forward in what a department must do if their officers wear a body-worn camera or make a recording of an incident or encounter while in a private place. It is important to realize the Body Camera Act defines a body-worn camera as a device that is worn by an

officer that records their activity. The word “device”, “worn” and “records audio and video” should be considered as encompassing Taser mounted cameras or other such devices that fall within the definition.

The Law Enforcement Action Forum first published a *Sample Policy and Procedures for Audio & Visual Recording Using a Body-Worn Recording Device* in January of 2015 and has very recently updated the policy to comply with the Law Enforcement Body-Worn Camera Privacy Act. Bringing the policy into compliance was only part of the equation. LEAF Legal Advisor, Audrey Forbush, shareholder of Plunkett Cooney P.C., suggests the Body Camera Act requires particular knowledge of working with the Crime Victim’s Rights Act (CVRA) and the Michigan Freedom of Information Act (FOIA), especially since the amendments of 2015.

Forbush commented that close attention needs to be paid to the words used in the Body Camera Act.

- Section 3 (1), affirmatively states the “disclosure of any audio or video recording by a body worn camera is subject to the protections provided for crime victims in sections...” and refers to numerous sections of the CVRA.
- Under Section 3 (2), “...a recording recorded by a law enforcement officer with a body worn camera that is recorded in a private place is exempt from disclosure under the Freedom of Information Act.”
- Section 5 (1), “An audio or video recording from a body worn camera that is retained by a law enforcement agency in connection with an ongoing criminal investigation or an ongoing internal investigation is not a public record and is exempt from disclosure under the freedom of information act, ... but only to the extent that disclosure as a public record would do any of the following:” (The Act includes a list of exemptions similar to the FOIA Sec. 13 exemptions often cited by law enforcement.)

She pointed that Sec 3 (1) indicates all recordings are protected by the Victim’s Rights Act but under (2) the exemptions from FOIA are only for recordings in a private place. By contrast, Section 5(1), exempts any recordings of ongoing criminal and ongoing internal investigations only to the extent that the exemption meets those listed. Forbush said the Body Camera Act is written in a straight forward manner but you better know the nuances of the language or the department could cause itself a lot of trouble and possibly litigation if they mishandle the information.

Victim’s Rights Under The Body Camera Act

Forbush said Section 3 (1) of the Body Camera Act refers to the William Van Regenmorter Crime Victim’s Rights Act, Act 87 of 1985, which established several rights for victims of crime and juvenile offenses. For the purposes of the Body Camera Act, Forbush felt it was important to understand that one of the primary issues of the Crime Victim’s Rights Act is to prohibit the release of a victim’s home or work address, home or work telephone number, picture, photograph, drawing or other visual representation or image. She continued that victims of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct or similar crime where the victim is less than 18, in addition to protecting the previous information, the name and address of an immediate family member or relative of the victim who has the same surname as the victim or any other information that would tend to reveal the identity of the victim, including reference to the victims familial or other relationship to the accused must also be protected.

This becomes important when the department is looking at all video associated with an incident, including videos made traveling to and from the scene and of interviews with victims. In video that is taken in the victim’s neighborhood or home, the background of the video must be scrutinized for identifying features that are contemplated by the Victim’s Rights Act. Forbush also cautioned to closely scrutinize the footage

involving initial contact for family members or photos that may be visible in the background. Also watch for known local identifiers that may divulge the neighborhood or address. All this information must be protected under the Michigan Constitution Article I, Section 24, Victim's Rights Act and the Body-Worn Camera Privacy Act.

If a department fails to comply with the Crime Victim's Rights Act there is no specific private cause of action. Forbush pointed out that the Crime Victim's Rights Act states in MCL 780.832, Sec. 82, "*Nothing in this article shall be construed as creating a cause of action for money damages against the state, a county, a municipality or any of their agencies, instrumentalities, or employees.*"

It is recognized that an individual has an "informational privacy interest" right, which is an individual's interest in avoiding disclosure of personal matters (*Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)). This "informational privacy interest" is of constitutional dimension in only two instances:

1. Where the release of personal information could lead to bodily harm (*Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998).
2. Where the information released was of a sexual, personal, and humiliating nature (*Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998).

A state actor's violation of an individual's substantive due process right to privacy may give rise to a cognizable § 1983 claim. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998) and *Bloch v Ribar*, 156 F.3d 673 (6th Cir., 1998) (right to privacy impacted by publicly revealing confidential and highly personal details of victim's rape). The court uses the standard of whether the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question, *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008).

Forbush said that the people who are responsible for reviewing and releasing body-camera video must know and understand the CVRA, FOIA and the Body Camera Act. They have to work diligently to comply with privacy requirements and appropriately utilize the exemptions found in FOIA and the Body Camera Act to protect covered information. The burden is on top level management to make sure employees are properly trained on the various mandates of each respective Act.

FOIA And The Act

Though on its face the Body Camera Act seems to give significant exemptions from FOIA for body-worn camera recordings, Forbush says particular attention should be given to specific sections. Section 3(1) all relates to the Crime Victim's Rights Act and (2) exempt all recordings made in a private place except as provided under exemptions in Sections 4 and 5. Section 4, lists individuals who may request a copy of a recording made in a private place. These individuals under Section 4 may obtain a copy of the recording unless there is an exemption from FOIA, Section 1 or the Crime Victim's Rights Act and information exempted under Section 5 of the Act.

Section 5 exempts release of a recording which involves ongoing criminal or internal investigations but only to the extent that that disclosure of the public record would *interfere with law enforcement proceedings; deprive a person of a fair or impartial adjudication; constitute an unwarranted invasion of personal privacy; identify a confidential source or disclose confidential information furnished by the source; disclose investigative techniques or procedures; endanger the life or physical safety of law enforcement personnel; a civil action where the requesting person is a party and 10 sections of the Crime Victims' Rights Act.* Interestingly many of the exemptions are similar to those found in FOIA, Section 13.

It is important to note that all the previous Sections address recordings in private places. However, Section 5 is about *all* recordings from a body-worn camera that are retained by an agency. Forbush said that the statement “...but only to the extent that disclosure as a public record would do any of the following...” puts the responsibility on the FOIA Coordinator to provide specific reasons why the information requested meets the statement of exemptions just as if the request for information were a general FOIA request. She cautions that simply citing the Law Enforcement Body-Worn Camera Privacy Act will probably not be sufficient to meet the current FOIA standards for not producing the recording and supporting the decision why a recording meets the statute exemptions.

She points to *Federated Publications Inc. v City of Lansing*, 467 Mich. 98,102; 649 NW2d 383 (2002) where the Michigan Supreme Court ruled a public body must provide the requester with a written response stating the reason for the denial, including an explanation of the basis for any claimed exemption from disclosure. Additionally, with the 2015 changes in FOIA, Forbush cautioned that if a production of records is denied or redacted, the explanation for the basis of denial or redaction must be complete. She suggests the explanation should contain language from the cited exemption and how that exemption fits into the information denied or redacted at the time the record is produced.

Forbush suggested that FOIA Coordinators read the October 2003 LEAF Newsletter entitled *FOIA: Still Complicated & Potentially Costly!* The LEAF Newsletter provides examples to help Coordinators provide sufficient explanations to support their conclusion that the information requested fits a particular exemption. She went on to say that at a minimum, public bodies should cite the particular statutory exemption itself, quote its language and provide a brief explanation, if necessary and/or possible, how the records fits within the exemption. Most importantly, do not just cite the Law Enforcement Body-Worn Camera Privacy Act as the source of the exemption. The Michigan Courts are on record that FOIA is a pro-disclosure statute and the burden is on the municipality to justify non-disclosure. Therefore, always provide as much information as possible without compromising the exempt information.

It is absolutely the responsibility of the municipal entity to comply with the Freedom of Information Act requirements for handling requests for information. Forbush said every effort must be made to meet all timetables, documentation and response requirements found in FOIA. It may be necessary to provide additional training for whomever is responsible for gathering and reviewing materials of the requirements of the Crime Victim’s Rights Act, the Body Worn Camera Privacy Act and how they fit into FOIA, including the ability to charge the appropriate fees as described in Section 7 of the Body Camera Act.

Records Must Be Kept

Forbush remarked that Section 6 (1) of the Body Camera Act requires departments to retain general recordings not associated with a particular event for 30 days from the date the recording is made. Subsection (2) requires that ongoing criminal or internal investigation or incidents involving prosecution or civil action should be retained until the completion of the ongoing investigation or legal proceeding. Subsection (3) requires the recordings to be retained for not less than 3 years if the recording is relevant to a formal complaint against a law enforcement officer or agency.

She said it is important to comply with the Act but the statute of limitations for civil rights claims, in Michigan, against a municipal entity, begins 3 years from when the cause of action arises. The MML suggests that records described in the Act and those of incidents that may be described as involving controversy should be kept for a minimum of 42 months. This gives wiggle room for a plaintiff who files a claim at the last minute and the paperwork does not catch up to the retention deadline. The prosecuting attorney should be consulted prior to disposal of any evidence involving a criminal case. This may be significant in cases where a protracted appeal process may be involved.

In Section 6 (4), the Body Camera Act speaks of being unable to produce a recording due to the passing of the retention schedule or due to technical failure or human error. If a recording cannot be produced, there is no presumption created that the recordings would corroborate either the prosecution's or the defendant's version of events in a criminal prosecution or the plaintiff's or defendant's version in a civil action. Forbush said this section levels the playing field for all participants in the proceedings and allows the officers to present their version of the events, which they hopefully clearly articulated in their reports that the recordings would have supported if they still existed.

A Policy Is Required

In Section 8 of the Law Enforcement Body Worn Camera Privacy Act, the Legislature made it very clear that if a department utilizes a body camera they must have a written policy that outlines the use of the camera by officers, how the equipment and recordings are maintained and specifics on the release of the recordings that are made. Forbush remarked that if a department has cameras and does not have a policy or regulate the use and storage of the recordings, they are placing themselves at risk, even before the Act. There are several statutes that impact the release of information and industry standard on the handling of the documentation of a department. Forbush suggest review of the LEAF Newsletter from December of 2012, *Thoughts About Body Worn Cameras*. She also points to *FOIA: Still Complicated & Potentially Costly*, October 2013.

Providing rules, policy and training addressing the requirements for how the recordings may be used and handled is very important. Forbush said departments should look in the Law Enforcement Risk Reduction Manual Chapter 21, but specifically the *Sample Policy and Procedures for Audio & Visual Recording Using a Body Worn Recording Device* found in Chapter 21 Policy C. Section VI. *Departmental Use and/or Release of Audio/Visual Recordings* and VII. *Requirements for Compliance*. These sections provide important guidance for employees in how the recordings are to be handled and released. The sections also provide penalties for violating the policy and its intent. She remarked that top management and supervisors must be very proactive in ensuring compliance and protecting information held by the department.

Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
1675 Green Road, Ann Arbor, MI 48105 ph - 800-653-2483*

Contact information: Gene King, gene.king@meadowbrook.com ph - 800-482-2726 ext. 8040

Act No. 85

Public Acts of 2017

Approved by the Governor

July 12, 2017

Filed with the Secretary of State

July 12, 2017

EFFECTIVE DATE: January 8, 2018

STATE OF MICHIGAN

99TH LEGISLATURE

REGULAR SESSION OF 2017

Introduced by Reps. Runestad, Lucido, Chirkun, Chang, Howrylak, Barrett and Gay-Dagnogo

ENROLLED HOUSE BILL No. 4427

AN ACT to exempt from disclosure certain audio and video recordings recorded by law enforcement officers with a body-worn camera in certain private places; to describe certain individuals who may request disclosure of those audio and video recordings; and to prescribe the powers and duties of certain local and state law enforcement agencies.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the “law enforcement body-worn camera privacy act”.

Sec. 2. As used in this act:

(a) “Body-worn camera” means a device that is worn by a law enforcement officer that electronically records audio and video of his or her activities.

(b) “Evidentiary audio and video recording” means an audio and video recording of an incident or encounter recorded by a body-worn camera, including a crime, arrest, citation, search, use of force incident, or confrontational encounter with a citizen, that may be materially useful for investigative or prosecutorial purposes, including for a criminal and internal investigation.

(c) “Private place” means a place where an individual may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or a substantial group of the public has access.

Sec. 3. (1) The disclosure of any audio or video recording recorded by a body-worn camera is subject to the protections provided for crime victims in sections 8, 19, 19a, 21, 34, 38, 48, 62, 68, and 80 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.758, 780.769, 780.769a, 780.771, 780.784, 780.788, 780.798, 780.812, 780.818, and 780.830.

(2) Except as otherwise provided in section 4 and subject to section 5, a recording recorded by a law enforcement officer with a body-worn camera that is recorded in a private place is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Sec. 4. Except for an audio and video recording exempted from disclosure under section 13 of the freedom of information act, 1976 PA 442, MCL 15.243, and section 3(1) or 5, any of the following individuals may request a copy of an audio and video recording recorded by a law enforcement officer with a body-worn camera in a private place:

- (a) An individual who is the subject of the audio and video recording.
- (b) An individual whose property has been seized or damaged in relation to a crime to which the audio and video recording is related.
- (c) A parent of an individual who is less than 18 years of age described in subdivision (a) or (b).
- (d) A legal guardian of an individual described in subdivision (a) or (b).
- (e) An attorney who represents an individual described in subdivision (a) or (b).

Sec. 5. (1) An audio or video recording from a body-worn camera that is retained by a law enforcement agency in connection with an ongoing criminal investigation or an ongoing internal investigation is not a public record and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, but only to the extent that disclosure as a public record would do any of the following:

- (a) Interfere with law enforcement proceedings.
- (b) Deprive a person of the right to a fair trial or impartial adjudication.
- (c) Constitute an unwarranted invasion of personal privacy.
- (d) Disclose the identity of a confidential source or, if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
- (e) Disclose law enforcement investigative techniques or procedures.
- (f) Endanger the life or physical safety of law enforcement personnel.
- (g) Disclose information regarding a crime victim in violation of sections 8, 19, 19a, 21, 34, 38, 48, 62, 68, and 80 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.758, 780.769, 780.769a, 780.771, 780.784, 780.788, 780.798, 780.812, 780.818, and 780.830.

(2) An audio or video recording from a body-worn camera that is retained by a law enforcement agency relating to a civil action in which the requesting party and the public body are parties is not a public record and is exempt from disclosure under section 13(1)(v) of the freedom of information act, 1976 PA 442, MCL 15.243.

Sec. 6. (1) Except as provided in subsections (2) and (3), a law enforcement agency shall retain an evidentiary audio and video recording recorded by a body-worn camera for not less than 30 days from the date the recording is made.

(2) A law enforcement agency shall retain audio and video recordings that are the subject of an ongoing criminal or internal investigation, or an ongoing criminal prosecution or civil action, until the completion of the ongoing investigation or legal proceeding.

(3) A law enforcement agency shall retain audio and video recorded by a body-worn camera for not less than 3 years after the date the recording is made if the recording is relevant to a formal complaint against a law enforcement officer or agency.

(4) If a complaint against a law enforcement officer or law enforcement agency is made after the expiration of the retention period described in subsection (1), (2), or (3) or a law enforcement agency is unable to produce an audio and video recording related to the complaint in any criminal prosecution or civil action as a result of a technical failure or human error, this act does not create a presumption that the audio and video recording would corroborate either the prosecution's or the defendant's version of events in a criminal prosecution or the plaintiff's or the defendant's version in a civil action.

Sec. 7. A law enforcement agency may charge a fee for a copy of an audio and video recording recorded by a law enforcement officer with a body-worn camera. A fee charged under this section shall be calculated under and in compliance with section 4 of the freedom of information act, 1976 PA 442, MCL 15.234.

Sec. 8. A law enforcement agency that utilizes body-worn cameras shall develop a written policy regarding the use of the body-worn cameras by its law enforcement officers and the maintenance and disclosure of audio and video recordings recorded by body-worn cameras that complies with the requirements of this act.

Enacting section 1. This act takes effect 180 days after the date it is enacted into law.

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved

Governor