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The Brennan Center for Justice appreciates the opportunity to submit comments on the NYPD's Proposed Policy for Body-Worn Cameras. The Brennan Center for Justice at NYU Law School is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We have testified before the New York State Assembly for a hearing on the use of body-worn cameras by law enforcement, and we have developed in-depth resources comparing body camera policies used by police departments across the country.<sup>1</sup>

In our comments, we first place the proposed body camera policy in its broader context, noting both the potential promise and the potential drawbacks of police-worn body cameras. Second, we address specific elements of the proposed policy and its accompanying addendum.

#### **A. Body cameras as a tool for both accountability and surveillance**

Body cameras show great promise as a tool for accountability and transparency. They are, however, still essentially untested. Little empirical evidence is available about their efficacy and their impact on police-community relations. Any implementation of body cameras – or other new technology – must be accompanied by a rigorous, independent study to determine whether their benefits outweigh their risks and to assess how to calibrate the program to best serve the interests of the community. In a force as large as the NYPD's, the cost of storing and managing body camera video will become significant very quickly; those costs cannot be justified in the absence of evidence that their use contributes substantially to effective and community-focused policing.

In addition, outfitting police officers with cameras will pose inevitable risks to privacy, particularly for innocent people captured in the background of a law enforcement interaction or persons inside private residences and other constitutionally protected areas. The widespread deployment of

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<sup>1</sup> *Hearing on the Use of Body-Worn Cameras by Law Enforcement Officials Before the N.Y. State Assembly, Comms. on Codes, Judiciary, & Governmental Operations* (2015) (statement of Michael Price, Counsel, Liberty and Nat'l. Security Program, Brennan Center for Justice), available at <https://www.brennancenter.org/sites/default/files/151208%20-%20Price%20-%20Testimony%20to%20NYS%20Assembly%20on%20BWCS%20-%20FINAL.pdf>; see POLICE BODY-WORN CAMERA POLICIES, <https://www.brennancenter.org/body-cam-city-map?splash>.

cameras will also magnify the increasingly pervasive surveillance on American streets, and the impact will be felt disproportionately in communities that have the majority of contacts with law enforcement. The Department's body camera policies and procedures must mitigate these risks to the greatest extent possible.

Finally, the proposed policy is accompanied by an addendum that addresses several issues not taken up in the policy itself, including the public release of footage, retention of videos, and discipline for failure to comply with the policy. It is, however, unclear where the addendum, or the individual issues covered in it, will be placed. It is also unclear whether the policy matters addressed in it are scheduled to be resolved before the pilot project commences, and if so, through what process. The Department must clarify these questions before initiating the pilot project, as the issues in the addendum are critical to public confidence in, and effective functioning of, the program.

## **B. Proposed body camera policy**

We offer the following observations regarding specific aspects of the NYPD's proposed body camera policy and the accompanying addendum. We do not thereby intend to either endorse or reject other aspects of the policy, including provisions regarding officers' ability to view body camera video prior to writing or submitting reports or statements.

### 1) Prohibited recordings

The policy states that body-worn cameras shall **not** be used to record certain enumerated events or locations, including "any individuals who are engaged in political activity." The policy further defines "political activity" as "the exercise of a right of free expression or association for the purpose of maintaining or changing governmental policies or social conditions." We agree that it is appropriate to prohibit the recording of political activity; we believe that when the government creates and maintains video recordings of political activity, it risks chilling protected First Amendment expression and association. We recommend that the NYPD clarify that if a law enforcement interaction takes place during political activity (for instance, a person engaging in political activity is arrested or searched), the body-worn camera will be activated and the guidance regarding recording will apply in full.

### 2) Requests to terminate recording, including inside a home

The policy directs that officers may deactivate a body-worn camera "upon a recorded request by a member of the public if in the judgment of the [officer] it is safe and advisable to do so and after considering all the circumstances, including the requester's right to privacy." The policy further advises that if "a suspect is present at the scene," the camera should not be deactivated. It is important that body-worn camera policies provide guidance regarding individual requests that the camera be turned off, and we believe this is the right approach.

The policy does not, however, address how or whether officers should entertain requests to turn off a camera inside a private home, apartment, or other constitutionally-protected spaces. Many of the same factors that counsel in favor of body cameras generally, including increased oversight of officer behavior and transparency regarding police-civilian interactions, suggest that cameras should frequently record inside a home as well, where a record of a law enforcement interaction may be even more critical.

At the same time, however, a body camera captures a record of the home and preserves it for later review, raising issues of privacy and Fourth Amendment protections. In addition – as the policy notes – a body camera may record an account from a victim of domestic violence or other sensitive crime who may be uncomfortable speaking with a camera present.

These factors counsel in favor of particular caution when recording inside a home. Where an officer is at the home to serve a warrant or in the context of another non-consensual interaction, the guidance above should be followed – that is, the officer should consider all the circumstances, including the requester’s privacy, when he or she receives a request to deactivate the camera. However, when the officer is in the home pursuant to the occupant’s consent, the occupant must be advised of the presence of the camera and must have an opportunity to request that the camera be turned off, which should be honored unless enforcement action is anticipated or taken.<sup>2</sup> The use of a camera otherwise exceeds the scope of consent. Notably, several cities already emphasize the importance of consent to record in the context of a consent search.<sup>3</sup>

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<sup>2</sup> Notably, the policy governing the earlier pilot program specified that the cameras would not be activated in places where a “reasonable expectation of privacy” exists. N.Y. POLICE DEP’T, OPERATIONS ORDER 48: PILOT PROGRAM – USE OF BODY-WORN CAMERAS 3 (2014), *available at* [https://rcfp.org/bodycam\\_policies/NY/NYPD\\_BWC\\_Policy.pdf](https://rcfp.org/bodycam_policies/NY/NYPD_BWC_Policy.pdf). A July 2015 report on the pilot program issued by the NYPD’s Inspector General noted that such an area would include an individual’s home and that officers would not activate their cameras “unless enforcement action is anticipated or taken.” *See* NYC DEP’T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD’S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY 11 (2015), *available at* <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

<sup>3</sup> *See, e.g.*, SEATTLE POLICE DEP’T, BODY-WORN VIDEO PILOT PROGRAM, 16.091 (Apr. 1, 2015), *available at* <http://www.seattle.gov/police-manual/title-16---patrol-operations/16091---body-worn-video-pilot-program>; CHARLOTTE-MECKLENBURG POLICE DEP’T, BODY WORN CAMERA, 400-006 (Apr. 29, 2015), *available at* [https://rcfp.org/bodycam\\_policies/NC/Charlotte\\_BWC\\_Policy.pdf](https://rcfp.org/bodycam_policies/NC/Charlotte_BWC_Policy.pdf) (directing that if a citizen withdraws consent for recording during a consent search of a “non-public” place, the officer shall consider consent to be withdrawn for the search itself); LAS VEGAS METRO POLICE DEP’T, BODY WORN CAMERAS, 5/210.01, *available at* [https://www.bja.gov/bwc/pdfs/LasVegasMetro\\_PD-BWC-Policy-Current.pdf](https://www.bja.gov/bwc/pdfs/LasVegasMetro_PD-BWC-Policy-Current.pdf) (stating that when an officer’s legal basis for a residence search is based solely on consent, the officer is required to advise and obtain consent to record); SAN JOSE POLICE DEP’T, POLICE BODY WORN CAMERA POLICY, *available at* [http://www.sjpd.org/InsideSJPD/BodyCameras/SJPD\\_BWC\\_Policy\\_06-29-15\\_with\\_POA\\_approval.pdf](http://www.sjpd.org/InsideSJPD/BodyCameras/SJPD_BWC_Policy_06-29-15_with_POA_approval.pdf) (same).

3) Notice of recording

The policy states that uniformed members of the service are “*encouraged* to advise members of the public that they are being recorded as soon as it is safe and practicable to do so.” (Emphasis added.) Initial responses to body cameras suggest that they contribute most to positive behavior on both sides of the badge when officers advise civilians that the interaction is being recorded, and we would therefore recommend that the policy adopt a stronger stance with respect to notification.<sup>4</sup> For instance, the policy could say that officers “*must* advise members of the public that they are being recorded as soon as it is safe and practicable to do so.”

4) Discipline for failure to record

The policy does not specify officer discipline for failing to record; it states that when an officer fails to record when such recording would be required, “the Platoon Commander should investigate the circumstances surrounding the failure. Platoon Commander should take appropriate action.” The policy does not, however, specify or describe what would constitute “appropriate action.”

The appendix to the policy acknowledges that “[o]fficer discipline is generally not mentioned in the proposed policy,” and observes that “[i]t is difficult to specify a discipline system as there are many variables that determine whether or not an officer should face discipline in specific instance[s].” The appendix goes on to explain that “police officers will face discipline for failure to follow the patrol guide and for consistent and unjustified failure to record.”

It is certainly the case that a variety of factors will determine the proper official response when an officer fails to record, including the circumstances surrounding the law enforcement interaction, the officer’s history with and familiarity with body-worn cameras, and whether there was a reasonable justification for failing to record. Nevertheless, the policy should more explicitly spell out the disciplinary consequences for unjustified failures to record; if body cameras are to help facilitate increasing transparency of police functions, there must be straightforward guidance regarding the consequences of failing to do so without justification. The policy could contemplate an escalating series of disciplinary measures, perhaps after a pilot or “break-in” period for officers to become acclimated to wearing body-worn cameras. In addition, there could be a mechanism for a high-level

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<sup>4</sup> See, e.g., Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, THE HUFFINGTON POST (Oct. 13, 2015), [http://www.huffingtonpost.com/entry/police-body-camera-study\\_us\\_561d2ea1e4b028dd7ea53a56](http://www.huffingtonpost.com/entry/police-body-camera-study_us_561d2ea1e4b028dd7ea53a56) (“Many officers reported that the equipment changed citizen behavior and helped to de-escalate confrontations between civilians and police.”); Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, THE GUARDIAN (Nov. 4, 2013), <https://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>.

supervisor to review the circumstances in the event of a dispute over the justification for a failure to record.

5) Retention limits

The addendum to the proposed policy states that the NYPD will generally retain video for six months, unless needed for “some other purpose,” in which case it will be “retained longer.” The addendum goes on to specify retention limits in particular circumstances, including where the video is needed for criminal cases, civilian complaints, or lawsuits; where it contains evidence of a felony or misdemeanor; or where it contains certain evidence that could be relevant to a federal lawsuit against the police department. Limits on retention, particularly for video with no evidentiary value, are critical to guarding against abuse or misuse of body camera recordings. The NYPD’s retention limits should be formalized and given official status, with public notice in the event of proposed changes.

6) Auditing measures

Neither the proposed policy nor the addendum contains any mechanism for auditing the body camera system, including access to, copying, and sharing of recordings. The only relevant passage in the policy indicates that “all viewings will be recorded and monitored by the BWC audit system,” but there is no further description there or elsewhere of how the BWC audit system operates. It is critical that a robust and fully functioning audit system be implemented at the beginning of the pilot period. In the absence of such a system, it will be impossible for the department to accurately assess both the adequacy of the system and the potential for misuse.

7) Training

Neither the proposed policy nor the addendum sets out any provisions for training officers in the appropriate use of body cameras and handling of the video. According to the background materials, the goal of the body camera pilot project is to determine whether body cameras “can help to encourage lawful and respectful police-citizen interactions and improve both officer and public safety.”<sup>5</sup> These goals will be achievable only if officers are trained in how and when to notify civilians that the body camera is operating; how to position the body camera to ensure that it is recording as much of an interaction as possible; what the consequences are for deliberately failing to record; and more. Indeed, the Police Executive Research Foundation, DOJ’s Office of Community Oriented Policing Services, and the National Law Enforcement and Corrections Technology

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<sup>5</sup> NYPD BODY-WORN CAMERA PROPOSED POLICY: FACT SHEET, <https://policingproject.org/nypd-body-worn-camera-proposed-policy-fact-sheet/> (last visited Aug. 5, 2016).

Center’s Sensor, Surveillance, and Biometric Technologies Center on Excellence all recognize the critical importance of training to an effective body camera program.<sup>6</sup>

In addition, any conclusions that can be gleaned from the pilot will be meaningful only if officers have been fully trained in their use. The department must therefore commit to dedicating training time and resources to ensure that both the officers and the public are best served by the NYPD’s implementation of body cameras.

8) Limits on use of biometric recognition technologies

Finally, neither the policy nor the addendum sets any limits on the future use of biometric recognition technologies, which seems likely to occur within the foreseeable future. For instance, Taser – a major manufacturer of body cameras – has stated that body camera video will be live-streaming to the cloud by 2017, with facial recognition software rolled out not long after that.<sup>7</sup> And biometric recognition is not limited to facial recognition; remote iris recognition and high-tech fingerprint identification are becoming available as well.<sup>8</sup>

Both real-time and stored videos are thus likely to become searchable for particular individuals. While this functionality could help officers find suspects faster and augment their ability to identify and remember people they encounter, it will also create an unprecedented level of intrusion into private moments and everyday activities, effectively eliminating anonymity in public. And because individuals may not always be correctly identified, people who simply look like the intended target run the risk of being tracked or arrested; notably, the risk of being misidentified appears to be higher

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<sup>6</sup> See U.S. DEP’T OF JUSTICE COMMUNITY ORIENTED POLICING SERVICES & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM RECOMMENDATIONS AND LESSONS LEARNED 65 (2014), available at <https://www.bja.gov/bwc/pdfs/PERF-ImplementingBWCPProgram2014.pdf> (“Before agency personnel are equipped with body-worn cameras, they must receive all mandated training.”); U.S. DEP’T OF JUSTICE OFFICE OF JUSTICE PROGRAMS NATIONAL INSTITUTE OF JUSTICE, A PRIMER ON BODY-WORN CAMERAS FOR LAW ENFORCEMENT 9 (2012), available at <https://www.bja.gov/bwc/pdfs/A-Primer-on-Body-Worn-Cameras-for-Law-Enforcement.pdf> (“Proper training on policies and equipment is a must. Agencies should ensure that a thorough logistics plan is in place prior to implementation.”).

<sup>7</sup> Matt Stroud, *Taser Plans to Livestream Police Body Camera Footage to the Cloud by 2017*, MOTHERBOARD (July 18, 2016), <http://motherboard.vice.com/read/taser-axon-police-body-camera-livestream>.

<sup>8</sup> See, e.g., Derrick Harris, *Google: Our New System for Recognizing Faces Is the Best One Yet*, FORTUNE (Mar. 17, 2015), [fortune.com/2015/03/17/google-facenet-artificial-intelligence/](http://fortune.com/2015/03/17/google-facenet-artificial-intelligence/); David Goldman, *Hackers Recreate Fingerprints Using Public Photos*, CNN MONEY (Dec. 30, 2014), [money.cnn.com/2014/12/30/technology/security/fingerprint-hack/index.html](http://money.cnn.com/2014/12/30/technology/security/fingerprint-hack/index.html); Robinson Meyer, *Long-Range Iris Scanning Is Here*, THE ATLANTIC (May 13, 2015), <http://www.theatlantic.com/technology/archive/2015/05/long-range-iris-scanning-is-here/393065/>.

for women and people of color.<sup>9</sup> The department will need to anticipate and plan for these eventualities with a forward-looking policy that sets strict limits upon the use of biometric recognition technologies. Limits on retention of video, robust oversight mechanisms, and regular audits will also assist in ensuring that biometric recognition technologies are used, if at all, in a limited fashion.

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If we can provide any additional information regarding our comments, we would be pleased to do so. We can be reached at [rachel.levinson.waldman@nyu.edu](mailto:rachel.levinson.waldman@nyu.edu) (Rachel Levinson-Waldman: 202-249-7193) or [faiza.patel@nyu.edu](mailto:faiza.patel@nyu.edu) (Faiza Patel: 646-292-8325).

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<sup>9</sup> See, e.g., Clare Garvie & Jonathan Frankle, *Facial-Recognition Software Might Have a Racial Bias Problem*, THE ATLANTIC (Apr. 7, 2016), <http://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/>.