

**TESTIMONY OF THE BRENNAN CENTER FOR JUSTICE**

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**before the New York City Council Committee on Public Safety**

**on Intro. 1136-2018: Requiring the NYPD to issue public reports on  
the Department's use of body-worn cameras**

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Good morning members of the Committee on Public Safety. Thank you Chairman Richards for holding this hearing and inviting the Brennan Center to testify.

My name is Laura Hecht-Felella. I am a Legal Fellow with the Liberty and National Security Program at the Brennan Center for Justice at NYU School of Law.

The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. The Liberty and National Security Program focuses on ensuring that law enforcement use of new and existing technologies does not violate fundamental rights. As part of this work, the Brennan Center has documented the body camera policies of police departments throughout the United States.<sup>1</sup> In addition, body cameras were one of several tools that the Brennan Center analyzed in a chart published last month on the New York City Police Department's ("NYPD") surveillance technologies.<sup>2</sup>

Although body cameras are often heralded as a straightforward tool to improve law enforcement accountability, they raise significant and complicated issues around privacy, data retention, and disclosure. In the wake of high-profile incidents involving use of force by police officers, some civil rights groups have encouraged law enforcement to adopt

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<sup>1</sup> *Police Body-Worn Camera Policies*, BRENNAN CENTER (last updated July 19, 2019), <https://www.brennancenter.org/our-work/research-reports/police-body-worn-camera-policies>.

<sup>2</sup> *New York City Police Department Surveillance Technology*, BRENNAN CENTER (Oct. 4, 2019), <https://www.brennancenter.org/our-work/research-reports/new-york-city-police-department-surveillance-technology>

body-worn cameras as part of broader transparency reforms.<sup>3</sup> Body cameras have distinctive potential as accountability tools because, if used appropriately, they can help provide a contemporaneous record of interactions between police officers and the public.

However, without adequate safeguards, body cameras also have the potential to significantly increase scrutiny of already over-policed communities.<sup>4</sup> Particularly when used in conjunction with other technologies, body cameras could conceivably function as mass surveillance devices. They can record significant amounts of information about the people that officers encounter while in the course of their regular duties, regardless of their relationship to a suspected crime. The possibility that body cameras might be equipped with facial recognition technology raises constitutional concerns,<sup>5</sup> as well as issues regarding effectiveness and racial bias.<sup>6</sup> It also magnifies the risk that they will become a tool of dragnet surveillance. Strong oversight over access to, retention, and analysis of body camera data is critical to protecting the privacy of New Yorkers.

The NYPD's use of body-worn cameras has increased exponentially in the last five years. The Department first began using body cameras in 2014 as part of a pilot program required by a federal judge in *Floyd v. City of New York* – a lawsuit challenging the NYPD's unconstitutional stop-and-frisk program.<sup>7</sup> In March 2019, the NYPD announced that all of its approximately 20,000 uniformed patrol officers had been equipped with

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<sup>3</sup> See, e.g., *Police Body-Worn Cameras: Let's Do It Right*, ACLU (last accessed Nov. 15, 2019) <https://www.aclum.org/en/police-body-worn-cameras-lets-do-it-right>.

<sup>4</sup> Press Release, The Leadership Conference on Civil and Human Rights, Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras (May 15, 2015), <https://civilrights.org/2015/05/15/civil-rights-privacy-and-media-rights-groups-release-principles-for-law-enforcement-body-worn-cameras/>.

<sup>5</sup> Facial recognition is recognized as extraordinarily intrusive, challenging reasonable expectations of privacy. Law enforcement use of facial recognition can chill the exercise of First Amendment rights by exposing protesters to persistent surveillance and identification. See, e.g., *Garbage In, Garbage Out: Face Recognition on Flawed Data*, GEORGETOWN LAW'S CENTER ON PRIVACY AND TECHNOLOGY (May 16, 2019), <https://www.flawedfacedata.com>.

<sup>6</sup> Numerous studies have found that facial recognition performs poorly when analyzing the faces of women, children, and people with darker skin tones. See Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1(2018), <http://gendershades.org/overview.html>; see also Salem Hamed Abdurrahim, *Review On The Effects Of Age, Gender, And Race Demographics On Automatic Face Recognition*, 34 THE VISUAL COMPUTER 1617 (2018), <https://doi.org/10.1007/s00371-017-1428-z>; Jacob Snow, *Amazon's Face Recognition False Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018), [www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.d](http://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.d)

<sup>7</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

body-worn cameras. The Department also stated that it would be providing an additional 4,000 body cameras to its specialty units.<sup>8</sup>

Although the NYPD solicited public feedback<sup>9</sup> and ultimately published a policy regarding its use of body cameras,<sup>10</sup> it has been difficult for the public to get information about how the program is operating or to obtain recorded footage.<sup>11</sup> Moreover, the Department's policy on its public release of body camera footage, published last month, has serious gaps and leaves much to the Police Commissioner's discretion.<sup>12</sup> Although the NYPD is one of the most technologically advanced police forces in the United States,<sup>13</sup> historically it has not been the most transparent. The NYPD often reveals details about its surveillance technologies only after costly Freedom of Information Law (FOIL) litigation, investigative reporting, or court orders.<sup>14</sup> This erodes public trust and can lead to abuses of constitutional rights.

As this bill contemplates, it is important that the NYPD's use of body cameras is overseen closely by the City Council. However, the Brennan Center is concerned that the proposed bill does not go far enough. It leaves out many of the factors critical for ensuring body-worn cameras do not unduly invade New Yorkers' civil rights and civil

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<sup>8</sup> Press Release, NYPD, NYPD Completes Rollout of Body-Worn Cameras to All Officers on Patrol (Mar. 6, 2019), <https://www1.nyc.gov/site/nypd/news/pr0306/nypd-completes-rollout-body-worn-cameras-all-officers-patrol>.

<sup>9</sup> Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy (Policing Project at New York University School of Law, Fall 2016), <https://www.policingproject.org/nypd-bodycam-report>; NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy (NYPD Apr. 2017), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-camera-policy-response.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf).

<sup>10</sup> Use of Body-Worn Cameras, NYPD Patrol Guide (Jan 8, 2018), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/body-worn-cameras-patrol-guide.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf).

<sup>11</sup> In February 2019, an appellate court ruled that body worn camera footage is not a personnel record protected from FOIL under Civil Rights Law Section 50a. *Matter of Patrolmen's Benevolent Association of the City of N.Y., Inc. v. De Blasio*, 169 A.D.3d 518, *recalled and vacated* by 171 A.D.3d 636 (1st Dept. 2019). However, civil rights groups and the Civilian Complaint Review Board have still reported difficulties obtaining footage. See Yasmeen Khan, More Than a Third of Police Misconduct Investigations Waiting for Body Camera Footage, GOTHAMIST (June 17, 2019), [https://gothamist.com/2019/06/17/ccrb\\_body\\_camera\\_videos.php](https://gothamist.com/2019/06/17/ccrb_body_camera_videos.php); Memorandum from the Civilian Complaint Review Board on BWC and Document Request Issues with the NYPD (July 5, 2019), [https://brooklyneagle.com/wp-content/uploads/2019/07/20190710\\_boardmtg\\_BWC\\_memo-2-1.pdf](https://brooklyneagle.com/wp-content/uploads/2019/07/20190710_boardmtg_BWC_memo-2-1.pdf).

<sup>12</sup> Public Release of Body-Worn Camera (BWC) Footage of Critical Incidents, NYPD Operations Order (Oct. 18, 2019), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/oo-46-19-bodyworn-camera-footage.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/oo-46-19-bodyworn-camera-footage.pdf).

<sup>13</sup> *About NYPD*, NYC.gov, [www1.nyc.gov/site/nypd/about/about-nypd/about-nypd](http://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd) (last accessed Oct. 3, 2019).

<sup>14</sup> Dustin Volz, *Privacy Group Sues NYPD For Release Of Facial-Recognition Documents*, REUTERS (May 2, 2017), [www.reuters.com/article/us-usa-cyber-face-recognition-idUSKBN17Y1Z1](http://www.reuters.com/article/us-usa-cyber-face-recognition-idUSKBN17Y1Z1).

liberties. These include information on how body camera footage is retained, who has access to it, how it is analyzed, and how it might be combined with a number of other surveillance technologies currently being used by the NYPD.

The retention of body-worn camera footage generates a large database that can be used as a powerful instrument of surveillance. NYPD policy permits body camera footage to be stored for a year or longer, and authorizes officers to view their own body-worn camera recordings for any reason, and that of other officers if “the viewing is in furtherance of an investigation” or for another official purpose.<sup>15</sup> It is important to know in what kinds of cases NYPD officers are utilizing recordings from body-worn cameras, and to ensure that body camera footage is not being used to conduct generalized surveillance. The Department should be required to track, audit, and make generalized reports on who is accessing body camera footage and for what stated purpose. The body camera program was originally created to improve accountability and repair public trust in the NYPD after a federal judge found the Department’s stop-and-frisk policies were racially biased and unconstitutional.<sup>16</sup> It is important to ensure that surveillance of those very communities is not a by-product.

The City Council should also require the NYPD to report on whether, and how often, it shares body camera footage with other law enforcement agencies. The NYPD belongs to the New York State Intelligence Center (NYSIC), which is a “fusion center” that facilitates joint information sharing between the private sector and local, state, and federal government agencies.<sup>17</sup> To the extent the NYPD is disseminating footage outside of the Department, it should be required to report on it. In addition, given the reported difficulties the public and oversight agencies like the Civilian Complaint Review Board have had in obtaining NYPD body camera footage, the NYPD should report on its responses to FOIL or other requests.

The City Council should also require the NYPD to track and report on its use of biometric tools, like facial recognition, to analyze recordings or assist in identification, whether in real time or through historical video. This could be incorporated in the quarterly reporting contemplated by subsection (b) of the proposed legislation.

Combining body cameras with biometric technologies, such as facial recognition, creates an unprecedented level of intrusion into the everyday lives of New Yorkers, and poses serious implications for our basic liberties. Unlike some of the NYPD’s other technologies, body cameras can simultaneously record audio and video. They are transportable, allowing officers to record not just in public spaces, but also inside New

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<sup>15</sup> Use of Body-Worn Cameras, NYPD Patrol Guide, *supra* Note 8.

<sup>16</sup> *Floyd*, 959 F. Supp. 2d at 563.

<sup>17</sup> Faiza Patel & Andrew Sullivan, Brennan Center, A Proposal for an NYPD Inspector General (Sept. 2012), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_NYPD\\_Inspector\\_General.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_NYPD_Inspector_General.pdf).

Yorkers' apartment buildings and homes. Moreover, even videos of discrete, individual incidents could include a significant amount of personal information about not only the subject of the video, but also anyone in the background – especially if layered with facial recognition capabilities. In the past, the collection of biometric information generally required a physical search, like taking someone's fingerprints or conducting a buccal swab. However, facial recognition enables law enforcement officers to make a multitude of real-time identifications remotely and in secret, raising concerns about the impact on Fourth Amendment-protected privacy rights. It also may discourage political activism by enabling the instantaneous and widespread identification of individuals at constitutionally protected gatherings. These concerns are magnified by the fact that facial recognition software has been shown, in study after study, to have large error rates in identifying women, people of color, children, and the elderly.<sup>18</sup>

We cannot continue to address surveillance technologies like body cameras in isolation. These tools are used in combination with one another, creating layered surveillance that is incompatible with democratic society. It is worth noting that body-worn cameras would be covered by the Public Oversight of Surveillance Technology (POST) Act, introduced by Council Member Vanessa Gibson. The POST Act would require the NYPD to disclose basic information about the surveillance tools it uses and the existing safeguards to protect the privacy and civil liberties of New Yorkers.<sup>19</sup> Because it would require the NYPD to provide high-level data about its body-worn camera program, it would be a valuable companion to today's proposed bill, which requires more detailed reporting on specific incidents. The POST Act is supported by over half the City Council, with thirty co-sponsors and endorsements from the Black, Latino/a, and Asian Caucus and the Progressive Caucus.

Thank you again for the opportunity to testify today. I am happy to answer any questions.

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<sup>18</sup> *Supra*, Note 6.

<sup>19</sup> New York City Council Int. 0487-2018, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343878&GUID=996ABB2A-9F4C-4A32-B081-D6F24AB954A0>.