

POLICE VIDEO AND PUBLIC RECORDS: The New Rules



BY MARK R. WEAVER

TV news and the internet often feature videos of pets, sports highlights and—everyone's favorite category—dumb people doing dumb things. Now, there's a new contender in videos vying for your attention: cameras worn by police, known as body-worn cameras.

Until 2019, Ohio law concerning public accessibility of this footage was as inconsistent and hard to follow as your drunk friend's explanation about how he lost his shoes. But, after years of lobbying from groups with opposing views on how and whether to release body-worn camera video, Ohio lawmakers finally set standards that clarify what can be released.

It's important to distinguish between two kinds of videos that might be available at your local police department. The first category covers police body-worn camera and dashboard camera footage. These records – created by the law enforcement agency itself – should be released to the public, unless one of 17 statutory exceptions apply. More on that later.

The other category of footage police maintain is video supplied by others. Think bystander phone videos or images captured by security or doorbell cameras. Police don't create these records, but they do collect them during investigations. While fitting the definition of a public record in R.C. 149.011(G), such videos would likely be protected from release as a confidential law

enforcement investigation record. That exception lasts through the end of the criminal trial or until prosecutors determine that no case will go forward. Then, the records can be released unless some other exception applies.

One exception to the rule of keeping footage confidential until the first trial is over is security camera footage created by a public office, such as surveillance footage of a government building's lobby. Surveillance video like this was at issue in a case where a vengeful litigant ambushed and tried to kill a judge walking near the Jefferson County Courthouse. Luckily, the judge was carrying a handgun (prosecutors and judges are permitted to carry concealed weapons, including in courthouses) and was able, with the help of a nearby armed probation officer, to stop the attack. An exterior courthouse security camera captured the incident and – you guessed it – the media immediately requested a copy. After months of litigation, the Ohio Supreme Court, in *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 2020-Ohio-5371, ordered the video released.

Bystander and security camera videos are often voluntarily publicized by whoever made the recordings. Their desire to score social media buzz often leads them

Park
NATIONAL BANK

Work with people who understand your retirement is uniquely yours.

614-228-0063
parknationalbank.com

Investments are not FDIC insured, not bank guaranteed, and may lose value.

to post it before police collect it for an investigation. When detectives do obtain such private footage, it becomes that agency's record and – despite their ability to withhold it as a confidential law enforcement investigation record – police may choose to proactively release it to, for example, seek public assistance to apprehend suspects. As is true with nearly all purposeful release of records that could otherwise be

“ Since body-worn cameras go everywhere an officer goes, the legislative considerations about what to release are more complex.”





withheld, the record provided will then be available to anyone who asks for it, until destroyed pursuant to a records retention schedule. The release essentially creates a waiver of future ability to withhold that record.

Not every release of confidential records constitutes a waiver. Recently, I was the special prosecutor tasked with charging a sheriff who ignored mandatory confidentiality statutes regarding child abuse records and posted them on the internet. The jury convicted the sheriff and he resigned from office. The lesson? If a statute protects a record from release, a public records practitioner should determine if that statute mandates or permits withholding the record.

In the public records law classes I teach, I use a traffic light analogy to illustrate this concept. Records prohibited from release are “red-light” records. Examples include LEADs database criminal history reports, tax returns filed with the state, HIV test results and – as one now former sheriff discovered – child abuse reports. Records that a public office may permissively withhold based on an exception

are “yellow-light” records. This includes attorney-client privileged materials (the client may release), government trade secrets and confidential law enforcement investigatory records.

A public official who releases a record that is, by statute, a yellow-light exception creates a waiver – a bar from withholding that record again. Conversely, a public official who releases a record that the law designates as a red-light exception risks going to jail for 180 days. The offense is not listed in Title 29 (where most criminal offenses are found), but rather at R.C. 102.03(B).

Now that you understand the public records status of video that police obtain after someone else filmed it, let's focus on the first category – body-worn and cruiser cam video. While R.C. 149.43 (A)(1)(jj) places body-worn camera and cruiser cam footage in the same category, the difference in these two types of video creates different policy impacts. For example, unless a police cruiser drives through your living room window, a dashboard camera is unlikely to film you in your underwear, watching *The Masked Singer* and

binge eating chocolate-covered pretzels. The footage a dashboard camera collects is almost always in a public area, where the expectation of privacy (and the likelihood of encountering people in their underwear) is reduced.

Since body-worn cameras go everywhere an officer goes, the legislative considerations about what to release are more complex. In any given shift, an officer wearing such a camera can be in the bedroom of someone who reported a prowler, the hospital room of a rape victim, or a public bathroom where someone overdosed on fentanyl. Advocates for police warned legislators that privacy issues raised from footage taken in places like that indicated that body-worn camera video should have significant restrictions on release. On the other side of the argument were news media lobbyists and critics of police, who urged as much openness as possible. Working with these competing factions, legislators created a general rule of openness for these videos, with 17 specific exceptions from release.

These exceptions are self-explanatory and, as of this writing, no courts have interpreted them. A few examples shed light on how lawmakers sought to balance the interests between victim/officer privacy and the desire for transparency. One exception says that an agency may withhold footage that depicts “the death of a person or a deceased person's body, unless the death was caused by a peace officer.” Another: agencies may withhold footage that depicts “a conversation between a peace officer and a member of the public that does not concern law enforcement activities.” Other exceptions protect images of children, household interiors unless an adversarial encounter occurs there, and personal



information of someone questioned but not charged by police. In some cases, the subject of the recording can waive the agency's withholding of the record. If a lawsuit ensues, a judge can balance the competing interests – an option not available to courts in cases involving most other public records.¹

As more Ohio police agencies mandate that officers wear cameras to record their work, courts will further explore these issues. Until then, to better understand which ones can be withheld from public records release, grab a bag of chocolate-covered pretzels and review the 17 statutory exceptions at R.C. 149.43 (B) (15-17). It's a better use of your time than watching *The Masked Singer*, anyway.

¹ R.C. 149.43(H)(2).

Mark R. Weaver
Isaac Wiles
mweaver@isaacwiles.com

