



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

June 23, 2016

Senator Loni Hancock
Chair of the Senate Public Safety Committee
Sate Capitol, Room 2031
Sacramento, CA 95914

RE: AB 1940 (Cooper) – Support if Amended/Oppose Unless Amended

Dear Senator Hancock:

The Electronic Frontier Foundation (EFF) regrets to inform you that we oppose AB 1940 unless amended. EFF does so for the reasons set forth in our letter (attached) of May 16, 2016. The bill's amendments of May 31, 2016, do not alter our opposition. The following are the key points in EFF's May 16 letter.

First, EFF supports AB 1940's requirement that agencies develop body-worn camera policies.

Second, EFF opposes the absence from the bill of any requirement that these policies must be made available to the public and the officers.

Third, EFF opposes the bill's requirement that agencies must allow their officers to review body camera footage before they write a report, are ordered to give an internal affairs statement, or before any criminal or civil proceeding. Given what we know about the malleability of human memory and how it may be shaped, altered, and even overwritten by later events such as viewing a video, this provision of the bill would preclude officers from making accurate and fully inclusive reports about their interactions with the public.

In short, the bill should be amended to require officers to write their reports prior to viewing body camera footage, and to require agencies to make their policies available to officers and the public. With these amendments in place, EFF would gladly support the bill, but without them we must regretfully oppose.

Please feel free to contact me at 415-436-9333 (x176) if you have further questions.

Sincerely,

Adam Schwartz
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Protecting Rights and Promoting Freedom on the Electronic Frontier

May 16, 2016

The Honorable Lorena Gonzalez, Chair
California State Assembly Committee on Appropriations
1020 N Street, Room 2114
Sacramento, CA 95814

RE: AB 1940 (Cooper) – Support if Amended/Oppose Unless Amended

Dear Assemblymember Gonzalez:

The Electronic Frontier Foundation regrets to inform you that we must oppose AB 1940 unless it is amended. While the bill includes the important requirement that all California law enforcement agencies wishing to employ body cameras must develop a policy controlling how those cameras may be used, it also has several fatal flaws that would undermine public trust in the usefulness of body cameras.

EFF supports AB 1940's requirement that agencies develop a body-worn camera policy because it would help to ensure that agencies wanting to use these powerful tools do so in a way that benefits rather than harms the public. While body cameras can help to ensure police accountability and address citizen complaints, they also have the potential to become yet another tool for government surveillance of the public—disproportionately impacting communities that are already over-policed. The points the bill proposes agencies address in their policies—such as where, when, and under what circumstances cameras can and cannot be used; training requirements for officers; and notification requirements for the public—will all be useful for agencies to think about before they start using cameras. *See* Sec. 832.19 (b)(1)-(9).

However, two parts of the bill would nullify these benefits. First, the bill does not require that agencies make their body-worn camera policies available to either the officers using the cameras or to the public. Sec. 832.19 (b)(10)-(11). We cannot see any reason why an agency that's mission is to "protect and serve" the public would want to hide its policies, but by making such disclosure optional, the bill allows agencies to do so. As a consequence, the bill would undermine public trust in a program that has been spurred on largely because of the already strained relationship between the police and the public they are supposed to serve.¹ It also would prevent officers from fully understanding their responsibilities when using these tools. The bill should not only require agencies to draft a body-worn camera policy but should also require that agencies make those policies available to their officers and to the general public.

¹ *See generally* Interim Report of the President's Task Force on 21st Century Policing (March 2015) available at http://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf.

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The bill's second flaw is more serious. Section 832.19 (b)(1) of the bill requires that agencies allow their officers to review body camera footage before they write a report, are ordered to give an internal affairs statement, or before any criminal or civil proceeding. Given what we know about the malleability of human memory and how it may be shaped, altered, and even overwritten by later events such as viewing a video, we believe this provision of the current bill would preclude officers from making accurate and fully inclusive reports about their interactions with the public. As an independent internal affairs investigation of a 2009 BART Police shooting in Oakland noted, "[a]llowing involved officers to view video prior to an interview allows them to either subconsciously fill in the blanks where there are no memories of the incident or preplan for alibis for substandard conduct."²

The County of Los Angeles Office of Independent Review noted in a 2013 report, "due to lighting, distance, angle and other technical factors[,] what is depicted on video is not necessarily consistent with what actually occurred" and therefore may differ from an officer's memory of the events.³ After reviewing research on the pliability of memory, the OIR stressed the "importance of "minimizing post-event misinformation" by restricting officer access to body camera footage until after filing a report. The OIR recognized that, "[w]hile what is shown on a video is not necessarily 'misinformation,' it can certainly be different information than that recalled."⁴

We know from numerous independent research studies, that our memories of an event are impacted by external factors that may be presented to us after the event, and can easily be modified and shaped by those factors. As noted memory researcher Elizabeth Loftus has put it, new information can very easily "supplement, distort or contaminate [our] memories."⁵ For example, research has shown that subjects can be convinced to provide false confessions and false eye witness testimony when presented with video that differs from the subject's memory.⁶ Subjects can also be convinced they remember incidents from childhood that never occurred—and will even unconsciously make up "facts" to support the false

² *Public Report: Review of BART PD Policies, Practices and Procedures: New Year's Day 2009*, submitted to BART by Meyers, Nave Professional Law Corporation, at p. 5.

http://www.bart.gov/docs/Meyers_Nave_Public_Report.pdf.

³ L.A. Office of Independent Review, *Eleventh Office of Independent Review Annual Report* at 35 (Dec. 2013), available at http://shq.lasdnews.net/shq/LASD_Oversight/OIR-Eleventh-Annual-Report.pdf#page=35

⁴ Office of Independent Review, *Eleventh Office of Independent Review Annual Report* at 36.

⁵ Jacque Wilson, "Trust your memory? Maybe you shouldn't," *CNN* (May 18, 2013)

<http://www.cnn.com/2013/05/18/health/lifework-loftus-memory-malleability/>.

⁶ Nash, R., & Wade, K. (2009) Innocent but proven guilty: Eliciting internalized false confessions using doctored-video evidence *Applied Cognitive Psychology*, 23 (5), 624-637 DOI: 10.1002/acp.1500; Henkel, L. A. (2011) Photograph-induced memory errors: When photographs make people claim they have done things they have not. *Appl. Cognit. Psychol.*, 25: 78-86. doi: 10.1002/acp.1644; Wade, K., Green, S., & Nash, R. (2009). Can fabricated evidence induce false eyewitness testimony? *Applied Cognitive Psychology* DOI: 10.1002/acp.1607;

memory, fervently believing those “facts” to be true.⁷ This can happen even when the “remembered” events are implausible or even biologically or geographically impossible.⁸

Given the distrust that too often exists between communities and the police, the goals of any body-worn camera program should be to “strengthen accountability and transparency.”⁹ However Sections 832.19 (b)(1) and 832.19 (b)(10)-(11) undermine those goals. As the BART report noted, “allowing officers to view video of the event prior to the interview erodes the public’s faith in the process and unnecessarily impacts the investigation.”¹⁰ Allowing agencies to withhold their body-worn camera policies from the public and from officers would do the same.

For these reasons, EFF urges you to amend Section 832.19 (b)(1) to require officers to write their reports prior to viewing body camera footage and to amend Sections 832.19 (b)(10)-(11) to require agencies to make their policies available to officers and the public. With these amendments in place, EFF would gladly support the bill, but without them we must regretfully oppose.

Please feel free to contact me at 415-436-9333(x 136) if you have further questions.

Sincerely,

Jennifer Lynch
Senior Staff Attorney

⁷ Elizabeth F. Loftus & Jacqueline E. Pickrell, “The Formation of False Memories” *Psychiatric Annals* 25:12 (Dec. 1995) available at https://webfiles.uci.edu/eloftus/Loftus_Pickrell_PA_95.pdf.

⁸ *Id.*; see also Giuliana A. L. Mazzoni, Elizabeth F. Loftus, & Irving Kirsch, “Changing Beliefs About Implausible Autobiographical Events: A Little Plausibility Goes a Long Way,” *Journal of Experimental Psychology: Applied*, Vol. 7, No. 1, 51-59 (2001) available at <https://webfiles.uci.edu/eloftus/MazzoniLoftusKirsch01.pdf>.

⁹ See Office of Community Oriented Policing Services, U.S. Department of Justice, “Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned” (2014) available at <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>; see also Interim Report of the President’s Task Force on 21st Century Policing (“In establishing the task force [on 21st Century Policing] the President spoke of the distrust that exists between too many police departments and too many communities—the sense that in a country where our basic principle is equality under the law, too many individuals, particularly young people of color, do not feel as if they are being treated fairly.”).

¹⁰ Public Report: Review of BART PD Policies, Practices and Procedures.