



Via email only

January 23, 2017

Supervisor Cindy Chavez
Supervisor Dave Cortese
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Santa Clara County Board of Supervisors
Finance and Government Operations Committee
70 West Hedding Street
San Jose, CA

Dear Santa Clara County Board of Supervisors,

The undersigned organizations dedicated to protecting civil rights and civil liberties write regarding Santa Clara County Sheriff's Anticipated Surveillance Impact Report and Proposed Surveillance Use Policy ("Use Policy") for the Body-Worn Camera ("BWC") System. We applaud the effective use of Santa Clara's Surveillance Technology Ordinance to facilitate a debate over this proposal and take this opportunity to suggest critical improvements for the Use Policy.

Residents of Santa Clara County – regardless of race, religion, immigration status, gender, or sexual orientation – deserve to be treated equally under the law and during interactions with law enforcement. Body-worn cameras have potential in this respect and hold the promise of improving transparency, accountability, and trust between law enforcement and the community, but ultimately they are only tools. Whether their use will effectively advance community goals depends on the details of the policies in place and how these policies are developed.

I. THE SURVEILLANCE ORDINANCE PROVIDES INFORMATION ESSENTIAL TO PUBLIC DEBATE OVER THIS PROPOSAL.

As the Board is aware, the Sheriff's Anticipated Surveillance Impact Report and Proposed Surveillance Use Policy documents were released in accordance with Santa Clara's Surveillance Technology and Community Safety Ordinance (No. NS-300.897), which the Board adopted in June 2016. Under the ordinance, County departments seeking to adopt surveillance technologies must obtain Board approval of surveillance proposals following public debate and provide the Board and public with an Anticipated Surveillance Impact Report and a proposed Surveillance Use Policy before such debate occurs. We commend the Sheriff's Office and County Board for using the Ordinance's mechanisms to produce this information and facilitate public debate about the body-worn camera proposal.

As required by the Ordinance, the Sheriff's Department produced an Anticipated Surveillance Impact Report for the body-worn camera program. A strong Impact Report can help inform a robust public debate about a surveillance technology proposal, enabling smart decisions by elected leaders. The Impact Report for this proposal is informative, easy-to-read, and clearly explains how body cameras generally function and how Santa Clara County deputies will specifically use them. The Impact Report attempts to summarize the cameras' potential impact on civil liberties and civil rights and outlines solutions aimed at addressing those impacts. Importantly, the Impact Report is forward-looking and provides residents with information about how the proposal will affect the community in the coming years.

II. THE PROPOSED USE POLICY SHOULD BE STRENGTHENED TO GUARANTEE TRANSPARENCY, ACCOUNTABILITY, AND OVERSIGHT.

a. The Use Policy Should Clarify the Public Interest Purposes that Would Be Furthered by a Body-Worn Camera Program.

The first section of the Use Policy sets forth the proposed purposes of the body-worn camera system. As the public prepares to debate the body-worn camera proposal, it is essential that the Board facilitate a discussion about these purposes, which constitute a mutual understanding between residents and the government about the goals of the body-worn camera program. As written, this section of the Use Policy only identifies the purposes of the body-worn cameras related to the enhancement of law enforcement activities, such as capturing evidence of criminal conduct. While body-worn cameras may prove to be a useful law enforcement tool, their utility in ensuring transparency and accountability of law enforcement within Santa Clara County is of equal, if not greater, importance.

b. The Use Policy Should Further Limit the Ability of Deputies to Review Footage Before Making Initial Statements or Reports.

The question of when deputies may review footage is central to the success of Santa Clara County's body-worn camera program. Without sufficient limits on when officers can review footage before making a statement, the County risks a public perception that body-worn cameras are not tools for law enforcement accountability, but instead tools for cover-up. The Use Policy appropriately prohibits deputies involved in "officer-involved incidents" or cases involving "serious bodily injury" from viewing footage before making an initial statement, but unfortunately it does extend that prohibition to situations where deputies are subject to complaints, an investigation, or charges of misconduct.

Simply put, allowing the target of an investigation to review potentially incriminating evidence before writing a report or making a statement is a poor investigative practice. It not only undermines trust, but also the pursuit of truth -- cognitive science research convincingly demonstrates that once an individual reviews video of an incident, his independent memory of that event is tainted if not completely lost.¹ In addition to the scenarios outlined in the Use

¹ See generally Morgan, Southwick, Steffian, Hazlett, Loftus, *Misinformation can influence memory for recently experienced, highly stressful events*, International Journal of Law and Psychiatry 36 (2013) 11-17, available at

Policy, when a deputy is under investigation, that deputy should not be permitted to view body-worn camera footage before making a statement or writing an initial report.

c. The Use Policy Lacks Guidance for the Public Release of Video.

The public must be able to see important footage to evaluate law enforcement conduct and develop trust that body cameras are a tool for transparency and accountability. Yet the current Use Policy lacks guidelines or criteria regarding when release would be appropriate.

Without any guidance on when release is appropriate, it is possible that a Sheriff may only release video that supports its deputies, and conceal video that shows evidence of misconduct—or release no video at all. Such an approach is at odds with the transparency that body-worn camera programs are intended to promote, as well as recommendations by policing experts. The Police Executive Research Forum, in its report of recommendations for agencies implementing body-worn camera programs, recommends that “with certain limited exceptions ... body-worn camera video footage should be made available to the public upon request” in order to “demonstrate transparency and openness in their interactions with members of the community.”² PERF also recommends cautious use of exceptions to public records laws.³

The Use Policy should explain in greater detail how the County will release footage of public interest. For example, the policy should require prompt disclosure to civilians who are depicted in police recordings being subjected to any kind of enforcement activity. Also, the policy should generally require prompt disclosure of police recordings that depict newsworthy events, such as officer shootings of civilians, with blurring where possible of civilian faces and voices to address privacy concerns.

d. The Use Policy Needs Safeguards to Protect Against General Surveillance.

The current policy lacks safeguards to prevent the Sheriff from using body-worn cameras as a surveillance tool against the public, alone or in conjunction with other technology such as facial recognition software. Body cameras are meant to be tools for accountability, not for general surveillance, and especially not to gather information on individuals as they exercise their First Amendment protected speech, association, or religion.

https://webfiles.uci.edu/eloftus/Morgan_Misinfo_IJLP2013.pdf?uniq=-5q3yfp; Jeffrey L. Foster, Thomas Huthwaite, Julia A. Yesberg, Maryanne Garry, Elizabeth F. Loftus, *Repetition, not number of sources, increases both susceptibility to misinformation and confidence in the accuracy of eyewitnesses*, *Acta Psychologica* 139 (2012) 320–326 (repeated viewing increases the chances that officers will remember video as their own perception), available at https://webfiles.uci.edu/eloftus/Foster_Repetition_ActaPsych2012.pdf?uniq=7a5h8l. See also Kathy Pezdek, *Should Cops Get to Review the Video Before They Report?* THE MARSHALL PROJECT (Aug. 13, 2015), available at <https://www.themarshallproject.org/2015/08/13/should-cops-get-to-review-the-video-before-they-report>; Lara Boyle, *Malleable Memories: How Misinformation Alters Our Perception of the Past*, YALE SCIENTIFIC (April 1, 2013), available at <http://www.yalescientific.org/2013/04/5227/>.

² Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (emphasis added), v (2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

³ *Id.* at 18.

The Use Policy should expressly prohibit analyzing video using other surveillance tools such as facial recognition technology. We appreciate that the Sheriff’s memo to the Board of January 18 states that the Sheriff will not add biometrics to its BWC program without first coming back to the Board. But this is not enough, given the grave threat to privacy posed by the combined power of body worn cameras with facial recognition technology. Rather, the issue must be addressed explicitly within the Use Policy itself.

The Use Policy should also expressly prohibit cataloging and retaining a record of individuals’ contacts with police—particularly when those contacts arise out of non-criminal or constitutionally-protected behavior.

Finally, the Use Policy should explicitly address deputy use of BWCs in the vicinity of civilians engaged in First Amendment activity. Any police recording of First Amendment activity (by BWCs or otherwise) carries the inherent risk of chilling and deterring that activity. So the Use Policy should generally bar the use of BWCs to record First Amendment activity, except to document violations of law and police actions as otherwise authorized by the Use Policy.

e. The Use Policy Should Have a Shorter Retention Period.

The proposed Use Policy provides that even when a recording has no apparent value to a criminal investigation or administrative matter, it should still be retained for “up to one year.” This is too long. There is an inherent danger that these police recordings of civilians, often containing sensitive information, will be improperly disclosed due to hacking, human error, or otherwise. There is also a hazard of misuse of these sensitive recordings. A critical means to minimize these risks is to reduce the period of retention.⁴

f. The Use Policy Should Provide Consequences or Disciplinary Measures for a Failure to Comply with Its Provisions.

The County should enforce the Use Policy’s rules by auditing officers’ compliance and imposing meaningful consequences for failure to activate cameras or tampering with equipment. The inclusion of disciplinary measures in this Use Policy will be crucial to increasing accountability and public trust. The Use Policy should outline how enforcement will work so that the public understands deputies will be held accountable for transgressions.

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We applaud Santa Clara County’s commitment to transparency, accountability, and oversight of surveillance technologies. We urge the Board to take this opportunity to strengthen the proposed BWC Use Policy and look forward to the public debate over this proposal and its costs and benefits, as is required by the Surveillance Technology and Community Safety Ordinance.

⁴ According to a recent study by the Constitution Project, “[m]ost existing policies retain such footage between 60-90 days.” Constitution Project, *Guidelines for the Use of Body-Worn Cameras by Law Enforcement* (Dec. 2016) at p. 36, available at <http://www.constitutionproject.org/wp-content/uploads/2016/12/BodyCamerasRptOnline.pdf>.

We would be happy to discuss this letter and our recommendations further.

Sincerely,

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