|  |  |  |
| --- | --- | --- |
|  |  | **MEMORANDUM** |
| Date | October 14, 2015 |  |
| To | Urban Institute | |
| From | WilmerHale Body Camera Team | |
| cc | Jonathan G. Cedarbaum | |
| Re | **Summary of Laws and Pending Legislation Relevant to Police Body Cameras and Their Footage - Florida** | |

**I. Executive Summary**

There are no Florida laws expressly directed to the use of body cameras by police officers. Although Florida’s wiretapping law prohibits the intentional interception of private, oral communications, the law permits a law enforcement officer to use body cameras to record “communications” where there is no expectation of privacy in such communications, or, if there is such an expectation, where the officer is a party to the communication or the other parties to the communication have consented.

Although body camera footage would likely meet the definition of a “public record” under the Public Records Law, and therefore be subject to disclosure, there are numerous potentially applicable exemptions. For example, under Florida law, body camera footage that is taken within: (i) a private residence; (ii) a facility that offers health care, mental health care, or social services; or a place that a reasonable person would expect to be private is, subject to certain exceptions, considered confidential and exempt from disclosure under the Public Records Law.

Accordingly, police use of body cameras in public settings is likely permissible under current Florida law. Indeed, it appears that law enforcement officers have already begun recording interactions with the public through various body camera programs. Cities and counties with policies and procedures already in place governing the use of police body cameras include Miami Dade County[[1]](#footnote-1), Tampa,[[2]](#footnote-2) Sarasota[[3]](#footnote-3) and Okaloosa County.[[4]](#footnote-4)

**II. Surveillance/Privacy**

*A. Existing law*

The Florida law relevant to the recording and storage of body camera footage is the Wiretap Law, which is codified at Fla. Stat. § 934.01 et seq. Although the Wiretap Law does not expressly address body cameras, its relevant parts effectively permit police to use body cameras to record “communications” where there is no expectation of privacy in such communications, or, if there is such an expectation, where the officer is a party to the communication or the other parties to the communication have consented. Where the police use body cameras to record events that do not constitute a “communication,” such as video only without audio, it is not entirely clear how this law would apply, but it appears that such video recordings would fall outside of the prohibitions of the Wiretap Law and could therefore be lawfully recorded by police.[[5]](#footnote-5)

1. Restrictions on recording, collection, and/or storage

The Wiretap Law makes it a third degree felony to “endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept any wire[[6]](#footnote-6), oral, or electronic communication.”[[7]](#footnote-7) Fla. Stat. §§ 934.03(1)(a), (4). “Oral communication” is defined broadly as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.” *Id*. § 934.02(2). “Intercept” is defined as the “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” *Id*. § 934.02(3). These definitions suggest that the audio portion of a police body recording taken in circumstances where there is no expectation of privacy would not constitute the “interception” of an “oral communication” under the Wiretap Law.

2. Relevant exceptions to the restrictions on recording, collection, and/or storage

The Wiretap Law contains several exceptions to otherwise unlawful recording, some of which appear relevant to police body camera recordings. Under Florida law, it is lawful for an “investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication ***when such person is a party to the communication*** or ***one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act***.”[[8]](#footnote-8) Fla. Stat. §§ 934.03(2)(a)3(c) (emphasis added). To the extent there is a “communication” to which a law enforcement officer could be considered a party, or to which other parties to the “communication” have consented, then police video recording of that conversation would therefore not run afoul of the Wiretap Law.

The Wiretap Law also makes it lawful “for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.” *Id*. §§ 934.03(2)(a)3(d). Therefore, to the extent all parties to a “communication” have consented, a police video recording of that conversation would not run afoul of the Wiretap Law.

In addition, even in the absence of one of these exceptions, Florida law permits the interception of oral communications by law enforcement officers pursuant to a court order issued in accordance with the procedures set forth in Section 934.09[[9]](#footnote-9), and where such interception may provide evidence of the commission of certain specified criminal offenses which an agency has the responsibility to investigate. Fla. Stat. §§ 934.07(1)(a).

Finally, the Wiretap Law only protects communications where there is an expectation of privacy (the oral communication must be “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation”). *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994) (“[F]or an oral conversation to be protected under section 934.03 the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable.”). Therefore, “communications” where there is no expectation of privacy fall outside of the scope of the law and can be “intercepted” regardless of whether the exceptions discussed above apply. For example, the Supreme Court of Florida has found that there is no reasonable expectation of privacy in a police car, such that the Wiretap Law would not apply to conversations that take place in those vehicles even when a police officer is not present and “consent” has not been given. *Id*.

3. Prohibition on disclosure of recordings to the public

The Wiretap Law prohibits any person from intentionally disclosing or using “the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of” the statute.” Fla. Stat. §§ 934.02(1)(c), (d). The law also prohibits any person from “intentionally disclos[ing] . . . the contents of any wire, oral, or electronic communication” obtained through a court-ordered interception “when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation.” *Id*. § 934.02(1)(e).

4. Relevant exceptions to the prohibition on disclosure of recordings to the public

We have not identified any relevant exceptions to the above-mentioned prohibitions.

*B. Pending legislation*

A number bills relating to the police use of body cameras were introduced in the Florida legislature in 2015. Although most died during the 117th regular legislative session, the following two recently-introduced bills are pending.

* HB 93/SPB 418 (introduced by on August 21, 2015 by Reps. Jones and Williams and on October 2, 2015 by Sen. Smith, respectively) would create policies and procedures for the use of body cameras by law enforcement. Specifically, the law would require that law enforcement agencies establish “policies and procedures addressing the proper use, maintenance, and storage of body cameras and the data recorded by body cameras.” The law would require law enforcement agencies that use body cameras to ensure that its personnel are properly trained and that the audio and video data recorded is retained in accordance with Florida’s public records law. This proposed law explicitly makes Chapter 934, which includes the Wiretapping Act, inapplicable to such recordings.

**III. Freedom of Information/Access to Public Records**

*A. Existing law*

Florida’s freedom of information law is called the Public Records Law, codified at Fla. Stat. § 119.07 et seq.

1. Requirement to disclose

Florida’s policy is that “that all state, county, and municipal records are open for personal inspection and copying by any person” and that “[p]roviding access to public records is a duty of each agency.” Fla. Stat. § 119.01(1). Consistent with this policy, the state’s Public Records Law requires that “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so . . . .” *Id*. § 119.07(1)(a). “Public records” are broadly defined as “all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” *Id*. § 119.02(12). Police body camera footage would appear to fall within this broad definition of public record. Each state agency is required to provide access to public records so long as they are not exempt by law from disclosure. *Id*. § 119.01(2)(f).

2. Exceptions to the requirement to disclose

On July 1, 2015, Florida Senate Bill No. 248 was enacted into law, thereby amending the Florida Public Records Law to create an exemption for certain police body camera footage.[[10]](#footnote-10) The Public Records Law makes body camera[[11]](#footnote-11) recordings confidential and exempt from disclosure “if the recording: a. [i]s taken within the interior of a private residence; b. [i]s taken within the interior of a facility that offers health care, mental health care, or social services; or c. [i]s taken in a place that a reasonable person would expect to be private.” Fla. Stat. § 119.071(2)(l)2. This body camera-specific “exemption does not supersede any other public records exemption . . . .” *Id*. § 119.071(2)(l)7. Therefore, “[t]hose portions of a recording which are protected from disclosure by another public records exemption shall continue to be confidential and exempt.” *Id*.

The law, however, permits the disclosure of footage by a law enforcement agency “[i]n furtherance of its official duties and responsibilities.” *Id*. §§ 119.071(2)(l)2, 3. Law enforcement officers must also disclose relevant portions of body camera recordings:

* “to a person recorded by a body camera”
* “to the personal representative of a person recorded by a body camera”
* “to a person not depicted in a body camera recording if the recording depicts a place in which the person lawfully resided, dwelled, or lodged at the time of the recording” or
* “pursuant to a court order[[12]](#footnote-12)”

*Id*. §§ 119.071(2)(l)4(a)-(d).

Once a communication has been collected, the body camera recording must be retained for at least 90 days. Fla. Stat. § 119.071(2)(l)(5).

The following additional statutory exemptions are also likely to be relevant to the disclosure of police body camera footage:

* “[a]ctive criminal intelligence information and active criminal investigative information.” Fla. Stat. § 119.071(2)(c).
* “[a]ny information revealing surveillance techniques or procedures or personnel.” *Id*. § 119.071(2)(d).
* [a]ny information revealing the substance of a confession of a person arrested . . . until such time as the criminal case is finally determined by adjudication, dismissal or other final disposition.” *Id*. § 119.071(2)(e).
* “[a]ny information revealing the identity of a confidential information or a confidential source.” *Id*. § 119.071(2)(f).
* Information that may reveal the identity of a victim of child abuse or a sexual offense. *Id*. §§ 119.071(2)(h)a, b.
* Information revealing undercover personnel of any criminal justice agency. *Id*. §§ 119.071(4)(c)

3. Redactions

The Public Records Act explicitly permits the redaction of public records where there is an applicable exemption: “[a] person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying.” Fla. Stat. § 119.07(1)(d).

*B. Pending legislation*

There is no pending legislation concerning the treatment of body camera footage under Florida’s Public Records Law.

**IV. Other Potentially Relevant Laws**

A. *Drones*

The Freedom from Unwarranted Surveillance Act prohibits certain uses of drones by law enforcement agencies. Fla. Stat. § 934.50 et seq. Specifically, the Act prohibits law enforcement officers from using drones to “gather evidence or other information” or “to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent.”[[13]](#footnote-13) *Id*. §§ 934.50(3)(a), (b). The Act provides exceptions to this general prohibition, including where a law enforcement agency has obtained a warrant or possesses a reasonable suspicion that “swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence,” or to facilitate the search for a missing person. *Id*. §§ 934.50(4)(b), (c). The Act defines drones narrowly as “a powered, aerial vehicle that: 1. Does not carry a human operator; 2. Uses aerodynamic forces to provide vehicle lift; 3. Can fly autonomously or be piloted remotely; 4. Can be expendable or recoverable; and 5. Can carry a lethal or nonlethal payload.” Given this definition, the Act is inapplicable to the use of police body cameras since those would not meet the definition of drone.

ActiveUS 148877873v.1

1. The Miami-Dade County policy is available at <https://www.bja.gov/bwc/pdfs/MiamiDadePD_FL-Policy.pdf>. [↑](#footnote-ref-1)
2. The Tampa policy is available at <https://www.bja.gov/bwc/pdfs/TampaPD_FL_SOP609_9BodyCam.pdf>. [↑](#footnote-ref-2)
3. The Sarasota policy is available at <https://www.bja.gov/bwc/pdfs/FL_Sarasota_BWC_Policy.pdf>. [↑](#footnote-ref-3)
4. The Okaloosa County policy is available at <https://www.bja.gov/bwc/pdfs/OkaloosaCounty_SO_BWC.pdf>. [↑](#footnote-ref-4)
5. Although Florida does have a law criminalizing video voyeurism, that law would generally not apply to police body camera recordings. That law criminalizes instances where a person “for his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy.” Fla. Stat. §§ 810.145(2)(a). [↑](#footnote-ref-5)
6. Police body cameras would not likely be used in instances where they would intercept wire communications as those are more traditionally defined as “any aural transfer made in whole or in part *through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception* including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce.” Fla. Stat. §§ 934.02(1) (emphasis added). It is difficult to imagine a scenario where a police body camera would intercept a wire communication. [↑](#footnote-ref-6)
7. The Wiretap Law also makes it a third degree felony to “[i]ntentionally use[], endeavor[] to use, or procure[] any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when: 1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or 2. Such device transmits communications by radio or interferes with the transmission of such communication.” Fla. Stat. §§ 934.03(1)(b). This provision of the statute could apply to police body camera recordings were the devices somehow radio-enabled. [↑](#footnote-ref-7)
8. The Florida legislature explained that “[t]o safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.” Fla. Stat. §§ 934.01(4). [↑](#footnote-ref-8)
9. Section 943.09 requires that each application include, among other things, the requesting officer’s identity, a statement of the facts and circumstances relied upon by the applicant to justify the reason for the requested order, “a statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed . . . or be too dangerous,” and the time period for which the interception will be maintained. *See* Fla. Stat. §§ 934.09(1)(a)-(f). [↑](#footnote-ref-9)
10. The bill only discussed the increased use of body cameras and a necessity to preserve the confidentiality of the recordings, without mentioning the permissibility of the recordings in the first instance. [↑](#footnote-ref-10)
11. A Body camera is “defined as a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities.” Fla. Stat. § 119.071(2)(l)a. [↑](#footnote-ref-11)
12. The law requires that the court, in making its determination, at least “consider whether:

    (A) Disclosure is necessary to advance a compelling interest;

    (B) The recording contains information that is otherwise exempt or confidential and exempt under the law;

    (C) The person requesting disclosure is seeking to obtain evidence to determine legal issues in a case in which the person is a party;

    (D) Disclosure would reveal information regarding a person that is of a highly sensitive personal nature;

    (E) Disclosure may harm the reputation or jeopardize the safety of a person depicted in the recording;

    (F) Confidentiality is necessary to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice;

    (G) The recording could be redacted to protect privacy interests; and

    (H) There is good cause to disclose all or portions of a recording.”

    Fla. Stat. §§ 119.071(2)(l)(4)(d)(I)(A)-(H). [↑](#footnote-ref-12)
13. The Act goes on to specify that “a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.” Fla. Stat. §§ 934.50(3)(b).

    [↑](#footnote-ref-13)