

To: Members, Austin City Council, Public Safety Committee

From: Kathy Mitchell, Texas Criminal Justice Coalition

Date: May 23, 2016

Subject: The City Must Create a Policy to Implement SB 158 and Clarify What is Not Explicit

What State Law Does and Does Not Do

In 2015, the Texas Legislature passed Senate Bill 158, which establishes a statewide grant program through which Texas law enforcement agencies may apply for funding to equip their frontline officers with body worn cameras.

Per the law, the Austin Police Department (APD) adopted a body camera policy in May 2016, prompting community concerns that the policy does not adequately ensure transparency and accountability.

APD Chief Art Acevedo has responded to these concerns by saying that the Department can only do what state law says. **Fortunately, SB 158 clearly gives the local City Council what we would, in other contexts, call “rulemaking” authority** to create a policy that fills in the gaps in state law. *Since you are familiar with that rulemaking function, I have attached the statute so you can see exactly what is prescribed by law and what is left to local rulemaking.*

In brief, the City MUST produce a local policy that addresses the following areas of concern [see Texas Occupations Code, Sec. 1701.655]:

(b) A policy [...] must ensure that a body worn camera is activated only for a law enforcement purpose and must include:

(1) guidelines for when a peace officer should activate a camera or discontinue a recording currently in progress, considering the need for privacy in certain situations and at certain locations;

(2) provisions relating to data retention, including a provision requiring the retention of video for a minimum period of 90 days;

(3) provisions relating to storage of video and audio, creation of backup copies of the video and audio, and maintenance of data security;

(4) guidelines for public access, through open records requests, to recordings that are public information;

(5) provisions entitling an officer to access any recording of an incident involving the officer before the officer is required to make a statement about the incident;

(6) procedures for supervisory or internal review; and

(7) the handling and documenting of equipment and malfunctions of equipment.

(c) A policy [...] may not require a peace officer to keep a body worn camera activated for the entire period of the officer's shift.

(d) A policy [...] must be consistent with the Federal Rules of Evidence and Texas Rules of Evidence.

This list essentially itemizes the areas where the statute has left local jurisdictions flexibility; key terms are not defined, and consequently there are many different approaches within the statutory framework that a city could adopt. Note also that these are the minimum requirements for policy implementation. **The policy “must” include the above-mentioned provisions or requirements, but it may very well include other provisions or requirements.** The fact that the Legislature saw fit to limit that broad discretion by adding some outside limits in (c) and (d) indicates that lawmakers understood that cities might go further than the minimum framework set out in statute.

Finally, Sec. 1701.657 requires officers wearing cameras to “act in a manner that is consistent with the policy of the law enforcement agency that employs the officer with respect to when and under what circumstances a body worn camera must be activated.” Clearly the policy should not violate the statute, but at the end of the day officers must follow the local policy, including provisions not specified in statute.

Revised Policy Should Give Officers More Guidance in Key Areas

We have highlighted above the items on the required list where we feel the policy released this week falls short and where you can clearly guide APD to a more robust solution. We also believe that a policy of notifying people that they are being videotaped is well within the broad discretion set out by these minimum standards.

Let’s start with the term “law enforcement purpose,” which guides the rulemaking framework. The policy must ensure that a body worn camera is activated only for a law enforcement purpose. The term is undefined by SB 158 and is used in a variety of ways in both case law and statute. Generally, it is broad enough to include most activities of law enforcement. APD has determined that, for purposes of the application of the body camera policy, it will include the time officers spend doing private security and other outside jobs (Law Enforcement Related Employment overtime). We agree with this. We also believe that **body cameras should be activated in order to make interactions with the public more peaceable and improve trust in the police force.** That too is a “law enforcement purpose.” Setting a broad goal like this for the body camera program is a key role for Council, which must give direction to its Departments in the implementation of laws where there is so much discretion.

Once City Council has agreed on the purpose of law enforcement with respect to this body camera program, we ask that you **direct staff to return with a policy that gives officers clear guidance on the following:**

- How body cameras will be used in First Amendment-protected activities, and the relationship between this data and surveillance technologies available to law enforcement
- How body cameras should be used in a “private space” (e.g., a private home), and clearer guidelines for turning off the camera upon request to protect certain classes of individuals (witnesses, children, etc.)

- Notification to the public that interactions are being videotaped ([several jurisdictions have done this already](#))
- A procedure for documenting on the video itself the discretionary decisions by officers to turn off the camera
- Public disclosure of critical incident video that is not taken in “private spaces” (our primary topic today)

We understand that public release of critical incident video is the most controversial of our proposals, so we sought the advice of outside counsel to ensure we are not asking for something you legally cannot do. *See attached memo by [Jennifer Riggs](#), former Chief of the Texas Attorney General’s Open Records and Administrative Law sections, who articulates in more detail your authority to determine what is “public information” within the SB 158 framework.*

Can APD release body camera footage to the public under the “law enforcement purpose” provision of SB 158 for the purpose of increasing transparency and providing accountability between law enforcement and the citizenry?

In short, YES, unless the video was taken in a “private space” which is defined in the statute as “a location in which a person has a reasonable expectation of privacy, including a person’s home.”

- **The statute allows it:** Regardless of other provisions of the body camera statute, **law enforcement can release any video not taken in a “private space” for a “law enforcement purpose”** [Texas Occupations Code, Sec. 1701.661(b)] as long as its policy for release is “consistent with” Texas or Federal Rules of Evidence [Sec. 1701.655(d), which allow for the existence of “public information”].
- **The key term is not defined by SB 158:** The term “law enforcement purpose” is not defined by statute; case law usage is broad; and you have discretion to determine what it will mean for purposes of body camera implementation.
- **The regulatory authority is provided:** The statute explicitly gives local jurisdictions regulatory authority around disclosure by requiring localities to produce a body camera policy that must include “guidelines for public access, through open records requests, to recordings that are public information.”

Body cameras are likely to provide the best factual information about an incident that citizens and the Department have ever had. That is why they are a widely supported approach to accountability and can help build trust between the police force and those who pay their salaries.

Unfortunately, if the statute’s broad allowance for public release for a “law enforcement purpose” is interpreted to mean that APD can release some videos and not others at its sole discretion, the community will suspect the police of protecting their own interests at the expense of community safety, accountability, and respect. Under *this* proposal, **we suggest that the city create a policy of transparency that defines body camera video taken during a critical incident in a “non-private” space as public information in order to build trust.** It *can* do this and it should do this.

What Would an Equitable System of Public Disclosure Look Like?

We suggest the following general framework as a starting point for discussion.

The description of video that the Department “may” release under 1701.661(b) is quite broad. 1701.661(a) exempts from disclosure all body camera video of “an incident that involves the use of deadly force by a peace officer or that is otherwise related to an administrative or criminal investigation.” Then (b) says any of that video “may” be released.

We suggest that a **clearly defined subset of such video** be incorporated into a standardized and even-handed procedure for prompt public release. That subset should include incidents that do not occur in a private space involving:

- deadly force (regardless of the nature of that force),
- all officer-involved shootings,
- all tasings;
- other use of force incidents that result in an investigation; and
- any incident that results in a complaint to the Office of the Police Monitor (OPM) by a member of the public.

For incidents involving use of force:

- During the first three days after an incident, while investigators are pursuing immediate leads and conducting initial interviews, and while the officer is viewing all the videotape as required by law before making a statement, the video can remain confidential.
- After that three day period, a copy of all the video, including any dash cam video that might also exist, should be given to the person harmed or the family of the deceased or a lawyer representing the person harmed or the family of the deceased.
- After another three days, all the video should be released to the public.
- If body camera or dash camera video clearly displays the faces of children or the faces of witnesses, the video should be released with the faces blurred.

For incidents that result in a complaint to the OPM by a member of the public, essentially the same framework should be implemented, except that the timeframe would start with the filing of the complaint. A member of the public whose offense “constitutes a misdemeanor punishable by fine only and does not result in arrest” (e.g. traffic stop video) must be told about their right to decide not to allow release of the video to the general public in accordance with 1701.661(f). The complainant should always be given a copy of the video of his or her own interaction with the officer, regardless of that choice. The City should publicly post the procedure for members of the public to request and receive video of their own interactions with officers.

This structure is entirely within the City Council’s discretion and would provide clarity to both the public and officers around what video will be public information and exactly when and how it will be released. It also respects the rights of the family to have some time to process what happened before video is released to others.