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ACLU of Massachusetts Briefing Paper: The Legality of Police Body-Worn Cameras in Massachusetts

Body-worn cameras (BWCs) are becoming integral to 21st-century community policing. Over 95% of large police departments have reportedly deployed body cameras or have committed to doing so.¹ And it is easy to see why. From Florida to Colorado to California, body cameras have been associated with declines in civilian complaints and uses of force.²

Yet Massachusetts has been exceptionally slow to adopt body cameras. Programs exist in only one Massachusetts city (Methuen) and a few small towns (such as Erving and Gill). One possible explanation for this circumstance is that Massachusetts is generally slow to adopt police accountability tools. For example, Massachusetts is one of just six states that does not require its police officers to be licensed.³

It has also been argued, however, that Massachusetts has been slow to adopt body cameras due to reported concerns that the state wiretap law makes them illegal.⁴ It has even been argued that the state legislature should pass a special carve-out exempting police BWCs from the wiretap law.⁵

These arguments are incorrect. For four reasons, police body-worn cameras are lawful in Massachusetts, and creating a special body camera carve-out in the state wiretap law would be both unnecessary and dangerous.

1. The Massachusetts Legislature has already authorized police body-worn cameras.
2. The Massachusetts wiretap law does not make police body-worn cameras illegal. The law generally prohibits only “secret” audio recording, which means that the open use of a body camera does not violate this law, even when it is done without the speaker’s permission.
3. Exempting police use of BWCs from the wiretap law’s prohibition on secret recording would not be merely unnecessary; it would harm civil rights and liberties. Such a carve-out would give police unprecedented authority to use BWCs for *secret* recording.
4. A special carve-out for police use of BWCs could be interpreted—wrongly, but dangerously—to call into question civilians’ right to record. In a worst-case scenario, this could put civilians at risk of arrest for conduct that is lawful under the current law.

These points are explained in greater detail below.

1. The Massachusetts Legislature has already authorized police body-worn cameras.

The Massachusetts Legislature has expressly authorized the use of police body-worn cameras. In October 2015, the Legislature passed a supplemental budget providing \$250,000 in grants for “police body camera pilot programs” to be administered by the state’s Executive Office for Public Safety and Security.⁶ These grants are intended to “improve public safety, enhance community-police relations, foster better accountability for the actions of police personnel, deter inappropriate conduct by police officers and by members of the public, capture digital audio-video evidence for criminal, civil and traffic-related court cases, be used as a training tool for officer safety and best practices and protect privacy.”

Because police body-camera programs have been authorized by law, they are by definition not prohibited by law, including the state wiretap law. Under normal principles of statutory interpretation, the general statutory language in the wiretap law—which does not mention body cameras at all—“must yield” to the more specific language in the 2015 enactment that specifically authorizes body camera programs.⁷

Indeed, EOPSS is now poised to award the BWC grant money authorized by the legislature, and several Massachusetts police departments have already used or piloted body cameras. Yet we are unaware of any report that any officer has been accused of violating the wiretap law.

2. Open use of police body-worn cameras complies with the state wiretap law.

Even if police body-worn cameras had not been specifically authorized in the 2015 budget provision, their use would still not violate the state wiretap law. That law prohibits “interception,” which is explicitly defined to only encompass “secret” audio recording: “The term ‘interception’ means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device.”⁸

Open recording does not violate this law, even when the open recording is done without the speaker’s permission or over the speaker’s objection. Today, police use body-worn cameras without running afoul of the wiretap law simply by using them as intended. As long as a body-worn camera is worn in plain view on the outside of an officer’s uniform, its use is out in the open—not secret. See *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011) (a recording “made with a device known to record audio and held in plain view” is not “secret” under the wiretap law); *Commonwealth v. Hyde*, 434 Mass. 594, 605 (2001) (a tape recorder held “in plain sight” is not “secret”).

After all, BWCs are obvious recording devices. They are conspicuous electronic equipment with plainly visible lenses. Accordingly, just as holding up a smartphone to record public activity does not violate the wiretap law, neither does using a camera openly affixed to and displayed on a police uniform. Indeed, because BWCs’ sole purpose is to record, there can be no confusion about what they are being used for—and no reasonable argument that a police officer who openly wears a BWC runs afoul of the wiretap law.⁹

Notably, agents of the Boston Police Department frequently use cameras to record video and audio of public gatherings and demonstrations, from the Boston Calling music festival to #BlackLivesMatter protests.¹⁰ It is simply not possible for everyone at these events to *know* that they are being recorded; at any given moment, many people will be facing away from the person holding the camera.¹¹ Yet, when this recording is done openly, no one is concerned that it might violate the wiretap statute. The same goes for officers wearing BWCs.

3. Amending the wiretap statute is not merely unnecessary; carving out police use of BWCs from the wiretap law’s prohibition on secret recording would have the dangerous consequence of actually *allowing* police to secretly record civilians.

Amending the wiretap law to create a BWC carve-out—for example, changing the definition of “intercepting device” so that it excludes BWCs used by the police¹²—could have serious adverse consequences for civilians.

Exempting BWCs from the statutory ban on secret recording would have the effect of *allowing* police to use BWCs to *secretly* record civilians. Current law authorizes only non-secret police use of body-worn cameras with audio recording capability; explicitly removing BWCs from the definition of “intercepting device” would allow purposeful *secret* recording with these devices—for example, by placing a BWC inside a shirt pocket.

We should be extremely cautious about expanding law enforcement’s ability to secretly record or listen in on civilians. Open use of BWCs is appropriate and legal today. We should not amend the law to allow BWCs to be used for secret recording in the future.

4. Adopting special statutory language to authorize police to record civilians could be incorrectly interpreted to mean that the same kind of open recording by civilians is illegal.

Creating a special exemption for *police* use of BWCs could be interpreted to give police a greater right to record civilians than the other way around. Taken to a logical extreme, such an interpretation could even expose civilians to the risk of arrest or prosecution for conduct that is now perfectly legal.

Enacting an exemption for police BWCs might cause courts or prosecutors to believe, incorrectly, that civilian conduct is illegal whenever it is similar to a police officer’s use of a body-worn camera. For example, under current law, it is lawful for a police officer, a civilian, and a journalist to affix cameras to or hold cameras near their clothing and then record a Black Lives Matter protest. But if the law is changed to expressly authorize that conduct when undertaken by police officers—but not civilians or journalists—will civilians and journalists become subject to arrest for engaging in that activity?

Conclusion

Police body-worn camera programs are lawful in Massachusetts, as long as police use the cameras correctly—that is, openly, rather than surreptitiously. Misplaced fears that such programs might violate the state wiretap law should not be used to justify the slow adoption of this critical tool for improving police-civilian interactions and accountability. Both police and the communities they serve may have something to gain.

¹ Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, *Governing*, Jan. 26, 2016, at <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>.

² See, e.g., Chloe Zercoe, *Body camera study: Denver police see drop in arrests, UOF complaints*, *PoliceOne*, Sept. 4, 2015, at <https://www.policeone.com/police-products/body-cameras/articles/9485301-Body-camera-study-Denver-police-see-drop-in-arrests-UOF-complaints/>; Lyndsay Winkley, *SDPD used more force, fewer aggressive options in 2015*, *San Diego Union-Tribune*, Mar. 22, 2016, at <http://www.sandiegouniontribune.com/news/2016/mar/22/sdpd-body-camera-report-force-complaints/>; Nick Adams, *Police body cameras reduce use of force, study finds*, *Herald Tribune*, Oct. 12, 2015, at <http://www.heraldtribune.com/article/20151012/ARTICLE/151019909>.

³ See Roger L. Goldman, *Rogue cops should not be recycled from one police department to the next*, *The Guardian*, May 20, 2015, at <http://www.theguardian.com/commentisfree/2015/may/20/rogue-cops-should-not-be-recycled-from-one-police-department-to-the-next>.

⁴ See, e.g., Editorial, *Our Opinion: We need rules now for police body cameras*, *The Patriot Ledger*, Apr. 9, 2016, at <http://www.patriotledger.com/article/20160409/OPINION/399999952>; Patrick Johnson, *Police body cameras in Massachusetts: A simple idea that's hard to enact*, *MassLive*, Aug. 5, 2015, at http://www.masslive.com/news/index.ssf/2015/08/police_body_cameras_in_massach.html.

⁵ Legislation of this nature was filed in the 2015-2016 Massachusetts legislative session as H.1637, which was sent to study.

⁶ An Act Making Appropriations for the Fiscal Year 2015 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, *2015 Mass. Laws ch. 119*, § 8000-1020, <https://malegislature.gov/Laws/SessionLaws/Acts/2015/Chapter119>.

⁷ *TBI, Inc. v. Board of Health of N. Andover*, *431 Mass. 9*, 18 (2000); see also *Risk Mgt. Found. of Harvard Med. Insts., Inc. v. Commissioner of Ins.*, *407 Mass. 498*, 505 (1990); *Green v. Bock Laundry Mach. Co.*, *490 U.S. 504*, 524-26 (1989).

⁹ There are numerous additional steps that a responsible police department could take to ensure that members of the community know about and approve of the department's use of BWCs. These steps might include soliciting community input into whether and how to introduce BWCs, altering the uniform so that it indicates a BWC is being worn, informing civilians that they are being recorded whenever it is feasible to do so, and engaging in a public education campaign so that the community knows about the department's BWC program. These measures can serve as a reminder to all parties to be mindful of their conduct, and may help improve the quality and safety of police-civilian interactions. But these measures are not required by the state wiretap law.

¹⁰ See, e.g., Beryl Lipton, *Watch the Boston Common protest through the police's perspective*, Dec. 3, 2015, at <https://www.muckrock.com/news/archives/2015/dec/03/BPD-BLM-footage/>.

¹¹ Although police officers do not violate the state wiretap law by openly recording public gatherings of people engaged in constitutionally-protected First Amendment activity, this practice is regrettable and inconsistent with responsible policing. Federal regulations state that surveillance teams “shall not collect or maintain criminal intelligence information about the political, religious or social views, associations, or activities of any individual or any group . . . unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.” *28 C.F.R. § 23.20(b)*.

¹² The proposed legislation cited above (see n.5) would have provided: “A camera with audio recording capability mounted in a marked police vehicle or on the person of a uniformed police officer will not constitute an ‘intercepting device.’”