

Legislative Analysis



LAW ENFORCEMENT BODY-WORN CAMERA PRIVACY ACT

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House Bill 4427 (reported from committee as H-1)
Sponsor: Rep. Jim Runestad
Committee: Judiciary
Complete to 5-18-17

Analysis available at
<http://www.legislature.mi.gov>

(Enacted as Public Act 85 of 2017)

BRIEF SUMMARY: House Bill 4427 creates the Law Enforcement Body-Worn Camera Privacy Act to do the following:

- With some exceptions, prohibit a recording recorded by a body-worn camera in a private place from disclosure under the Freedom of Information Act (FOIA).
- Specify the circumstances under which a recording would be subject to FOIA and the William Van Regenmorter Crime Victim's Rights Act.
- With some exceptions, require a video and audio recording to be retained for at least than 30 days from the date it was made.
- Specify that if a complaint against a law enforcement officer was made after the retention period expired, or if an audio and video recording could not be produced due to a technical failure or human error, the act would not create a presumption that the recording would corroborate the defendant's, prosecution's, or plaintiff's version of events in any criminal or civil action.
- Allow a law enforcement agency to charge a fee for a copy of a recording.
- Require each law enforcement agency utilizing body-worn cameras to develop a written policy for the use of the devices and the maintenance and disclosure of recordings made by the devices.

FISCAL IMPACT: The bill would not have a significant fiscal impact on the Department of State Police (MSP), but may have fiscal implications for some local units of governments. See ***Fiscal Information*** below for a more detailed discussion.

THE APPARENT PROBLEM:

In Michigan, only a few law enforcement agencies equip their officers with body-worn cameras or "body-cams." Currently, about 50 law enforcement agencies, including the Michigan State Police, the City of Detroit, and the Macomb County Sheriff's Department, have officers wear the devices. Although limited research has been done, early reports show that the devices' ability to make an impartial record of the interactions between officers and the public can be beneficial to both law enforcement and the public. The recordings can provide greater public oversight and scrutiny into the actions of police. On

the other hand, law enforcement officers can be protected from frivolous or fraudulent claims of using excessive force or unprofessional conduct. So why aren't more agencies routinely using the devices for all on-duty officers?

One reason is simple: it can be costly to initially outfit an entire department with body cams. But the costs don't end after the initial purchase. Storage of footage from multiple body cameras can be costly, even if done digitally. Additionally, it is not clear under existing law how an agency is to handle requests from the public, including from the media, for footage from a particular incident. For example, is all footage from a police raid on a home accessible by the public? What if minors are present? Or the residents scantily clad? What about when officers respond to a request for help and find someone has fallen in the tub or shower? What if the footage has no value as evidence for a current or possible lawsuit or criminal investigation? Though Michigan's Freedom of Information Act (FOIA) provides some protection from release of information if it constitutes an invasion of privacy or would compromise an ongoing criminal investigation, it is apparent that this law doesn't address all the concerns arising from expanded use of police body cameras. As a result, it reportedly some law enforcement agencies in the state grant public access to all body cam recordings, whereas others deny all requests. Moreover, the uncertainty over how FOIA requests should be answered appears to act as a disincentive for some agencies, thus slowing expansion of the use of body cameras.

To address such concerns, legislation creating a new act to specifically address the issue surrounding privacy and public rights to body camera footage, along with minimum requirements for retention and storage of footage, has been offered.

THE CONTENT OF THE BILL:

The Law Enforcement Body-Worn Camera Privacy Act would regulate public access to recordings recorded by body-worn cameras worn by law enforcement officers and retention of evidentiary audio and video recordings recorded by the body-cams. "Body-worn camera" means a device that is worn by a law enforcement officer that electronically records audio and video of the officer's activities. A more detailed description follows.

Public access to recordings and exemptions to public access

Under the bill, disclosures of any audio or video recording recorded by a body-worn camera would be subject to the protections provided for crime victims under the William Van Regenmorter Crime Victim's Rights Act (CVRA). Among other things, the sections of the CVRA cited in the bill exempt certain personally identifiable information, such as names and addresses, and visual representations—including any film, videotape, or digitally stored image—from disclosure under the Freedom of Information Act (FOIA).

Except as provided in the bill, a recording recorded by a law enforcement officer with a body-worn camera or similar device that is recorded in a private place is exempt from disclosure under the Freedom of Information Act (FOIA). "Private place" is defined as a place where an individual may reasonably expect to be safe from casual or hostile intrusion

or surveillance but does not include a place to which the public or a substantial group of the public has access.

Except for an audio and video recording exempted from disclosure under Section 13 of the Freedom of Information Act, any of the following individuals may request a copy of an audio and video recording recorded in a private place:

- An individual who is the subject of the audio and video recording.
- An individual whose property has been seized or damaged in relation to a crime to which the recording is related.
- A parent of, a legal guardian of, or an attorney for an individual described above.

An audio or video recording from a body-worn camera that is retained by a law enforcement agency in connection with an ongoing criminal investigation or an ongoing internal investigation is not a public record and would be exempt from disclosure under FOIA, but only to the extent that disclosure as a public record would do any of the following:

- Interfere with law enforcement proceedings.
- Deprive a person of the right to a fair trial or impartial adjudication.
- Constitute an unwarranted invasion of personal privacy.
- Disclose the identity of a confidential source or, if the record were compiled by a law enforcement agency in the course of criminal investigation, disclose confidential information furnished only by a confidential source.
- Disclose law enforcement investigative techniques or procedures.
- Endanger the life or physical safety of law enforcement personnel.
- Disclose information regarding a crime victim in violation of provisions of the CVRA.

Disclosure of recordings in civil actions

An audio or video recording from a body-cam retained by a law enforcement agency relating to a civil action in which the party requesting the recording and the public body are parties is not a public record and so is also exempt from disclosure under FOIA.

Retention of evidentiary recordings

In general, a law enforcement agency must retain *an evidentiary audio and video recording* for at least 30 days from the date the recording was made. The term means an audio and video recording of an incident or encounter recorded by a body-worn camera and includes a crime, arrest, citation, search, use of force incident, or confrontational encounter with a citizen, that may be materially useful for investigative or prosecutorial purposes, including for a criminal and internal investigation.

Recordings that are the subject of an ongoing criminal or internal investigation, or an ongoing criminal prosecution or civil action, must be retained by a law enforcement agency until the completion of the ongoing investigation or legal proceeding.

The recording must be retained for at least three years after the date the recording was made if the recording is relevant to a formal complaint against a law enforcement officer or agency.

No presumption of corroboration

If a complaint against a law enforcement officer or law enforcement agency is made after the expiration of the relevant retention period or a law enforcement agency is unable to produce an audio and video recording related to the complaint in any criminal prosecution or civil action as a result of a technical failure or human error, the act would not create a presumption that the audio and video recording would corroborate either the prosecution's or the defendant's version of events in a criminal prosecution or the plaintiff's or defendant's version in a civil action.

Fee

A law enforcement agency could charge a fee for a copy of an audio and video recording from a body-cam. The fee must be calculated under and in compliance with Section 4 of FOIA.

Written policy on body-worn camera

A law enforcement agency utilizing body cams would be required to develop a written policy regarding the use of the devices by its law enforcement officers and the maintenance and disclosure of the recordings recorded by body-worn cameras that complies with the requirements of this act.

The bill would take effect 180 days after enactment.

FISCAL INFORMATION:

The MSP currently has a small pilot program testing the use of body-worn cameras, which would likely remain unaffected by this bill.

However, House Bill 4427 could impose significant costs on some local units of government that have already adopted body-worn cameras. These costs would be dependent upon the variation between local law enforcement programs and policies for data retention and the requirements in this bill. Most local law enforcement agencies contract with third-party vendors for cameras, support equipment, and data storage. This bill would impose costs on local law enforcement agencies who have body-worn camera programs that do not meet the minimum required data storage period, while those agencies that already meet or exceed the requirements would likely have no additional costs. The local law enforcement agencies that did not previously meet the minimum standards would have to purchase additional storage capacity through their vendor or find other means of compliance.

The costs of complying with the provisions requiring the disclosure of copies of audio or video footage would likely be covered through processing fees paid by the requesting party.

ARGUMENTS:

For:

House Bill 4427, as reported by the House Judiciary Committee, represents a multi-year effort to find a balance between the needs and rights of the public and press for transparency and access to the truth in citizen encounters with the police and the privacy rights of individuals who may be included in the footage of police body cameras. The bill establishes clear guidelines for when footage filmed in a private place, such as a person's home, is subject to public disclosure under the state Freedom of Information Act, or is deemed not to be public information. The bill allows a person who is included in the footage, or the parent of a minor seen or heard in the footage, to access the recordings. The bill doesn't contradict current FOIA provisions, but adds clarity to how FOIA requests of body cam recordings should be addressed by law enforcement agencies. Thus, the bill should ensure uniform responses to requests across the state rather than the current situation where some agencies will release any footage and others deny all requests. The cost to fulfill a request is borne by the person or entity requesting a copy of the recording.

The bill also requires a recording to be kept for at least 30 days if it contains audio and video footage of a crime, arrest, citation, search, use of force incident, or confrontational encounter with a citizen, and up to three years if a complaint is filed. This ensures that footage that could be used as evidence in an investigation, prosecution or defense, or in an ensuing lawsuit would be protected and gives citizens and law enforcement agencies a reasonable amount of time to file a complaint or begin an investigation without creating overly burdensome retention requirements, especially for larger departments. Footage that would not fit within the parameters for retention could be erased. For example, a recording of a person approaching an officer to ask for directions or an officer changing a tire would likely not need to be retained.

If a complaint is filed after the 30-day period, and a recording is no longer available for that incident or is missing due to a technical issue or human error, the bill specifies that the fact the recording is unavailable would not automatically corroborate the claims of either party to a criminal or civil action.

For:

When used properly, the consensus is that use of body cameras provides meaningful public oversight of police, increases police accountability, can be useful in police training (for example, identify responses by officers that do not follow a department's policies or best police practices), and can be important evidence in complaints against police and any ensuing investigation. It also can protect law enforcement officers as well. A body cam recording can document an incident of excessive force by an officer as well as provide evidence an officer followed police procedure or whether a citizen's claim of harm or property damage is true or false. It can also provide important clues should an officer be assaulted, ambushed, or killed in the line of duty. Thus, many feel the use of body cameras by law enforcement should be mandated for every officer.

The bill does not mandate the use of body cameras, nor does it address the cost to equip every officer with one, but it is hoped that by establishing reasonable retention periods and clarifying the circumstances under which a recording could be released under a FOIA request, that enactment of the bill will encourage expanded use across the state.

Underscoring the importance body cameras can play in policing, Axon (formerly Taser International) announced in April of this year that it will—for one year—equip every police officer in the country with a body camera, as well as "provide police departments with all the hardware, data storage and training they need to use the devices." At the end of the year, a department could return the devices or choose to purchase the body cameras and docking devices (about \$400 and \$200, respectively). Reportedly, Axon's decision was fueled by a Pew Research Center study finding that "policing is more difficult than ever before" and the company's belief that use of body cameras "hold the potential to change police work as we know it by seamlessly collecting an impartial record and reducing the need for endless paperwork," according to the Axon founder and CEO Rick Smith. (*This company is offering body cameras to every cop in the U.S.*, Wattles, Jackie, CNN tech, April 5, 2017. Accessed online)

POSITIONS:

The ACLU of Michigan testified in support of the bill. (4-25-17)

The Oakland County Sheriff's Office indicated support for the bill. (5-2-17)

The Michigan Department of State Police indicated support for the bill. (4-25-17)

The Fraternal Order of Police indicated support for the bill. (5-2-17)

The Michigan Coalition to End Domestic and Sexual Violence indicated support for the bill. (5-2-17)

The Michigan Press Association indicated opposition to the bill as written. (5-2-17)

The Police Officers Association of Michigan indicated opposition to the bill. (4-25-17)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.