

Support SB 387 – Strengthen Police Transparency and Accountability

SB 387 would appropriate \$20 million for the fiscal year ending June 30, 2022 to the body-worn and dashboard camera fund established in RSA 105-D:3 for the purpose of reimbursing county and municipal law enforcement agencies for 50 percent of the initial body-worn and dashboard cameras and associated video retention acquisition costs. The appropriation shall be funded from any remaining American Rescue Plan Act funds, or any other federal funds that can be used for this purpose, with any additional funding coming from the state general fund.

Provides funding in support of a New Hampshire Commission on Law Enforcement (LEACT) recommendation. The LEACT final report included a recommendation that all law enforcement departments to use body cameras.ⁱ Despite this recommendation, sufficient funding was not made available to ensure that departments could purchase the necessary equipment. This legislation is an important step toward achieving this LEACT recommendation.

Legislators must also ensure strong policies governing the use of body cameras before they are deployed. Without strong policies, body cameras become just another tool to hide law enforcement abuses. While New Hampshire has minimum standards that govern the use of body cameras,ⁱⁱ the standards lack several key provisions that are necessary to ensuring accountability. Specifically, the legislature must ensure the state’s body camera law includes the following mandates:

- That appropriate disciplinary action is taken against an officer who fails to follow recording and retention requirements.
- A prohibition against recording First Amendment protected activity, including peaceful protests, unless related to a call for service or other law enforcement action.
- Beyond what is mandated by state law, all videos depicting any police use of force or alleged police misconduct should be released to the public upon request; where a video depicts a member of the public being killed, shot by a firearm, or grievously injured by an officer, such video should be released within five days of a request.
- That no law enforcement officer may review or receive an accounting of any body camera footage until they have completed their initial reports, statements, or interviews (with certain exceptions).ⁱⁱⁱ
- Video redaction may be used to protect privacy, but only where the redaction does not interfere with a viewer’s ability to fully, completely, and accurately comprehend the events captured on the video footage.
- A rebuttable evidentiary presumption in favor of criminal defendants who reasonably assert that exculpatory evidence was destroyed or not captured in cases where an officer failed to adhere to recording or retention requirements.
- A rebuttable evidentiary presumption in favor of civil plaintiffs suing the government, a law enforcement agency, and/or law enforcement officers for damages based on police misconduct in cases where an officer failed to adhere to recording or retention requirements.

Body cameras must be a tool to enhance law enforcement accountability, not hide law enforcement abuses. Current law exempts body cameras from disclosure under 91-A unless the footage depicts “[a]ny restraint or use of force by a law enforcement officer[,]” ... the “discharge of a firearm,” ... or “[a]n encounter that results in an arrest for a felony-level offense[.]”^{iv} But, those provisions also include a broad exemption for “those portions of recordings which constitute an invasion of privacy of any person.”^v In addition, body camera footage of police misconduct that does not meet the criteria

above is exempt from disclosure. Because of these exemptions, law enforcement can, in certain cases, decide what video footage they want to release or keep secret. When law enforcement have the power to protect themselves instead of serving the public interest, they undermine the very purpose of deploying body cams in the first place. Setting the right balance between privacy and transparency in public access is tricky, but some situations are clear: when the video captures a critical incident (such as a serious use of force), when there are allegations of misconduct regarding the interaction captured on video, or when the subject of the video requests it, camera video should be released. Legislators must ensure body cameras are a tool to increase law enforcement transparency and accountability.

Current New Hampshire law undermines the integrity of the investigatory process. Under current law, officers may review their body camera footage prior to preparing their reports or statement of events, including in instances where an officer killed a person, unless the local agency prohibits it.^{vi} Officers involved in a critical incident like a shooting or facing charges of misconduct should not be permitted to view footage of the incident before making a statement or writing an initial report. Police do not show video evidence to other subjects or witnesses before taking their statements, and for good reasons. First, cognitive science has demonstrated that watching video of an incident actually changes a person's memory. Second, persons intent on providing misleading statements would be advantaged to know what falsities would and would not be disproven by body camera footage. Officers should watch the video after their initial statement and then have the chance to offer additional information and context. Because they may not remember a stressful incident perfectly, omissions or inconsistencies in their initial account shouldn't be grounds for discipline without evidence they intended to mislead. This would provide the fullest picture of what happened without tainting officers' initial recollection or creating the perception that body cameras are being used to cover up misconduct rather than to hold officers accountable.

Body Cameras are not a solution to police violence. As we have seen across the country, the introduction of police body cameras has not stopped police violence.^{vii} Contrary to what we see on television, in reality law enforcement spend the vast majority of their time policing low level offenses like drug possession and having an open container of alcohol. Of the approximately 10 million arrests each year, only about five percent are for serious offenses like murder, rape, and aggravated assault.^{viii} The vast majority of arrests are for low level things like "drug abuse violations" and disorderly conduct.^{ix} New Hampshire is not far off the national numbers. For example, as the Vera Institute for Justice found, "[i]n 2018, the Manchester Police Department made 4,142 arrests. Like most departments around the country, the majority of these arrests were not made for serious violent incidents, but instead for low level offenses. In fact, 84 percent of the 4,142 arrests in 2018 in Manchester were made for non-serious non-violent charges. These arrests are often made in response to situations that do not require police presence."^x The only way to reduce police violence and make our communities safer and stronger is to reduce the size, scope, and role of law enforcement and invest in our communities. Can body cameras, if governed by proper policies, improve police transparency and accountability? Perhaps, to a modest degree. Can they bring about significant improvements to the inequities and violence that plague modern policing? No.

Legislators should fund body cameras and ensure the state's body camera law strengthens law enforcement transparency and accountability.

Legislators must also rethink the role of policing in our society.

The ACLU's model body camera policy can be found at: <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

ⁱ New Hampshire Commission on Law Enforcement, Report and Recommendations, Aug. 31, 2020, p. 19, available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>.

ⁱⁱ See, RSA 105-D:2

ⁱⁱⁱ Current law states that “If an officer is suspected of wrongdoing or involved in an officer-involved shooting or other use of deadly force, the agency *may* limit or restrict an officer from viewing the video file.” (Emphasis added). RSA 105-D:2(XIV).

^{iv} 91-A:5(X)(a-c).

^v *Id.*

^{vi} Current law states that “If an officer is suspected of wrongdoing or involved in an officer-involved shooting or other use of deadly force, the agency *may* limit or restrict an officer from viewing the video file.” (Emphasis added). RSA 105-D:2(XIV).

^{vii} Louise Matsakis, *Cameras Haven't Stopped Police Brutality. Here's Why*, Wired, June 17, 2020, available at <https://www.wired.com/story/body-cameras-stopped-police-brutality-george-floyd/#:~:text=Six%20years%20later%2C%20body%20cameras%20are%20now%20used,while%20he%20was%20in%20police%20custody%20last%20month>; See also, Cheryl Corley, *Study: Body-Worn Camera Research Shows Drop In Police Use Of Force*, NPR, Apr. 26, 2021, available at <https://www.npr.org/2021/04/26/982391187/study-body-worn-camera-research-shows-drop-in-police-use-of-force> (“Body-worn cameras are a useful part of the response but not a solution by themselves. Body-worn cameras are not going to solve the problem of the enormous gap we see in police use of force in the U.S. against Black versus white Americans.”)

^{viii} Vera, *Every Three Seconds: Unlocking Police Data on Arrests*, Jan. 2019, available at <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview>.

^{ix} *Id.*

^x Vera, *What Policing Costs, Manchester, NH*, available at <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities/manchester-nh>.