



Tennessee Coalition for Open Government

BOARD OF DIRECTORS

Lucian Pera, President
Adams and Reese LLP
Adam Yeomans, Vice President
The Associated Press
Marian Ott, Treasurer
League of Women Voters, Tennessee
Dr. Dorothy Bowles, Secretary
Professor Emeritus, UT-Knoxville
Douglas R. Pierce, Past President
King & Ballou
Whit Adamson
Tennessee Association of Broadcasters
Victor Ashe
Former Knoxville mayor, lawmaker
Braden Boucek
The Beacon Center
Anita Bugg
WPLN Nashville Public Radio
Maria De Varenne
The Tennessean
Elenora Edwards
The Tennessee Press
Ron Fryar, Publisher
Cannon Courier
Alison Gerber
Chattanooga Times Free Press
Frank Gibson
Tennessee Press Association
Louis Graham
The Commercial Appeal
Robb Harvey
Waller Lansden Dortch & Davis
Rick Hollow
Hollow & Hollow
Gregg K. Jones
The Greeneville Sun
Jack McElroy
Knoxville News Sentinel
Helen Burns Sharp
Public interest advocate, Chattanooga
John Stern
Citizen Activist, Nashville
Hedy Weinberg
ACLU-TN
Dick Williams, State Chairman
Common Cause of Tennessee
John Williams
Tune, Entrekin & White, PC
Larry Wood
WNWS-FM

Dec. 15, 2016

The Honorable State Rep. Bob Ramsey
Chairman, House State Government Committee
212 War Memorial Building
Nashville, TN 37243

Dear Rep. Ramsey,

Thank you for your leadership as co-chairman of the Advisory Committee on Open Government (ACOG) in studying the issue of body camera footage.

Enclosed are answers to the six questions formed by the ACOG subcommittee to help inform discussion regarding considerations on how to treat body camera video footage under the Tennessee Public Records Act.

Tennessee Coalition for Open Government (TCOG) has been involved since it was founded in 2003 in providing education and advocacy for transparency in government through strong and sensible public records and open meetings laws.

We hope that the answers to these questions are useful to lawmakers.

Sincerely,

Adam Yeomans,
Vice President of TCOG and TCOG's representative on ACOG
Regional Director - The South
The Associated Press

cc: TCOG Board of Directors

Tennessee Coalition for Open Government
P.O. Box 22248, Nashville TN 37202
(615) 602-4080 | www.tcog.info
"To preserve and improve access to public information"

1 - Should there be any exceptions from access under the Public Records Act to video from law enforcement body cameras?

Under current state law, law enforcement entities have discretion to withhold records that are part of an ongoing investigation. This exemption is based on Rule of Criminal Procedure 16(a) (2) “Discovery and Inspection, Information Not Subject to Disclosure.”

We believe this exemption adequately shields from public disclosure any video that could harm an investigation or prosecution.

However, a weakness exists with the interpretation of this exemption that we believe threatens the rights of citizens to monitor their own government’s activities. When the government wields ultimate power over individual liberty — the authority to use lethal force against a citizen — the importance of public oversight is even greater.

Under the current interpretation of the “ongoing investigation” exemption, citizens — and even family members of the deceased or seriously injured — have no right to see body camera video that records lethal use of force unless police decide they want to release it. And in actuality in some cases in Tennessee, law enforcement and prosecutors have claimed, the law prevents citizens from seeing such video *even after the case is closed*.

This exemption — as interpreted — goes too far. Other states have recognized there must be limits to blanket confidentiality. In early December, for example, the Ohio Supreme Court ruled in a dash cam video case that: “(A) record that merely pertains to a law-enforcement matter does not constitute a confidential law-enforcement investigatory record unless the release of the record would create a high probability of disclosure of specific investigatory work product....”

“In the end, we hold that decisions about whether an exception to public-records disclosure applies to dash-cam recordings require a case-by-case review to determine whether the requested recordings contain investigative work product.”

Here in Tennessee, we know that release of video does not always harm an investigation or prosecution. Law enforcement frequently releases video footage before an investigation is concluded. In Gallatin in 2016, police released body camera footage of an incident in which a police officer shot and killed a woman approaching and threatening him with an axe only one day after the shooting. The investigation had hardly begun. (The police officer ultimately was not charged.)

If police are allowed to release some video and not others without explanation, citizens could easily think police will release video that shows them in a positive, defensible light and withhold video that might lead to questions about their actions.

Such double standards undermine trust. They also prevent communities and even local officials (such as a city council or county commission) from having the information they need to fully provide oversight of their law enforcement agencies.

It is our conclusion that transparency is the best path in cases in which law enforcement accountability is at issue. We believe that in order to withhold such body cam footage in cases of a citizen's death or serious injury, a higher standard should be met that demonstrates how keeping the video secret from the public would harm an investigation or prosecution on a per case basis. Police and district attorneys should not have sole authority to make this decision with no oversight or standards.

Law enforcement and others argue that citizens have an eventual right to see police documents, including body camera footage, once a case is over. But this has not been the case in most of Tennessee when the footage is related to a fatal police shooting. Here's why:

Most sheriff and police departments in the state use the Tennessee Bureau of Investigation to investigate police shootings and other allegations against officers. If there is video from a body or dashboard camera of the incident in question, the video becomes part of the TBI file. State and local officials have interpreted the TBI exemption to cover local records used in a TBI investigation, and have contended that even when the case is over, those records remain confidential under the TBI exemption [T.C.A. §10-7-504(a)(2)(A)].

Here is what the Tennessee Bureau of Investigation said in responding to a records request that was made by a reporter with The Mountain Press in Sevierville to the TBI, the Sevier County Sheriff's Department and the district attorney for body camera footage that recorded the fatal Jan. 13, 2016, shooting of 29-year-old Brandon Bearden by a sheriff's deputy:

"After reviewing the request, this office is unable to provide you with either all or part of the requested record(s). The basis for this denial is T.C.A. §10-7-504(2) (A), which states in part 'All investigative records of the Tennessee Bureau of Investigation...shall be treated as confidential and shall not be open to inspection by members of the public. The information contained in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record.' **The law does not provide that the files can become public upon review of the District Attorney General, or even upon on the conclusion of the case.**" - Susan Niland, Public Information Office, TBI (April 4, 2016 letter).

The district attorney decided not to bring charges against the sheriff's deputy and the deputy is back to work. But the district attorney and sheriff still refuse to release the video to a news reporter.

It is hard to imagine a more serious citizen right of access to records than a right of access to a government video that records death of a citizen at the hands of our government. Imagine if it were your own family member. Yet our public records law creates this very scenario, leaving citizens no right of oversight, particularly in cases where there is no prosecution.

We endorse the Tennessee Press Association's comments, including that it is possible to protect things like due process and the right to a fair trial without resorting to a blanket closure of records. And that broad exemptions could lead to arbitrarily withholding information, actions which have been suspect and viewed as self-serving in other states and cities.

We also endorse the League of Women Voters comments in their calls for transparency.

2 - Should there be a timeframe established for when video (and audio) from law enforcement body cameras be available under the Public Records Act?

The Tennessee Public Records Act generously provides records custodians time to fulfill public records requests that might require redaction. The law instructs that public records are to be provided promptly. However, if it is not practical to provide the records promptly, such as in cases in which redaction or compilation could take several hours, a custodian may provide the requester an estimate on how long fulfilling the records request can take.

When the record is part of an ongoing local police investigation, law enforcement can delay access to the record until after the investigation and prosecution is finished. Our experience is that this could be days, months or even years. We do not believe that the timeframe for access should be delayed even longer. And we believe that in many cases, access to body camera footage related to a fatal police shooting should be accessible to the public before a case is finished. Body camera footage should only be withheld if it can be reasonably demonstrated that releasing it will harm an ongoing investigation or prosecution.

We are not alone in this view. In a scientifically conducted poll by icitizen in July, 2016, 88% of Tennesseans said they believed that citizens should have a right of access to body camera footage that records use of force resulting in citizen death or serious injury even before an investigation is finished. Of those, most thought access should be provided unless a judge decided it would harm an investigation or prosecution. The rest were even more adamant about access, and thought not even a judge should prevent access. In contrast, only 12% thought police should have total discretion on whether to release such video.

Further, status of an investigation as "open" can be manipulated to delay disclosure of records.

In Blount County two years ago, a sheriff's deputy shot and killed a homeowner who was camped out in his barn with a shotgun, positioned to protect his property from burglars. A sheriff's deputy stopped by to check on the property, and in a tragic case of mistaken identity, shot and killed the homeowner.

The Daily Times in Maryville knew that sheriff records could be kept confidential until after the investigation was completed. When a reporter noticed that the deputy had been put back on patrol months later, the newspaper asked for access to the records. It had been almost a year since the shooting. They were told that the deputy had been cleared, but the case was not yet closed. After a few weeks of back-and-forth between an editor and the sheriff's department about how one could not have it both ways, permission was granted to view the records. This incident demonstrates how easy it is to "keep a case open" as a guise to delay access to public records for reasons unrelated to an investigation.

3 - Similar to GIS cost recovery, should record custodians be able to impose a cost recovery charge to reflect costs of video maintenance, storage and redaction?

No. Implementing a cost recovery fee for public access to video that serves a public interest would undermine the purpose of the cameras, which is to provide better accountability and insight into policing.

TCOG takes no position on whether or not law enforcement entities should purchase and use body cameras. We understand that the purchase of cameras, and perhaps more significantly, the maintenance and storage, is a very costly endeavor, often running into the millions of dollars. This decision on how to deploy taxpayer money must be made at the local level.

But creating excessive fees to get copies of the video — larger than the per-hour labor fees already allowed by law — would likely shut down any oversight of actions that are in the public interest to see. In fact, communities in which citizens might have lobbied for the purchase of body cameras would be sorely shocked to realize that any public accountability for the cameras would come with yet another price tag, this time borne directly by those most interested in accountability.

News organizations, criminal justice nonprofit groups, and others would find that tax dollars used to create accountability were really just tax dollars used to create a surveillance system without providing for the public benefit of oversight.

Furthermore, if you are a citizen who unfortunately found yourself or a family member recorded in a police video, you should not have to pay to get a copy of that video. If the government is going to record citizens — presumably without their permission — they should not be allowed to tax citizens who want to know how they are being surveilled.

4 - Should video reflecting use of force resulting in death or serious body injury be treated differently?

We believe that video that records law enforcement's use of force resulting in death or serious body injury should be available to the public immediately, or within a reasonable number of days, not months or years after the incident.

The current laws give local law enforcement agencies, such as police and sheriff's departments, sole discretion on releasing video during an ongoing investigation. But as outlined at length in answer to the first question, investigations into police shootings are often turned over to the TBI.

TBI's exemption to the Tennessee Public Records Act applies to records even after a case is closed. Based on this, law enforcement has claimed that local records, including body camera footage, related to a TBI investigation into a police shooting continue to be confidential after the case is closed.

(See answer to No. 1 for fuller discussion on this issue.)

5 - What other issues related to public access to the videos need to be considered by the General Assembly?

One stated purpose of body cameras is to shed light on interactions between police and citizens when there is a dispute or question about what happened.

The public has a legitimate interest in questions of excessive use of force by law enforcement or other behavior that threatens to deprive citizens of their civil rights and liberties. If government-created records can shed light when these questions arise, the public should not be denied access to see those records.

We understand the use of body cameras will result in the development of hundreds and even thousands of hours of stored video of citizens. We don't claim to know all of the types of video that may be collected. But we do believe that citizen privacy should be balanced against the public's right to know how their government is operating.

Here, we would like to make an additional point. While public access to body camera footage may present citizen privacy issues, a perhaps even larger threat to citizen privacy is how government is using such video.

For example, will police store video indefinitely and use technology — such as facial recognition software — to build files on individual citizen activity without the knowledge or consent of the individual, or without any just cause? Who will have access to watch the video within law enforcement departments or within other parts of government, and for what reasons?

Will public oversight of use of this new tool be limited through well-meaning but overly broad exemptions to the public records law?

As the General Assembly considers questions of public policy on body cameras, the public's right to know needs to be maintained.

6 - Does your organization have suggested legislative solutions?

We believe that the TBI exemption [T.C.A. §10-7-504 (a)(2)(A-B)] should be revised to allow for a citizen right of access to closed investigative records, including footage from body or dash cameras.

This is not without example. As mentioned, local police records are subject to inspection after a case is closed (See *Memphis Publishing Co. vs Holt*, 1986).

In addition, the General Assembly has over the years made sure that when adding state agencies to the investigative exemption in the Public Records Act that they also added that the records would cease to be confidential after a case was over. In fact, three other state agencies which have confidentiality during the investigative and prosecution stage lose that confidentiality when the case is over [T.C.A. §10-7-504 (a)(2)(B)]:

“The records of the departments of agriculture and environment and conservation and the Tennessee alcoholic beverage commission referenced in subdivision (a)(2)(A) shall cease to be confidential when the investigation is closed by the department or commission or when the court in which a criminal prosecution is brought has entered an order concluding all proceedings and the opportunity for direct appeal has been exhausted; provided, however, that any identifying information about a confidential informant or undercover law enforcement agent shall remain confidential. — [10-7-504 (2) (B)]

One way to achieve access to TBI records in closed cases would be to add the TBI to 10-7-504 (a)(2)(B). In fact, one must ask (and be able to answer) why endless confidentiality of public records has been granted one state agency, when no others have the same exemption. This is an especially relevant question in light of the Tennessee Supreme Court in the *Holt* case which affirmed that citizens have a right to records of closed law enforcement investigations.

We should mention that proposed legislation last year would have given district attorneys discretion to release documents from a Tennessee Bureau of Investigation file after an investigation is closed. This measure failed.

We do not think the proposed legislation would have ensured citizens a right to access body camera footage in cases where a citizen is killed or seriously injured. A prosecutor who has decided not to pursue charges in a police-shooting case might decide to release video and other documents when the documents clearly supported his or her decision, but withhold video and documents that might appear less defensible. We do not think selective transparency is transparency.

In addition to eliminating the "forever confidential" TBI exemption, our organization thinks that the General Assembly has an opportunity to establish public policy for release of body camera footage that poses no threat to the investigation or prosecution of the case.

One way to do this would be to require law enforcement to seek permission from a judge to withhold video, meeting a standard that shows how releasing such video would harm an investigation.

This would not be an excessive burden. In 2015, 20 people were shot and killed by law enforcement officers in Tennessee. In the 2016, the number was also 20 as of Nov. 21.

The view that citizens should have a right of access to any video footage that might be available in these cases is in line with what most Tennesseans think.

About 9 in 10 Tennesseans (89%) support public access to police body camera video when it records use of force that results in a citizen's serious injury or death, according to a scientifically conducted poll this summer. The support for such access crossed all party lines and demographics.

When further asked about access during an ongoing investigation, 60% agreed with the statement that "the public should have access to video from police body camera video that records officer-involved shootings unless a judge decides releasing it would harm an ongoing investigation."

Another 28% agreed with the statement "citizens should always have a right to see video from an officer's body camera when it records an officer-involved shooting." Only 12% chose the statement, "Police should be able to withhold video of an officer-involved shooting for any reason. They should not have to seek approval from anyone, such as a judge, to withhold the video."

The poll by icitizen that surveyed 531 registered voters online from July 25-27. To achieve an accurate demographic representation of the public, the data were sampled and weighted to U.S. Census benchmarks for gender, age, region, education, income and race, and to voter file benchmarks for age, region and gender. It has a margin of error of plus or minus 4 percentage points.