



## Newsletters

### Informing Illinois Newsletter - August 2016

August 29, 2016

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#### Is Your Police Department Ready for Body Cameras?

Police use of force has been heavily scrutinized for more than a year. In May 2015, the U.S. Department of Justice announced that it was providing \$20 million in grants to help local and tribal agencies purchase and learn to use body cameras. The grants are part of President Obama's plan to spend \$75 million over three years to buy 50,000 "bod cams" for police organizations. Despite the national push, local law enforcement remains divided over the use of such technology, with some agencies blatantly resisting.

According to the U.S. Department of Justice Census of State and Local Law Enforcement Agencies, 2008 (July 2011, NCJ 233982), in September 2008, there were approximately 17,895 law enforcement agencies nationwide and state and local law enforcement agencies employed more than 1.1 million persons on a full-time basis, including about 765,000 sworn personnel. Agencies also employed approximately 100,000 part-time employees, including 44,000 sworn officers.

#### Benefits of Cameras

Body cameras hold a lot of promise for enhancing transparency and promoting accountability for law enforcement officers. They will help protect the public against police misconduct and the police against false accusations of abuse. In short, body cameras have the potential to be a win-win.

The cameras also provide better evidence for both criminal and civil trials. Related benefits to having this type of evidence is quicker resolution of lawsuits against the officers for misconduct and criminal prosecution for those arrested. Citizen-based complaints could be resolved without resorting to litigation. The footage could benefit the law enforcement agencies with training and evaluating officers' performance.

There also is evidence that individuals behave better when they know that they are being watched. For example, in 2012, the Rialto, California police department and the University of Cambridge-Institute of Criminology conducted a year-long study to investigate whether body cameras have an effect on complaints lodged against officers. (William Farrar, Operation Candid Camera:

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Government



Rialto Police Department's Body-Worn Camera Experiment, The Police Chief 81 (2014)). Over the course of 988 shifts, randomly assigned front-line officers wore body cameras. The study found there was an 88 percent decrease in citizen complaints and a 60 percent decrease in the use of force by officers wearing the cameras.

### Legal Issues

Municipalities will need to implement body camera programs and policies. Such programs will require a significant commitment of staffing, and funding to purchase the cameras and to store and preserve data collected by them.

Also, technology is generally ahead of the law and that is the case with body cameras for police officers, an area where there is little guiding case law. It will take time for the legislatures and courts to catch up. Therefore, it is imperative that the law enforcement agencies ensure that their officers know the current law about privacy, search and seizure, consent, interviews, interrogations, state and federal disclosure rules, and FOIA laws.

### *FOIA and Records Management*

The Freedom of Information Act (FOIA) will also come into play. When an agency receives a FOIA request, officers must spend time reviewing the footage to not only find the requested footage, but to determine if any exception applies to prevent disclosure. The reviewing officers must also determine if any portions need to be redacted and then apply the redactions.

Other burdens include: data storage, access and security; evidentiary issues, such as chain of custody; categorizing the videos; maintaining the cameras; training; and additional administrative costs. Remember, no public record can be destroyed until it has been approved for destruction. Video footage qualifies as a public record.

Thirty days before an agency disposes of or destroys any record, regardless of physical format or characteristics, the agency head must submit a Local Records Disposal Certificate to the Office of the Secretary of State's Records Management Section and proceed with disposal only after a copy of the certificate has been reviewed and approved by the records management section's staff and returned to the agency. The Local Records Commission must keep the original copy of the disposal certificate in its files and the disposing agency must retain a duplicate signed copy. Both the application for authority and the permanent public records can be accessed through a FOIA request. The data storage cost alone may deter municipalizes from implementing the use of cameras.

### *Use of Body Cameras Within Private Homes*

Police officers and departments should use caution with body cameras when entering a private home, especially if minors are present. In reality, this could cause potential litigation for privacy violations, intentional infliction of emotional distress, and public humiliation if uninvolved parties are caught on camera and the footage becomes available in the public to their detriment.

As for constitutional issues, absent a warrant or some exigent circumstances, an officer must legally ask for permission to enter the premises. Likewise, barring exigencies, it would be prudent to ask if the officer can record in an individual's residence. If the individual does not consent, this denial should at least be recorded. A traditional Fourth Amendment analysis for determining if a reasonable expectation of privacy exists will be important.

### *Miranda Rights*

Police cameras could also affect *Miranda* warnings. The footage could provide good evidence of a clear and accurate reading to the suspect and invocation of the right or any waiver.

### Conclusion

Municipalities should perform a cost-benefit analysis before purchasing cameras. Agencies should review the current money budgeted for litigation costs associated with misconduct and judgments paid, and the money paid out on those cases where settlement is likely and expenses related to responding to citizen complaints. Those figures should be compared to the costs associated with purchasing cameras, and with training, staffing, administrative needs and storage.



Law enforcement agencies need to draft policies that address the right to access and store the data and to train officers, and limitations on body cameras, just to name a few. As always, with change, it may be difficult to balance the civil liberties of the public with the new technology. But, most likely, it will be worth it.

### **PAC Says Emails in Public Employees' Personal Email Accounts Can Be "Public Records" Under FOIA**

According to a binding opinion released by the public access counselor (PAC) on August 9, 2016, emails in public employees' personal email accounts can be "public records" for which public bodies must conduct a reasonable search under the Freedom of Information Act (FOIA). It appears, though, that simply asking or ordering employees to search their personal accounts or electronic devices could qualify as a "reasonable search."

The opinion in question, PAC 16-006, concerns the Chicago Police Department (CPD) and the controversial Laquan McDonald case. CNN sent a FOIA request to CPD seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers" for certain date ranges. CPD refused to search the officers' personal email accounts or to request that the officers search their personal accounts and report what they found. It did, however, search those officers' official CPD email accounts for the term "Laquan McDonald." Apparently, CPD did not search the officers' CPD email accounts for any other search terms.

The PAC found that CPD violated the FOIA by refusing to conduct a "reasonable search" for responsive records. As a threshold issue, the PAC stated that "communications pertaining to the transaction of public business that were sent or received on the CPD employees' personal e-mail accounts are 'public records.'" This is because the FOIA defines "public records" as "all records . . . having been prepared by or for, or having been or being used by . . . any public body." The PAC dismissed CPD's argument that emails in officers' personal accounts were not "public records" because CPD never possessed them.

Because CPD maintained that emails in the officers' personal accounts were not "public records" subject to FOIA, it did not ask or order the officers to search their personal email accounts for emails that were potentially responsive to CNN's FOIA request. The PAC found that CPD's failure to ask or order the officers to search their personal accounts amounted to a failure to conduct a reasonable search. The PAC acknowledged that FOIA "does not specifically describe the manner in which a public body is required to perform its search[.]" However, "an automated search of the entirety of a personal e-mail account using a search term is not necessarily required. Depending on the circumstances, ordering CPD officers to produce any responsive records may satisfy the requirement that CPD conduct a reasonable search."

The PAC further found that CPD's search of the officers' official CPD email accounts was not reasonable because CPD only searched for the term "Laquan McDonald." The PAC found that that failed to account for other terms officers may have used to refer to Mr. McDonald.

The PAC opinion raises a number of issues for local governments. While the opinion is not binding on any public body other than CPD, it will almost certainly be used as persuasive authority in future FOIA litigation. It could thus effectively become binding legal authority in the future. As a result, public bodies must consider: (1) whether to limit or forbid employees' use of personal accounts or devices for work purposes; (2) whether and how to try to obtain consent from employees to search their personal accounts or devices given Fourth Amendment concerns; and (3) even if use is limited or prohibited, how the public body will go about searching for responsive records on personal accounts and devices. In the opinion, the PAC seems to suggest that CPD asking or ordering officers to search their private accounts could satisfy the FOIA's "reasonable search" requirement. A public body could craft a policy outlining a specific protocol for documenting what search terms employees are asked to search for, how employees are asked (via phone, email, etc.), which employees are asked and when, when each employee reported the results of their search, and what specifically each employee reported. This could help the public body defend against allegations that it did not fulfill its "reasonable search" obligation.