

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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House Memorial 104 and Senate Memorial 98
STUDY LAW ENFORCEMENT BODY
CAMERA ISSUES

Stakeholders' Summary Report

During the 2018 Legislative Session, this Legislative Body passed House Memorial 104 and Senate Memorial 98, STUDY LAW ENFORCEMENT BODY CAMERA ISSUES, directing the New Mexico Office of the Attorney General (NMOAG) to convene a group of stakeholders to study and make recommendations for policy and legislation that would incorporate best practices in law enforcement, protect the mental and physical health information of individuals, protect the privacy of victims of crime, and provide the necessary transparency to law enforcement officers to ensure community support for their actions.

The group of stakeholders was to include representatives from the New Mexico Association of Counties, the New Mexico Municipal League, the Department of Health, the Children, Youth and Families Department, the Aging and Long-term Services Department, the Corrections Department, the Veterans' Services Department, the Behavioral Health Services Division of the Human Services Department, the Interagency Behavioral Health Purchasing Collaborative, the Administrative Office of the District Attorneys, the Public Defender Department, the New Mexico Criminal Defense Lawyers Association, the New Mexico Sheriffs and Police Association, the New Mexico Hospital Association, Disability Rights New Mexico, the National Alliance on Mental Illness New Mexico, the New Mexico Coalition Against Domestic Violence, the New Mexico Foundation for Open Government, the American Civil Liberties Union of New Mexico, the Albuquerque Police Department, the Bernalillo County Sheriff's Office, the New Mexico State Police and at least two members of Native American tribes. The NMOAG was further directed to submit a written report of the stakeholders' findings to this legislative body.

As requested, the NMOAG convened the group of stakeholders and formed three different working groups on the issue of body-worn camera (BWC) initiatives for law enforcement agencies in New Mexico. Seventeen stakeholders participated in this study and production of this report. Those participants included: the New Mexico Association of Counties, the Children, Youth and Families Department, the Behavioral Health Services Division of the Human Services Department, the Public Defender Department, the New Mexico Criminal Defense Lawyers Association, the New Mexico Chiefs of Police Association, the New Mexico Hospital Association, Disability Rights New Mexico, the National Alliance on Mental Illness New Mexico, New Mexico Foundation for Open Government, the American Civil Liberties Union of New Mexico, the Albuquerque Police Department, the Bernalillo County Sheriff's office, the New Mexico State Police, the City of Albuquerque, Bernalillo County, and NMOAG. The group of stakeholders met on five (5) occasions. These meetings took place at the New Mexico Office of the Attorney General on April 16, 2018, June 4, 2018, August 15, 2018, October 10, 2018 and November 27, 2018.

The three small groups formed from stakeholders of the larger group included: (1) the best practices group; (2) the crime victims group; and (3) the mental and physical health group. All three groups submitted reports which are collated and summarized below.

BEST PRACTICES WORKING GROUP SUMMARY

The purpose of this working group was to identify and analyze the best practices surrounding body-worn camera initiatives by law enforcement in New Mexico. Participants of this smaller working group included: the Public Defender Department, New Mexico Association of Counties, New Mexico Foundation for Open Government, American Civil Liberties Union of New Mexico, New Mexico Criminal Defense Lawyers Association, Albuquerque Police Department, Bernalillo County Sheriff's Office, New Mexico State Police, and NMOAG.

The group convened at the Law Office of the Public Defender's offices in Albuquerque, on August 2 and September 20, 2018.

This working group heard from several witnesses: Peter Simonson, Executive Director of the American Civil Liberties Union of New Mexico (ACLU-NM); Jonathan Sather, Lieutenant of the Albuquerque Police Department (APD) in charge of the policy considerations of APD's body-worn camera initiative; and Jim Kaplan, Civilian Evidence Supervisor at APD. This group also heard from its many members, including: Benjamin Baker of the New Mexico Attorney General's Office; Barry Porter of the New Mexico Criminal Defense Lawyers' Association; Christopher George of the Albuquerque Police Department; Larry Corning of the Bernalillo County Sheriff's Office; Ted Collins of New Mexico State Police; Karen Moses, Melanie Majors, and Susan Boe of the New Mexico Foundation for Open Government; Paul Haidle of ACLU-NM; Sal Baragiola and Patrick Trujillo of the New Mexico Association of Counties; and Christopher Dodd of the Law Office of the Public Defender, who served as chair of the working group.

Peter Simonson, Executive Director of ACLU-NM

ACLU-NM spoke and gave a large amount of valuable feedback. Because the BWC topic is quickly changing, the ACLU is constantly adapting their position to respond to new developments. The national ACLU released a report regarding BWCs. ACLU-NM agrees with many but not all of the positions in that report. The ACLU-NM was very clear in testifying that BWCs have significant implications for the First Amendment, free speech, racial justice, equal protection, and criminal justice reform. ACLU-NM testified that in Albuquerque, BWCs have allowed the public to see the shooting of James Boyd and assess whether such use of force was required. As law enforcement says that BWC footage doesn't show the whole story of an incident, ACLU agrees. You are only seeing one perspective. However, it does give much more than not having it. A prosecutor would not decline to present video footage to a judge or jury just because it shows only one angle. In addition, BWCs work both ways. They sometimes exonerate police officers and at other times support accusations of misconduct. The ACLU feels that there are particular types of video that should always be recorded: use of force, incident leading to arrest, and incidents where the subject of the recording has requested the contact be recorded.

As a general principle, the ACLU's position is that law enforcement officers (LEOs) should be required to activate BWCs for every contact with the public and there should be repercussions for failing to do so. However, the ACLU acknowledged that there are contexts where we as a community need to be cautious about collecting BWC footage, such as: in the home, in places of

business, and in locker rooms or restrooms. Thus, the ACLU would like mechanisms to protect privacy in these instances. ACLU also has concerns for the privacy of victims of crime with regard to the public release of footage. ACLU does not want victims of crime to be afraid to go to the police for fear of the footage being played in the media.

With regard to IPRA, it is the position of the ACLU-NM that there are better ways to address those privacy considerations than amending IPRA. New Mexico has some of the best open records laws in the U.S. and ACLU-NM does not want to jeopardize that. IPRA is important for proving or disproving allegations of misconduct in government. So, without amending IPRA, the ACLU-NM suggested the following options:

- o When BWC is activated and officer is approaching a home, the officer should ask the resident whether video should be turned off.
- o When interacting with victims, the officer should ask them if they want cameras turned off.

With regard to redaction of BWC, the ACLU-NM supports some limited ability to redact such as to blur faces, etc., as long as redaction does not interfere with the spirit of IPRA. In addition, the ACLU-NM feels that source videos shouldn't be redacted. As for retention, the ACLU-NM agrees that there needs to be a policy for retaining important BWC footage. They recommended that non-flagged recordings should be deleted after a few weeks or months and that flagged recordings should be retained much longer.

Jonathan Sather, APD Lieutenant, and Jim Kaplan, APD Civilian Evidence Supervisor

APD gave detailed testimony as to how overwhelming the BWC issue is. To date, the APD BWC project has generated 120-140 terabytes of footage. APD recently changed retention-flagging to a CAD-integrated retention system. It used to be that the officers had to flag each video for retention based upon the contents of the video. Now, when a CAD receives a case number, all videos generated under that CAD are automatically marked for retention. This is called CAD/RMS integration.

The working group highly praised APD for this development, as it represents a reduction of time expended and potential for human error in the manual retention flagging system. Automation is critical for a successful BWC program.

The Albuquerque Civilian Police Oversight Agency has been given access to the BWC system to view and download video. They can flag videos for retention. District Attorneys have evidence.com for prosecutors, which allows them access to BWC footage for prosecution purposes. BWC footage is also useful in identifying officers who fail to follow protocols and procedures.

APD has a Unit dedicated to responding to IPRA requests. The Unit averages 410 IPRA requests per month for lapel footage. The Unit has a Supervisor, two full-time employees and four

temporary employees. As an example of the volume of requests received, it was noted that one of the temporary employees is working full-time on a request for all videos from 2014 through February 11, 2018.

Members of the group expressed that citizens should be able to request retention of video footage. The group all agreed that costs need to be considered from all perspectives, costs to citizens and costs to government entities in redacting and producing.

Summary of the Group's Primary Concerns

The working group quickly determined that there are two distinct areas of best practices for any BWC initiative: creation and collection of BWC footage and retention of that footage.

Creation and Collection of BWC Footage

The creation and collection of BWC footage created the greatest level of disagreement among the members of the working group. APD, which has implemented agency-wide mandatory BWC recording, has found that the program has been beneficial, assisting in identifying problem officers and instituting early intervention programs to assist these officers in professional development. The Law Office of the Public Defender and the Attorney General's Office agreed that BWC footage is critically important in the prosecution and defense of criminal cases. The Bernalillo County Sheriff's Office and the New Mexico Association of Counties were extremely wary of the possibility of a statewide-unfunded mandate that all law enforcement agencies be required to deploy and use BWCs.

All members seemed to agree that big-data analysis and tracking of citizens through BWC deployment pose a significant threat of abuse. The members of the working group were concerned that large technology corporations could use the data generated by BWCs to develop products that are against the public interest.

The working group also recognized that BWCs are an additional expense to law enforcement agencies. APD made available for the group the contracts it has with Axon, the company managing its cameras and footage storage. APD spends \$881,640 per year on its BWC system.

Retention of BWC Footage

There was good consensus in the working group on issues related to retention of BWC footage. The group agreed that there must be very clear requirements for when footage should be retained and for how long. The group agreed that the retention of all BWC footage should, at a minimum, equal the length of time permitted for a citizen to make a complaint against an officer, because the footage will provide good insight into whether the complaint is warranted. The group also felt that the State Records Retention Schedule should establish the length of time for BWC footage to be retained based on the nature of the recording. This would ensure a consistent policy statewide for all police agencies. The group agreed that BWC footage poses unique challenges from an IPRA

perspective. The group supported the idea that the New Mexico Attorney General's Office should add a section to its IPRA Compliance Guide addressing lapel footage.

There was significant interest from many members in the creation of a statewide repository for BWC footage. Such an entity could function as a clearinghouse for storing and releasing BWC footage under IPRA. This would permit the state to leverage economies of scale and execute a single contract for the storage of BWC footage, which would reduce the overall cost of BWC programs and ensure consistent application of the records retention and IPRA requirements.

The working group was extremely concerned to hear that in many of the smaller law enforcement agencies in New Mexico that have implemented BWC programs, there are some agencies that do not have any policies and procedures for the storage and release of BWC footage. The State Police informed the group that there are agencies where once the storage space on the BWC devices is consumed, the law enforcement officers are simply deleting footage.

Conclusions

BWC programs require an extensive investment of time and resources by law enforcement agencies. They provide a good oversight mechanism that allows agencies to identify officers who fail to follow protocols and procedures and provide early intervention programming to get officers on the right track for effective policing. It is critical that any BWC program be accompanied by comprehensive and clear policies governing when footage should be captured and how it should be retained. The IPRA requirements for BWC footage must be clear and agencies should be trained on compliance.

CRIME VICTIMS WORKING GROUP SUMMARY

The purpose of this working group was to identify and analyze the issues that BWCs present for crime victims. The group convened on July 26, 2018. Participants of this smaller working group included: the Public Defender Department, New Mexico Foundation for Open Government, American Civil Liberties Union of New Mexico, Albuquerque Police Department, Bernalillo County Sheriff's Office, New Mexico State Police, and NMOAG.

As an initial matter, the group read and considered the Victims of Crime Act, NMSA 1978, § 31-26-1 et seq. The group noted that the purpose of the Act, as set out in Section 31-26-2, is to treat victims of violent crime with "dignity, respect and sensitivity at all stages of the criminal justice process." The same statute also requires that victims' rights be protected by "law enforcement agencies, prosecutors and judges as vigorously as are the rights of criminal defendants." Lastly, the group considered the definition of "criminal offense" as defined in Sections 31-26-3(B) (1)-(21) of the Act.

Summary of the Group's Primary Concerns

The group identified and discussed a number of concerns relative to crime victims. Specifically, they discussed the re-victimization that may occur if the footage is released to the public. There

was concern for victims in rural areas being treated differently, as opposed to metro areas with body camera usage. The group concluded that how a victim and the type of crime is defined is important; specifically sex crimes, domestic violence, and crimes against children. A majority of the group agreed that sexual assault, domestic violence, and child victims should be protected and the group discussed protocols that would best protect that population. However, the group struggled between the conflict presented between protecting the public interest and preserving evidence.

With regard to IPRA concerns, the group discussed possible amendments, shortcomings of current legislation and enforcement, and better education on IRPA. They also discussed to what extent a victim's rights can impact the release of body camera footage. As noted with the other groups, the crime victims working group recognized the lack of a system in place to store video in smaller organizations and general retention problems.

MENTAL AND PHYSICAL HEALTH WORKING GROUP SUMMARY

The purpose of this working group was to identify and analyze the issues BWCs present for mental and physical health concerns. Participants of this smaller working group included: Disability Rights New Mexico, New Mexico Foundation for Open Government, American Civil Liberties Union of New Mexico, New Mexico Hospital Association, and NMOAG.

Nancy Koenigsberg of Disability Rights NM (DRNM)

DRNM expressed that there should be a balance between public safety and the right to privacy and need for transparency. They believe that interactions between law enforcement and individuals should be recorded, but redaction is key. DRNM also expressed that Crisis Intervention Training (CIT) for APD has been very helpful. Mobile Crisis Teams (MCT) are law enforcement officers paired with clinicians who, when available, respond to behavioral health calls. The officer's job is to secure the scene before permitting the clinician to talk with the individual. The MCT officer stands in front of the individual with the clinician standing behind the officer off to an angle. This enables the MCT officer to assure the safety of the clinician and enable the clinician to see the individual. There is usually a field officer on scene as well. Because there is at least one officer present at all times, the conversation with the clinician is not confidential. However, DRNM notes that opinions vary as to whether the conversation between a clinician and an individual when law enforcement is present, where health information related to that individual is discussed, is one that should be protected from disclosure under existing statute. Nonetheless, recording of the police interaction is important.

DRNM states that key questions are: (1) who decides what constitutes a "behavioral health call"; (2) who will assign dispatch code once footage is recorded; and (3) how will that footage be classified. A further concern is that there are legitimate civilian police oversight functions where reviews of pattern and practice are important. DRNM also noted the emergency medical services guidelines are mentioned in the memorial but are not part of a statute.

Beth Landon of NM Hospital Association

The Hospital Association expressed that recording in an area where someone is receiving treatment is prohibited under HIPAA. Hospital emergency departments are becoming more and more dangerous due to the nature of people being transported there and substance abusers are self-medicating because they are unable to afford mental health medication. The Hospital Association was concerned whether all stops for DUI or involvement of mobile crisis teams, would be considered behavioral health interactions. These were all situations that highlight the need for protocols and procedures on BWC use, storage and public or protected nature of the footage.

Leon Howard of ACLU-NM

ACLU-NM expressed that the infrastructure to protect health information already exists within an IPRA exception. While ACLU feels that emergency interventions or exigent situations should always be recorded, it would be good to get consent to record, since recording a constituent receiving services in a healthcare setting is prohibited. ACLU noted that an important question is the threshold for identifying a law enforcement "behavioral health" interaction. The ACLU is concerned about a slippery slope that can be expanded to exempt more and more interactions. They also reiterated a theme that continued to present itself in all meetings related to BWC, which is the length of time recordings should be preserved.

ACLU stated that it is also necessary to balance transparency and privacy. A person has an expectation of privacy in his or her home. It is possible to tell the individual that the interaction is being recorded and the person can ask that the camera be turned off. However, that discussion must be recorded before turning off the camera. Mr. Howard indicated that if it is a behavioral health call, there might be an issue regarding capacity to consent. He personally believes that there should be very narrow circumstances to consent to not record in a home. Another issue raised by ACLU is who should be responsible for determining if and when it is necessary to redact faces and other personal identifying information from footage.

Kip Purcell of NMFOG

NMFOG testified and agreed with most of what was said by ACLU-NM. NMFOG does not have a position on the collection of information, but is concerned about what is done with footage once it is recorded and created. NMFOG also raised the issue as to when the rendering of behavioral health or health care assistance converts an interaction with law enforcement into treatment. NMFOG also expressed concern that exceptions to IPRA can be used in a self-interested way to thwart public accountability and a more generalized concern with creating more exceptions to IPRA. NMFOG also noted that protected information does not include documentation of, or recordings of, behaviors other than behaviors documented for treatment purposes. The documentation or recording of treatment by a health care provider is protected. NMFOG directed the group's attention to three statutes relevant to the conversation. One, NMSA 1978, §

24-7B-3(G) (2006), defines “mental health treatment” under the Mental Health Care Treatment Decisions Act. Two, NMSA 1978, § 43-1-10 (2013) gives peace officers the ability to transport individuals for an emergency mental health evaluation. Three, NMSA 1978, § 14-6-1(A) (1977) provides that “[a]ll health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record.”

Jim Ogle of NAMI-NM

Mr. Ogle submitted input intended to represent families and people living with a mental illness. He believes that caller should not be hesitant about calling 9-1-1 for assistance during a behavioral health crisis. If a caller is aware that he/she will be video-taped, and the information is available to the public, there is a natural reluctance to make the call and divulge critical behavior information to the law enforcement officer. Mr. Ogle contends that although transparency is important for accountability, in non-criminal law enforcement/family/consumer interactions, privacy for behavioral health issues is likewise important. With the stigma that is involved and the public’s lack of knowledge on behavioral health issues, an unnecessary disclosure of law enforcement/family/consumer interactions can be very detrimental to the person involved. In the extreme, this could lead to suicide. In less traumatic cases, it can lead to a person losing a job, or just cause problems in neighbor relations and be a setback in the recovery process.

In Albuquerque/Bernalillo County, the Mobile Crisis Teams (MCT), which include a police officer and behavioral health clinician, respond to high priority behavioral health calls as triaged by the dispatchers, and a behavioral health situation as determined by another law enforcement officer. Mr. Ogle feels that it needs to be clarified whether the clinician is considered a person providing health care and thus whether that information should be protected. Pursuant to NMSA 1978, Section 32A-6A-4, definitions from the Children's Mental Health and Developmental Disabilities Act: "clinician" means “a person whose licensure allows the person to make independent clinical decisions, including a physician, licensed psychologist, psychiatric nurse practitioner, licensed independent social worker, licensed marriage and family therapist and licensed professional clinical counselor.” Mr. Ogle raised the issue as to whether this statute includes the clinicians that are part of the MCT's, since the MCT's don't make a distinction between adult and child patient. Additionally, the definition of a “mental health or developmental disabilities professional” as used in the Mental Health and Developmental Disabilities Code means “a physician or other professional who by training or experience is qualified to work with persons with a mental disorder or a developmental disability.” The specific purpose of the clinician with the MCT is to work with a person that has a mental disorder. Thus, he questions whether their should work fall under the same confidentiality statutes as other mental health professionals.

Mr. Ogles believes there needs to be access to the MCT calls-for-service video's for police oversight. At a minimum, the civilian police oversight committee and direct police supervisors should have access, under the condition that the material is kept confidential. He further believes that the NM Medical Service Guidelines were included in the Memorial to point out the rules

emergency response people live under for physical illnesses/injuries. As such, he asks why is behavioral health any different in these non-criminal situations?

Mr. Ogle stated that he would like to see a proposal that the MCT's videos within Bernalillo County are considered confidential, with the caveat there is no indication of a criminal activity and release of video's should be treated the same as health information. Mr. Ogles also seeks clarification, possibly in the Mental Health and Developmental Disabilities Code, whether the clinicians that are part of the MCT's are practicing what they were trained for. He stressed that he thinks this is important to protect the clinician license and the privacy of vulnerable individuals and families that request help in a behavioral health crisis.

Key Issues Identified

The group determined these three related issues merited further discussions: (1) what constitutes a law enforcement "behavioral health" interaction which would require redaction if made the subject of an IPRA request; (2) who decides whether the interaction is a "behavioral health interaction"; and (3) whether labeling an interaction as a "behavioral health" interaction would cover too many law enforcement interactions and thus thwart public accountability.

CONCLUSION

House Memorial 104 and Senate Memorial 98 brought together a diverse group of stakeholders to study and make recommendations for policy and legislation that would incorporate best practices in law enforcement, protect the mental and physical health information of individuals, protect the privacy of victims of crime, and provide the necessary transparency to law enforcement officers to ensure community support for their actions. From the three small working groups formed to complete this task, it was clear that further work is needed to develop recommendations for policy and legislation.

House Memorial 104 and Senate Memorial 98
Study Law Enforcement Body Camera Issues
Stakeholders' Summary Report

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to the

Courts, Corrections and Justice Committee of the 2018 Interim
Room 322 of the State Capitol

by

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