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March 2, 2017

Hon. Karl Racine
Attorney General
441 Fourth Street, N.W.
Washington, D.C. 20001

Re: Public access to body-worn-camera trial exhibits

Dear Mr. Racine:

I am writing to you because the D.C. Open Government Coalition is concerned about the position your office has taken recently regarding the right of the public and news media to view and copy body-worn-camera videos introduced into evidence in public judicial proceedings. We believe your policy on this issue conflicts with the public's First Amendment and common law right of access to criminal judicial proceedings and related evidence.

In light of the following, we hope you will change your office's practice when you receive requests in the future for trial exhibits generally, and for BWC video exhibits specifically. If we cannot convince you to alter the policy we are prepared to intervene in an appropriate case to assert the public's right of access.

The U.S. Supreme Court firmly established 36 years ago that the public and the news media have a qualified First Amendment right to attend criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). A party seeking to close a trial must demonstrate a compelling, overriding interest that outweighs the public's interest in observing such proceedings. *Id.* at 580 – 581.

Less than a year later, the D.C. Court of Appeals relied on *Richmond Newspapers* to hold that the public has a First Amendment right to attend pretrial detention hearings as well as trials. *United States v. Edwards*, 430 A.2^d 1321 (D.C. 1981). *See, also, The Washington Post v. Robinson*, 935 F.2^d 282 (D.C. Cir. 1991)(First Amendment right of access to plea agreements and exhibits attached to them).

The D.C. Court of Appeals more recently held that the First Amendment right of access encompasses criminal judicial records, in addition to the right to attend court proceedings. *Nellson v. Bayly*, 856 A.2^d 566, 567 (D.C. 2004)(*per curiam*)(*Edwards* "gave critical guidance on the standards governing public access to criminal ... records"). The Court of Appeals

mandated adherence to “strict conditions governing any request to seal a criminal record or to close a criminal courtroom.” *Nellson, supra*.

The BWC video exhibits that assistant attorneys general introduce into evidence are criminal court records to which the public is presumed to have a First Amendment right of access, and the government has the burden of demonstrating otherwise.

As a matter of practice, the Superior Court clerk does not keep exhibits after a trial is concluded. Therefore, your assistants routinely retain custody of BWC video exhibits pursuant to D.C. Crim. R. 119 as a surrogate for the Court. *See Mohkiber v. Davis*, 537 A.2d 1100, 1105 (D.C. 1988) (“The fact that a suit has gone to judgment does not in any sense militate against the public’s right to prosecute a substantiated right to see the records of a particular case”).

The presumptive First Amendment right ensures that in nearly all instances the news media and public can see exactly what the judge saw before making a legal ruling, or what the trier-of-fact relied upon to reach a verdict. Unless the government or defendant makes a very substantial showing of a need for secrecy, nothing will be redacted. There may be instances in which exhibits admitted into evidence in a public criminal trial are so intimate that a judge would feel the need to seal them. But those instances are extremely rare, and it is exceedingly unlikely that a routine DUI case would fall into that category.

In response to recent requests from Paul Wagner, a Fox5 News reporter, you asserted that legislation enacted last year prohibits you from disclosing BWC video trial exhibits. That legislation, which addresses the public’s right to request BWC video under the Freedom of Information Act, states that all requests must be made to the Metropolitan Police Department. D.C. Code § 2-532(c)(2)(B).

To be clear, Mr. Wagner did not ask for BWC video. He, and we, are asking for access to trial exhibits, which include portions of video made using body-worn cameras. Because the First Amendment and common law govern public access to judicial records, the FOI Act cannot be applied to infringe that right.

As the D.C. Court of Appeals recognized,

Public access to judicial proceedings serves an amalgam of functions.... An open courtroom has an ameliorative effect on judicial proceedings themselves.... In addition ..., openness and publicity perform an informative, educative function by enabling the public to observe the operation of the criminal justice system.... Related to the educative function is another purpose of open proceedings, promoting the appearance of justice.... Public confidence cannot long be maintained where ... the record supporting the court’s decision [are] sealed from the public view.

Edwards, supra, at 1344 – 45.

Providing access to court records ensures timeliness as well as completeness. The Freedom of Information Act guarantees neither. It gives the public body in possession of government records

broad discretion to withhold information falling within numerous exemptions. D.C. Code § 2-534. In the context of public criminal judicial proceedings, the personal privacy and law enforcement exemptions are particularly problematic because public bodies often apply an over-broad interpretation of exemptions where disclosure “would constitute a clearly unwarranted invasion of personal privacy” (§ 2-534(a)(2), personal privacy exemption); and disclosure would “[c]onstitute an unwarranted invasion of personal privacy” (§ 2-534(a)(3)(C), law enforcement exemption). Simply put, the concept of personal privacy applied in FOI Act cases has no applicability when determining the public’s right to see exhibits introduced in criminal judicial proceedings.

After you refused to make the BWC trial exhibits available, Mr. Wagner filed FOIA requests with MPD for the BWC exhibits in five DUI cases. But, in response, MPD did not provide the trial exhibits. It gave him 10 heavily redacted, raw BWC videos that appear to be related to four of the cases. Due to the redactions — blurring of the faces of all officers in uniform and defendants, and bleeping of all pertinent verbal and radio communications — it is impossible to identify the case to which a particular videos relates.

Your office’s reliance on § 2-532(c)(2)(B) and MPD’s heavy redaction of raw BWC video do not satisfy the public’s right of access to criminal trial exhibits. In recognition of this, the U.S. Attorney’s office routinely provides BWC trial exhibits in response to media requests. We ask that you amend your policy to comply with established binding precedent in the District.

We would welcome the opportunity to discuss this matter with you in more detail.

Yours truly,

A handwritten signature in black ink, appearing to read 'R. Becker', with a long horizontal flourish extending to the right.

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