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Testimony of
Robert S. Becker

On behalf of the D.C. Open Government Coalition
February 23, 2023

Before the Committee on the Judiciary and Public Safety
Of the Council of the District of Columbia

Performance Oversight Hearing — Metropolitan Police Department and
the Office of Police Complaints

On behalf of the D.C. Open Government Coalition, thank you for giving us the opportunity to provide our assessment of the Metropolitan Police Department's (MPD) performance in the past year. I am a member of the Coalition board, and a Ward 4 resident.

In its nearly 14-year history, the Coalition has rarely testified about the MPD's performance. But we feel compelled to do so now to call out the Department's blatant failure to comply with the Freedom of Information Act (FOIA), its refusal to follow Office of Open Government (OOG) opinions calling department redactions unlawful, and its disregard for the Council's clearly stated legislative intent. In light of the department's actions, we urge the committee to hold a public roundtable later this year to assess whether MPD is meeting its disclosure obligations regarding body-worn camera (BWC) videos and officer disciplinary records under the Comprehensive Policing and Justice Reform Amendment Act of 2022 (Police Reform Bill), Bill 24-320. Absent Congressional interference, the bill will take effect in mid-May.

**MPD ROUTINELY WITHHOLDS BODY-WORN CAMERA VIDEOS IN VIOLATION OF
THE FOI ACT**

In response to FOIA requests, the MPD routinely misapplies the law-enforcement and personal privacy exemptions to withhold public records, and to justify withholding or grossly over-redacting BWC videos. MPD's pattern of behavior when processing FOIA requests appears to be guided by the principle that the more difficult it makes the process, the more likely the requester

will be to give up and go away without the records or videos.¹

In situations where the MPD ultimately discloses BWC videos of events that occurred in public places visible to passers-by, it redacts them to such an extent that all relevant content and context is lost. It blurs the faces and badges of officers in uniform and emergency medical personnel, falsely claiming that failing to do so would constitute a “clearly unwarranted invasion of [the] personal privacy” of government employees. D.C. Code § 2-534(a)(2).

I say “falsely claiming,” not “erroneously claiming,” because in response to a Coalition complaint, the OOG ruled that “[t]he redaction of video footage that reveals an MPD officer’s identity is not a proper application of the D.C. FOIA personal privacy exemption because MPD officers have no reasonable expectation of privacy while performing their duties in public places.” MPD District of Columbia Freedom of Information Act Compliance, OOG-002-10.1.19-AO, Nov. 5, 2020 (OOG Opinion). Less than three months ago, the Council reinforced that ruling, stating that

officers’ faces should not be redacted from BWC footage. Police officers have tremendous power over members of the public.... They can stop and search people, make arrests, and are authorized to carry firearms and, when justified, use deadly force. The unique powers and functions of police officers ... require a robust system of oversight to ensure they are not abused or misused.

Bill 24-320, the Comprehensive Policing and Justice Reform Amendment Act of 2022, Committee Report, (Nov. 30, 2022), 19.

In response to multiple complaints arising from police-involved deaths, the Council first enacted emergency legislation in 2021 requiring MPD to give victims, decedents’ families and the Council access to BWC videos and other records of the incidents, and to make the videos public. After that, MPD made public heavily redacted video clips — not complete videos — from use-of-force and officer-involved death incidents. The clips appeared as one or two panes in what were titled, “Community Briefings.”

To a large extent, the “Community Briefing” format is an effort to present in narrative form the MPD’s version of events preceding, during and following the use of force or shooting, and to use excerpts from the videos to support that narrative. Close examination of the incomplete video clips is virtually impossible, and no matter how many officers were involved in an incident, MPD provided clips from at most two of them.

The permanent legislation, which will take effect in mid-May unless blocked by Congress, will require MPD to,

Within 5 business days after an officer-involved death or the serious use of force,

¹ In a sworn declaration, Vendette Parker, a former MPD FOIA Officer, said that at the direction of senior MPD officials, she “delayed, denied, or improperly altered” 20 requests “originating from news reporters or people known to be critical of the department, or those containing requests for information with the potential to embarrass the department.” *Phillips v. D.C.*, No. 22-CV-277, Doc. No. 1, Exh. A (D.D.C. filed Feb. 2, 2022). See, also, <https://dcogc.org/blog/dc-police-officials-manipulated-foia-to-avoid-embarrassment-says-new-lawsuit>.

publicly release:

- (I) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and
- (II) A description of the incident; ...

The law

Require[s] the public disclosure of the names of all subject officers (the officers who committed the acts at issue). Further, ... the release should include the BWC recordings of all officers (not just subject officers) that capture any part of the events leading up to the incident, during the officer-involved death or serious use of force, and after the incident.

Committee Report, 18.

We have good reason to believe that the MPD will not meet the Council’s expectations, just as it has refused to accept the OOG’s interpretation of the law. The one 2023 “Community Briefing” posted on MPD’s YouTube channel, a [February 10 officer-involved shooting](#), includes only excerpts from one officer’s camera, and blurs all faces, including at least one officer and the person arrested.

Furthermore, MPD continues to deny FOIA requests from people involved in recorded incidents that occur in public places, and D.C. residents generally. A pedestrian who had been struck by a car at the intersection of Missouri Avenue and 5th Street, N.W., filed a FOIA request in early January for unredacted BWC videos recorded by responding officers.² An MPD FOIA officer informed her that she could view the video at any police district, but while doing so, “you will not be able to download, record, take photos, and/or write notes. If you decide after viewing the footage that you would like to obtain a copy, you will then be instructed on how to submit a FOIA request.”

MPD provided heavily redacted excerpts of videos from one officer, asserting that the personal privacy exemption,

covers any and all information that can identify someone. In this instance, you have requested BWC video footage. Without authorization and/or a privacy waiver on file from individuals involved and/or non-involved, who can be seen and/or heard in the video footage, we redact their images and their voices to protect their privacy.

See attached email from Aaron Harden. Contrary to the OOG’s advisory opinion and the Bill 24-320 Committee Report, MPD claimed “the images of, and the badges worn by, MPD police officers are also redacted in BWC footage, as they too have some expectation of privacy although they are acting in their official capacity.” *Id.*

² In the interest of full disclosure, the pedestrian is my daughter, Loren Becker, a Brightwood Park resident.

The excerpts included interviews with two witnesses to the accident, but not of an officer's interview with the driver whose car struck the woman. According to a different FOIA officer,

You specifically advised FOIA Specialist, Mr. Harden, you are seeking the interview of the driver involved in the incident. Although, the statement was given and/or recorded in a public space, it does not constitute as a primary benefit to the general public to make release to you under a FOIA without the driver's consent.

See attached email from Lisa Archie-Mills.

MPD did not explain why it is "a primary benefit to the general public" to disclose interviews of uninvolved witnesses, but not to disclose the driver's interview. The only possible rationale is that, because the driver was cited for a moving violation, MPD is asserting that she has a greater privacy interest than uninvolved witnesses.

Such an interpretation conflicts with Common Law privacy principles³ and D.C. statutes. Among records MPD is required to keep are:

- (4) Arrest books, which shall contain the following information:
 - (A) Case number, date of arrest, and time of recording arrest in arrest book;
 - (B) Name, address, date of birth, color, birthplace, occupation, and marital status of person arrested;
 - (C) Offense with which person arrested was charged and place where person was arrested;
 - (D) Name and address of complainant;
 - (E) Name of arresting officer; and
 - (F) Disposition of case[.]

D.C. Code § 5-113.01. *See, also*, DCMR § 18-3011.2 (all traffic adjudication hearings "will be open to the public."). Pursuant to D.C. Code § 5-113.06,

- (a) Except as provided in subsection (c) of this section, the records to be kept by paragraphs (1), (2), and (4) of § 5-113.01 shall be open to public inspection when not in actual use, and this requirement shall be enforceable by mandatory injunction issued by the Superior Court of the District of Columbia on the application of any person.

The only individuals denied access by § 5-113.06(c) are "practitioner[s], whether directly or through a paid intermediary, [who] solicit for financial gain a client, patient, or customer within 21 days of a motor vehicle accident...." D.C. Code § 22-2335.14.

Because details of traffic citations and the identities of cited drivers are public records, the MPD cannot withhold BWC video of the driver's interview based on a claim that disclosure would be

³ For our purposes, it is sufficient to understand that a person has no expectation of privacy regarding an event that occurs in a public place. The "plain view doctrine" is the embodiment of that principle in the criminal procedure context. MPD regularly defends warrantless searches for drugs, guns and other contraband on grounds that, because the seized items were in "plain view," the suspect had no reasonable expectation of privacy in them.

a clearly unwarranted invasion of personal privacy. Because the exemption cannot apply, it is immaterial whether or not MPD believes the general public would benefit from disclosure.

Police departments nationwide employ body-worn cameras, and many jurisdictions respond very differently than MPD does to requests for public access to BWC videos. The Baltimore Police Department (BPD) provides a [form](#) on its website for requesting BWC videos under the Maryland Public Information Act. Md. Code Ann., Gen. Prov. §§ 4-101, *et seq.* If the recorded incident occurred in a public place, BPD releases unredacted videos, for which it charges \$50 per video.

For a 2020 program, the Coalition selected an incident from Baltimore news stories in which two men were arrested during evening rush hour, and requested videos from cameras worn by two responding officers. The BWC videos that arrived a few weeks later showed faces and badges of all officers on the scene, the men arrested, and all bystanders, and included audio of all interactions.

If the Committee is interested, I will provide BPD and MPD videos for comparison.

**THE COMMITTEE SHOULD CLOSELY OVERSEE ROLL-OUT OF PROVISIONS
MANDATING PUBLIC ACCESS TO BWC VIDEOS AND LAW ENFORCEMENT
DISCIPLINARY RECORDS**

Over strenuous objections from the MPD and the police union, the Council enacted Subtitle X of the Police Reform Bill, amending the FOI Act to prevent the MPD from following its longstanding practice of withholding a broad range of records related to officer misconduct. The bill amends § 2-534 by adding:

“(d-1)(1) Notwithstanding any provision of this act, a request under this act for disciplinary records **shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy** for officers within the Metropolitan Police Department (“MPD”), the District of Columbia Housing Authority Police Department (“HAPD”), or the Office of the Inspector General (“OIG”), except as described in paragraph (3).

Id. Sec. 134 (emphasis added). The bill identifies a few discrete types of information that may be redacted.

Our concerns are threefold — that the MPD, HAPD, OIG, and unions representing officers, will initiate litigation to delay or block implementation of the new law; that they will find new, creative privacy arguments to rationalize withholding disciplinary records; or that, unable to apply the privacy exemption, they will assert other exemptions to withhold records. We believe our concerns are justified by MPD’s pattern of resistance to transparency, and by attempts made by law enforcement agencies and unions in other jurisdictions to prevent implementation of similar transparency laws.

The Council’s clear intent is that D.C. residents have a right to know about virtually all officer misconduct cases. We ask the Committee to hold a public roundtable later this year to make sure

MPD is complying fully with its obligations to disclose BWC videos and officer disciplinary records.

Sec. 135 of the Police Reform Bill requires the Office of Police Complaints (OPC) to create a database of disciplinary complaints against MPD, HAPD and OIG officers, and make it available to the public by the end of 2024. To meet that deadline, the OPC must begin, as soon as the legislation takes effect, to address substantial fiscal, technological and policy challenges, and the Council must begin now by providing funding in the Fiscal Year 2024 budget for those efforts.

We look forward to working on the advisory committee the Police Reform Bill creates to help the OPC implement the database, and to keeping the committee informed about public access to MPD records, including BWC videos and officer disciplinary records. Thank you.

Formed in March 2009, the D.C. Open Government Coalition seeks to enhance public access to government information and transparency of government operations of the District. We believe transparency promotes civic engagement and is critical to a responsive and accountable government. We strive to improve the processes by which the public gains access to government records and proceedings, and to educate the public and government officials about the principles and benefits of open government. Visit our website, www.dcofc.org.

For additional information call Robert Becker, 202 306-2276.



RE:::2023-BWC-00134_Exemption & Redaction information.

2 messages

Harden, Aaron (MPD) <aaron.harden@dc.gov>

Wed, Jan 4, 2023 at 3:15 PM

To: [REDACTED]

Good afternoon [REDACTED],

Per our phone conversation; this is why we redact requested BWC footage.

With regard to personal privacy, in accordance to the Code of the District of Columbia § 2-534 (a)(2) which states:

Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

Please be advised, exemption (a)(2) is not just limited to protecting individuals' names, social security numbers, date of birth and/or home addresses. It covers any and all information that can identify someone. In this instance, you have requested BWC video footage. Without authorization and/or a privacy waiver on file from individuals involved and/or non-involved, who can be seen and/or heard in the video footage, we redact their images and their voices to protect their privacy. In addition, the images of, and the badges worn by, MPD police officers are also redacted in BWC footage, as they too have some expectation of privacy although they are acting in their official capacity.

With regard to "Citizen Viewing" requests, as we discussed, you can make a request to view the footage at the police district of where the incident occurred. **Ex:** If the incident occurred in 4D, you would need to make your request to view footage at the 4th district station. Please know, when reviewing the footage, you will not be able to download, record, take photos, and/ or write notes. If you decide after viewing the footage that you would like to obtain a copy, you will then be instructed on how to submit a FOIA request.

I hope you find this information helpful.



RE:::Final Response_2023-BWC-00134

Archie-Mills, Lisa (MPD) <lisa.archie-mills@dc.gov>

Thu, Feb 2, 2023 at 5:43 PM

To: [REDACTED]

Cc: "Harden, Aaron (MPD)" <aaron.harden@dc.gov>, "Reaves, Brandynn (MPD)" <brandynn.reaves@dc.gov>

Good afternoon [REDACTED],

I am in receipt of your e-mail below. Unfortunately, MPD cannot release a record to you which depicts the images and/or audio interviews contained in a police record of someone other than yourself without authorization from those subject individuals and/or their legal representative (if applicable). You specifically advised FOIA Specialist, Mr. Harden, you are seeking the interview of the driver involved in the incident. Although, the statement was given and/or recorded in a public space, it does not constitute as a primary benefit to the general public to make release to you under a FOIA without the driver's consent.

We regret the inconvenience this may have caused.

Please know that, under D.C. Official Code § 2-537 and 1 DCMR § 412, you have the right to

appeal this le-mail to the Mayor or to the Superior Court of the District of Columbia. If you elect to appeal to the Mayor, your appeal must be in writing and contain "Freedom of Information Act

Appeal" or "FOIA Appeal" in the subject line of the letter, as well as, on the outside of the envelope. The appeal must include (1) a copy of the original request; (2) a copy of any written denial; (3) a statement of the circumstances, reasons, and/or arguments advanced in support of disclosure; and (4) a daytime telephone number, an e-mail and/or U.S. mailing address at which you can be reached.

The appeal must be mailed to: the Mayor's Office of Legal Counsel, FOIA Appeal, 1350 [Pennsylvania Avenue, N.W., Suite 407, Washington, D.C. 20004](#). Electronic versions of the same information can instead be e-mailed to the Mayor's Office of Legal Counsel at foia.appeals@dc.gov. Further, a copy of all appeal materials must be forwarded to the Freedom of Information Officer of the involved agency, or to the agency head of that agency, if there is no designated Freedom of Information Officer there.

Failure to follow these administrative steps will result in delay in the processing and commencement of a response to your appeal to the Mayor.

Regards,

[REDACTED]