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 **Testimony of the**

**D.C. Open Government Coalition**

by

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Co-Chair, Coalition Legal Committee

Before the

Council of the District of Columbia, Committee on Transportation & the Environment

FY 22 Performance Oversight – Washington Metro Area Transit Authority

February 17, 2023

Thank you for the opportunity to provide views on the performance of the Washington Metro Area Transit Authority (WMATA), specifically policies governing the video that will be produced by the Transit Police body-worn cameras when they are issued later this year.

Public access to police video has been in the news in D.C. and elsewhere for some time. Prompt and full access is now considered a best practice especially as it sheds light on police conduct in controversial situations, which benefits both police and the public.[[1]](#endnote-1) Secrecy has no place in developing BWC rules, yet that seems to be WMATA’s choice so far. It’s time for a change.

Our attempts to learn about and discuss the policies WMATA is developing have all been fruitless:

* WMATA denied our request for the policy with incorrect claims of exemption under its Public Access to Records Policy and denied our appeal.[[2]](#endnote-2)
* We got no reply last year to our letters to the board, CEO, Riders Advisory and a D.C. board member. We tried a second time with the board and CEO and again heard nothing.[[3]](#endnote-3)
* The Department of Justice that funded the cameras and which reviewed the policy also denied our federal FOIA request. Our appeal was accepted, and the agency was asked to review its claimed exemptions. We haven’t heard further.

We ask that the Council in today’s hearing discuss with the WMATA leadership the schedule for completing these policies and get their commitment that no body-cam video policy will be final until the board releases a draft for comment and holds at least one public hearing.

**Background on WMATA cameras**

In announcing the new Transit Police body-worn camera program June 28, 2022, the agency quoted Chief Michael Anzallo affirming a “focus on safety, transparency and building community partnerships.”[[4]](#endnote-4) We looked forward to working with WMATA to ensure transparency with the goal of improving public confidence regarding Metro Transit Police operations.

We did the same over the past seven years regarding the District’s Metropolitan Police Department (MPD) body-worn camera program. The D.C. Coalition has been there from the beginning, providing input as the MPD and D.C. Council set the legal framework governing use and retention of, and public access to, the video. We brought to the table information on best practices from our research on policy elsewhere. Facts on the ground have changed greatly, but as an example of the information we can provide, see our 2020 review of many states and cities’ approaches.[[5]](#endnote-5)

We have continued to monitor access to the District’s MPD video since 2015, when cameras were fully adopted, including making requests and evaluating issues raised as the program has matured.[[6]](#endnote-6)

With support by the Virginia Coalition on Open Government, state law provides that police body-worn camera video is subject to the state’s regular FOIA statute. Maryland law is the same.

The June 28, 2022, WMATA release noted progress on the “necessary internal work to draft policies and procedures,” and that texts are “now being reviewed by DOJ.” It said WMATA would engage in “public outreach prior to program rollout” next year.

That has not happened, and we have tried unsuccessfully to obtain the policies, so we have been unable to review what is covered and offer comments in support of maximum transparency.

While the Virginia Coalition for Open Government does not take a policy position on the specific process that should be used to develop rules governing access to Metro Transit Police body-worn camera video, it fully endorses any effort that maximizes public input, access, and involvement.

**Cameras raise issues that require public discussion**

Police agencies face many issues in adopting body-worn cameras. These include:

* Rules for use of the equipment, such as mandatory or discretionary activation, times and places not to be recorded (such as inside a private house where no criminal activity is taking place), whether/when cameras may be deactivated, sanctions for improper use and failure to activate, and retention of video
* Rules for internal access such as by officers writing reports about their own conduct that is under review, complaint investigators, auditors, supervisors
* Mandatory release requirements in situations of high public interest (officer-involved shootings, significant other uses of force)
* Rules for public access, including general requests, processing deadlines, privacy protection rules including allowable redactions or any exceptional situations where video is not to be released, and fees that may be imposed
* Requirements for regular public report of data on, and impact evaluation of, the camera program such as equipment reliability and officer adherence to usage rules, video use in officer training and complaint review, and including as D.C. just passed, reporting on time and costs for public access;[[7]](#endnote-7) (and tracking use of force and complaints is always wise so we assume it’s happening already)

In 2015, D.C. Mayor Muriel Bowser proposed that MPD camera video be kept secret. The D.C. Council disagreed and pushed for rules adopted with broad engagement, passing legislation outlining a process for Council review. See details in the November 2015 Council committee report that accompanied the resulting draft rules that passed unanimously.[[8]](#endnote-8)

In the end, D.C. police body-worn camera video has been made available to the public under the D.C. Freedom of Information Act, which generally treats BWC videos like any other public record, subject to mandatory disclosure unless its content justifies withholding under one of the existing exemptions in the statute. There is also a narrow statutory exception for BWC video of certain incidents including sexual assault, domestic violence, and stalking.[[9]](#endnote-9)

While the District’s approach to BWC video access is far from perfect, both on paper and in practice (where it has proved to be a big struggle to enforce the public’s general right to rapid access at reasonable cost to interpretable footage), its rules at least have the legitimacy that comes from review by both legislative and executive branches and months of community consultation. Administrative rulemaking alone lacks this powerful affirmation.

**WMATA should adopt an inclusive process for setting camera policy**

The process WMATA has embarked on, involving extensive in-house development followed by federal sponsor review, but apparently lacking a wide range of expert and consumer perspectives, is inefficient and almost certainly will not achieve the agency’s stated goal of enhanced public trust. Nor does it build on accumulated wisdom. D.C. WMATA board member Tracy Loh suggested her experience six years ago in Mt. Rainier, Md., could be helpful but there is much more since then.[[10]](#endnote-10)

By the time the WMATA board reaches the “public outreach” stage, WMATA staff will have invested much time and effort in their proposed policies and the time until “rollout” will be short. By that point, changes proposed by members of the public that would better serve the public interest, even minor changes, will meet significant internal resistance. That result would be a disservice to WMATA and to the public.

We recommend an alternate process for WMATA, since the interests involved are so diverse that rules on cameras should not be made by police alone. The WMATA board should publish draft policies and hold one or more public hearings to collect views about this step forward in police transparency. The board will benefit from the participation of a wide range of expert and consumer perspectives, such as transit riders, police and civic organizations, attorneys, news media, and criminal justice researchers, all engaged with the board in a public-facing dialogue.

Unfortunately, although police accountability remains a major public issue, video access limits persist. Privacy advocates and representatives of police nationwide have repeatedly opposed public access to body-cam videos, citing potential threats to officers or claims that union contracts shield “personnel records” from public view.

Open government advocates have rejected those arguments generally, and specifically in the jurisdictions WMATA serves, because law enforcement and privacy exemptions in the D.C.,

Maryland, and Virginia public records laws have for decades provided ample protection for those interests. Courts have already acknowledged the limited privacy interests of officers while they’re on the job in public.[[11]](#endnote-11) We believe that if WMATA engages in an open, public, and evidence-based process, the policies it adopts will produce transparency, enhance public confidence, and protect legitimate public safety and privacy concerns.

The past several years have repeatedly shown, particularly in cases where force was used against civilians, that withholding BWC footage sows distrust and frustrates public demands for police accountability. Almost inevitably, video comes out anyway, captured by other bystanders, and the delay in producing BWC video only makes it appear that law enforcement has something to hide. But robust access also can protect officers who do behave properly (for instance, by putting to rest false allegations). We urge WMATA to consider these lessons learned.

Thus, we believe it would be a mistake not to engage the public openly in the rules themselves. WMATA Transit Police appear to be deep into a process that they may assume, after months of work, is on track to be completed shortly. The WMATA Board of Directors should instead take the police work product as a draft subject to further open and public review, with adoption only after the board has considered a full range of views on the important issues the new technology raises. **We strongly urge the Council to ask the board to adopt an open and full-blown public-engagement process such as we have proposed above, and we look forward to taking an active part in that.**

For any questions, reach me at: fmulhauser@aol.com or 202-550-4131.

The Open Government Coalition is a citizens’ group established in 2009 to enhance public access to government information and ensure the transparency of D.C. government operations. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings and to educate the public and government officials about the principles and benefits of open government in a democratic society.

We work to maintain the legal foundation assuring open government –- the Open Meetings Act, the Freedom of Information Act, and the mayor’s Open Data Policy — through public education, legislative advocacy, and litigation. For example, the Coalition has an extensive website with practical advice for finding information and a blog on D.C. open government news, holds public forums such as an annual Summit during Sunshine Week in March, testifies to the D.C. Council, and files complaints and court actions to correct agency problems. The Coalition has no staff but does its work through the volunteer efforts of 13 directors, who include reporters, community activists, experts with open government institutions overseas and at the federal level, and attorneys in media law, nonprofit legal services, and criminal defense. The Coalition participates in a National Freedom of Information Coalition where advocates from dozens of states work together on common issues all are facing.

1. ENDNOTES

 For a recent summary that emphasizes the importance of policy implementation details, see Rachel M. Cohen, “What do we want police body cams to do? Taking a new look at one of the most commonly adopted police reforms in the country.” *Vox* (Feb. 2, 2023). (“So far, thebest evidence we have suggests they have led to less use of force and provided more tools for holding rogue cops accountable — but, like most reforms, how they’re used matters.”). Available at: <https://www.vox.com/policy-and-politics/23579290/police-body-worn-cameras-tyre-nichols-reform-bwc>. [↑](#endnote-ref-1)
2. For our appeal describing the incorrect denial and why it was based on multiple misunderstandings of the law, see here: <https://dcogc.org/wp-content/uploads/2023/02/PARP-appeal-body-cam-plans.docx>. [↑](#endnote-ref-2)
3. The letter and our blog discussing it are here: <https://dcogc.org/blog/coalitions-call-for-wmata-to-make-rules-in-the-sunshine-for-body-cam-video/>. [↑](#endnote-ref-3)
4. Justin George, “Metro Transit Police officers to get body cameras this year.” *Washington Post*, July 2, 2022. Available at: <https://www.washingtonpost.com/transportation/2022/07/02/metro-transit-police-body-cameras/>. [↑](#endnote-ref-4)
5. D.C. Open Government Coalition, *State and Local Policies Regarding Public Access to Police Body-Worn Cameras: Executive Summary* **(**September 2020). Available at: <https://tinyurl.com/5x39tcp3>. [↑](#endnote-ref-5)
6. Based on an Open Government Coalition complaint, the Office of Open Government reviewed how and why MPD redacts details from BWC video requested under FOIA. Their 2020 opinion found it takes a long time, costs a lot, and blurs far more than privacy law allows. These combined incorrect policy choices, the opinion shows, can undercut the program goals. Available at: <https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020>. [↑](#endnote-ref-6)
7. See reporting requirements added by Title I, Subtitle B of D.C. Act A24-781, *Comprehensive Policing and Justice Reform Amendment Act of 2022* (B24-320) pending before Congress. Available at: <https://www.dcregs.dc.gov/Common/DCR/Issues/IssueCategoryList.aspx?CategoryID=4&IssueID=1018>. [↑](#endnote-ref-7)
8. The Council committee report is available at: <https://tinyurl.com/2yn7my3u>. [↑](#endnote-ref-8)
9. Exclusions were added to D.C. Freedom of Information Act at D.C. Code § 2-534(a)(2A).

 [↑](#endnote-ref-9)
10. According to the July 2, 2022, *Washington Post*, “WMATA board member Tracy Hadden Loh said the work of other law enforcement agencies will serve as a guide for transit police. Loh was a Mount Rainier, Md., city council member in 2016 when the city’s police department became one of the first in the state to use body-worn cameras. ‘A lot of the kinks have been worked out in terms of the technology and in terms of the best policies in order to govern how they’re used in the field and how the footage is stored and released,’ she said.” We wrote Ms. Loh to request Coalition involvement and to discuss how experience elsewhere was being evaluated (since some departments have adopted drastic limits on public access). We received no reply. [↑](#endnote-ref-10)
11. See, for example, *Glik v. Cunniffe* (1st Cir. 2011), available at: <https://caselaw.findlaw.com/us-1st-circuit/1578557.html>. MPD policy has recognized the public right to record since 2012. <https://go.mpdconline.com/GO/GO_304_19.pdf>. (“The Metropolitan Police Department (MPD) recognizes that members of the general public have a First Amendment right to video record, photograph, and/or audio record MPD members while MPD members are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.”) [↑](#endnote-ref-11)