

**BODY-WORN CAMERA FOOTAGE RETENTION AND  
RELEASE: DEVELOPING AN INTERMEDIATE FRAMEWORK  
FOR PUBLIC ACCESS IN A NEW AFFIRMATIVE  
DISCLOSURE-DRIVEN TRANSPARENCY MOVEMENT**

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*The widespread use of body-worn cameras (BWCs) by law enforcement agencies calls into question how those departments store and publicly release the large amounts of video footage they amass under public access laws. This Note identifies a changing landscape of public access law, with a close look at the federal Freedom of Information Act (FOIA) and its state analogues, as the result of the Capitol Insurrection and the national Movement for Black Lives. Namely, legislative enactments, DOJ programs, agency policy statements, and judicial opinions all indicate a movement toward more access and potentially more proactive disclosure of government records. This Note considers what a disclosure regime of BWC footage should look like in light of the new developments in freedom of information laws; it proposes an intermediary framework for release that balances proactive disclosures and agency responses to requests for disclosure. Three policy goals should serve as guideposts to achieve this intermediary framework: minimizing privacy violations and unnecessary oversurveillance, improving cost efficiency, and assessing the need for redistribution of resources from police to other more community-improving apparatuses. The congressional investigation of the Capitol Insurrection, the George Floyd Justice in Policing Act, and the Colorado Enhance Law Enforcement Integrity Act are exemplary, in some ways, of what disclosure should resemble. This model for approaching disclosure will be important for considering what types of information the public can access, what the public can do with that information, and how resources can be diverted or otherwise reconsidered as a part of disclosure regimes.*

INTRODUCTION .....	1730
I. BWCs AND FREEDOM OF INFORMATION LAWS.....	1733
A. History and Goals of BWCs.....	1734

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B.	Post-Ferguson Creation of BWC Programs and Policies .....	1736
1.	Video Creation.....	1737
2.	Compliance With Department Policies .....	1738
3.	Officer Review.....	1739
4.	Video Storage and Public Access .....	1739
C.	The Legal and Regulatory Landscape of BWC Footage Retention and Release.....	1740
1.	FOIA and State Freedom of Information Laws.....	1740
2.	Barriers to Disclosure .....	1741
3.	State Freedom of Information Laws and BWC Footage Retention and Release.....	1742
II.	NEW TRANSPARENCY GOALS AND FUNDING TOWARD POLICE ACCOUNTABILITY .....	1745
A.	Moving Toward a More Open Government: New Transparency Goals Following the Movement for Black Lives and the Capitol Insurrection.....	1746
B.	Transparency Measures Aimed at Policing .....	1747
1.	State Transparency Measures .....	1747
2.	Federal Transparency Measures.....	1748
C.	Broad Transparency Measures and the Push Toward Affirmative Disclosure.....	1750
D.	The Need for a New BWC Transparency Regime and New Policy Goals.....	1754
III.	AN INTERMEDIARY APPROACH TO PUBLIC ACCESS OF BWC FOOTAGE.....	1756
A.	Centralized Agency as a Place of Review.....	1757
B.	Privacy and Surveillance .....	1760
C.	Increasing Cost Efficiency.....	1763
D.	Assessing Redistribution .....	1764
	CONCLUSION.....	1766

## INTRODUCTION

As the most photographed American man in the nineteenth century, Frederick Douglass lauded the transformative nature of the camera as a catalyst for social change and racial justice; that is, with the camera, we can “see what ought to be by the reflection of what is, and endeavor to remove the contradiction.”<sup>1</sup> Two centuries later, American lawmakers continue to hold on to this vision of the camera as a tool to achieve justice. Following

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1. Henry Louis Gates, Jr., *Frederick Douglass’s Camera Obscura*, *Aperture*, Summer 2016, at 27, 27, <https://archive.aperture.org/article/2016/2/2/frederick-douglass-camera-obscura> (on file with the *Columbia Law Review*) (quoting Frederick Douglass).

the killing of Michael Brown in Ferguson, Missouri in 2014, law enforcement agencies across the United States widely implemented police body-worn camera (BWC) programs in an effort to increase police accountability and transparency.<sup>2</sup> But since the inception of BWC programs across the country in 2014, police have “shot and killed almost the same number of people annually—[over] 1,000.”<sup>3</sup> Notwithstanding the perhaps well-meaning origin of BWCs, the results from these programs on police accountability remain generally unreliable.<sup>4</sup>

Beyond the use of the camera itself as a tool, the footage amassed from the vast number of police–civilian interactions recorded on BWCs also raises important questions about the utility of BWCs in fostering police accountability. Determinations regarding where footage is stored, how it is stored, how long it is stored, whether it ever gets deleted, and whether the public will have access to certain footage might shield law enforcement agencies from necessary accountability, abrogate certain privacy rights, and incur costs and resources that might be better directed toward reforms or institutions other than law enforcement agencies.<sup>5</sup> Given the continued investment of resources into these programs at the state and federal level, it is worth considering whether certain aspects of BWC programs, like footage retention and release, can be improved to better serve the transparency and accountability goals that these programs are meant to achieve.

State freedom of information laws and the federal Freedom of Information Act (FOIA) determine the amount of time footage can be retained by police departments and whether that footage must be released to the public.<sup>6</sup> But, following the January 6th Capitol Insurrection (Capitol Insurrection) and the Movement for Black Lives during the summer of 2020, the conversation surrounding public access to government information seems to be evolving to encourage some degree of affirmative

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2. See Justice Department Awards Over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States, DOJ (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law> [<https://perma.cc/YH3P-CXDJ>] [hereinafter DOJ, BWC Grants].

3. See Fatal Force, Wash. Post, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (on file with the *Columbia Law Review*) (last updated Sept. 23, 2022).

4. See, e.g., Jennifer Lee, Will Body Cameras Help End Police Violence?, ACLU of Wash. (June 7, 2021), <https://www.aclu-wa.org/story/%C2%A0will-body-cameras-help-end-police-violence%C2%A0> [<https://perma.cc/H6CL-44HH>].

5. See Police Body Camera Policies: Retention and Release, Brennan Ctr. for Just. (Aug. 3, 2016), <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-retention-and-release> [<https://perma.cc/XB5X-WJVA>] [hereinafter Brennan Ctr., BWC Retention Policies] (last updated July 19, 2019).

6. See *id.*

disclosure of government records.<sup>7</sup> This change complements the traditional request-driven model of disclosure, which currently exists at the state and federal level and requires interested members of the public to request the disclosure of certain information. Both the Capitol Insurrection and the Movement for Black Lives have increased discourse about the importance of transparency for government records and called into question the efficacy of traditional forms of disclosure under transparency laws like FOIA and its iterations at the state level.<sup>8</sup> In light of this discourse, this Note proposes that more affirmative disclosure with clear guiding principles and standards can both strengthen the accountability function and mitigate some of the risks of BWC footage retention and release policies.

Part I discusses the history of BWC programs, the considerations state and local governments weigh when crafting BWC programs, and the landscape of state freedom of information laws and FOIA. Part II explores how transparency regimes are changing from the typical request-driven model of disclosure to emphasize more affirmative disclosure. It further discusses the shortcomings of the current disclosure regime for BWC footage. Considering the new shifts in disclosure regimes and the shortcomings of the current disclosure regime for BWC footage, Part III presents an intermediary regulatory framework for BWC footage retention

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7. Many pieces of scholarship and journalistic reports refer to the 2020 protests, demonstrations, and conversations in support of Black lives, antiracism efforts, police reform, and abolition following the murder of George Floyd collectively as the “Black Lives Matter” movement of 2020. See, e.g., Erika D. Smith, 2020 Was the Year America Embraced Black Lives Matter as a Movement, Not Just a Moment, *L.A. Times* (Dec. 15, 2020), <https://www.latimes.com/california/story/2020-12-16/black-lives-matter-protests-george-floyd-coronavirus-covid-2020> (on file with the *Columbia Law Review*); Ashley Westerman, Ryan Benk & David Greene, In 2020, Protests Spread Across the Globe With a Similar Message: Black Lives Matter, *NPR* (Dec. 30, 2020), <https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt> [<https://perma.cc/2254-FERK>]. While the Black Lives Matter (BLM) organization continues to play an instrumental role in guiding racial justice efforts and encouraging protests and other forms of public participation and demonstration in support of Black lives, BLM was not the only organization involved in the 2020 movements. See Isaac Chotiner, A Black Lives Matter Co-Founder Explains Why This Time Is Different, *New Yorker* (June 3, 2020), <https://www.newyorker.com/news/q-and-a/a-black-lives-matter-co-founder-explains-why-this-time-is-different> (on file with the *Columbia Law Review*) (“And it has always been somewhat decentralized. We have tried various structures, but we have always said the power goes on in the local chapter because they know what is going on, and they are the ones familiar with the terrain.” (quoting Opal Tometi, co-founder of BLM)); John Eligon & Kimiko de Freytas-Tamura, Today’s Activism: Spontaneous, Leaderless, but Not Without Aim, *N.Y. Times* (June 3, 2020), <https://www.nytimes.com/2020/06/03/us/leaders-activists-george-floyd-protests.html> (on file with the *Columbia Law Review*). This Note will refer to the protests, demonstrations, and conversations that occurred in 2020 following the murder of George Floyd, along with other Black individuals, as the “Movement for Black lives” to encompass the full range of organized, spontaneous, and collaborative antiracist activism in support of Black lives that occurred in 2020 and continues today.

8. See *infra* Part II.

and release. By combining the benefits of affirmative and request-driven disclosure and adopting policy goals as guideposts in the creation of this intermediary framework, Part III argues that better outcomes in accountability and societal justice can be achieved.

### I. BWCs AND FREEDOM OF INFORMATION LAWS

In 2014, the death of Michael Brown in Ferguson, Missouri, and the protests and demonstrations thereafter prompted a considerable shift in policing reform. Amid a national conversation about police brutality and American policing practices, law enforcement agencies across the country started to buy BWCs en masse.<sup>9</sup> About a year and a half later, the Department of Justice (DOJ), under the Obama Administration, started to issue grants to help law enforcement agencies purchase these devices.<sup>10</sup> From 2016 to 2018, Congress appropriated \$112.5 million to the DOJ to provide grants to law enforcement agencies wishing to buy BWCs.<sup>11</sup> The rapid adoption of BWCs across the United States came with the promise of increased police accountability under the assumption that if police conduct was recorded, it would encourage officers to behave better under the watchful eye of the public.<sup>12</sup> That promised accountability, however, has not necessarily come to fruition, and it remains unclear whether BWC programs actually provide some wholesale remedial benefit to communities that are disproportionately killed and harmed by the police.<sup>13</sup>

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9. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NewsHour (June 25, 2020), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [<https://perma.cc/7ERQ-FTXN>].

10. See DOJ, *BWC Grants*, supra note 2 (explaining that the DOJ grants helped local and tribal law enforcement agencies purchase BWCs, fund training and technical assistance in the use of the devices, and evaluate the impact of the devices on policing practices); Ben Miller, *Data Pinpoints the Moment When Police Body Cameras Took Off*, Gov't Tech. (Jan. 4, 2019), <https://www.govtech.com/data/data-pinpoints-the-moment-when-police-body-cameras-took-off.html> [<https://perma.cc/NKF2-RU2S>].

11. See Nathan James, Kristin Finklea, Whitney K. Novak, Joanna R. Lampe, April J. Anderson & Kavya Sekar, U.S. Gov't Accountability Off., GAO-R43904, *Public Trust and Law Enforcement—A Discussion for Policymakers* 25 (2020).

12. See, e.g., Bureau of Just. Assistance, DOJ, *Body-Worn Cameras (BWCs): Overview*, Bureau of Just. Assistance (June 26, 2015), <https://bja.ojp.gov/program/body-worn-cameras-bwcs/overview> [<https://perma.cc/RSE7-AS2Z>] (last updated Aug. 27, 2020); see also Josh Sanburn, *The One Battle Michael Brown's Family Will Win*, Time (Nov. 25, 2014), <https://time.com/3606376/police-cameras-ferguson-evidence/> (on file with the *Columbia Law Review*) (quoting a statement from Michael Brown's family encouraging others to "[j]oin . . . [the] campaign to ensure that every police officer working the streets in this country wears a body camera").

13. See Samuel D. Hodge, Jr. & Rachel Ortiz, *Police Body Cameras: A Lesson in Objectivity and Accountability or a Tool Without a Scientific Basis?*, 27 Rich. J.L. & Tech. 1, 5 (2021) ("[The] remedial, readily obtained answer is to purchase BWCs to increase

This Part presents the history of BWCs as a technology in section I.A. It also examines common policy considerations local governments and police departments deliberated post-Ferguson when adopting BWC programs in section I.B. Local governments and police departments alike contemplated how to structure BWC programs, how the technology would be integrated into previous policing practices, how BWCs would advance new policing practices, and how BWC programs would impact the public. Specifically, section I.C reviews how local governments and police departments approached the issue of how long police departments should store video footage captured by BWCs. It outlines the treatment of video footage retention and release under the landscape of state freedom of information laws and FOIA.

A. *History and Goals of BWCs*

At their core, BWCs are a technological tool that lawmakers, policy-makers, and other advocates viewed as possessing the right qualities to attain better policing outcomes. BWCs typically consist of a “system” that includes a camera with at least one microphone, a battery pack, and internal data storage.<sup>14</sup> A variety of companies manufacture and sell BWCs, including COBAN, Motorola, Panasonic, Pinnacle, Utility, Pro-Vision, and Axon.<sup>15</sup> These cameras are typically mounted on police officers’ chests or another part of their bodies or uniforms.<sup>16</sup> In addition to the actual camera, accompanying software programs allow law enforcement personnel to “review video [and to] archive, search, redact, and export the video footage.”<sup>17</sup> In some cases, the camera is additionally equipped with automatic analytics like facial recognition or weapon detection technology.<sup>18</sup>

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accountability and efficiency of law enforcement officials; however, the effectiveness of the equipment is debatable . . . [and BWCs] ha[ve] had some negative results on individuals whom the video systems are designed to protect.”); Lee, *supra* note 4 (“While it is clear that video footage, including body camera footage, has played an important role in driving forward the conversation about police accountability, the evidence on whether body cameras are an effective tool for actually delivering police accountability is mixed at best.”).

14. See Vivian Hung, Steven Babin & Jacqueline Coberly, Johns Hopkins Univ. Applied Physics Lab’y, *A Primer on Body Worn Camera Technologies* 5 (2016), <https://www.ojp.gov/pdffiles1/nij/grants/250382.pdf> [<https://perma.cc/8QE4-2BBV>].

15. Mitch Zamoff, *Assessing the Impact of Police Body Camera Evidence on the Litigation of Excessive Force Cases*, 54 *Ga. L. Rev.* 1, 9 (2019).

16. See Hung et al., *supra* note 14, at 9 (“Camera mounting systems allow officers to attach and detach BWCs to several areas, including around the ear or head, on a helmet or hat, on the chest, and in many other places.”).

17. *Id.*

18. See *id.* at 41 (“Three future trends seem likely to involve more automated analytics, including facial recognition, weapons detection, etc.”); Katelyn Ringrose, *Law Enforcement’s Pairing of Facial Recognition Technology With Body-Worn Cameras Escalates Privacy Concerns*, 105 *Va. L. Rev. Online* 57, 60 (2019) (explaining that a 2016 DOJ-funded study “found that at least nine out of thirty-eight BWC manufacturers currently include some form

Data storage from BWCs occurs in two places: on the device itself and on a storage medium, centralized by the law enforcement agency, to store all recorded audio and video footage.<sup>19</sup> For example, the camera itself can hold sixteen gigabytes (GB), thirty-two GB, or another volume of data storage.<sup>20</sup> Law enforcement agencies then choose how to store all the footage amassed from officers wearing BWCs. Storage of video footage can largely be distilled into two categories: internal storage systems or cloud-based storage systems.<sup>21</sup> Internal storage can take a variety of forms, such as copying videos onto DVDs or CD-ROMs and storing the hard copies in a secure location.<sup>22</sup> Larger law enforcement agencies contract with cloud storage providers to upload video footage to a cloud-based storage system.<sup>23</sup> Once video footage is stored in either an internal system or a cloud-based system, state law, local government ordinances, or police department policy classify the footage as either “evidentiary,” meaning it can be used for some investigative purpose, or “non-evidentiary,” which includes all other types of video footage.<sup>24</sup> This distinction between evidentiary and non-evidentiary video footage determines how long the video footage will be retained and when, if at all, it will be released to the public or deleted.<sup>25</sup>

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of facial recognition in their camera technology or are planning for its possible future inclusion”); Malkia Devich-Cyril, *Defund Facial Recognition*, Atlantic (June 5, 2020), <https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771/> (on file with the *Columbia Law Review*) (“America has long used science and technology to categorize and differentiate people into hierarchies that, even today, determine who is able and unable, deserving and undeserving, legitimate and criminal. As with the scientific racism of old, facial recognition doesn’t simply identify threats; it creates them . . .”).

19. See Hung et al., *supra* note 14, at 12.

20. *Id.*

21. See, e.g., Jessica Macari, N.C. Conf. of Dist. Att’ys, *Body-Worn Cameras: Concerns and Considerations* 6 (2015), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/north-carolina-district-attorneys\\_best-practices-committee\\_body-worn-cameras-concerns-and-considerations.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/north-carolina-district-attorneys_best-practices-committee_body-worn-cameras-concerns-and-considerations.pdf) [<https://perma.cc/KSU5-S5WZ>] (“Smaller agencies may choose to create a system involving copying the videos onto DVDs or CD-ROMs and storing them in a secure location.”); N.Y.C. Police Dep’t, *Body Worn Cameras: Impact and Use Policy* 3 (2021), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/post-final/body-worn-cameras-nypd-Impact-and-use-policy\\_4.9.21\\_final.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/body-worn-cameras-nypd-Impact-and-use-policy_4.9.21_final.pdf) [<https://perma.cc/9U66-63YG>] (describing that, for the New York City Police Department, “[a]ll BWC-recorded videos are uploaded to a cloud-based storage system”).

22. See Macari, *supra* note 21, at 6.

23. See *id.*; N.Y.C. Police Dep’t, *supra* note 21, at 3.

24. See Bureau of Just. Assistance, DOJ, *Body-Worn Camera Toolkit: Body-Worn Camera Frequently Asked Questions* 16–17 (2015), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BWC\\_FAQs.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BWC_FAQs.pdf) [<https://perma.cc/NF2U-7D92>] [hereinafter BJA, *BWC Toolkit FAQs*] (“Some departments classify body-worn camera video as either ‘evidentiary’ or ‘non-evidentiary.’ Evidentiary video includes footage that can be used for investigative purposes . . . . The length of time a video is retained is then typically determined by how the video is classified . . . .”); Brennan Ctr., *BWC Retention Policies*, *supra* note 5.

25. See *infra* section I.C.3.

Seven states mandate the statewide use of BWCs by law enforcement officers.<sup>26</sup> Other state and local governments and police departments choose at their discretion to implement BWC programs in accordance with state law and the availability of state or federal funding.<sup>27</sup> As of 2016, the Bureau of Justice Statistics estimated that about forty-seven percent of the 15,328 general-purpose law enforcement agencies in the United States had acquired BWCs.<sup>28</sup> Other research estimates that from 2013 to 2018, the number of law enforcement agencies with BWCs more than doubled.<sup>29</sup> Governments and agencies typically adopt BWC programs in hopes of achieving transparency and accountability in policing.<sup>30</sup> Section I.B will explore the various facets of BWC programs that local governments and police departments considered post-Ferguson when instating BWC programs in hopes of fulfilling these goals of transparency and accountability in policing.

### B. *Post-Ferguson Creation of BWC Programs and Policies*

As BWC programs proliferated, individual police departments and state and local governments established laws and policies regarding the use of BWCs for policing. They also regulated the collection and maintenance of footage amassed from the cameras. Scholars have broadly organized those policy choices for BWC programs and the corresponding benefits and issues with a particular policy choice into four categories: (1) video creation, (2) compliance with department policies, (3) officer review of video footage before writing reports, and (4) storage and access.<sup>31</sup>

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26. See Body-Worn Camera Laws Database, Nat'l Conf. of State Legislatures (Apr. 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#> [<https://perma.cc/VHW6-5EMB>].

27. See *id.*

28. Shelley S. Hyland, Off. of Just. Programs, Bureau of Just. Stat., DOJ, NCJ 251775, *Body-Worn Cameras in Law Enforcement Agencies*, 2016, at 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/bwclea16.pdf> [<https://perma.cc/2C9J-D4SW>]; see also *State Trends in Law Enforcement Legislation: 2014–2017*, Nat'l Conf. of State Legislatures (Sept. 24, 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/state-trends-in-law-enforcement-legislation-2014-2017.aspx> [<https://perma.cc/V6DF-TU26>] (explaining that, since 2015, thirty-four states and the District of Columbia have created laws addressing the use of BWCs).

29. See Cynthia Lum, Megan Stolz, Christopher S. Koper & J. Amber Scherer, *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 *Criminology & Pub. Pol'y* 93, 94 (2019).

30. See Hyland, *supra* note 28, at 1 (noting that the “main reasons (about 80% each) that local police and sheriffs’ offices had acquired BWCs were to improve officer safety, increase evidence quality, reduce civilian complaints, and reduce agency liability”); Bryce Clayton Newell, *Police Visibility: Privacy, Surveillance, and the False Promise of Body-Worn Cameras* 40 (2021) (explaining that the implementation of BWC programs reflects a “liberal and legalistic approach to police reform” where the “primary purpose of body cameras and other technologies with the ability to ‘watch’ the police is to ensure police accountability and protect civil rights”).

31. See Seth W. Stoughton, *Police Body-Worn Cameras*, 96 *N.C. L. Rev.* 1363, 1414–22 (2018); see also *Police Body-Worn Camera Policies*, Brennan Ctr. for Just. (Dec. 10, 2015),



1. *Video Creation.* — Some police departments' BWC program policies mandate that officers record certain interactions with the public or otherwise require the officer to provide concrete justifications for failing to record certain required events.<sup>32</sup> Other police departments do not have policies about when officers must record interactions with the public. Instead, these departments grant their officers discretion to choose when to start and stop recording.<sup>33</sup> This discretion has created concerns about the quality of video footage that might result.<sup>34</sup> For example, in the context of litigating excessive force cases, Professor Mitch Zamoff has explored the impact of incomplete video footage resulting from officer discretion in recording. He concluded that incomplete video footage might hurt plaintiffs in civil suits against police officers and fail to provide an accurate account of the police–civilian interaction.<sup>35</sup> Other scholars, such as Professor Seth Stoughton, have additionally posited that officer discretion in choosing when to record may weaken the behavioral and signaling benefits of BWC usage: “An officer who has not bothered to activate her camera not only has no extra motivation to behave properly but may actually be perversely incentivized to behave in ways that she knows are inappropriate.”<sup>36</sup> Among other benefits, Professor Stoughton explains that

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<https://www.brennancenter.org/our-work/research-reports/police-body-worn-camera-policies?splash> [<https://perma.cc/YEZ6-N6E7>] (last updated July 19, 2019) (compiling and comparing BWC policies from police departments around the country).

32. See Police Body Worn Cameras: A Police Scorecard, Leadership Conf. on Civ. & Hum. Rts. & Upturn, <https://www.bwcorescorecard.org/> [<https://perma.cc/JG72-HUWQ>] [hereinafter BWC Scorecard] (last updated Nov. 2017); see also Chi. Police Dep't, Special Order S03-14, Body Worn Cameras § II.A.1–2, B.3 (2017), <https://www.bwcorescorecard.org/static/policies/2017-06-09%20Chicago%20BWC%20Policy.pdf> (on file with the *Columbia Law Review*) (“The decision to electronically record a law-enforcement-related encounter is mandatory, not discretionary, except where specifically indicated . . . . The Department member will verbally justify on the BWC when deactivating it prior to the conclusion of the incident.”).

33. See BWC Scorecard, *supra* note 32.

34. See Lindsay Miller & Jessica Toliver, Police Exec. Rsch. F., Off. of Cmty. Oriented Police Servs., DOJ, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, at vi, 12 (2014) (noting the tension between different approaches to BWC programs, i.e., in 2013, the ACLU's approach would “require officers to record all encounters with the public” and the approach adopted by the Police Executive Research Forum would allow some discretion as to when police officers can and should record).

35. See Zamoff, *supra* note 15, at 36–42 (presenting an empirical study showing that as of 2018, out of the sixty-six 42 U.S.C. § 1983 excessive force cases involving bodycam evidence in which a federal district court issued a published decision on a defensive summary judgment motion, one-third involve a video that only partially captures the encounter).

36. Stoughton, *supra* note 31, at 1415 (arguing that discretion “may actually reduce public trust” because “it is all too easy for community members to draw damning inferences from the absence of video in an incident that could have, and should have, been recorded, especially when BWCs were adopted . . . to reduce civilian distrust of the police”). But see Newell, *supra* note 30, at 126 (“The choice to record . . . was a point of consternation for many officers over the course of the study. They were frequently concerned about this issue

the potential behavioral benefits of BWCs “fall into three distinct categories: improving compliance with rules, decreasing incivility, and reducing violence.”<sup>37</sup> Professor Stoughton additionally advances the argument that BWCs, when adopted by a police department, can have “signaling” benefits; their adoption can serve “as a signal to community members that the agency is both receptive and responsive to public calls for transparency and accountability.”<sup>38</sup> He maintains that these behavioral and signaling benefits, at least in part, arise because officers know that their interactions will be recorded and subject to review. Thus, when officers have discretion to choose when to record, it chips away not only at the behavioral and signaling benefits of BWCs but also at public trust, as officers can simply choose to not record bad interactions with the public.<sup>39</sup>

2. *Compliance With Department Policies.* — Even when a police department mandates the recording of all police–civilian interactions as a matter of department policy, that department must evaluate whether police actually comply with the policy and determine what action to take in the case of noncompliance.<sup>40</sup> Some scholars, such as Julian R. Murphy, have advocated for supervisory review of BWC footage in order to deter or otherwise discipline police misconduct and to target training to correct such conduct.<sup>41</sup> Other scholars, like Professor Stoughton, have outlined a variety of police department policy options for supervisory review of BWC footage: Supervisory review could be (1) mandatory in certain instances, (2) recommended but discretionary, (3) restrictive, where a supervisor only reviews footage when there is a reason to do so, such as the filing of a civilian complaint, or (4) sampled, where review is based on a random sampling of a specific officer’s interactions with civilians.<sup>42</sup> Supervisory review can be beneficial for police departments to review potential officer misconduct.<sup>43</sup> The lack of supervisory review can decrease officer

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due to perceived ambiguities in legal and policy requirements involving camera activation.”); Taylor Emmeline, *Lights Camera, Redaction . . . Police Body-Worn Cameras: Autonomy, Discretion, and Accountability*, 14 *Surveillance & Soc’y* 128, 130 (2016) (“[P]olice officers knowing that body-worn cameras are recording them . . . might feel inhibited to let trivial things slide or to dispense with a warning through fear of being viewed as overly lenient, or even negligent in their duty to protect the public.”).

37. Stoughton, *supra* note 31, at 1383 (explaining that both officers and civilians can be affected by the behavioral changes BWCs might encourage).

38. *Id.* at 1382.

39. *Id.* at 1415.

40. See *id.* at 1416–17 (referencing the initial BWC program implementation by the Phoenix, Arizona Police Department, which had a broad mandatory recording policy but, because “supervisors were not recognizing, evaluating, or addressing officers’ failure to abide by the policy,” officers complied only 13.2% of the time by the end of the trial period).

41. See Julian R. Murphy, *Is It Recording?—Racial Bias, Police Accountability, and the Body-Worn Camera Activation Policies of the Ten Largest Metropolitan Police Departments in the USA*, 9 *Colum. J. Race & L.* 141, 158 (2018).

42. See Stoughton, *supra* note 31, at 1417.

43. See *id.* at 1416–17.

compliance with program mandates, such as requirements on when the officer must record interactions with the public, and therefore can decrease the overall effectiveness of a BWC program.<sup>44</sup>

3. *Officer Review.* — When adopting BWC programs, law enforcement agencies and state and local governments must determine whether police officers are permitted to review video footage prior to filing a report. For example, in Florida, police officers are permitted by statute to review video footage prior to filing a report.<sup>45</sup> Scholars like Professor Joel M. Schumm have criticized such policies that allow officer review. Professor Schumm posits that this type of officer review could allow for biased reporting, where police officers may base their reports on the BWC footage rather than what they actually understood and remember to have happened.<sup>46</sup> Similarly, the Leadership Council on Civil and Human Rights has criticized unrestricted officer review of video footage for its potential to skew officers' written records, to undermine the evidentiary value of police reports by "narrowing the amount of independent evidence available in a case," to "unduly inflate officer credibility" by artificially increasing "consistency between officer testimony and video evidence," and to diminish procedural fairness.<sup>47</sup>

4. *Video Storage and Public Access.* — When crafting their BWC programs, police departments and state and local governments consider how to store the footage amassed from BWCs and to what extent, if any, the public should be able to access that footage. Broadly, BWC programs vary, as a matter of law and policy, in terms of how long police departments must retain video footage, whether state law classifies the video footage as part of the public record, whether police departments are required to release certain kinds of footage to the public, how retention and release should consider the privacy concerns associated with public access, and how much an agency will pay to maintain video storage.<sup>48</sup> Section I.C. of this Note will explore the types of laws and policies police departments and state and local governments create regarding BWC storage and public access.

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44. See *id.*

45. See Fla. Stat. Ann. § 1718(2)(d) (West 2018).

46. Joel M. Schumm, Nat'l Ass'n of Crim. Def. Laws., Policing Body Cameras: Policies and Procedures to Safeguard the Rights of the Accused 24–25 (2017), <https://www.nacdl.org/getattachment/4163cc7b-1f4e-4e6c-9a60-a76794390d94/policing-body-cameras-policies-and-procedures-to-safeguard-the-rights-of-the-accused.pdf> [<https://perma.cc/VRE5-QCTT>].

47. Harlan Yu & Miranda Bogen, Leadership Conf. on Civ. & Hum. Rts. & Upturn, The Illusion of Accuracy: How Body-Worn Camera Footage Can Distort Evidence 10–14 (2017), <https://www.upturn.org/static/reports/2017/the-illusion-of-accuracy/files/Upturn%20and%20LCCHR%20-%20The%20Illusion%20of%20Accuracy%20v.1.0.pdf> [<https://perma.cc/P4XY-PFYT>].

48. See Brennan Ctr., BWC Retention Policies, *supra* note 5.

C. *The Legal and Regulatory Landscape of BWC Footage Retention and Release*

The retention of BWC footage is largely controlled by three regulatory systems: freedom of information laws at the state level, municipal ordinances at the local level, and police department policies.<sup>49</sup>

1. *FOIA and State Freedom of Information Laws.* — The general purpose of FOIA is to “keep citizens in the know about their government,” and it requires “federal agencies . . . to disclose any information requested under . . . FOIA unless it falls under one of the nine exemptions.”<sup>50</sup> State freedom of information laws typically mirror the statutory scheme of FOIA, and state courts often interpret those state statutes in accordance with federal precedent.<sup>51</sup>

Disclosure under FOIA and state law equivalents generally occurs in two ways: affirmative disclosure and responses to requests submitted by members of the public.<sup>52</sup> FOIA has two affirmative (or as they are sometimes called, proactive) disclosure provisions that require agencies to publish certain information in the Federal Register and to proactively disclose other information “for public inspection and copying.”<sup>53</sup> Outside of the affirmative disclosure provisions, under FOIA, agencies additionally disclose information pursuant to requests made by the public. And the requester has a private right of action to sue the agency when their requests are wrongly denied.<sup>54</sup> Many state freedom of information laws are structured similarly to FOIA and also require, or otherwise allow,

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49. See *id.*

50. See Off. of Info. Pol’y, DOJ, What Is FOIA?, FOIA.gov, <https://www.foia.gov/about.html> [<https://perma.cc/DQY3-KVFF>] (last visited July 15, 2022) [hereinafter DOJ, What Is FOIA?].

51. *Abdur-Rashid v. N.Y.C. Police Dep’t*, 992 N.Y.S.2d 870, 891 (Sup. Ct. 2014) (holding that New York state courts may interpret New York’s public disclosure law, the Freedom of Information Law (FOIL), using the legislative history of the “[f]ederal analogue”); David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Pa. L. Rev. 1097, 1098–99 (2017) [hereinafter Pozen, Freedom Beyond FOIA] (“[M]ore than one hundred countries and all fifty states have enacted their own freedom of information laws, many of them based on the federal FOIA . . .”). For a compilation of information about various state open records laws, see Open Government Guide, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-guide/> [<https://perma.cc/3XVG-XA9G>] (last visited July 15, 2022).

52. See Off. of Info. Pol’y, Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request, DOJ, [https://www.justice.gov/oip/oip-guidance/proactive\\_disclosure\\_of\\_non-exempt\\_information](https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information) [<https://perma.cc/X2PU-JMCH>] [hereinafter DOJ, Proactive Disclosure Guidance] (last updated Dec. 17, 2021).

53. 5 U.S.C. § 552(a)(1)–(2) (2018); see also DOJ, Proactive Disclosure Guidance, *supra* note 52.

54. See 5 U.S.C. § 552(a)(3), (a)(4)(B); Christina Koningsor, Transparency Deserts, 114 Nw. U. L. Rev. 1461, 1471 (2020); DOJ, Proactive Disclosure Guidance, *supra* note 52.

affirmative disclosure of certain information<sup>55</sup> and require agencies to respond to requests for information from the public.<sup>56</sup> At the federal level, FOIA only applies to information held by federal agencies and “does not create a right of access to records held by Congress, the courts, or by state or local government agencies.”<sup>57</sup> With the exception of five states, all state legislatures are subject to freedom of information laws.<sup>58</sup>

2. *Barriers to Disclosure.* — As part of FOIA’s statutory scheme, nine exemptions allow agencies to deny requests for government information.<sup>59</sup> Notably, Exemption 7, “the Law Enforcement Exemption,” exempts records or information “compiled for law enforcement purposes” that would result in one of FOIA’s nine statutorily enumerated harms, such as an interference with enforcement proceedings or a deprivation of a right to a fair trial or an impartial adjudication.<sup>60</sup> Joseph Wenner explored Exemption 7(A), which exempts the disclosure of records that would interfere with law enforcement proceedings, and Exemption 7(C), which exempts the disclosure of records when such disclosure would lead to an unwarranted invasion of personal privacy, as the two exemptions most likely to apply to BWC footage disclosure.<sup>61</sup> He concluded that state courts likely will not make BWC footage categorically exempt under these exemptions according to FOIA precedent.<sup>62</sup> He additionally posited that state

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55. See Proactive Disclosure Requirements, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-sections/2-proactive-disclosure-requirements/> [<https://perma.cc/DZ62-HHE2>] (last visited July 15, 2022) (noting that Alabama, Arizona, Connecticut, Delaware, Florida, Iowa, Louisiana, Michigan, Missouri, New York, North Carolina, North Dakota, and Texas do not have proactive disclosure requirements discussed in their freedom of information statutes while other states do not require, but may allow, proactive disclosure).

56. See Status of Requester, Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-sections/1-status-of-requester/> [<https://perma.cc/G6ZX-9REU>] (last visited July 15, 2022).

57. Freedom of Information Act, U.S. Dep’t of State, <https://foia.state.gov/learn/foia.aspx> [<https://perma.cc/4RW4-FWHL>] (last visited July 15, 2022).

58. See How Open Is Your Government? Find Out, Muckrock, <https://www.muckrock.com/place/> [<https://perma.cc/82SF-EH52>] (last visited July 16, 2022); see also Pozen, Freedom Beyond FOIA, *supra* note 51, at 1102 n.25 (“In contrast to many state FOI laws, FOIA applies only to executive agencies and does not reach Congress, the courts, private entities, or the President’s inner circle.”).

59. See 5 U.S.C. § 552(b)(1)–(9); Joseph Wenner, Who Watches the Watchmen’s Tape? FOIA’s Categorical Exemptions and Police Body-Worn Cameras, 2016 U. Chi. Legal Forum 873, 879 (“Courts have held that these exemptions are discretionary, still allowing an agency to disclose potentially exempt information if that agency concludes that there would be no resulting harm from public disclosure.”); DOJ, What Is FOIA?, *supra* note 50.

60. 5 U.S.C. § 552(b)(7)(A)–(F) (listing other exempted harms including unwarranted invasion of personal privacy, disclosure of the identity of a confidential source, disclosure of law enforcement investigation techniques and procedures that would reasonably be expected to risk circumvention of the law, and endangerment of the life or physical safety of any individual); see also Wenner, *supra* note 59, at 879.

61. See Wenner, *supra* note 59, at 881–84.

62. See *id.* at 890–91.

courts and law enforcement agencies should examine the applicability of these categorical exemptions on a case-by-case basis to strengthen the transparency benefits of BWCs and protect the public's personal privacy and the integrity of ongoing investigations.<sup>63</sup>

In comparison to the nine categorical exemptions that exist at the federal level, state freedom of information laws can contain “hundreds of enumerated exemptions, either within the public records statute itself or scattered throughout the state code.”<sup>64</sup> Broadly, beyond just the number of exemptions that freedom of information laws at the state level may contain, there are more barriers to transparency at the state and local level than at the federal level.<sup>65</sup> These barriers to transparency include, among other issues, “high price quotes for public records requests, . . . nonsensical government responses, . . . excessive redactions, overreliance on certain exemptions, and failure to comply with statutory time limits.”<sup>66</sup> Professor Christina Koningisor has explored the concept of “transparency deserts,” where a confluence of low performance in three central features of a local transparency ecosystem can lead to a “downward spiral of reduced disclosure and public oversight.”<sup>67</sup> These three features are: “(1) the substance of transparency requirements binding the government; (2) the resources, expertise, and attitudes of state and local government actors tasked with implementing these laws; and (3) the robustness and health of local media and civil society organizations.”<sup>68</sup> This reality of high barriers to public access at the state and local level is particularly concerning as it relates to the public disclosure of BWC footage, given that law enforcement agencies “appear to consistently receive some of the highest numbers of requests” along with state public health agencies and corrections departments.<sup>69</sup>

3. *State Freedom of Information Laws and BWC Footage Retention and Release.* — Generally, state laws prescribe when the government must disclose information to the public and thus govern retention and

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63. See *id.* at 891, 902.

64. Koningisor, *supra* note 54, at 1506 (citing Nev. Rev. Stat. Ann. § 239.010 (West 2020) (listing 431 exemptions)); see also Public Records Exemptions, Or. Dep't of Just., <https://justice.oregon.gov/PublicRecordsExemptions/> [https://perma.cc/X59M-MJ82] (last visited Aug. 23, 2022) (providing a public catalog, maintained by the Attorney General, of the over five hundred exemptions to the disclosure of public records under Oregon law).

65. See Koningisor, *supra* note 54, at 1461 (“[I]n contrast with federal law, state transparency law introduces comparatively greater barriers to disclosure and comparatively higher burdens upon government.”).

66. *Id.* at 1505 (noting that there is overlap in some transparency problems at the federal and state level such as timing delays in terms of responding to requests, but additionally emphasizing that at the state level, there are “distinct transparency problems . . . in the transparency laws themselves”).

67. *Id.* at 1527.

68. *Id.*

69. *Id.* at 1477–78.

disclosure of video recordings from BWC footage. But some statutes go so far as to include distinct provisions aimed at police video footage.<sup>70</sup> When specifically addressing retention times of BWC footage, state law, or otherwise local government ordinances or police department policies, will classify the video footage as either evidentiary or non-evidentiary.<sup>71</sup> The initial bifurcation of BWC footage as evidentiary or non-evidentiary is made by law enforcement personnel in line with guiding state and municipal laws and police department policy.<sup>72</sup> This distinction determines how long the video footage is stored and whether it will be released to the public or deleted.<sup>73</sup>

All fifty states and the District of Columbia permit police departments to withhold records deemed “investigatory,” that is, evidentiary footage.<sup>74</sup> For example, California law directs state and local law enforcement agencies to make accessible to the public “a video or audio recording that relates to a critical incident”; the law defines a critical incident as either “an incident involving the discharge of a firearm at a person by a peace officer or custodial officer” or an incident “in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury.”<sup>75</sup> But the law also outlines that police departments may refuse to disclose such footage when it would interfere with an “active criminal or administrative investigation.”<sup>76</sup>

In addition to specifications regarding evidentiary and non-evidentiary evidence, some state laws, local ordinances, and police department policies create a retention schedule for BWC footage. A retention schedule designates how long the video should be stored, depending on the content matter of the video, and what can be done to the footage after the retention period expires. Some police departments create further subclassification systems for the specific type of video footage being stored and a corre-

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70. See Police Video (e.g., Body Camera Footage, Dashcam Videos), Reps. Comm. for Freedom of the Press, <https://www.rcfp.org/open-government-sections/14-police-video/> [<https://perma.cc/TMY5-84HX>] (last visited July 31, 2022).

71. See BJA, BWC Toolkit FAQs, supra note 24, at 16–17; Brennan Ctr., BWC Retention Policies, supra note 5.

72. See BJA, BWC Toolkit FAQs, supra note 24, at 16–17.

73. See *id.*

74. See Nate Jones, Public Records Laws Shield Police From Scrutiny—and Accountability, Wash. Post (July 30, 2021), [https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny-and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489\\_story.html](https://www.washingtonpost.com/investigations/public-records-laws-shield-police-from-scrutiny-and-accountability/2021/07/29/be401388-a794-11eb-bca5-048b2759a489_story.html) (on file with the *Columbia Law Review*) (quoting Adam Marshall, senior staff attorney at the Reporters Committee for Freedom of the Press, “[t]he exemptions for law enforcement-related records . . . [are] given deference by courts . . . [s]o you end up with a situation where the governmental entities . . . are the least transparent”); Open Government Guide, supra note 51.

75. Cal. Gov’t Code § 6254(f)(4), (f)(4)(C)(i)–(ii) (2021).

76. *Id.* § 6254(f)(4)(A).

sponding retention schedule.<sup>77</sup> For example, the New York City Police Department maintains a category assignment system that sets the retention time of a video recording within its cloud-based storage system: Videos pertaining to homicides are never deleted, videos of arrests are stored for five years, and videos of investigative encounters are stored for eighteen months.<sup>78</sup>

For non-evidentiary video footage, many police departments retain the footage for sixty to ninety days before deleting it, while other police departments retain non-evidentiary footage for longer periods of time, such as 190 days.<sup>79</sup> For some states, even after the retention period for non-evidentiary footage expires, the law does not require the destruction of the video footage, and thus, non-evidentiary video evidence can be stored for an unspecified amount of time.<sup>80</sup> Under Georgia law, for example, law enforcement agencies must retain video recordings from BWCs for a minimum of 180 days or longer if those records are evidentiary.<sup>81</sup> But the

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77. See Adrienna Wong, *ACLU of Cal., The Right to Know: How to Fulfill the Public's Right of Access to Police Records* 4, 13 app. B1 (2019), [https://www.aclusocal.org/sites/default/files/field\\_documents/aclu\\_ca\\_right\\_to\\_know\\_access\\_police\\_recorec.pdf](https://www.aclusocal.org/sites/default/files/field_documents/aclu_ca_right_to_know_access_police_recorec.pdf) [<https://perma.cc/65PE-DNMS>].

78. See N.Y.C. Police Dep't, *supra* note 21, at 6.

79. See Brennan Ctr., *BWC Retention Policies*, *supra* note 5 (noting that in Arlington, Texas, in accordance with Chapter 552 of the Texas Government Code and departmental procedures, non-evidentiary video footage is kept for ninety days); see also S.F. Police Dep't, *General Order 10.11.03(J), Body Worn Cameras 5* (2020), [https://www.sanfranciscopolice.org/sites/default/files/2020-11/DGO10.11.BWC\\_20201110.pdf](https://www.sanfranciscopolice.org/sites/default/files/2020-11/DGO10.11.BWC_20201110.pdf) [<https://perma.cc/Q9C7-5MG9>] (“Consistent with state law, the Department shall retain all BWC recordings for a minimum of sixty (60) days, after which recordings may be erased, destroyed or recycled.”). But see *ACLU, A Model Act for Regulating the Use of Body Worn Cameras by Law Enforcement* § 1(i) (2021) (“Body camera footage shall be retained by the law enforcement agency that employs the officer whose camera captured the footage, or an authorized agent thereof, for six (6) months from the date it was recorded, after which time such footage shall be permanently deleted.”); Phx. Police Dep't, *Operations Order 4.49: Body-Worn Video Technology* para. 10.A (2021), [https://www.phoenix.gov/policesite/Documents/operations\\_orders.pdf](https://www.phoenix.gov/policesite/Documents/operations_orders.pdf) [<https://perma.cc/9B2G-JPW9>] (“All captured digital media will be retained by the Department for 190 days following the date recorded. Captured video may be retained for longer periods in the event the video is the subject of a litigation hold, a criminal case, part of discovery, etc.”).

80. See, e.g., Ga. Code Ann. § 50-18-96(c)–(d) (2022) (“The retention periods described in this Code section are de minimis. This Code section shall not require the destruction of such video recording after the required retention period.”); Balt. Police Dep't, *Policy: Body Worn Camera 824* (2018), [https://www.baltimorepolice.org/sites/default/files/Policies/824\\_Body\\_Worn\\_Cameras.pdf](https://www.baltimorepolice.org/sites/default/files/Policies/824_Body_Worn_Cameras.pdf) [<https://perma.cc/7YHS-3JJK>] (indicating that the Baltimore Police Department does not specify how long non-evidentiary material may be kept and may deny requests to release video footage if the footage would fall within one of the exceptions under the Maryland Public Information Act). See generally Off. of the Md. Att'y Gen., *Maryland Public Information Act Manual* (17th ed. 2022), [https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA\\_manual\\_printable.pdf](https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf) [<https://perma.cc/9T8E-TYLD>] (lacking a requirement to destroy records after an agency's mandatory retention period has expired).

81. See Ga. Code Ann. § 50-18-96(b)(1)–(2) (requiring a recording that (1) is part of a criminal investigation, (2) shows a detainment or arrest, vehicular accident, or an officer's



law further notes that the retention periods are “de minimis,” and law enforcement agencies are not required to destroy video recordings after the required retention period ends.<sup>82</sup>

Together, the history of BWC technology, the implementation structure of inaugural BWC programs, the original intended BWC policy goals of local governments and police departments, and the treatment of video footage retention and release through state freedom information laws and FOIA lay the background necessary to analyze the recent shifts in transparency regimes as it relates to BWC footage.

## II. NEW TRANSPARENCY GOALS AND FUNDING TOWARD POLICE ACCOUNTABILITY

Following the national and international Movement for Black Lives and the Capitol Insurrection on January 6th, 2021, there has been broader conversation and demand for more transparency in government. Among other topics, this conversation has specifically considered what types of information the public should have regarding national security and policing.<sup>83</sup> Simultaneously, the federal government continues to funnel more money toward BWC program implementation without mandating clear standards on retention and release.<sup>84</sup> Section II.A examines the changes in freedom of information laws and policies at the federal and state level following both the Capitol Insurrection and the Movement for Black Lives. Section II.B presents how these changes in freedom of information laws have impacted law enforcement agencies. In light of the recent changes in freedom of information laws and policies, section II.C argues that transparency regimes appear to be moving in a direction that reinvigorates affirmative disclosure by agencies subject to freedom of information laws. Finally, section II.D explains that, while the benefits of affirmative disclosure can be applied to mend the shortcomings of BWC footage retention and release policies, transparency by itself is an insufficient policy goal to achieve positive, substantive outcomes in policing.

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use of force, or (3) can reasonably be anticipated to be necessary for pending litigation to be retained for thirty months from the date of such recording).

82. *Id.* § 50-18-96(c)–(d).

83. See *supra* section I.C.

84. See Bureau of Just. Assistance, DOJ, O-BJA-2022-171093, BJA FY 2022 Body-Worn Camera Policy and Implementation Program to Support Law Enforcement Agencies 1 (2022), <https://bja.ojp.gov/funding/O-BJA-2022-171093.pdf> [<https://perma.cc/38WW-R72M>] [hereinafter BJA, FY 2022 BWC Funding]; Press Release, Off. of Pub. Affs., DOJ, Justice Department to Provide Funding for Body-Worn Cameras to Small, Rural and Tribal Law Enforcement Agencies (July 7, 2021), <https://www.justice.gov/opa/pr/justice-department-provide-funding-body-worn-cameras-small-rural-and-tribal-law-enforcement> [<https://perma.cc/JVD9-SBU9>] [hereinafter DOJ, BWC Funding to Local Law Enforcement Agencies].

A. *Moving Toward a More Open Government: New Transparency Goals Following the Movement for Black Lives and the Capitol Insurrection*

Following the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and many other Black individuals, protests, conversations, debates, and advocacy across the country and the world focused on addressing systemic racism, policing, and justice during the summer of 2020.<sup>85</sup> Among the various demands articulated during this national and international movement—including defunding police departments and abolishing the police—the public, at both the national and local level, increased calls for transparency and accountability for police officers.<sup>86</sup> In addition to the Movement for Black Lives in the summer of 2020, the Capitol Insurrection by a pro-Trump mob, launched as Congress completed its count of electoral college votes to certify President Joseph Biden’s election, further increased demands for transparency in government, remedial efforts to address America’s issue of systemic racism, and increased integrity in democratic processes.<sup>87</sup> Both of these events took place against the backdrop of Donald Trump’s presidency, which saw record numbers of FOIA requests and litigations requesting more access to government records.<sup>88</sup>

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85. See Larry Buchanan, Quoctrung Bui & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in U.S. History, *N.Y. Times* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with the *Columbia Law Review*).

86. See Karina Zaiets, Janie Haseman & Veronica Bravo, We Looked at Protester Demands From Across the Nation and Compared Them With Recent Police Reforms, *USA Today* (July 20, 2020), <https://www.usatoday.com/in-depth/news/2020/07/20/protester-demands-police-policy-change-chokehold-ban/5357153002/> [<https://perma.cc/U92Q-ZPW5>] (last updated July 24, 2020) (“Creating a board overseeing the police and implementing other measures to increase transparency and accountability were some of the most voiced demands around the country.”); see also Simon Balto, Opinion, What “Defund the Police” Really Means, *Wash. Post* (Feb. 9, 2021), <https://www.washingtonpost.com/outlook/2021/02/09/what-defund-police-really-means/> (on file with the *Columbia Law Review*) (examining the historical underpinnings of the 2020 calls to defund the police and dispelling the view that it is an invitation to “anarchy” and “lawlessness” and instead emphasizing that defunding police is a “road map and a clarion call for a healthier, more beautiful, more caring, less-punishing society”); Mariame Kaba, Opinion, Yes, We Mean Literally Abolish the Police, *N.Y. Times* (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (on file with the *Columbia Law Review*) (explaining the position that the United States should abolish the police and that the police are beyond reform, given that “[t]here is not a single era in United States history in which the police were not a force of violence against [B]lack people”).

87. See *The Attack*, *Wash. Post*, <https://www.washingtonpost.com/politics/interactive/2021/jan-6-insurrection-capitol/> (on file with the *Columbia Law Review*) (last visited July 22, 2022).

88. See Exempt From FOIA, US Legislative Support Agencies Follow Uneven Transparency Standards, *First Branch Forecast* (Feb. 6, 2020), <https://firstbranchforecast.com/2020/02/06/foia-legislative-support-agencies-transparency/> [<https://perma.cc/8Q7J-EPUL>] (“During the Trump administration, the number of FOIA requests, FOIA lawsuits, and records censored have all reached record levels, driven from a

As a result of these national events, federal and state governments, across all three branches, responded to demands for more transparency.<sup>89</sup> Some of the measures federal and state governments adopted in response are aimed broadly at making records amassed by the government more accessible to the public; other measures are aimed more specifically at police reform.

B. *Transparency Measures Aimed at Policing*

1. *State Transparency Measures.* — At the state level, many state legislatures modified their freedom of information laws or proposed new laws aimed at increasing transparency and public access to government information surrounding policing. While not all legislative measures were enacted, the spate of proposals is indicative of an increased, dedicated attention to transparency in policing at the state level. For example, since the Movement for Black Lives in the summer of 2020, states like California, Massachusetts, New Jersey, New York, and South Carolina have enacted or have pending legislation that would permit the disclosure of the disciplinary records of law enforcement officers.<sup>90</sup> In New York, former Governor Andrew Cuomo signed a bill into law on July 10, 2020 that repealed section 50-a, a law used to shield law enforcement agency

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combination of non-responsive agencies, reduced proactive disclosure, and active litigation by civil society groups.”); FOIA Project Staff, FOIA Lawsuits Are Taking Longer to Resolve, The FOIA Project (Jan. 23, 2020), <http://foiaproject.org/2020/01/23/lawsuits-annual-2019/> [<https://perma.cc/64XA-LELN>] (displaying a table showing that pending FOIA lawsuits more than doubled between 2015 and 2019 as compared to previous years).

In the last two years of President Barack Obama’s presidency, 2015 and 2016, the DOJ received 67,783 and 73,103 FOIA requests, respectively, for each fiscal year. See United States Department of Justice Annual Freedom of Information Act Report Fiscal Year 2015, at 23–24 (2015), [https://www.justice.gov/oip/departments-justice-annual-foia-report-fy15-Full\\_Report/download](https://www.justice.gov/oip/departments-justice-annual-foia-report-fy15-Full_Report/download) [<https://perma.cc/H2YD-C9TL>]; United States Department of Justice Annual Freedom of Information Act Report Fiscal Year 2016, at 24–25 (2016), <https://www.justice.gov/oip/page/file/920581/download> [<https://perma.cc/4QRP-E6Z4>]. In contrast, during the last two years of Trump’s presidency, 2019 and 2020, all DOJ agencies received 95,119 and 86,729 FOIA requests, respectively. See United States Department of Justice Annual Freedom of Information Act Report Fiscal Year 2019, at 18–19 (2019), <https://www.justice.gov/oip/page/file/1253751/download> [<https://perma.cc/DYL2-AL4R>]; United States Department of Justice Annual Freedom of Information Act Report Fiscal Year 2020, at 20–21 (2020), <https://www.justice.gov/oip/page/file/1371846/download> [<https://perma.cc/K8PB-5LR4>].

89. See Frank D. LoMonte, *Rebuilding Trust Through Government Transparency and Accountability*, 46 *Hum. Rts.*, no. 3, 2021, at 18, 18–19 (examining the challenge Biden will face to rebuild public confidence and increase transparency in executive branch data following Trump’s presidency); Steve Zansberg, *Public Access to Police Body-Worn Camera Recordings* (Status Report 2020), *Comm’n’s Law.*, Fall 2020, at 51, 51–55 (detailing the status of police BWC policies around the United States); *infra* notes 109–113 and accompanying text.

90. See S.B. 16, 2021 Leg. Sess. (Cal. 2021) (enacted); H. 4160, 192nd Gen. Ct. (Mass. 2021); A.C.R. 187, 219th Leg. (N.J. 2020); S.B. S8496, 2019–2020 Leg. Sess. (N.Y. 2020) (enacted); H. 3814, 124th Leg. Sess. (S.C. 2021).

disciplinary records from public disclosure, amid the nationwide demands for police reform.<sup>91</sup> The repeal bill additionally balanced increased accessibility to law enforcement disciplinary records with other concerns, such as privacy rights, and required agencies to redact personal information when responding to a disclosure request.<sup>92</sup>

Since 2020, other states have enacted legislation that specifically addresses the issue of BWC footage storage. In June 2020, Colorado enacted the Enhance Law Enforcement Integrity Act, which adopted provisions addressing the issue of BWC footage storage among other measures to enhance law enforcement integrity.<sup>93</sup> The statute aims to balance public access with ex post and ex ante privacy concerns by centering victims and their families, establishing a retention schedule, and mandating the release of certain footage when a request is made by the public.<sup>94</sup> For example, when there is a complaint of officer misconduct, the statute requires law enforcement agencies to release all unedited video and audio recordings of the incident, including footage from BWCs or other recording devices, within “twenty-one days after the local law enforcement agency or the Colorado state patrol received the complaint.”<sup>95</sup> Simultaneously, the new law centers victims of police misconduct and their families. Namely, the statute mandates that “[a]ll video and audio recordings depicting a death must be provided upon request” to a victim’s family member or other lawful representative and that the family or legal representative “be notified of [their] right . . . to receive and review the recording at least seventy-two hours prior to public disclosure.”<sup>96</sup>

2. *Federal Transparency Measures.* — At the federal level, the government responded to demands for increased transparency and police reform in a variety of ways, including through new legislative efforts, changes to

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91. See N.Y. S.B. S8496 § 1 (repealing section 50-a).

92. *Id.* § 4 (specifying categories of personal information that must be redacted from a law enforcement agency’s response to a request for disciplinary records); Ellen Moynihan, Denis Slattery & Chris Sommerfeldt, Cuomo Signs Historic 50-a Repeal Bill, Making N.Y. Police Disciplinary Records Public After Decades of Secrecy, N.Y. Daily News (June 12, 2020), <https://www.nydailynews.com/news/politics/ny-cuomo-police-reform-disciplinary-records-20200612-5zryohkuwjew7ksjowhtswmsk4-story.html> (on file with the *Columbia Law Review*).

93. See S.B. 20-217(IV)(C)(2)(a), Gen. Assemb., 2020 Reg. Sess. (Colo. 2021) (enacted); Russell Berman, What the Rest of America Can Learn From Colorado, Atlantic (Sept. 22, 2021), <https://www.theatlantic.com/politics/archive/2021/09/police-reform-consequences/620150/> (on file with the *Columbia Law Review*) [hereinafter Berman, Colorado].

94. See Russel Berman, The State Where Protests Have Already Forced Major Police Reform, Atlantic (July 17, 2020), <https://www.theatlantic.com/politics/archive/2020/07/police-reform-law-colorado/614269/> (on file with the *Columbia Law Review*); see also Colo. S.B. 20-217(II)(A)–(C).

95. See Colo. S.B. 20-217(IV)(C)(2)(a); Berman, Colorado, *supra* note 93 (exploring the story of a Black man, Kyle Vinson, who was wrongfully brutalized by the police, and in response the chief of the Aurora Department “quickly released” the BWC footage and “abjectly apologized to Vinson in a news conference”).

96. Colo. S.B. 20-217(IV)(C)(2)(b)(I).

executive agencies, and changes in allocation of funding to the states. Following the Movement for Black Lives in the summer of 2020, Congress launched a new legislative effort in June 2020 to address issues of policing through the George Floyd Justice in Policing Act (GFJPA).<sup>97</sup> Even though the bill failed to pass in the Senate, the GFJPA aspired to address many issues of police accountability and transparency. Specifically, it set standards for BWC video retention times and release to the public for both federal law enforcement agencies and state and local law enforcement agencies receiving federal funding.<sup>98</sup> In many ways the GFJPA serves as a model for what retention should look like at the state and local level.<sup>99</sup>

Even without passage of the GFJPA, the DOJ launched the first phase of its Body-Worn Camera Program in September 2021, requiring federal law enforcement agents to wear BWCs during preplanned law enforcement operations or the execution of a search and seizure warrant or order.<sup>100</sup> This new DOJ program builds upon an October 2019 pilot program and an October 2020 policy announcement that permitted but did not mandate—as the new policy prescribes—the use of BWCs during preplanned law enforcement operations for federally deputized task force officers.<sup>101</sup> The implementation of the program followed multiple recommendations within the federal government for law enforcement agencies, like the U.S. Capitol Police, to wear BWCs after the Capitol Insurrection to promote transparency, accountability, and security.<sup>102</sup> The first phase of

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97. See George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (2020).

98. See Press Release, Sherrilyn Ifill, Former President & Dir.-Couns. of the NAACP Legal Def. & Educ. Fund, Inc., Statement on the Failure to Advance the George Floyd Justice in Policing Act of 2021 (Sept. 22, 2021), <https://www.naacpldf.org/press-release/ldf-issues-statement-on-the-failure-to-advance-the-george-floyd-justice-in-policing-act-of-2021/> [<https://perma.cc/3VHL-Y92Y>] (stating that the bill contained a number of measures that would have increased accountability for law enforcement officers.).

99. See *infra* Part III.

100. See Press Release, Off. of Pub. Affs., DOJ, Justice Department Announces First Federal Agents to Use Body-Worn Cameras (Sept. 1, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-first-federal-agents-use-body-worn-cameras> [<https://perma.cc/K8CK-RU9F>] [hereinafter DOJ, 2021 BWC Program Press Release].

101. *Id.*; see also Press Release, Off. of Pub. Affs., DOJ, Department of Justice Announces Pilot Program for Use of Body-Worn Cameras by Federally Deputized Task Force Officers (Oct. 28, 2019), <https://www.justice.gov/opa/pr/departement-justice-announces-pilot-program-use-body-worn-cameras-federally-deputized-task> [<https://perma.cc/M6P2-JSLL>]; Press Release, Off. of Pub. Affs., DOJ, Department of Justice Announces the Use of Body-Worn Cameras on Federal Task Forces (Oct. 29, 2020), <https://www.justice.gov/opa/pr/departement-justice-announces-use-body-worn-cameras-federal-task-forces> [<https://perma.cc/4VT2-SY6F>].

102. See, e.g., Task Force 1-6, Capitol Security Review 6 (2021), [https://www.speaker.gov/sites/speaker.house.gov/files/20210315\\_Final\\_Report\\_Task\\_Force\\_1.6\\_Capitol\\_Security\\_Review\\_SHORT.pdf](https://www.speaker.gov/sites/speaker.house.gov/files/20210315_Final_Report_Task_Force_1.6_Capitol_Security_Review_SHORT.pdf) [<https://perma.cc/UZX8-MHWC>] (recommending that the U.S. Capitol Police “be equipped with [BWCs], an item not currently in their inventory, to improve police accountability[,] . . . protect officers from false accusations of

this program includes agents from the Phoenix and Detroit Field Divisions of the ATF, the DEA, the FBI, and the U.S. Marshals Service.<sup>103</sup>

The DOJ's stated goals for this policy mirrored those of the first wave of BWC programs—increased law enforcement accountability and transparency.<sup>104</sup> The DOJ also continues to encourage states and local governments to increase use of BWCs. In 2021, the agency announced that the Bureau of Justice Assistance (BJA) “is releasing \$7.65 million in a competitive microgrant grant solicitation that will fund body-worn cameras . . . to any law enforcement department with 50 or fewer full-time sworn personnel, rural agencies (those agencies within non-urban or non-metro counties); and federally-recognized Tribal agencies.”<sup>105</sup> This increased funding complemented the 2021 Body-Worn Camera and Implementation Program to Support Law Enforcement Agencies grant solicitation that anticipated a total award amount of \$27.5 million to help law enforcement agencies implement BWC programs.<sup>106</sup> In March of 2022, the BJA solicited additional grant applications for law enforcement agencies seeking to purchase BWCs; the highest award amounts have a cap of two million dollars, for site-based awards to law enforcement agencies and site-based awards to state correctional agencies, with the BJA soliciting forty and eight applications from those agencies respectively.<sup>107</sup>

### C. *Broad Transparency Measures and the Push Toward Affirmative Disclosure*

In addition to the measures aimed specifically at policing, the push for increased transparency inspired by the national Movement for Black Lives and the Capitol Insurrection has also included broad measures for public access to government records. For example, following the Capitol Insurrection, Congress initiated an investigation into the Insurrection as the DOJ concurrently engages in over 850 prosecutions stemming from

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misconduct[.] . . . [and] provide visual and audio evidence . . . leading to better investigations and prosecutions when needed”); Tom Jackman, Congressman Files Bill Requiring Capitol Police to Wear Body Cameras, Wash. Post (Jan. 13, 2021), <https://www.washingtonpost.com/nation/2021/01/13/body-cameras-bill/> (on file with the *Columbia Law Review*).

103. See DOJ, 2021 BWC Program Press Release, *supra* note 100.

104. *Id.* (“Law enforcement is . . . most effective when there is accountability and trust between law enforcement and the community . . . [We] expanded our body worn camera program to our federal agents, to promote transparency . . . with the communities we serve and protect . . . [and] among our state, local and Tribal law enforcement partners . . .” (internal quotation marks omitted) (quoting Att’y Gen. Merrick B. Garland)); see also *supra* sections I.A–B.

105. DOJ, BWC Funding to Local Law Enforcement Agencies, *supra* note 84.

106. See *id.*; see also Bureau of Just. Assistance, DOJ, O-BJA-2021-131001, BJA FY 21 Body-Worn Camera Policy and Implementation Program to Support Law Enforcement Agencies 5 (2021), <https://bja.ojp.gov/funding/opportunities/o-bja-2021-131001> [<https://perma.cc/3Y5M-7A28>] (noting that these grants fund other “expenses reasonably related to BWC program implementation” including redactions costs and storage costs).

107. See BJA, FY 2022 BWC Funding, *supra* note 84.

the Insurrection.<sup>108</sup> As a result of the congressional investigation, Congress has amassed a large amount of information, including video footage captured by Capitol Police surveillance cameras in the Capitol and “a series of reports Congress instructed House and Senate officials to prepare, including a catalog of unreleased Capitol Police inspector general reviews dealing with security vulnerabilities and other issues.”<sup>109</sup>

The public, by way of media companies, has pursued litigation seeking access to these congressional records in federal courts. Courts have mandated public access to these records despite objections from the agencies holding them, like the Capitol Police.<sup>110</sup> Congress and congressional agencies, like the Capitol Police, are not subject to FOIA,<sup>111</sup> but media companies have used other legal devices, like the common law right of access, to obtain congressional records.<sup>112</sup> Further, the move toward more

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108. See H.R. Res. 3233, 117th Cong. § 2 (2021) (“There is established in the legislative branch the National Commission to Investigate the January 6 Attack on the United States Capitol Complex . . .”); see also Press Release, Merrick B. Garland, Att’y Gen. of the United States, Statement of Attorney General Merrick B. Garland on the Investigation Into the January 6th Attack on the Capitol (June 24, 2021), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-investigation-january-6th-attack-capitol> [<https://perma.cc/A2B6-V9EW>] (“We have now crossed the threshold of 500 arrests, including the 100th arrest of a defendant on charges of assaulting a federal law enforcement officer.”); Kyle Cheney & Josh Gerstein, Where Jan. 6 Prosecutions Stand, 18 Months After the Attack, *Politico* (July 7, 2022), <https://www.politico.com/news/2022/07/07/jan-6-prosecutions-months-later-00044354> [<https://perma.cc/ML7K-Q4AV>].

109. See Josh Gerstein, Wrangling Over Jan. 6 Footage Could Force Open Congressional Records, *Politico* (Aug. 18, 2021), <https://www.politico.com/news/2021/08/18/jan-6-footage-congressional-records-505894> [<https://perma.cc/79P9-SQ9M>].

110. See *United States v. Torrens*, 560 F. Supp. 3d. 283, 283 (D.D.C. 2021). In this case, a coalition of sixteen media organizations filed suit to release nine videos submitted for a plea hearing of one of the Capitol insurrectionists, Eric Chase Torrens. *Id.* at 286. The case resembles disputes in many of the DOJ prosecutions of Capitol insurrectionists in which defense attorneys have claimed that prosecutors are excluding too much of the video footage from the January 6th Insurrection as “highly sensitive.” See Gerstein, *supra* note 109. The dispute arising from the defense attorneys for the insurrectionists centers on the claim that prosecutors have approved the release of incriminating video clips but have omitted other video footage that would paint the defendants in a more favorable light. *Id.* The district court judge presiding over the case, Chief Judge Beryl Howell, ordered the prosecutors to put videos on the court record and potentially in the public domain; the judge concluded that the video footage consisted of judicial records and met the six factors of the *Hubbard* test, which is used to determine whether those judicial records should be publicly available. See *Torrens*, 560 F. Supp. 3d. at 294 (citing *United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980)).

111. See 5 U.S.C. § 552(a) (2018) (“[E]ach agency shall make available to the public information as follows . . .”); see also *id.* § 551(1)(A) (“[A]gency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the Congress.”).

112. See First Amended Complaint at 14, *Musgrave v. Manger*, No. 1:21-cv-02199 (D.D.C. Aug. 24, 2022); see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (describing the common law right of access as “a general right to inspect and copy public

transparency broadly in light of the Insurrection has caused federal agencies, like the FOIA Advisory Committee, to reconsider FOIA, and recommend that “FOIA-like rules” should apply to congressional agencies.<sup>113</sup> The FOIA Advisory Committee, established by the National Archives and Records Administration, is chaired by the Office of Government Information Services and makes recommendations to the Archivist of the

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records and documents” that is limited in scope). In a June 2021 opinion from the D.C. Circuit, the court responded to the request from a conservative watchdog group, Judicial Watch, seeking copies of subpoenas that the House Intelligence Committee issued during the first impeachment investigation into former President Donald Trump. See *Jud. Watch, Inc. v. Schiff*, 998 F.3d 989, 990 (D.C. Cir. 2021). The court ultimately concluded that the Constitution’s “Speech or Debate” clause precluded the group’s suit and affirmed and dismissed the case for lack of subject matter jurisdiction. *Id.* But a concurrence by Judge Karen LeCraft Henderson concluded that “in the right case, the application of the Speech or Debate Clause to a common law right of access claim would require careful balancing.” *Id.* at 993 (Henderson, J., concurring). Judge Henderson’s concurrence analogized to the public policy considerations underlying FOIA in the common law right to public access, citing to precedent that “citizens ‘know[ing] ‘what their Government is up to’ . . . [is] a structural necessity in a real democracy.” *Id.* at 994 (alterations in original) (quoting *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171–72 (2004)). She concluded that “[s]imply put, the Speech or Debate Clause should not bar disclosure of public records subject to the common law right of access in all circumstances.” *Id.* at 999 (emphasis omitted).

In light of the *Schiff* concurrence, a suit filed in the D.C. District Court similarly sought video footage captured by security cameras on January 6th and information generated from the congressional investigation into the Insurrection after the U.S. Capitol Police (USCP) refused to disclose such footage. See First Amended Complaint, *supra*, at 9 (bringing suit against USCP, along with other defendants, to mandate the disclosure of USCP surveillance footage); Defendants J. Thomas Manager and U.S. Capitol Police’s Motion to Dismiss or, in the Alternative, Motion for Summary Judgment at Exhibit B, *Musgrave*, No. 1:21-cv-02199, ECF No. 13-6; *id.* at Exhibit C, ECF No. 13-7 (refusing to disclose the USCP “security camera footage shared by the USCP with the Federal Bureau of Investigation as part of the investigation into the events of 6 January 2021” as it “is not a ‘public record’ subject to the public right of access ‘under the common law’”); see also Gerstein, *supra* note 109. This suit seeks to use a robust view of the common law right of access to make certain congressional records available. See *id.* (“The new legal fight has the potential to set a new precedent for what kinds of information Congress must disclose, and when—and is squarely aimed at upending decades of law that shielded the institution from public scrutiny.”).

113. See Off. of Gov’t Info. Servs., FOIA Adv. Comm., No. 2021-01, *Increasing Access to Information in the Legislative Branch 2* (2021) [hereinafter FOIA Adv. Comm. Recommendation]. In its recommendation for the 2020 to 2022 Term, the FOIA Advisory Committee recommended that the Archivist of the United States should recommend the following to Congress:

Congress should adopt rules or enact legislation to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.

*Id.* at 2. But this federal precedent is not widely transferable to state versions of freedom of information laws as most states, with the exception of five, subject their legislative bodies to public record laws. See Muckrock, *supra* note 58.



United States to improve FOIA administration and proactive disclosures; the Archivist of the United States can then take the Committee's recommendations to Congress.<sup>114</sup> The new FOIA Advisory Committee recommendation to congressional offices at the federal level sheds light on how the recent demands for transparency encourage a renewed look at the proactive disclosure requirements of FOIA and state freedom of information laws. The recommendation acknowledges that "Congress [and its offices] already go[] quite far in making [their] activities and legislation publicly accessible; there is no reason why it could not and should not go farther."<sup>115</sup>

Even though Congress is not subject to FOIA, the House, Senate, and legislative support agencies have generally proactively disclosed large amounts of information.<sup>116</sup> But the FOIA Advisory Committee specifically asks congressional offices to subject themselves to a more expansive proactive disclosure of certain records.<sup>117</sup> As further evidence that the transparency conversation at the federal level is shifting more toward a proactive view of FOIA, Attorney General Merrick Garland issued new, comprehensive FOIA guidelines in March highlighting the "presumption of openness" inherent in the administration of the statute.<sup>118</sup> The guidelines emphasize that "[t]he proactive disclosure of information is also fundamental to the faithful application of FOIA" and reference the DOJ's continued efforts to "encourage proactive agency disclosures, including by—as the Government Accountability Office (GAO) recommended—providing more specific criteria regarding how relevant metrics should be reported in agency Annual FOIA Reports."<sup>119</sup>

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114. See Freedom of Information Act (FOIA) Advisory Committee, U.S. Nat'l Archives & Recs. Admin., <https://www.archives.gov/ogis/foia-advisory-committee> [<https://perma.cc/WHM8-LLU2>] (last visited July 24, 2022); see also FOIA Adv. Comm. Recommendation, *supra* note 113, at 2.

115. FOIA Adv. Comm. Recommendation, *supra* note 113, at 8.

116. See *id.* (recognizing that [House.gov](https://www.house.gov), [Senate.gov](https://www.senate.gov), and [Congress.gov](https://www.congress.gov) provide "home bases" for information about members, organizations, activities, and legislation and noting that "GAO reports and testimonies can be found at [gao.gov](https://www.gao.gov)," "CRS reports are available at [crsreports.congress.gov](https://www.crsreports.congress.gov)," and "there is a plethora of information related to the output of Congress at [usaspending.gov](https://www.usaspending.gov)"); see also First Branch Forecast, *supra* note 88 (noting that both houses have proactively disclosed "enormous amounts of information about Members, staff, personnel, legislative activity, from draft bills to final laws, votes, committee reports, ethics data, transcripts and video archives from various proceedings, and spending, along with disclosures from individual offices and committees").

117. FOIA Adv. Comm. Recommendation, *supra* note 113, at 2, 8.

118. Off. of the Att'y Gen., Memorandum for Heads of Executive Departments and Agencies on Freedom of Information Act Guidelines 1–2 (Mar. 15, 2022), <https://www.justice.gov/ag/page/file/1483516/download> [<https://perma.cc/8FG3-KCAS>].

119. *Id.* at 2; see also Department of Justice Handbook for Agency Annual Freedom of Information Act Reports 1 (2021), <https://www.justice.gov/oip/page/file/1438431/download> [<https://perma.cc/64EG-M2LS>].

D. *The Need for a New BWC Transparency Regime and New Policy Goals*

The shift toward a more proactive disclosure regime, and the backlog of FOIA requests from the record number of submissions during the Trump Administration, is particularly relevant to BWC retention and release policies. Law enforcement agencies at the state and local level receive some of the highest number of requests under freedom of information laws.<sup>120</sup> Additionally, the increased number of law enforcement agencies using BWC programs since 2014 has “dramatically increase[ed] the stock of BWC recordings that are potentially available for public viewing.”<sup>121</sup> Finally, there may be cost efficiency gaps in these programs. As more money continues to be directed toward BWC programs, one of the largest costs in implementing the programs is the storage of video footage.<sup>122</sup> Further, redacting and editing footage for release to the public may require increased costs and resources.<sup>123</sup> With the sheer volume of both footage and requests and the costs associated with storage and release, a better system of disclosure is needed. As the use of affirmative disclosure has increased since the Movement for Black Lives in 2020 and the Capitol Insurrection, it is worth exploring to what extent affirmative disclosure can be integrated into request-driven disclosure for BWC footage.<sup>124</sup> A combined affirmative and request-driven disclosure framework could increase transparency outcomes for BWC programs.<sup>125</sup>

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120. See Koningisor, *supra* note 54, at 1477 (“Texas, for example, reported that state agencies received nearly 650,000 public records requests in 2017, a surprisingly high figure that does not include requests to local government officials.”).

121. Zansberg, *supra* note 89; see also *supra* section I.A.

122. See Chris Pagliarella, *Police Body-Worn Camera Footage: A Question of Access*, 34 *Yale L. & Pol’y Rev.* 533, 536 (2016) (“Despite initial savings in administrative costs, storing significant amounts of video footage is extremely costly over the long term . . . . New Orleans anticipates that its BWC program will cost \$1.2 million over five years, the ‘bulk of which will go to data storage.’” (quoting Lindsay Miller & Jessica Toliver, *Police Exec. Rsch. F., Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* 32 (2014), <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [<https://perma.cc/YU9R-7N9E>])); see also BJA, *BWC Toolkit FAQs*, *supra* note 24, at 15 (“Video data storage is one of the most expensive aspects of body-worn camera (BWC) programs.”); *Research on Body-Worn Cameras and Law Enforcement*, Nat’l Inst. of Just., DOJ (Jan. 7, 2022), <https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement> [<https://perma.cc/E6FV-NZDN>] (“Agencies not using body-worn cameras stated cost . . . [including] video storage . . . to be the primary disincentive.”); *supra* sections I.A., II.B.2.

123. See Newell, *supra* note 30, at 153 (providing that one police employee confirmed that “the process of previewing and redacting footage took up to three times longer than the length of the footage itself, and that current staffing levels could not support a high volume of requests or, indeed, even a single broad request”).

124. See *supra* section II.C; see also Koningisor, *supra* note 54, at 1543 (noting that more robust affirmative disclosure is only a “partial solution” and “cannot adequately replace the individual right of request”); Pozen, *Freedom Beyond FOIA*, *supra* note 51, at 1112–17 (highlighting the problems with FOIA’s reliance on requests to serve certain public values given that businesses make up the bulk of requests under the statute and concerned citizens only make up a fraction of the “700,000-plus FOIA requests submitted each year”).

125. See *infra* Part III.

But even though transparency is often the intended policy outcome of BWC programs, by itself, transparency is insufficient as a solution. For example, Professor David Pozen has commented that transparency is “neither an inevitable spur to nor an adequate substitute for good substantive regulation” but may be an “indispensable complement” to such regulation.<sup>126</sup> Professor Ngozi Okidegbe similarly concluded, in the context of regulating pretrial algorithms that are used for bail decisions, that while “transparency is a crucial precondition to rendering algorithmic governance democratically accountable to the public, transparency alone cannot attend to the multiple layers of democratic exclusion experienced by oppressed communities.”<sup>127</sup>

In the context of BWCs, footage transparency—one of the intended goals of BWCs—has had mixed results for achieving accountability in policing. For example, an empirical study conducted by Professor Zamoff revealed that in excessive force litigation, civil rights plaintiffs are less likely to prevail at summary judgment when there is BWC footage of an entire civilian–police incident.<sup>128</sup> This type of BWC footage, in some cases, has actually helped defendant police officers to dismiss excessive force cases more quickly.<sup>129</sup> In Salt Lake City, in 2014, footage from a BWC was used to justify a fatal shooting, even though the footage clearly demonstrated officer misconduct.<sup>130</sup> With the strength of doctrines like qualified immunity, even with BWC footage, many plaintiffs’ constitutional allegations pertaining to police brutality remain unadjudicated.<sup>131</sup> Not only has BWC

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126. David E. Pozen, *Transparency’s Ideological Drift*, 128 *Yale L.J.* 100, 102, 123–27, 163 (2018) (exploring transparency’s drift toward the right politically, specifically in the context of open record laws).

127. Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 *Conn. L. Rev.* 739, 746 (2022); see also Brigham Daniels, Mark Buntaine & Tanner Bangerter, *Testing Transparency*, 114 *Nw. U. L. Rev.* 1263, 1327 (2020) (“Transparency’s effectiveness relies on other functioning aspects of democratic institutions.”).

128. See Zamoff, *supra* note 15, at 36–42; see also *supra* section I.B.

129. Zamoff, *supra* note 15, at 50–52.

130. Pat Reavy, *Body Cam Helps Justify Fatal South Salt Lake Police Shooting*, *KSL.com* (Sept. 30, 2014), <https://www.ksl.com/article/31772096/body-cam-helps-justify-fatal-south-salt-lake-police-shooting> [<https://perma.cc/Y5ZM-ALQT>] (noting that even though the BWC footage displayed that Dillion Taylor had no weapon and was wearing headphones when police fatally shot him in the back, Salt Lake County District Attorney Sim Gill determined that the shooting was legally justified).

131. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021) (*per curiam*) (reversing the Tenth Circuit, holding that the Court “need not, and [does] not, decide whether . . . recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment, and observing that “[o]n this record, the officers plainly did not violate any clearly established law”); see also James et al., *supra* note 11, at 25 (“[W]hile early studies suggested that BWCs decreased the use of force by police officers, more recent studies have found mixed results . . .”); Lindsey Van Ness, *Body Cameras May Not Be the Easy Answer Everyone Was Looking For*, *PEW: Stateline* (Jan. 14, 2020), <https://www.pewtrusts.org/research-and-analysis/blogs/stateline/2020/01/14/body-cameras-may-not-be-the-easy-answer>

footage transparency not dispositively held officers accountable, BWC programs as a whole, when used as a tool for achieving transparency, do not seem to serve an accountability function without additional regulatory tools. For example, a review of seventy empirical studies of BWCs determined that body cameras have not had a significant or consistent impact on officer behavior or citizens' view of the police.<sup>132</sup> Police officers continue to shoot and kill hundreds of people annually; as of this writing, 1,049 people have died at the hands of police so far in 2022.<sup>133</sup>

These mixed results for transparency into BWC footage hint that transparency in this context, as scholars have also noted in other contexts, is insufficient to achieve an accountability function. But there is value in transparency for its accountability function when mixed with other regulatory measures and when used as an instrument toward other policy goals.<sup>134</sup> Thus, any transparency regime for BWC footage must consider what additional, substantive goals are needed to address the persistent inequities in America that transparency elucidates but does not actually fix.

### III. AN INTERMEDIARY APPROACH TO PUBLIC ACCESS OF BWC FOOTAGE

This Part proposes an intermediate regulatory framework to manage BWC footage and public access. The framework proposed in this Part is “intermediate” in the sense that it acknowledges the benefits of affirmative disclosure under freedom of information laws, while also appreciating the traditional model of request-driven disclosure. This intermediary framework is encapsulated in standards and recommended policies and procedures that law enforcement recipients of federal BWC grants, state and local governments, and law enforcement agencies should adopt when implementing their BWC programs. The congressional investigation of the Capitol Insurrection, the GFJPA, and the Colorado Enhance Law Enforcement Integrity Act (CELEIA) serve as templates for this intermediary framework.

Substantive change in policing is not just about transparency and having better access to policing data like BWC footage. Rather, with more transparency and a better system of managing footage, this section attempts to answer the question of what purposes an intermediary disclosure framework can serve beyond just transparency to improve policing outcomes. To effectively balance the benefits of affirmative disclosure with

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everyone-was-looking-for [https://perma.cc/3TLR-MRYM] (“Five studies and experiments showed that officers wearing cameras used force less often than officers not wearing cameras, but eight others showed no statistically significant difference in use of force.”).

132. Lum et al., *supra* note 29, at 97–101.

133. See Fatal Force, *supra* note 3.

134. See Okidegbe, *supra* note 127, at 746; see also David E. Pozen, Seeing Transparency More Clearly, 80 *Pub. Admin. Rev.* 326, 327 (2019) (“[T]ransparency must by and large be viewed in instrumental terms, as a means to other ends.”).

traditional request-based disclosure, an intermediate disclosure framework of BWC footage should be crafted in light of three policy principles: (1) minimizing the violation of the public's privacy and limiting unnecessary surveillance, especially for those communities that are already overpoliced; (2) improving the cost efficiency of BWC programs; and (3) assessing the need to redistribute resources. This section will present a framework to achieve these policy goals through a standard that the federal government can recommend to law enforcement grantees of federal funding for BWCs, or otherwise be adopted by state and local governments and law enforcement agencies implementing new laws or policies regarding BWC footage storage. The standard adopts the treatment of BWC footage and other government records modeled in the congressional Capitol Insurrection investigation, the GFJPA, and the CELEIA.

A. *Centralized Agency as a Place of Review*

In pursuit of all three policy goals listed above, state and local government should consider creating a centralized agency to review all types of public records, and specifically in the context of this Note, BWC footage. A centralized reviewing agency would review all BWC footage from law enforcement agencies at either a municipal- or statewide level. The structure of the agency can resemble that of the Select House Committee investigating the Capitol Insurrection. The Committee consists of thirteen members, appointed by the Speaker of the House.<sup>135</sup> Likewise, state or municipal legislative bodies can appoint members when creating a centralized reviewing agency.

The Committee has the power to “obtain full and prompt access” to information from a government department or agency that is relevant to investigating the Capitol Insurrection.<sup>136</sup> In the course of the investigation, the Committee has amassed massive amounts of information and has been under pressure to release the information it has gathered.<sup>137</sup> In turn, the Committee has begun and will continue to affirmatively publicize its findings from the investigation in a series of televised hearings and written

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135. See About, Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, <https://january6th.house.gov/about> [<https://perma.cc/WRR8-T4MU>] [hereinafter About Select Committee] (last visited July 27, 2022) (noting that five of the thirteen committee members “shall be appointed after consultation with the minority leader”).

136. See *id.*; see also Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States, H.R. Doc. No. 116-177, 117th Cong., r. X, cl. 11(b)(4), at 555 (2021).

137. See Jacqueline Alemany & Tom Hamburger, Committee Investigating Jan. 6 Attack Plans to Begin a More Public Phase of Its Work in the New Year, *Wash. Post* (Dec. 27, 2021), [https://www.washingtonpost.com/politics/january-6-attack-investigation/2021/12/27/e2c37488-62d4-11ec-8ce3-9454d0b46d42\\_story.html](https://www.washingtonpost.com/politics/january-6-attack-investigation/2021/12/27/e2c37488-62d4-11ec-8ce3-9454d0b46d42_story.html) (on file with the *Columbia Law Review*) (“The committee has taken in a massive amount of data—interviewing more than 300 witnesses, announcing more than 50 subpoenas, obtaining more than 35,000 pages of records and receiving hundreds of telephone leads through the Jan. 6 tip line . . .”).

reports to better inform the public about what happened during the Insurrection and recommend legislative and administrative changes.<sup>138</sup> Similarly, a centralized reviewing agency could obtain access to all BWC footage from law enforcement agencies within a municipality or state depending on the jurisdiction of the agency. It could then affirmatively publicize certain categories of BWC footage that would be of public interest and respond to requests for other types of BWC footage that cannot be affirmatively disclosed. Based on its review of footage, the agency could make legislative and administrative recommendations about how to use BWC programs. This structure could allow the agency to develop expertise over time, such that the agency can begin to affirmatively disclose certain types of footage that are frequently requested and subsequently disclosed. Agency expertise could additionally lead to more efficient processing of requests and a robust retention schedule that identifies certain categories of footage that should be deleted after a certain period of time.

In adopting an intermediary disclosure regime, like the Select Committee, a centralized reviewing agency can formulate rules and procedures to “prevent the disclosure, without the consent of each person concerned, of information . . . that unduly infringes on the privacy or that violates the constitutional rights of such person.”<sup>139</sup> These rules and procedures would serve the privacy rights of those captured on footage by limiting the extent of affirmative disclosure if such disclosure would violate the individual’s privacy rights. Additionally, as noted above, the use of a robust retention schedule to identify footage that agencies can delete after a specified time frame will limit the extent to which civilians captured on BWCs are unnecessarily surveilled.

A centralized reviewing agency that adopts an intermediary disclosure framework can further policy goals of cost efficiency and assess the need for redistribution of resources. Like the Select Committee, a centralized reviewing agency could maintain accountability by making regular and periodic reports about data and findings associated with BWC footage.<sup>140</sup> This type of centralized review and collection of data has been recommended in other FOIA contexts as well to improve the administration of

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138. See *id.*; see also Mary Clare Jalonick, Jan. 6 Committee Prepares to Go Public as Findings Mount, Associated Press (Jan. 2, 2022), <https://www.usnews.com/news/politics/articles/2022-01-02/jan-6-committee-prepares-to-go-public-as-findings-mount> (on file with the *Columbia Law Review*); Watch Live, Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, <https://january6th.house.gov/news/watch-live> (on file with the *Columbia Law Review*) (last visited July 27, 2022).

139. See Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States, H.R. Doc. No. 116-177, r. X, cl. 11(f), at 558.

140. See About Select Committee, *supra* note 135; see also Constitution, Jefferson’s Manual, and Rules of the House of Representatives of the United States, H.R. Doc. No. 116-177, r. X, cl. 11(c)(1), at 556.

the statute.<sup>141</sup> These reports would serve the policy aim of increasing cost efficiency and assessing the need for redistribution by providing a review of the data associated with BWC programs, such as the costs of storage, redaction, and deletion. These reports could also be used as a tool to assess areas of improvement for the legislature when appropriating funds and for law enforcement agencies using BWC programs. Finally, with a centralized reviewing agency, state and local governments will grow in their ability “to post large categories of records electronically [and] presumably reduce[] the costs associated with large-scale affirmative disclosure.”<sup>142</sup>

Ombudsman offices or freedom of information offices currently exist at the federal level and in at least nineteen states.<sup>143</sup> These offices typically “investigate and mediate complaints or hear appeals of records denials.”<sup>144</sup> For example, states like Maine have a Public Access Ombudsman, a position created by the Maine Legislature, that “review[s] complaints about compliance with [the state’s] Freedom of Access Act and attempt[s] to mediate their resolution [and] answer calls from the public, media, and government agencies about the requirements of the law.”<sup>145</sup> Many state and federal agencies also use dedicated FOIA employees.<sup>146</sup> Some states, however, use other agency employees to manage FOIA requests and disclosures.<sup>147</sup> But because of resource constraints, both dedicated individual

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141. See, e.g., FOIA Adv. Comm., Nat’l Archives & Recs. Admin., 2020-2022 Committee Term Final Report and Recommendations 10 (2022) (recommending that the Archivist of the United States ask the Office of Information Policy to “aggregate and report agency data on [Neither Confirm Nor Deny] responses on an annual basis”).

142. Koningisor, *supra* note 54, at 1543 (noting the administrative benefits of affirmative disclosure for individual agencies).

143. See Pam Greenberg, Ombudsman Offices Keep the Sun Shining on Government Records, Nat’l Conf. of State Legislatures: The NCSL Blog (Mar. 13, 2019), <https://www.ncsl.org/blog/2019/03/13/ombudsman-offices-keep-the-sun-shining-on-government-records.aspx> [<https://perma.cc/PJ9P-NY87>].

144. About OGIS, Nat’l Archives, Off. of Gov’t Info. Servs., <https://www.archives.gov/ogis/about-ogis> [<https://perma.cc/CYL3-N64T>] (explaining that OGIS acts as the FOIA ombudsman to “resolve[] FOIA disputes, identif[y] methods to improve compliance with the statute, and educate[] . . . stakeholders about the FOIA process”); Greenberg, *supra* note 143; see also Mark Fenster, The Informational Ombudsman: Fixing Open Government by Institutional Design, 1 *Int’l J. Open Gov’t* 275, 277 (2015) (“American states have a long history of . . . using ombudsmen and ombuds-like institutions to provide an institutional check on compliance with their open government laws.”).

145. Maine’s Public Access Ombudsman, Maine Freedom of Access Act: Your Right to Know, <https://www.maine.gov/foaa/ombudsman/index.htm> [<https://perma.cc/4SGU-V59Q>] (last visited July 27, 2022).

146. See, e.g., Steel, *supra* note 88, at 57–58 (noting the number of full-time FOIA employees and staff across federal agencies in fiscal year 2020).

147. See Pozen, Freedom Beyond FOIA, *supra* note 51, at 1124 (explaining that when non-FOIA personnel are assigned to perform the duties of FOIA, this diverts the employees “away from the agency’s substantive mission,” and even if Congress appropriates more money to dedicated FOIA personnel, non-FOIA employees have to search their emails and

employees managing requests and ombudsman offices can burden agencies or otherwise fail to work efficiently. When employees manage disclosure requests, this system can divert the employees from completing the agency's substantive mission.<sup>148</sup> At the federal level, the offices dedicated to processing FOIA requests have been "[c]hronically underfunded and historically low-status."<sup>149</sup>

While ombudsman offices help manage agency compliance with freedom of information laws, a centralized reviewing agency would differ by actually managing the process of disclosure itself, through both affirmative and request-driven procedures. States and local governments alternatively could integrate the roles of a centralized reviewing agency into a freedom of information ombudsman office; the ability to review all information, however, and make judgments about what should be disclosed affirmatively and in response to requests or otherwise deleted, would be instrumental to managing BWC footage. This would minimize violations of privacy, oversurveillance, and unnecessary expenditure of resources. Even to the extent a state or local government does not adopt a centralized reviewing agency, these policy goals can still be achieved through other means.<sup>150</sup>

#### B. *Privacy and Surveillance*

In his book, *Police Visibility*, Professor Bryce Clayton Newell explores the concept of "refractive surveillance" where the "body-camera-to-public-disclosure pipeline promises to reveal vast amounts of sensitive personal information about victims, witnesses, suspects, and bystanders."<sup>151</sup> Disclosure methods that display sensitive personal information increase the risk of unjustified police surveillance of the everyday activities of people captured on BWCs, notably communities that are already over-policed and thus more likely to be captured on camera. Particularly, the American government has historically collected and weaponized data obtained from low-income and minority communities.<sup>152</sup> Therefore, an

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files for responsive records); R. Karl Rethemeyer, *The Empires Strike Back: Is the Internet Corporatizing Rather Than Democratizing Policy Processes?*, 67 *Pub. Admin. Rev.* 199, 206 (2007) (showing that state-level employees share overlapping concerns with their federal counterparts regarding FOIA requests).

148. See Pozen, *Freedom Beyond FOIA*, *supra* note 51, at 1124.

149. *Id.* at 1104–05.

150. See *supra* sections III.B–.D.

151. Newell, *supra* note 30, at 153.

152. See *id.* These privacy concerns with the potential for oversurveillance of minority communities are grounded in the realities of technology used by police officers to fuel systemic racism and injustice. See Lori Aratani, *Secret Use of Census Info Helped Send Japanese Americans to Internment Camps*, *Wash. Post* (Apr. 6, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/03/secret-use-of-census-info-helped-send-japanese-americans-to-internment-camps-in-wwii/> (on file with the *Columbia*



intermediate regulatory framework for releasing and retaining BWC footage should aim to protect the privacy concerns of those captured on camera and avoid unnecessary oversurveillance of the public at large, especially those communities historically abused by the police. Law enforcement grantees of federal funding, state and local governments, and police departments should adopt a standard for release that prioritizes victims of police misconduct, establishes a clear retention schedule that specifies when information should be deleted, and adopts rigorous security guidelines for storing and sharing information. All of these measures can be implemented while still enforcing other safety measures that states have determined are necessary for the functioning of their governments, such as withholding certain investigatory records from public disclosure or deterring officer misconduct.<sup>153</sup>

To prioritize the victims of police misconduct, state and local governments can adopt disclosure laws or policies that mirror those embedded in the CELEIA. The statute requires “all video and audio recordings depicting a death” to be provided upon request to the victim’s family member, significant other, or other lawful representative when there is a complaint of officer misconduct.<sup>154</sup> The statute also classifies a group of individuals, including criminal defendants, victims, witnesses, and juveniles, whose substantial privacy interests should be protected in certain contexts of video footage such as footage displaying a mental health crisis or the interior of a home or treatment facility. To protect these individuals’ privacy interests, the Colorado statute first mandates that the video should be redacted or blurred to protect this interest “while still allowing public release.”<sup>155</sup> To the extent that redaction or blurring is insufficient to protect these privacy interests, the statute requires the release of the video to the victim or the victim’s family member upon request. In cases where the footage is not released to the public, law enforcement agencies still are required to contact the person in the video whose privacy interests are implicated, within twenty days after there is a complaint of officer

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*Law Review*); Adam Goldman & Matt Apuzzo, With Cameras, Informants, NYPD Eyed Mosques, Associated Press (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques> [<https://perma.cc/35RQ-6W8E>]; Alex Najibi, Racial Discrimination in Face Recognition Technology, Harv. Univ. Graduate Sch. of Arts & Scis. (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/> [<https://perma.cc/67ZH-922C>].

153. See S.B. 20-217(2)(b)(III), Gen. Assemb., 2020 Reg. Sess. (Colo. 2021) (enacted); Ethan Thomas, Note, The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking, 101 Colum. J.L. & Soc. Probs. 191, 222–23 (2017) (proposing a privacy-centered analysis of BWC footage that would disclose footage with the subject’s consent and footage depicting misconduct “would only be withheld if the subject was unable or unwilling to consent to release”); *infra* section I.C.

154. Colo. S.B. 20-217(2)(b)(I).

155. Colo. S.B. 20-217(2)(b)(II)(A).

misconduct.<sup>156</sup> A victim-focused policy on release and retention can help to mitigate the issue of oversurveillance by allowing individuals to know when they are captured on BWC footage and decide, to some degree when their privacy interests are at stake, whether or not that footage should be released.

A clear retention and release schedule can also help to address issues of privacy and oversurveillance. For example, as adopted in the GFJPA, when submitting policy proposals for BWC grants, BJA can recommend that law enforcement agencies receiving such grants should adopt a clear retention schedule, in line with state and local laws.<sup>157</sup> Additionally, as later explored in section III.B.3 and as articulated in the GFJPA, BJA can recommend that grantees should develop these retention schedules with “community input and publish [them] for public view.”<sup>158</sup> Law enforcement agencies or state and local governments can build upon retention schedules by requiring affirmative disclosures in certain instances to promote accountability goals. For example, in Colorado, the CELEIA, still subject to other state freedom of information laws and the privacy interests mentioned above, requires law enforcement agencies who have a complaint of officer misconduct filed against them to release “all unedited video and audio recordings of the incident, including those from [BWCs] . . . within twenty-one days after the local law enforcement agency or the Colorado state patrol received the complaint.”<sup>159</sup> Finally, a retention schedule can penalize law enforcement agencies who keep records beyond the retention schedule period, or at least devalue the evidentiary value of such footage. In the context of federal law enforcement agents using BWCs, the GFJPA would have required agencies to retain footage for six months after the date it was recorded and specified that “[a]ny video footage retained beyond 6 months solely and exclusively [for police training purposes] shall not be admissible as evidence in any criminal or

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156. Colo. S.B. 20-217(2)(b)(II)(B)–(C). But the statute grants witnesses, victims, and criminal defendants the right to “waive . . . the privacy interest that may be implicated by public release,” thus giving those impacted by the footage some choice in whether or not they want to release the footage. *Id.*

The GFJPA adopted a similar provision as it applies to federal law enforcement officers using BWCs. See H.R. 1280, 117th Cong. § 372(l)(4) (2021) (“[A]ny member of the public who is a subject of video footage . . . shall be permitted to review the specific video footage in question in order to make a determination as to whether they will voluntarily request it be subjected to a minimum 3-year retention period.”).

157. While the Constitution ultimately reserves general law enforcement power to the states, the federal government can provide law enforcement funding to the states with conditions upon how that funding must be used. See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 876–85 (2015) (explaining how federal funding molds state and local police departments).

158. See H.R. 1280, § 3051(c)(1), § 372(g)(i)–(j).

159. Colo. S.B. 20-217(2)(a).

civil legal or administrative proceeding.”<sup>160</sup> Mandating a retention schedule not only gives some finality to the public by assuring that their footage will eventually be deleted or released but also helps to protect against idiosyncratic law enforcement agency behaviors, such as releasing footage in a biased manner or retaining footage indefinitely.<sup>161</sup>

Finally, clear security guidelines can help to bolster the privacy rights of those individuals captured on BWCs. The GFJPA required grantees of federal funding to conduct “periodic evaluations of the security of the storage and handling of the body-worn camera data.”<sup>162</sup> Similarly, this type of standard can be recommended for law enforcement agency grant application project proposals. State and local governments should also adopt more rigorous standards for storing BWC footage to resemble “the strict chain-of-custody evidentiary expectations held by courts and police departments.”<sup>163</sup>

### C. *Increasing Cost Efficiency*

In addition to addressing issues of privacy and surveillance, the federal government, to the extent it provides grants to its agencies or to state and local law enforcement agencies; state and local governments; and law enforcement agencies should all increase efforts to improve the cost efficiency of BWC programs. Increased cost efficiency comes, in part, from assessing the need for redistribution of resources.<sup>164</sup> But an important consideration when implementing BWC programs is examining the costs incurred from storage, redaction, and responding to requests, which are some of the most expensive components of implementing these programs.<sup>165</sup> As it relates specifically to BWCs, state and local governments should implement laws and policies that mandate the affirmative disclosure of certain data categories associated with administering the disclosure of BWCs. These reports can mirror the structure of environmental impact statements (EIS), a form of affirmative disclosure required by the National Environmental Policy Act of 1969.<sup>166</sup> Like an EIS, law enforcement agencies receiving federal grants, or funds from state legislatures, could be

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160. See H.R. 1280, § 3051(c)(1).

161. See Pozen, *Freedom Beyond FOIA*, supra note 51, at 1153 (“Timing and formatting standards facilitate analysis and oversight. They can also make it harder for agencies to release material in a biased or opportunistic manner, so as to benefit certain political agendas or special interests, or in a manner designed to hide controversial items in a ‘flood’ of information.”).

162. See H.R. 1280, § 3051(c)(2).

163. Pagliarella, supra note 122, at 542 (noting also that “centralizing hundreds of departments’ file storage with a single private third party increases the risk that employees with that organization—or unscrupulous hackers—may misuse the collected storage for commercial datamining or worse”).

164. See *infra* section III.D.

165. See *supra* section II.D.

166. See 42 U.S.C. § 4332(C) (1969); see also Pozen, *Freedom Beyond FOIA*, supra note 51, at 1150 (describing EIS as one of the central features of environmental regulation and a positive example of affirmative disclosure).

required to affirmatively disclose a report before receiving additional funding for BWC programs. The report could include data such as the number of hours of BWC footage the law enforcement agency possesses, the amount of space needed to store the footage and where the footage is stored, the number of officer misconduct complaints filed and associated with a particular BWC footage record, and the number of requests received by the agency for disclosure of BWC footage. Like an EIS, a BWC footage report could include the negative and positive attributes of the program and propose alternatives to not only increase the cost efficiency of maintaining footage from the cameras but also, more broadly, to improve policing outcomes in a particular community.

#### D. *Assessing Redistribution*

While efficiency measures can be put in place to mitigate some BWC footage storage costs, it is critical that any reform or additional funding devoted toward BWC programs should consider, simply, who these programs serve and how increased funding to ineffective police reforms may perpetuate a lack of accountability. Policymakers must examine whether it makes sense to continue investing more money into BWC programs when it is unclear if BWCs improve police accountability and achieve the other expected policy goals of such programs.<sup>167</sup> Additionally, an assessment and a reconsideration of BWC programs, or at a minimum, the amount of money devoted to such programs intended to reform the police, is necessary to spur new ideas about policing and about remedying systemic racism and other forms of injustice.<sup>168</sup> Broadly, assessing the need for redistribution of resources asks why we continue to provide funding to efforts attempting to reform law enforcement agencies that empirically remain unaccountable, racist, and violent. Instead, perhaps some of the money funneled toward reforming unaccountable law enforcement

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167. See *supra* sections I.A–.B, II.D; see also Jennifer Lee, Will Body Cameras Help End Police Violence?, ACLU of Wash. (June 7, 2021), <https://www.aclu-wa.org/story/%C2%A0will-body-cameras-help-end-police-violence%C2%A0> [https://perma.cc/35E9-GNZ8] (noting that during the Movement for Black Lives in 2020, some called for more BWCs to increase accountability while others called for “divestment of resources away from police and reinvestment into communities”).

168. Professor Newell has addressed this argument at length:

Regardless of how one views the police, we should not ignore this wealth of critical perspectives or the argument that police, as an institution, is inseparably linked to state violence, domination, and exclusion. [For] [m]any social actors . . . body cameras are seen by some as moving that agenda forward. For some, police reform itself is seen as nothing more than ‘the science of police legitimation accomplished through the art of euphemism’: a project of maintaining existing social and economic structures . . . and reinforcing state power. Others argue that the police cannot—and should not—be recuperated but instead must be abolished.

Newell, *supra* note 30, at 27.

institutions can be better funneled toward reform apparatuses that do a better job of protecting and serving communities than the police.<sup>169</sup>

To properly assess redistribution and community needs, state and local governments and law enforcement agencies should increase public participation in the creation and administration of BWC footage storage and disclosure policies. Increased community engagement should include some measure of “power-shifting” to empower communities historically harmed by policing to not only participate but also make decisions about footage retention policies. Professor Okidegbe has proposed the idea of “power-shifting” when analyzing the decision to use algorithms for pretrial bail decisions.<sup>170</sup> Professor Okidegbe, as well as other scholars including Dean Richard A. Bierschbach and Judge Stephanos Bibas have noted that, if the ultimate decisionmaking power lies with another body, there is no guarantee that recommendations from those communities most harmed by a certain law or policy will actually be adopted: The ultimate decisionmaker can simply choose which recommendations to adopt and which to reject.<sup>171</sup>

Applying this power-shifting framework in the context of BWC footage storage would not “mean the end of reliance on . . . expertise,” as emphasized in practices that can improve cost efficiency and minimize privacy and oversurveillance.<sup>172</sup> But it could help to legitimize institutions and the processes that create BWC footage policies.

Decisionmaking power can be redistributed to those communities most impacted by BWC programs by creating a commission of community members and representatives from the agency administering BWC footage disclosure. This commission could issue guidance and standards about how BWC footage policies should be crafted for law enforcement agencies in a certain jurisdiction. The agency implementing BWC footage policies could then be subject to this commission’s guidance when adopting policies. Whenever a law enforcement agency proposes a policy that deviates from the commission’s guidance, it could be required to initiate notice and comment procedures similar to those promulgated at the federal level in the Administrative Procedure Act.<sup>173</sup> This power-shifting

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169. See, e.g., Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer> [<https://perma.cc/SS9N-9BK3>] (“The idea of defunding, or divestment, is new to some folks, but the basic premise is simple: We must cut the astronomical amount of money that our governments spend on law enforcement and give that money to more helpful services like job training, counseling, and violence-prevention programs.”).

170. See Okidegbe, *supra* note 127, at 767.

171. See *id.* at 768–71, 774; see also Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 *Minn. L. Rev.* 1, 20–21 (2012).

172. See Okidegbe, *supra* note 127, at 767.

173. See 5 U.S.C. § 553(b)–(c) (2018).

approach strengthens an intermediary disclosure regime by affirmatively providing the public with more insight and knowledge about the process used to create BWC footage policies. With this insight and information, a power-shifting approach goes beyond just transparency and also empowers those most impacted by BWC programs to make decisions in the policymaking process.

An alternative to achieving these institutional legitimacy goals, perhaps, might be to have more civilian oversight boards to comment on policing practices and procedures regarding BWC footage. Participation in civilian oversight boards, or other public participation measures, can, in itself, be empowering.<sup>174</sup> Public participation in this way might increase accountability for decisionmakers to incentivize them to justify the use of funding for BWC programs and the policies about storage. Finally, there are many other routes for decisionmaking in America's constitutional democracy, such as voting in local elections. While these alternative approaches to enhancing institutional legitimacy may support some level of input from the community in reassessing where government resources should be expended, this power-shifting framework, in the context of BWC footage, is not meant to overhaul these participatory measures. Rather, a power-shifting framework can enhance these other participatory measures by allowing nuanced, meaningful community input for some of the more detailed aspects of implementing BWC programs like managing footage.

#### CONCLUSION

Following the Movement for Black Lives in 2020 and the Capitol Insurrection, law and policy at the state and federal level appears to be embracing the long-neglected affirmative disclosure provisions of freedom of information laws. These major events, and the impact they have had on

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174. Troy Closson, N.Y.P.D. Should Discipline 145 Officers for Misconduct, Watchdog Says, *N.Y. Times* (May 11, 2022), <https://www.nytimes.com/2022/05/11/nyregion/nypd-misconduct-george-floyd.html> (on file with the *Columbia Law Review*) (highlighting that the New York City Civilian Complaint Review Board “found evidence to support 267 accusations of misconduct against” officers “behaving aggressively with protesters” following the murder of George Floyd); Zeynep Tufekci, Do Protests Even Work?, *Atlantic* (June 24, 2020), <https://www.theatlantic.com/technology/archive/2020/06/why-protests-work/613420/> (on file with the *Columbia Law Review*) (“The answer is yes, of course protests work . . . . Protests work because protesters can demonstrate the importance of a belief to society at large and let authorities understand that their actions will be opposed . . . .”); Strong Civilian Oversight of Police Now: Why New Jersey Must Pass A1515, *ACLU of N.J.*, <https://www.aclu-nj.org/en/legislation/strong-civilian-oversight-police-now> [https://perma.cc/37JT-BW6S] (last visited Aug. 14, 2022) (explaining that the proposed state bill would strengthen civilian complaint review boards like Newark’s, which has stood “as a national model since its creation in 2015 for providing the most comprehensive, meaningful checks on law enforcement”). But see Closson, *supra* (“Arva Rice, the watchdog agency’s interim chair, said that review board members have been pushing for lawmakers to improve their access to police records and exempt them from laws that govern sealed cases.”).

public access to government records, should reshape approaches to BWC footage retention by mixing affirmative and request-driven disclosure while aiming to achieve policy goals of minimized unnecessary surveillance and privacy violations, cost efficiency, and resource redistribution. The new direction of freedom of information laws and policies should reach beyond BWC footage retention policies; it should also shift conversations about police accountability from increasing transparency to also considering resource diversion toward other community goals. Broadly, it can shape conversation about the ex ante and ex post policy considerations lawmakers and agencies should weigh when adopting policies around public access to government records.

