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**WISCONSIN LEGISLATIVE COUNCIL  
AMENDMENT MEMO**

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<b>2017 Assembly Bill 351</b>	<b>Assembly Substitute Amendment 1 and Assembly Amendment 1 to Assembly Substitute Amendment 1</b>
<i>Memo published: November 21, 2017</i>	<i>Contact: Melissa Schmidt, Senior Staff Attorney</i>

**2017 ASSEMBLY BILL 351**

2017 Assembly Bill 351 (hereinafter, “the bill”), relating to body cameras on law enforcement officers, creates requirements related to: (1) law enforcement agency policies, training and compliance review of body cameras; (2) law enforcement agency retention of data recorded by the body camera (hereinafter, “body camera data”); and (3) when body camera data may be released in response to an open records request.

**ASSEMBLY SUBSTITUTE AMENDMENT 1**

**Law Enforcement Agency Policies, Training, and Compliance Review Related to Body Cameras**

**The Bill**

Under the bill, if a law enforcement agency uses a body camera on a law enforcement officer, the law enforcement agency must administer a policy regarding all of the following:

- The use, maintenance, and storage of body cameras and body camera data.
- Any limitations the law enforcement agency imposes on which law enforcement officers may wear a body camera.
- Any limitations the law enforcement agency imposes on situations, persons, or encounters that may be recorded by a body camera.

Also under the bill, if a law enforcement agency uses a body camera on a law enforcement officer, the law enforcement agency must do all of the following:

- Train all law enforcement officers wearing a body camera on the policy described above and on the body camera data retention requirements discussed below.
- Train all employees that use, maintain, store, or release body camera data on all of the following: (1) the law enforcement agency's policy on body cameras described above; (2) the body camera data retention requirements discussed below; and (3) the requirements regarding when the body camera data may be released as discussed below.
- Periodically review practices regarding the body cameras and body camera data to ensure compliance with: (1) the law enforcement agency's policy on body cameras described above; (2) the body camera data retention requirements discussed below; and (3) the requirements regarding when the body camera data may be released as discussed below.

### **Assembly Substitute Amendment 1**

Assembly Substitute Amendment 1 (hereinafter, "the substitute amendment") to the bill does not amend any provisions of the bill discussed above that are related to the requirements regarding policies, training, and compliance review of body cameras.

### **Retention of Body Camera Data**

#### **The Bill**

In general, the bill requires all body camera data to be retained for a minimum of 120 days after the date of recording and may be destroyed after that time. The bill provides the following exceptions for longer retention:

- Data must be retained until **disposition** of the case or complaint if the data records any of the following:
  - An encounter that resulted in the death of any individual or actual or alleged physical injury to an individual.
  - An encounter that resulted in a custodial arrest.
  - A search during an authorized temporary questioning (commonly referred to as a "Terry Stop") as provided under current law.
- Retention beyond 120 days may be directed by a law enforcement officer or law enforcement agency, a prosecutor, a defendant, or a court that determines that the data have evidentiary value in a prosecution. An entity making the directive shall submit a preservation order within 120 days after the incident.
- Data retained that are used in a criminal, civil, or administrative hearing may not be destroyed except upon all of the following: (1) final disposition; (2) a determination from the court or hearing examiner that the data are no longer needed; and (3) an order from the court or hearing examiner. Data retained in internal investigations

that are not subject to any such jurisdiction may be disposed of by the law enforcement agency.

### **The Substitute Amendment**

The substitute amendment makes the following changes with respect to the retention of body camera data provisions in the bill:

- Clarifies that the body camera data must be retained until **final disposition** of any case or complaint to which the data pertains, if the body camera data record any of the following: (1) an encounter resulting in the death of any individual or actual or alleged physical injury to an individual, an encounter resulting in a custodial arrest, or a search during an authorized temporary questioning (commonly referred to as a “Terry Stop”) as provided under current law; and (2) the data record a location where an individual may have a reasonable expectation of privacy.
- Provides that retention beyond either 120 days or the final disposition of any case or complaint to which the data pertains, if the body camera data record any of the events listed above, may also be directed by a board of police and fire commissioners. The substitute amendment also provides that the preservation directive must be submitted to the law enforcement agency having custody of the record within 120 days after the date of the recording.
- Eliminates the provision that authorizes a law enforcement agency to dispose of “data retained in internal investigations that are not subject to any such jurisdiction.”

### **Release of Body Camera Data**

#### **The Bill**

Under the bill, body camera data are, in general, confidential and not open to inspection and copying under the open records law. The bill provides an exception to this general rule for if the data records any of the following:

- An encounter that resulted in the death of any individual or actual or alleged physical injury to an individual.
- An encounter that resulted in a custodial arrest.
- A search during an authorized “Terry Stop.”

If the body camera data record any of the instances listed above, it is generally open to inspection and copying under the open records law. The exception to this is when the data record any of the instances listed above in a location where an individual may have a “reasonable expectation of privacy.” Under the bill, if the body camera data record any of the instances listed above, in a location where an individual may have a reasonable expectation of privacy, then all of the following apply:

- The body camera data is **not subject to the right of inspection and copying under the open records law** unless each individual who is a “known victim or witness” or an “owner,” or a person authorized by each such individual as provided under current law, provides the law enforcement agency with written permission for the release.
- If a law enforcement agency receives an open records request for the body camera data, the law enforcement agency generally must **mail a request for permission** to release the body camera data to the last-known address of each individual who is a “known victim or witness” or an “owner.” The law enforcement agency is not required, however, to mail requests for permission to release body camera data if the law enforcement agency denies the request on other grounds.
- If the law enforcement agency has not received the requisite permission to release the body camera data **within 14 business days after mailing the request**, then the law enforcement agency **may** deny the request. Any written permission for the release received after the 14-day period is valid with respect to any subsequent requests for the same data.
- If a law enforcement agency mails requests for permission for the release of body camera data, the law enforcement agency is not required to mail such requests for any subsequent open records request for the same body camera data.
- The law enforcement agency must retain any correspondence related to the body camera data for at least as long as the law enforcement agency retains the body camera data to which the correspondence relates.

A “known victim or witness” is defined by the bill to mean an individual to whom all of the following apply: (1) **the individual was present at the location during the recording**; (2) the individual’s identity is known to the law enforcement agency; and (3) the individual is not suspected of committing a crime or other violation of law in connection with the law enforcement officer’s presence in the location that was recorded.

An “owner” is defined by the bill to mean an individual to whom all of the following apply: (1) the individual owns or otherwise controls the property at the location that was recorded; and (2) the individual is not suspected of committing a crime or other violation of law in connection with the law enforcement officer’s presence in the location that was recorded.

The bill also provides that for purposes of an open records request for access to body camera data used by a law enforcement agency, the law enforcement agency is the legal custodian of the record. If any other authority has custody of such data, that authority is not the legal custodian of that data and must deny any portion of an open records request that relates to that body camera data.

## The Substitute Amendment

The substitute amendment creates an exception to the confidentiality of body camera data if the law enforcement agency determines that releasing the data is **in the interests of justice**. However, this exception does not apply to body camera data that record any of the following: (1) an encounter resulting in the death of any individual or actual or alleged physical injury to an individual, an encounter resulting in a custodial arrest, or a search during an authorized “Terry Stop”; and (2) the data record a location where an individual may have a reasonable expectation of privacy.

The substitute amendment also amends the bill to provide that all of the provisions related to the release of body camera data do not prohibit a district attorney from releasing body camera data when required to do so under current law governing the review of deaths involving officers.

Lastly, the substitute amendment also amends various provisions of the bill discussed above related to the release of body camera data that record any of the following: (1) an encounter resulting in the death of any individual or actual or alleged physical injury to an individual, an encounter resulting in a custodial arrest, or a search during an authorized “Terry Stop”; and (2) the data record a location where an individual may have a reasonable expectation of privacy. Specifically, for body camera data that record any of these instances, in a location where an individual may have a reasonable expectation of privacy, the substitute amendment provides all of the following:

- The body camera data are both **confidential** and **not subject to the right of inspection and copying under the open records law** unless each individual who is a known victim or witness or owner, or a person authorized by such individual as provided under current law, provides the law enforcement agency with written permission for the release.
- A law enforcement agency must **serve notice either by mail or by personally serving the notice of an open records request** for body camera data when it receives such a request, on each individual who is a known victim or witness or an owner, or a person authorized by each such individual as provided under current law. The notice may be mailed to the individual’s or person’s last-known address if his or her current address is not known. The notice must briefly describe the requested data and include a description of the rights of the individual or person to deny permission to the law enforcement agency to release the data.
- A law enforcement agency **must** deny the open records request if it has not received the requisite permission to release body camera data within 14 business days after the law enforcement agency makes the request **or a longer period determined by the department**.

## **ASSEMBLY AMENDMENT 1 TO THE SUBSTITUTE AMENDMENT**

Assembly Amendment 1 (AA 1) to the substitute amendment make the following two changes to the substitute amendment:

- Related to the retention of body camera data, clarifies that body camera data may not be destroyed at any time after the receipt of an open records request except as provided by current law.<sup>1</sup>
- Related to the release of body camera data, provides that for purposes of permission to release body camera data, a “known victim or witness” does not include a law enforcement officer who was acting in an official capacity, unless a crime or other violation of law has been committed or is alleged to have been committed against the law enforcement officer while the law enforcement officer was present at the location that was recorded.

## **BILL HISTORY**

Representative Kremer introduced the substitute amendment on October 27, 2017. On October 31, 2017, the Assembly Committee on Criminal Justice and Public Safety voted to recommend adoption of the substitute amendment by a vote of Ayes, 8; Noes, 4; and voted to recommend passage of the bill, as amended, by a vote of Ayes, 8; Noes, 4.

On November 9, 2017, Representative Kremer introduced AA 1 to the substitute amendment. Also on November 9, 2017, the Assembly voted to adopt AA 1 to the substitute amendment, and the substitute amendment, as amended, on voice votes. On the same day, the Assembly passed the bill, as amended, on a voice vote.

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<sup>1</sup> Current law prohibits an authority from destroying any record after the receipt of an open records request until “after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under [current law], the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.” [s. 19.35 (5), Stats.]