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**Testimony of Heath P. Straka  
Wisconsin Association for Justice  
September 13, 2018  
Before the Legislative Council**

**Study Committee on the Use of Police Body Car**

Good morning, my name is Heath P. Straka. I am a Partner at Axley Brynelson, LLP in Madison. I am President of the Wisconsin Association for Justice. As always, it is a privilege and honor to testify before the legislature on issues that impact public policy, the law, and the clients I represent. As an organization, WAJ primarily includes attorneys who specialize in representing plaintiffs in civil litigation. Our membership, however, is diverse and includes practitioners who specialize in various other areas of law including criminal defense, civil rights, and other areas impacted by this bill.

I am grateful that you as members of this committee have agreed to take a detailed and comprehensive examination of this issue before moving forward with a legislative solution. My brief remarks today also benefit from the presentations made during the first meeting of the group in August. I wish to thank the members of the committee, especially Sen. Testin and Rep. Taylor, and the Legislative Council staff for making a wide array of resources available not just to members of this committee, but also to the those in public at large who may be interested in this issue.

Having examined the legislation introduced during the most recent legislative session, I urge that members of this committee embrace some features found in AB-351/SB-279 (hereafter AB-351) and AB-557 with some consideration paid to the prevailing norms, best practices, and experiences of other states. I seek to focus, however, on two core concerns that impact those who may rely on body camera footage: access and retention.<sup>1</sup>

Most importantly, however, I urge this committee to continue the presumption that police body camera footage is a public record governed by Chapter 19, Wis. Stats. Secondly, if this committee resolves to recommend a uniform statewide retention standard, that it set minimum retention requirements for footage no shorter than 120 days and that any guidelines continue contemplating use in civil litigation.

Modern camera technology creates legitimate privacy concerns. The improved capabilities of police body cameras greatly expand the range of interactions with police that may be captured on video. As

<sup>1</sup> We defer to others' expertise about best practices in other areas under this committee's purview.

cameras continue to become cheaper and more reliable, we can expect that they will only become more common. We should embrace police body cameras in ways that are consistent with Wisconsin's stated policy "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31.

Any new standards crafted in the interest of protecting legitimate privacy concerns should be narrowly tailored to achieve their stated goal. These standards must not be allowed to become a tool to allow individuals to have a veto over the release of public records.

### **Big Picture: Body Camera Footage Should Remain a Public Record**

The current open records regime in Wisconsin is capable of adapting to the widespread deployment and use of police body cameras. The Legislative Council Staff Brief ably demonstrates that the existing statutes and procedures can provide necessary relief to local and county governments' cost and feasibility concerns regarding data storage and retention.<sup>2</sup> Specifically, the Public Records Board has consistently granted relief from the seven-year retention requirement imposed by Wis. Stat. § 19.21 (4)(b). The prevailing trend is to set the retention standard at 120 days to mirror the notice requirement for claims against government employees.<sup>3</sup> Additionally, recent legislative action has reduced the time where law enforcement agencies may face exposure to future legal action. Specifically, 2017 Act 235 shortened the statute of limitations for federal civil rights claims under 42 U.S.C. § 1983 from 6 years to 3 years.<sup>4</sup>

Concerns about privacy are similarly addressed by existing Wisconsin law. Many of the concerns raised nationally<sup>5</sup> and by last session's legislation about protecting privacy and withholding information to protect the integrity of police investigations, are already features of balancing tests in Wisconsin law.<sup>6</sup> While additional standards may be worthwhile to address concerns unique to body cameras, they should strive to maintain the presumption of access customarily present in Wisconsin law.

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<sup>2</sup> Staff Brief 2018-03, Study Committee on the Use of Police Body Cameras (July 18, 2018) at 5.

<sup>3</sup> Under Wis. Stat. § 893.80 (applying to county and local government employees) and Wis. Stat. § 893.82 (applying to claims against state employees).

<sup>4</sup> See Wis. Stat. § 893.53 as amended by 2017 Wisconsin Act 235.

<sup>5</sup> See, e.g., Amanda Essex, Presentation, State Activity Addressing Police Body Cameras and Data Management Practices, National Conference of State Legislatures (July 26, 2018) at slide 19.

<sup>6</sup> See Staff brief, note 2 supra, at 5-6.

## **Broadening the Discussion: Access Means Accountability and Helps Dispute Resolution**

I am here today to speak for a range of potentially impacted parties whose concerns may not otherwise be on this committee's agenda. Individuals rarely plan to be involved in lawsuits in advance – in many ways that is a good thing. The same is true about having prior knowledge that they may be recorded by police. Even though lawsuits have been undergoing a three-decade decline, access to our legal system remains an important right worthy of protection. Wisconsin citizens depend on our civil litigation system to resolve disputes. Dispute resolution through civil litigation has, since the founding of the American legal system, depended on reliable fact-finding. Body cameras are an important source of objective evidence both criminal and non-criminal matters.

I hope to speak to their concerns now in the hopes that this committee, and ultimately, the legislature will craft a policy that meets their needs by addressing privacy concerns while ensuring access. This committee should, however, strive to set adequate minimum standards in any area it chooses to address. I am hopeful and confident that this committee will make recommendations leading to the enactment of workable rules going forward.

### **Public Access to Body Camera Footage Helps Dispute Resolution Disputes Between Private Individuals**

The main thrust of this committee's examination appears to contemplate scenarios where police have worn a body camera and recorded audio and video footage in response to or during the investigation of a crime. As everybody in this room knows, police officers today are asked to perform a variety of caretaking functions in the community. Only a portion of a police officer's day may involve the active response to or investigation of alleged crimes.

In many other instances, police officers are dispatched to respond to events with no expectation of that a crime has occurred. Events that may be captured by police body camera footage includes medical calls; performing crowd control; and responding to car accidents. WAJ members have observed that the ability to obtain police body camera footage assists in resolving legal claims between private parties in some of these circumstances.

For example, obtaining body camera footage recorded at the scene of a car accident allows *both parties* (potential plaintiffs and defendants) the opportunity to examine statements made by witnesses and the parties themselves in the immediate aftermath of a crash. The footage also allows viewers to also see the location of cars, control devices, and obstructions while also giving the opportunity to observe the physical condition of witnesses and participants and the police response. In a situation where people may have suffered injuries that limit their long and short-term memory—including situations where involved persons

may have no memory of a crash at all, this information is a tool that ensures our legal system can accurately determine facts and resolve disputes.

### **Body Cameras Do Not Appear to Increase Legal Exposure**

A core rationale for deploying body cameras has been the ability of citizens to hold police accountable. As stated above, police body camera footage is a powerful tool in both the hands of the police and for those facing mistreatment or misconduct at their hand. This has policy implications for how police body camera footage is obtained, stored and released. The retention regime in Wisconsin and in many other states contemplates potential legal exposure faced by police departments for misconduct, civil rights violations and other claims.

The Police Executive Research Forum, in a report made available to this committee, examined the issue and concluded using body cameras may reduce police departments' legal exposure to a variety of civil rights, excessive force and other types of complaints.

Rather than encouraging a proliferation of misconduct or civil rights lawsuits against police, the proliferation of body cameras occurred at the same time as a significant decline in suits against the City of Phoenix.<sup>7</sup> While suits in Mesa, Arizona increased, the number and dollar value of payouts declined while the number of cases with no settlement/verdict paid increased.<sup>8</sup>

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<sup>7</sup> The Police Executive Research Forum (PERF), *Cost and Benefits of Body-Worn Camera Deployments* (April 2018), 38-39.

<sup>8</sup> *See id.*

## Specific Recommendations

1. **Police body camera footage should remain subject to Wisconsin Open Records Law and generally be available for inspection and copying.** The United States Department of Justice, in a report referenced by the NCSL presentation, recommended that:

Agencies should have clear and consistent protocols for releasing recorded data externally to the public and the news media (a.k.a. Public Disclosure Policies). Each agency's policy must be in compliance with the state's public disclosure laws (often known as Freedom of Information Acts).<sup>9</sup>

We agree. It appears that the prevailing trend is to treat police body camera footage as subject to otherwise applicable open records laws. There has not been a compelling reason offered to date why this presumption should change.

2. **Legislation should not provide arbitrary veto power against release.** Language contained in AB-351<sup>10</sup> requiring individual permission to release certain types of footage frustrates the purpose of public access and creates more than ample opportunity for abuse. In part because language (regarding locations with a reasonable expectation of privacy) remains undefined, individuals may be free to argue a more expansive expectation of privacy than recognized by Wisconsin law—and *grants them the ability to deny access*. A related provision further requires the denial of requests if permission is not received. Even in situations where an individual has no intention to argue any expectation of privacy if challenged, they can frustrate an acknowledged public interest in their specific case and turn the public policy of this state on its head.
3. **Preserve access to courts for to resolve access concerns.** Any regime adopted must continue providing access to the courts to adjudicate challenges to the release or denial of police body camera footage. It is unclear under AB-351, for example, if denials are subject to legal challenge by the media or members of the public.
4. **Maintain an adequate retention period.** Regardless of whether the committee makes a distinction between “evidentiary data” and “non-evidentiary data” any new legislation must ensure the

<sup>9</sup> Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services. [https://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](https://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf)

<sup>10</sup> Proposed Wis. Stat. § 165.87(3)(c)1 (2017 AB-351).

preservation of records for an adequate period. AB-351 establishes a minimum of 120 days. This is consistent with prevailing norms in Wisconsin today. While WAJ would support a minimum period longer than 120 days as in AB-557, we believe it should not be set lower.

- Consider codifying guidance already in common use. Examples include retention guidance for administrative review and litigation holds. Some of these features are already including in statute.

**5. Retention and access requirements should contemplate civil litigation.** As detailed above, the legislation offered to date appears to contemplate only scenarios where a crime is being investigated or where a potential civil claim may be filed against a police department or law enforcement agency.<sup>11</sup> For example, proposed Wis. Stat. § 165.87(4)(a)6 in AB-557 would benefit from additional definitions to improve clarity over its intended application and breadth.

However, any new rules should not restrict access to footage currently available under existing laws. Many of the proposed revisions threaten to create a default standard for access that is narrower than what current Wisconsin law allows. For example, any “evidentiary data” and “non-evidentiary data” definitions should be broader than the California examples provided to the committee.<sup>12</sup> Under those definitions, detailed auto accident investigations and response, for example, may not be required to be retained and they would certainly become more difficult to access.

**6. Privacy protections should provide clear guidance.** This committee should be careful to address privacy implications presented by police body cameras with precision. If the committee recommends adopting access restrictions, for example, for footage obtained in areas “where an individual may have a reasonable expectation of privacy”, it should define that language or make appropriate cross references to case law or applicable regulations.<sup>13</sup> Leaving important terms and concepts undefined defeats the purpose of establishing clear standards and creates new avenues for protracted disputes.

- Limit privacy protections to the best practices found in other states.<sup>14</sup>
- Use policy and procedures to address privacy considerations rather than restricting the access regime.<sup>15</sup>

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<sup>11</sup> Still, this presumes a law enforcement response to a crime or potential crime or the investigation thereof.

<sup>12</sup> Handout, Police Body Camera Follow-Up Information, from Amanda Essex, Criminal Justice Senior Policy Specialist, National Conference of State Legislatures (September 10, 2018) at 3.

<sup>13</sup> Proposed Wis. Stat. § 165.87(3)(d)1 (2017 AB-351).

<sup>14</sup> Amanda Essex, Presentation, State Activity Addressing Police Body Cameras and Data Management Practices, National Conference of State Legislatures (July 26, 2018) at slide 19.

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<sup>15</sup> Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services at 18.

