



February 25, 2021

RE: Floyd Submission Regarding NYPD BWC Impact and Use Policy

To Whom it May Concern:

In response to the NYPD’s draft Impact and Use Policy on the Use of Body-worn Cameras (“the Policy” or “BWC Policy”), the Center for Constitutional Rights (“CCR”) and Beldock Levine & Hoffman LLP (“BLH”) write to express their concern that the lack of privacy safeguards in the Policy will lead to broad unwarranted surveillance of Black and Latinx communities in New York - communities that are already disproportionately harmed by police violence, abuse, and discrimination.¹ CCR is an organization dedicated to the advancement and protection of the rights guaranteed by the United States Constitution and international human rights law. We have challenged discriminatory policing for decades, recognizing that discrimination and police violence do not arise as isolated incidents but are deeply embedded within the U.S. criminal justice system. BLH is a law firm specializing in civil rights actions, including police misconduct, wrongful convictions, and employment discrimination. BLH attorneys have brought numerous cases on behalf of individuals and as class actions including the Republican National Convention class action, and the *Daniels v. City of New York* case filed with CCR, the predecessor case to *Floyd v. City of New York*, as well as representing the Exonerated Five and the Estate of Eric Garner. Together, BLH and CCR successfully litigated the landmark federal class action lawsuit, *Floyd, et al. v. City of New York, et al.*, that successfully challenged the racially discriminatory and unconstitutional stop-and-frisk policies of the New York Police Department (“NYPD”).² BLH and CCR continue to represent the *Floyd* class members in a Joint Remedial Process ordered by the Court to implement reforms with the direct input of the people most affected by the NYPD’s discriminatory stop-and-frisk practices.

CCR and BLH have closely monitored the expanding use of body-worn cameras (“BWCs”) since they were first introduced in New York as part of the 2013 federal court decision in *Floyd*. Though Plaintiffs did not request it, the Court ordered a year-long experimental pilot program of BWCs as part of the injunctive remedies in the case, determining that BWCs were “uniquely suited to addressing the constitutional harms at issue” in the case. Since that time, on behalf of class Plaintiffs, CCR and BLH have pushed to make sure that the NYPD uses BWCs to increase accountability and transparency, rather than as a tool for evidence collection and surveillance.

¹ See https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/post-act/body-worn-cameras_nypd-impact-and-use-policy_draft-for-public-comment_01.11.2021.pdf

² In a historic ruling on August 12, 2013, following a nine-week trial, a federal judge found the NYPD liable for a pattern and practice of racial profiling and unconstitutional stops. See *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013). The *Floyd* case built on a previous landmark racial profiling case—*Daniels, et al. v. City of New York*, filed by CCR in 1999.

Regrettably, however, the NYPD’s BWC Policy lacks safeguards to protect against broad surveillance of Black and Latinx communities. There is no meaningful, regular public reporting about the Program, or easy access to videos by New Yorkers who might be recorded during an interaction with police. And the Civilian Complaint Review Board (“CCRB”) has continued to request more timely access to BWC video related to misconduct investigations.³ As a result, the Policy operates opaquely without effective oversight.

The issues we identify below are our priority concerns that must be immediately addressed in order for BWCs to be an effective tool for police transparency, accountability, and constitutional policing.

I. The Body-Worn Camera Policy Raises the Specter of Broad, Unwarranted Surveillance of Black and Latinx Communities in New York

Since the initial body-worn camera pilot was ordered in 2013 by the Court in *Floyd*, we have remained greatly concerned about the use of BWCs for surveillance and evidence collection.⁴ Especially as BWC technology continues to advance at a rapid pace, its expanded use in surveilling Black and Latinx communities already heavily targeted by police is extremely troubling, and, at a minimum, demands much greater transparency.

A. BWC Footage Must Not be Integrated with Facial Recognition Technology

The NYPD has been utilizing facial recognition software and platforms since 2011 and has continually refused to take a principled approach to safeguarding the use of BWC video footage with facial recognition software or similar platforms.⁵ The Policy is misleading in regard to BWC data and footage integration with facial recognition and other artificial intelligence technology. In fact, the draft Impact and Use Policy regarding “Facial Recognition Technology,” states that although “NYPD video cameras or systems do not possess a capability for real-time facial recognition . . . still images obtained from such devices may be used to probe images in accordance with NYPD facial recognition policy,” and later, “[I]f an officer, whose body-worn camera is activated, witnesses a crime but is unable to apprehend the suspect, a still image of the suspect may be extracted from body-worn camera video and submitted for facial recognition analysis.” The current patrol guide section governing facial recognition states that “probe images” from “reliable sources” can be run against an NYPD “photo repository.”⁶ There is nothing in the BWC Impact and Use Policy prohibiting the use of BWC images or video as

³ For example, in December 2020 at a CCRB-convened panel discussion, CCRB Executive Director Jon Darche said “The most important reform for us at the CCRB would be direct access to body-worn camera footage. Having the ability to search the database on our own would be the biggest help for the CCRB.” *available at*: https://twitter.com/ccrb_nyc/status/1339342486423171072.

⁴ See Ian Head and Darius Charney, *Don’t Let the NYPD Co-Opt Body Cameras*, New York Times, April 27, 2017; and Ian Head, *Help Write the Rules on NYPD Body Cameras*, New York Daily News, July 7, 2016.

⁵ See “NYPD Questions and Answers Facial Recognition” *available at*: <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/facial-recognition.page>

⁶ See Operations Order 212-129. In March 2020, after it was publicly reported that the NYPD had run more searches on Clearview AI (one of the leading facial recognition software platforms) than any other U.S. police department, the department issued its first patrol guide on the use of facial recognition.

“probe images.” Furthermore, the patrol guide section governing the use of BWCs states that “An image of a suspect depicted in a BWC video may be used in a photo array for identification. A still shot of the BWC footage depicting the subject may be taken on a Department computer, printed, and thereafter affixed to a photo array for identification.”

The integration of BWC video with facial recognition technologies, even if the NYPD is not running facial recognition in “real time,” will have a direct and disproportionate impact on Black and Latinx New Yorkers. NYPD stop-and-frisk data shows members of Black and Latinx communities continue to make up the vast majority of documented NYPD stops,⁷ giving images and faces of Black and Latinx people stopped a much greater chance of becoming “probe images” captured by a BWC and used in photo arrays or fed into facial recognition systems. Furthermore, recent studies on the accuracy of facial recognition continue to show “significant racial bias,” misidentifying people of color and especially Black people at higher rates than whites.⁸

B. Potential for Violation of N.Y. Crim. Proc. Law 140.50

The creation of any databases or lists of individuals stopped or encountered by NYPD officers and filmed on BWCs violates N.Y. Crim. Proc. Law §140.50(4). Such a repository of images would criminalize millions of people for simply encountering the police. Furthermore, those who might be arrested or summonsed while on camera but who have not had their cases adjudicated yet could nonetheless find themselves forever part of an NYPD database.

The implementation of BWCs by the NYPD began many years after the 2010 law was passed and technology continues to evolve. The Policy must address what types of safeguards are in place against the collection and use of BWC images by the NYPD.

II. NYPD Officers Routinely Fail to Correctly Operate Body-Worn Cameras, and Inadequate Supervisory Review Means Those Errors Go Unaddressed

The improper operation of BWCs by the NYPD is commonplace and prevents supervisors, CCRB investigators, auditors, the Federal Monitor in *Floyd*, and most importantly, the public, from ascertaining if certain events that ought to be captured on BWC recordings did in fact occur, such as the offering of business cards at the conclusion of *Terry* stops and other information required by the Right to Know Act. Because NYPD supervisors do not currently review enough BWC footage each month to identify and correct officer user error, these problems persist.

The current NYPD BWC self-inspection protocols requiring supervisory review of five videos per officer each month, chosen at random, do not give NYPD supervisors a meaningful sampling of the full range of their subordinate officers’ enforcement activities. This is especially

⁷ For example, stop data received by Plaintiffs from the City shows that over 85% of stops documented by the NYPD in the 3rd quarter of 2020 were of Black (57%) or Latinx (30%) people.

⁸ For example, see Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard University Graduate School. Available at: <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>.

important as there are thousands of *Terry* stops and other investigatory street encounters that occur each month across the city, the vast majority of which continue to be of Black and Latinx people, that officers are required to record on their BWCs.⁹ Because the five videos in each BWC self-inspection are chosen at random, supervisors could go months without actually reviewing any BWC footage of a street encounter or trespass encounter, which Black and Latinx communities commonly identify as the police interactions that results in frequent misconduct by the NYPD. Limited sampling prevents supervisors from adequately assessing the completeness of their officers' recordings, the timeliness of BWC activation and deactivation, or the lawfulness of officers' conduct during those encounters. Furthermore, without public data reporting, it is unclear whether officers are consistently recording the full duration of street encounters and trespass encounters as required by the Patrol Guide.¹⁰

III. The Retention Period for BWC Recordings and Associated Data Must Be Extended

CCR and BLH have serious concerns regarding how and for how long BWC video footage is retained by the NYPD, especially video of low-level encounters. We suggest that all recordings categorized or tagged as stops and/or investigative encounters be kept for a minimum of three years before being deleted or destroyed.¹¹ This is in line with other large U.S. police departments, such as Oakland and the Los Angeles County Sheriff's Office.¹² A three year retention policy is also consistent with the statute of limitations for claims brought pursuant to 42 U.S.C. § 1983 in New York State which might necessitate resorting to viewing BWC footage of a particular incident. *See Shomo v. City of New York*, 579 F.3d 176, 181 (2d Cir. 2009). Retention for three years would in turn benefit not only the Plaintiffs, but the City and NYPD as well.

Furthermore, the need for a longer retention period is necessary to resolve complaints filed with the CCRB. While the current minimum retention period of BWC video is 18 months, a longer retention period will ensure the availability of videos in the case of CCRB complaints that may take an extended period to evaluate. BWC video has become “some of the most defining evidence” in the assessment of CCRB complaints,¹³ and increasing the amount of time that BWC recordings are retained by the NYPD is critical to CCRB's mission and the ability for New Yorkers to hold police accountable for abuses of their power.

IV. Expand Access to Body-Worn Camera Footage

The BWC Impact and Use Policy's sections concerning access to BWC video and data—whether by the public or by oversight bodies—is extremely limited in scope. We believe several types of access are critical to the original, intended use of BWCs as tools for accountability.

⁹ See NYPD Patrol Guide Section 212-123, “Mandatory Activation of BWC for All Uniformed Members of Service.”

¹⁰ See Patrol Guide Section 212-123 on “Mandatory Activation” (para 4-6) and “Deactivation” (para 12).

¹¹ All metadata associated with any video should also be preserved for the same period of time.

¹² See Oakland Police Department General Order I-15.1 (“Ensure PDRD files are secured and retained for a minimum of two (2) years”); Los Angeles County Sheriff's Department, Proposed Manual Revision, 3-06/200.00 Body Worn Cameras (“All recordings shall be retained for a minimum period of three years;”).

¹³ CCRB BWC Report Feb. 2020 at 4.

A. CCRB Access

As the primary oversight body charged with evaluating and verifying complaints against the NYPD regarding police stops, the CCRB should not have to wait for the NYPD to turn over access to BWC video footage, but instead should have direct access to all BWC video in order to efficiently evaluate the complaints it receives. The Policy draft does not fully describe the cumbersome way CCRB currently accesses and views NYPD video since an arrangement for CCRB access and viewing of videos was made in late 2019 after public reporting revealed that the NYPD had been refusing to provide the CCRB with timely access to BWC video and data.¹⁴

We suggest a much simpler process—providing the CCRB with direct, secure access to BWC video. Direct access is not only technologically possible, it is standard procedure in other large cities with police oversight bodies, such as Washington D.C., San Francisco and New Orleans, where investigators are able to log directly into their city’s BWC storage platform to search for and view videos.¹⁵ We strongly support this method of access for CCRB investigators, who themselves have requested “unmediated direct access to BWC footage.”¹⁶

B. Access by Members of the Public

The Policy suggests that any member of the public wishing to access a BWC video must file a Freedom of Information Law (“FOIL”) request. But for those who know they have been captured on camera by a police officer, engaging in the FOIL process can be time-consuming, confusing, and potentially costly. Often, FOIL requests for BWC videos are denied. We call on the NYPD to develop a streamlined, systematic way for those recorded on BWC videos, as well as their family members, to access BWC recordings free of cost.

Because videos are now tagged with various metadata, searching for a specific instance by date and location is not difficult. Individuals interested in viewing their own video could schedule a visit at the Inspector General’s office, the CCRB or their local police precinct and view such footage. Especially as the Covid-19 pandemic has pushed private and public institutions to update and expand technology so that secure, remote access has become more standardized and available, digital access to BWC video via a website or similar platform should be possible. As the Court in *Floyd* suggested, such viewings could potentially “confirm or refute the belief” that they were “stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie.”¹⁷

Furthermore, the NYPD’s policy of “critical incidents” is unclear on whether family and legal representatives of the person(s) who have been harmed during such an incident are given

¹⁴ November 21, 2019 CCRB-NYPD Memorandum of Understanding, *available at*: https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/bwc_mou.pdf.

¹⁵ See Eric Umasky, “The NYPD Isn’t Giving Critical Bodycam Footage to Officials Investigating Alleged Abuse,” *ProPublica*, July 3, 2020. Available at: <https://www.propublica.org/article/the-nypd-isnt-giving-critical-bodycam-footage-to-officials-investigating-alleged-abuse>.

¹⁶ See Sydney Periera, *Memo: NYPD Oversight Investigators' Job Has Become "Untenable" Because Of Body Cam Backlog*, *Gothamist*, July 3, 2020, *available at*: <https://gothamist.com/news/memo-nypd-oversight-investigators-job-has-become-untenable-because-body-cam-backlog>.

¹⁷ See *Floyd* Remedial Order at 29.

any notice or input into the release of such videos. Furthermore, the NYPD's ability to control the timing of a video's release and to exercise discretion to edit videos in ways that benefit an NYPD or prosecutorial narrative, make this policy relatively meaningless in regard to greater transparency and accountability.¹⁸

V. Public Reporting

Nowhere in the policy does the NYPD discuss public reporting of data, despite the fact that the NYPD has operated its BWC program for over two years, capturing enormous amounts of video and data across the city. The tremendous amount of new electronic data documenting police encounters with New Yorkers is a unique source of information that can and should be aggregated and reported to the public. As body-camera technology has become more sophisticated, metadata such as time, date, and geographic location can and will be automatically recorded for each video taken by an NYPD officer.¹⁹

Public reporting of this data is vital to using the BWC program as a tool of police accountability, which was the intent of the original BWC pilot ordered by court in *Floyd*.²⁰ Furthermore, much like the NYPD's public reporting of stop-and-frisk data to the City Council and on their website, the regular publication of BWC-related data is critical for government officials, advocates, and others in evaluating how BWCs are being used and, more importantly, whether NYPD officers are conducting constitutional street encounters. As BWCs have become standard for police departments across the country, the release of such data should not be controversial. The New Orleans Police Department, for example, publishes some BWC metadata, including date, location, police district, and length of BWC recording.²¹

We request that the NYPD publish at a minimum, on a quarterly basis, the data below:

- Number of BWC mandatory recording events that are fully captured vs. partially captured to report on officer activation compliance;
- Total number of BWC recordings in each of the four categories officers must label them: Arrests, Summons, Investigative Encounter, and Uncategorized;
 - Within the Investigative Encounter category, number totals for each "tag" associated with *De Bour* Level 1, 2, or 3 encounters;²²
 - Demographic information about civilians involved recorded encounters;
- Number of encounters captured categorized by precinct and command; and
- Data on percentage of videos in each video category that were reviewed by a supervisor categorized by precinct/transit district/PSA.

¹⁸ See <https://www.youtube.com/watch?v=9EQ3hzZ5EiY>.

¹⁹ For example, the *Floyd* Monitor indicated in his 11th Report that videos are selected for review by the Monitor team using "categories" and "tags" associated with each video *Floyd v. City of New York*, Dkt. 795-1 at 27-35.

²⁰ Court's remedial order. See *Floyd* Remedial Order at 27 ("[B]ody-worn cameras are "uniquely suited to addressing the constitutional harms at issue in this case").

²¹ See "NOPD Body Worn Camera Metadata" available at: <https://catalog.data.gov/dataset/nopd-body-worn-camera-metadata>.

²² See *People v. De Bour* - 40 N.Y.2d 210 (1976).

VI. Community Input and Evaluation of Body-Worn Camera Policy is Critical

BWCs have been controversial in New York City since they were first suggested by the Court in *Floyd*. Initially, both the NYPD leadership as well as its union membership disparaged them and objected to their use, before later embracing and adopting the technology. Organizations representing many of the neighborhoods and communities who continue to be most impacted by policing in New York have also had reservations about whether BWC technology would actually be a helpful tool for greater transparency and accountability. We as counsel to Floyd share these organizations' concerns.

The Court's Remedial Order in *Floyd* notes that "[t]he communities most affected by the NYPD's use of stop and frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety." *Floyd* Remedial Order at 29. To that end, it is absolutely critical that the NYPD continuously engage with those communities in which BWCs are used, and that those communities and the local organizations that represent them be given regular opportunities for input into how and whether the NYPD's BWC program is meeting its intended goals of increased transparency and police accountability.

Conclusion

BWC technology that was originally suggested as a tool for holding police accountable for ongoing racial profiling and unconstitutional practices has veered farther and farther away from those goals and become, instead, an instrument of potential surveillance and government secrecy. We ask that the NYPD take seriously our concerns, and update and incorporate its Policy to be more transparent and accountable to the people they serve.

Sincerely,

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