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Keeping video of police encounters outside the domain of confidentiality

The availability of video footage capturing police encounters with private citizens has changed the landscape of policing for the better. Now that many police officers are equipped with body-worn cameras, the footage of their interactions with private citizens becomes critical evidence in a lawsuit brought by the private citizen(s) against the officer(s) and the police department who employs them. Too often, police agencies and their lawyers require the footage to be deemed confidential before agreeing to turn over the footage in litigation. This article provides a blueprint for tackling the issue of confidentiality with respect to body-worn-camera footage.

Protective orders and confidentiality

In most civil rights cases, before any discovery is exchanged between the parties (and even before initial disclosures are exchanged in federal court), the lawyers for the officers and police departments will insist on entering into a protective order. Generally speaking, it is fine to enter into a protective order at the outset of the case, because there are certain items of discovery that should remain private (i.e., officer's personal information); moreover, the protective order can also inure to your clients' benefit to the extent that they are in possession of discoverable private information that they would like to keep out of the public eye. It is essential, however, that plaintiffs' lawyers pay particular attention to the terms of a protective order before stipulating to it. The language in some protective orders can be overbroad and all-encompassing, such that it allows police agencies and officers to keep almost all information exchange in discovery confidential.

A good place to start for protective orders are the model protective orders available on the websites of most federal courts. For example, both the Northern and Central Districts of California have model protective orders on their websites. Most

times, the lawyers for police officers and agencies will agree to the model protective order, since large deviations from the model protective orders will not be accepted by the courts (unless by stipulation of the parties).

The most important elements of a protective order are: (1) the ability of any party to designate a document (or photograph/video) as "confidential"; and (2) the ability for any non-designating party to challenge the "confidential" designation at any time in the litigation. Both provisions are included in the model protective orders for the Northern and Central districts.

Finally, it is imperative that the protective order you enter into contain the following language: "The burden of persuasion in any such challenge [to confidentiality] shall be on the Designating Party." This is critical in the event that you decide to challenge a confidential designation by the police departments; provided that this language appears in the protective order, the onus is on the lawyers representing the police agencies, not you, to explain why certain documents, videos, or photographs should remain confidential.

Challenging "confidential" designations by police agencies

In police-misconduct cases, the lawyers for the agencies and officers will often designate much of the material they produce in discovery as confidential. In the case of body-worn-camera footage (or other video footage of the subject incident), it is imperative that you resist attempts from the police to keep such footage outside the public eye.

When challenging the confidential designation of video footage, "[t]he party opposing disclosure has the burden of proving 'good cause,' which requires a showing 'that specific prejudice or harm will result' if the protective order is not granted." (*In re Roman Catholic Archbishop of Portland in Oregon* (9th Cir. 2011) 661 F.3d 417, 424.) This is particularly the case where

the parties stipulated to the protective order. In deciding whether to continue the Protective Order, the Court must first determine whether "particularized harm will result from disclosure of information to the public." (*Ibid.*) "Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning, do not satisfy the Rule 26(c) test." (*Ibid.*) The party seeking protection from disclosure must "allege specific prejudice or harm." (*Ibid.*)

If the court determines that particularized harm will result from disclosure of the body camera footage, then it must balance "the public and private interests to decide whether [maintaining] a protective order is necessary." (*In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d at 424.) In doing such an analysis, the Court should balance the factors identified by the Third Circuit in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). (*In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d at 424.)

The *Glenmede* factors

1. Whether disclosure will violate any privacy interests

Most footage of police encounters will show the involved officers/deputies, as well as the plaintiff or the plaintiff's decedent. In some cases, the footage will also show private citizens who are not parties to the litigation. In some cases, plaintiffs or family members of a decedent do not want footage of themselves or their loved ones in the public eye. Absent such circumstances, however, the only question is the privacy interests of the involved officers/deputies and members of the general public.

As to the officers and police departments, their privacy interests are diminished because they are public servants and agencies subject to legitimate public scrutiny. (See *Harmon v. City of Santa Clara*, 323 F.R.D. 617, (N.D. Cal. 2018); see also *Shelley v. City of San Joaquin* (E.D. Cal. May 4, 2015) No. 2:13-cv-0266-MCE DAD, 2015

WL 2082370, at *4 [“Here, the party seeking protection from disclosure, the County, is a public entity subject to legitimate public scrutiny and, therefore, has a diminished privacy interest.”].) In the *Harmon* case, the court noted that the subject incident took place in broad daylight on a public street, where members of the general public could have witnessed or filmed the incident. To the extent that such facts exist in your case, you should argue that under such circumstances the privacy interests of the involved officers are further diminished.

With respect to private citizens, their claims to privacy may hold more weight with the court, because unlike police officers, they are not public servants subject to public scrutiny. Under such circumstances, you may consider reaching out to the witness to inquire if they have any objection about the video being released (to the extent they do not, you may attach a signed declaration from the witness to that effect). Even if a witness objects, the Court should still consider whether redacting portions of the sensitive discovery material will nevertheless allow disclosure. (*Foltz v. State Farm Mut. Auto Ins. Co.* (9th Cir. 2003) 331 F.3d 1122, 1136-37.) Redacting any identifying information from a private citizen (i.e., face, tattoos, clothing) in the video is a better alternative to barring disclosure altogether.

2. Whether the information is being sought for a legitimate purpose or for an improper purpose

The fact that body-worn-camera footage is in the public interest qualifies as a legitimate purpose. The court in *Sampson* held that “law enforcement’s use of body cameras” is “an issue of importance to the public generally, and to public health and safety specifically.” (*Sampson v. City of El Centro*, No. 14-cv-1807-L (DHB), 2015 WL 11658713, at *8-10.; see also *Sampson* at *10 [finding in the context of Rule 26(c) that “allegations of improper police treatment of minorities is an issue of importance to the public.”]) Moreover, in the aftermath of George Floyd’s death (and countless others whose deaths by police officers have been captured on video), there is an even more compelling interest for similar body-worn-camera footage to be in the public eye.

The lawyers for officers and agencies will often claim that plaintiffs are seeking disclosure of the footage for an improper purpose – to pre-condition potential jurors who may watch the footage before the trial. This argument is a red herring and without merit. The public interest in such information outweighs any potential for jury tampering. Finally, as the court noted in *Dominguez v. City of Los Angeles*, 2018 WL 6332274, through voir dire, defendants can ensure that prospective jurors do not harbor any bias on account of the body camera videos. (*Id.* at *7.)

3. Whether the disclosure of the information will cause a party embarrassment

Often, the conduct of the involved officers in these incidents can be embarrassing. But this is not a reason to prohibit disclosure. In many of these cases, the police agency employing the involved officer or deputy made a determination that the officer’s conduct was “within policy.” Moreover, the officers and agencies will maintain in discovery that the officers’ actions were lawful and that they did nothing wrong during the incident. In light of this, it is hard to imagine how video footage can be “embarrassing” to them when they contend that the involved officers have done nothing wrong. And even otherwise, “[t]he mere fact that the production of records may lead to a litigant’s embarrassment . . . will not, without more, compel the court to seal its records.” (*Kamakana v. City and County of Honolulu* (9th Cir. 2006) 447 F.3d 1172, 1179.)

4. Whether confidentiality is being sought over information important to public health and safety

As noted in the *Sampson* case above, body-worn-camera footage is an issue of importance to public health and safety. It provides objective accounts of police encounters and results in transparency between police departments and communities in which they police. It should also be noted that in 2019, Assembly Bill 748 went into effect in California. AB 748 requires law enforcement agencies to produce, in response to Public Records Act requests, video and audio recordings of “critical incidents,” which are defined as incidents 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. (Gov. Code, § 6254, subd. (f)(4).) Although this Government Code section provides for certain exceptions (where agencies can withhold such footage), it generally can be (and should be) cited for the proposition that the California legislature intended for such information to be public when it passed this law.

5. Whether the sharing of information among litigants will promote fairness and efficiency

This factor tends to have limited importance, since most footage is produced in discovery to all parties subject to the stipulated protective order. Obviously, if the footage is being withheld altogether, there are strong arguments that the parties are entitled to the video because it constitutes the best evidence of liability in the case.

6. Whether a party benefiting from the order of confidentiality is a public entity or official

In most cases, the party requesting confidentiality is a public entity. Under such circumstances, the public entities have a diminished interest in privacy. (See *Harmon v. City of Santa Clara* (N.D. Cal. 2018) 323 F.R.D. 617.; see also *Shelley v. City of San Joaquin* (E.D. Cal. May 4, 2015) No. 2:13-cv-0266-MCE DAD, 2015 WL 2082370, at *4 [“Here, the party seeking protection from disclosure, the County, is a public entity subject to legitimate public scrutiny and, therefore, has a diminished privacy interest.”].)

7. Whether the case involves issues important to the public

It goes without saying that body-worn-camera footage involves important issues to the public, including the fact that public access to such footage increases transparency and the likelihood for accountability. Under this factor, it is also helpful to cite to the body-worn-camera footage policy of the police department requesting confidentiality. These policies can typically be found online and contain helpful language. For example, the Fresno Police Department’s policy (450) with respect to Body Worn Video Cameras highlights the importance of video recordings providing an “objective record”

of contacts between officers and private citizens. Finally, if your case received media coverage, this is another factor that demonstrates importance to the public.

Conclusion

As the court noted in *Soto v. City of Concord* (N.D. Cal. 1995) 162 F.R.D. 603, 613, “In the context of civil rights suits

against police departments, this balancing approach should be ‘moderately pre-weighted in favor of disclosure.’” (Plaintiffs should resist all attempts to keep video footage of police encounters outside the public domain. The only way to advance the fight for police reform is by ensuring the public has access to video of these encounters.

John Taylor and Neil Gehlawat are trial lawyers at Taylor & Ring, where they handle civil rights cases against police agencies. John and Neil have tried cases against various municipalities in California both in state and federal court involving police shooting, in-custody deaths, and excessive use of force. 