

HOUSE BILL REPORT

HB 1917

As Reported by House Committee On: Judiciary

Title: An act relating to video and/or sound recordings made by law enforcement or corrections officers.

Brief Description: Concerning video and/or sound recordings made by law enforcement or corrections officers.

Sponsors: Representatives Hansen, Pettigrew, Ortiz-Self and Appleton.

Brief History:

Committee Activity:

Judiciary: 2/12/15, 2/19/15 [DPS].

Brief Summary of Substitute Bill

- Provides that video and/or sound recording, of any kind, made by uniformed law enforcement or corrections officers while in the course of their duty are not subject to provisions of the Privacy Act.
- Prohibits certain recordings from being made available to the public through a public records request, unless the request is for a specific incident and the request is made by either a person directly involved in the incident or a person with a court order.
- Amends the Privacy Act to allow law enforcement agencies to record private communications when the officer's presence is concealed if the officer has judicial authorization.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Haler, Hansen, Kirby, Klippert, Muri and Stokesbary.

Minority Report: Do not pass. Signed by 2 members: Representatives Shea, Assistant Ranking Minority Member; Goodman.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Without recommendation. Signed by 2 members: Representatives Orwall and Walkinshaw.

Staff: Brent Campbell (786-7152).

Background:

The Public Records Act.

The Public Records Act (PRA) requires all state and local government agencies to make all public records available for public inspection and copying unless the records fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

Certain information is exempt from disclosure under the PRA. If information falls under an exemption, an agency must redact the document to the extent necessary to remove the information. Exempted information includes, but is not limited to: certain personal records or personal information; real estate appraisals; and financial, commercial, and proprietary information.

Some information relating to investigations, law enforcement, and crime victims are also exempt. These exemptions include, but are not limited to:

- specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies;
- information revealing the identity of persons who are witnesses to or victims of crime or who file complaints, if disclosure would endanger any person's life, physical safety, or property;
- information revealing the identity of child victims of sexual assault who are under the age of 18;
- personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs; and
- the felony firearm offense conviction database of felony firearm offenders.

The Privacy Act.

Under the Privacy Act, it is generally unlawful to record a private conversation without the consent of all parties to the communication. Any person who violates this is subject to civil liability and any information obtained in violation of this is inadmissible in any civil or criminal case.

Certain recordings are exempt from provisions of the Privacy Act and thus do not require all parties to consent to the recording.

Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles are exempt from provisions of the Privacy Act. The Privacy Act also allows for video and/or sound recordings of arrested persons by police officers before their first appearance in court. However, such video must:

- include a statement informing the arrested person that such recording is being made;
- begin and terminate with an indication of the time;

- include a statement fully informing the arrested person of his or her constitutional rights; and
- be used only for valid police or court activities.

There are also exceptions to the "all party consent" requirement that allow law enforcement officers to record when only one party consents to the recording. Law enforcement may record a communication with one-party consent if: (1) the officer obtains authorization from a judge; and (2) there is probable cause to believe that the non-consenting party has committed, is engaged in, or is about to commit a felony or there is probable cause to believe the communication involves a drug offense.

Body Cameras and the Privacy Act.

A 2014 Attorney General opinion analyzed whether the use of body cameras violates current law. The opinion states:

1. The Washington Privacy Act does not require the consent of a law enforcement officer to use body cameras attached to police uniforms.
2. Conversations between law enforcement officers and members of the public are not generally considered private for purposes of the Privacy Act.
3. As a general matter, the Privacy Act does not require a law enforcement officer to cease recording a conversation at the request of a citizen, because such conversations are not private to begin with.
4. In order to use a recording as evidence in a criminal or civil case, the recording would be subject to the same laws and rules governing all evidence, including the requirement that the chain of custody be established to prove no tampering has occurred. Laws relating to the retention and disclosure of public records, including records retention schedules, would govern retention and disclosure of recordings.
5. The Privacy Act does not limit the use of body cameras to the use of such cameras in conjunction with vehicle-mounted cameras.

Summary of Substitute Bill:

All audio and/or video recordings made by uniformed law enforcement or corrections officers while in the course of their official duties are exempt from provisions of the Privacy Act.

The Privacy Act is also modified to remove the one-party consent exception and allow law enforcement officers, acting in the performance of their duties, to intercept certain private oral conversations in situations where the law enforcement officer's presence is concealed to one or more parties of the conversation. In order to make such a recording the officer must have judicial authorization as provided for in the Privacy Act.

Jurisdictions that deploy body cameras as of the effective date of the act are prohibited from disclosing audio and/or video recordings made by uniformed law enforcement or corrections officers pursuant to the PRA, unless:

- the request is specific as to the incident; and
- the requester is either:

- a person directly involved in the incident, or his or her attorney, who certifies that he or she does not intend to use the recording to intimidate, threaten, abuse, or harass any individual on the recording; or
- any other person with a court order finding that: public interest in disclosure significantly outweighs the privacy concerns of those recorded; any private individual on the recording was given the best notice practicable of the possible disclosure; and any private individual on the recording had reasonable opportunity to obtain a court order to enjoin disclosure.

Law enforcement or corrections agencies from jurisdictions that deploy body cameras by the effective date of the act are permitted to require a requester of a recording to identify him or herself to ensure compliance with these provisions. Such law enforcement or corrections agencies are also permitted to require a person who makes a request for a recording to pay for the costs of redacting any portion of the recording.

Law enforcement agencies that deploy body cameras by the effective date of the act are required to set policies regarding:

- when a body camera must be activated and de-activated and when an officer has discretion to activate and de-activate the device;
- what to do when a person is unwilling to communicate with an officer who is recording the conversation; and
- how an officer is to document when and why a body camera was de-activated prior to the conclusion of an interaction with a member of the public.

A taskforce is created to review and report on law enforcement agencies' use of body cameras and vehicle-mounted cameras.

Substitute Bill Compared to Original Bill:

The substitute bill:

- reinstates current law relating to recording arrested persons before their appearance in court;
- applies the PRA disclosure requirements to only jurisdictions that have deployed body cameras by the effective date of the act;
- removes a requirement that a person who requests and receives a recording give direct third-party notice to all nonlaw enforcement or corrections individuals before disclosing the recording to any other person;
- adds a requirement that a person directly involved in the incident who requests disclosure of a recording must certify that he or she does not intend to use the recording to intimidate, threaten, abuse, or harass;
- provides that a person not involved in the incident who seeks disclosure of a recording must obtain a court order;
- requires law enforcement agencies that have deployed body cameras by the effective date of the act to establish policies addressing certain issues;
- creates the taskforce; and
- provides that jurisdictions that have deployed body cameras by the effective date of the act may use recordings for officer accountability, evidentiary purposes, and any other purpose not prohibited by law.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The tragic shooting of Michael Brown in Ferguson, Missouri shows the necessity of body cameras; yet, it has become clear that body cameras cannot reasonably be implemented in Washington.

Body cameras do not solve problems, but they do reveal the truth. They are good for both law enforcement and the public. They supply good evidence, help promote healthy interactions between law enforcement and the public, increase accountability, and help improve public trust.

Body cameras also carry an inherent risk to invade privacy. Law enforcement officers see people at very sensitive times. They speak with victims of domestic violence and inform people about the death of family members. Currently, if video was taken of such interactions, the recording would have to be disclosed if requested and the video could then be put up on Youtube for all to see. That is unacceptable. This bill would protect the privacy of people who are in such difficult situations by giving law enforcement agencies the discretion to allow officers to turn off their recordings and also requiring someone not involved in the incident to show that there is a substantial public interest in disclosure. However, a person directly involved in the incident would have an absolute right to any recording.

Law enforcement agencies want to use body cameras, but are not financially able to do so unless the state's PRA is changed. The PRA is an important tool for transparency, but the financial costs associated with unlimited disclosure of these recordings is too high to allow for their use. Law enforcement agencies must review every minute of footage, redact certain information, and then release the recordings for any public records request. This process would have to be done even if someone requests all body camera recordings from a department. Law enforcement agencies simply cannot afford to meet those demands.

Leaving policies up to local governments is good. Communities should be able to decide when and where body cameras can be used. They need that flexibility in order to tailor a body camera program to the needs of their community.

(Opposed) This bill eliminates necessary safeguards within Washington's Privacy Act. Procedural safeguards for recording arrested individuals and vehicle mounted cameras are removed, and the bill would allow unfettered wiretapping and recordings.

A statewide framework is necessary to address privacy, accountability, and surveillance concerns. This bill does not address these concerns and would also create an uneven practice for use. It also greatly limits public disclosure by requiring too much specificity in requests and undermines accountability by giving too much discretion to police officers.

Body cameras should be used exclusively for accountability purposes, and there should be strict regulation for oversight to ensure they are not misused. Body cameras should be about rebuilding trust between communities and law enforcement, this bill does not do so. The importance of having strong and clear policies was made clear by incidents where police officers shot members of the public while their cameras were not turned on. Cameras should be on at all times except during certain breaks. Communities are currently divided between police and community, and strict regulations are needed in order to heal that divide.

Changes to two party consent open up privacy concerns. This bill eviscerates Washington's carefully constructed Privacy Act by allowing unlimited surveillance. This is a huge change to Washington's privacy laws and that change should not be made.

This bill has a prior restraint issue. Giving someone a recording and then telling them they cannot disclose it would be unconstitutional.

All recordings should be disclosable. The PRA is key for governmental transparency, and it should not be changed to limit the disclosure of recordings.

(Other) King County is interested in moving forward with body cameras, but, before it can do so, it needs help with the public disclosure aspect. Ironically, an exemption for body cameras will actually create more transparency because there will be no body cameras until public disclosure is worked out. This bill creates a good framework regarding public disclosure.

Persons Testifying: (In support) Representative Hansen, prime sponsor; James McMahan, Washington Association of Sheriffs and Police Chiefs; Clifford Cook, Bellingham Police Chiefs; Steve Strachan, Bremerton Police Chiefs; Rob Huss, Washington State Patrol; Mark Lindquist, Washington Association of Prosecuting Attorneys and Pierce County Prosecuting Attorneys; Renee Mahar, Council of Metropolitan Police and Sheriffs; Candice Bock, Washington Association of Washington Cities; and Jim Henry, Poulsbo City Council.

(Opposed) Shankar Narayan and Jared Friend, American Civil Liberties Union; Harriet Walden, Mothers for Police Accountability; Shar Lichty, Peace and Justice Action League of Spokane; Toby Nixon, Washington Coalition for Open Government; and Rowland Thompson, Allied Daily Newspapers.

(Other) Dave Upthegrove, King County Council.

Persons Signed In To Testify But Not Testifying: None.