FINAL BILL REPORT
EHB 2362

C 163 L 16
Synopsis as Enacted

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

Sponsors: Representatives Hansen, Pettigrew, Nealey and Kirby.

House Committee on Judiciary
Senate Committee on Law & Justice

Background:

Body worn cameras are increasingly being deployed by law enforcement agencies to record interactions between law enforcement officers and community members in the course of the officers' official duties. Body worn camera recordings are public records subject to the Public Records Act.

Public Records Act.
The Public Records Act (PRA) requires state and local government agencies to make all public records available for public inspection and copying upon request, unless the records fall within certain statutory exemptions. The stated policy of the PRA favors disclosure and requires that listed exemptions be narrowly construed. If information falls under an exemption, an agency must determine whether the exempt information can be deleted so that the remaining portions of the record may be released. An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure.

The PRA exempts a variety of records from public inspection and copying, including many types of personal records and personal information. Some information relating to investigations, law enforcement, and crime victims is also exempt. These exemptions include:

- specific intelligence information and investigative records compiled by investigative or law enforcement agencies, if nondisclosure is essential to effective law enforcement or for the protection of any person's right to privacy;
- 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;

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.

- information revealing the identity of child victims of sexual assault who are under the age of 18; and
- personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs.

The PRA does not contain a specific privacy exemption. However, some PRA exemptions incorporate privacy as one component of the exemption. Invasion of a person's right to privacy under the PRA is defined to mean disclosure of information that would be both highly offensive to a reasonable person and not of legitimate concern to the public.

An agency may not distinguish among persons requesting records, and may not require requestors to provide information about the purpose of the request except to determine whether disclosure is exempted or prohibited. An agency may not charge a fee for locating and making records available for inspection, but may charge for the actual cost of copying the records.

A party who prevails against an agency in a legal action seeking the right to inspect or copy public records must be awarded all costs and reasonable attorneys' fees incurred in the action. In addition, the court may award the person up to $100 per day that the person was denied access to the public record. Agencies are immune from liability for damages based upon the release of a public record if the agency acted in good faith in attempting to comply with the PRA.

Privacy Act.
The Privacy Act prohibits the interception or recording of a private communication without first obtaining the consent of all parties to the communication unless a specific exemption applies. Consent may be obtained when one party announces to all other persons engaged in the communication that the communication is about to be recorded, and the announcement is itself recorded.

Certain recordings are exempt from the Privacy Act. Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles are exempt, as are recordings of arrested persons before their first appearance in court. However, these recordings must follow a number of specific statutory requirements and limitations.

The Privacy Act applies only to audio recordings of private communications. In determining whether a conversation or communication is private, courts consider whether the parties manifested a subjective intention that the communication be private and whether that expectation of privacy was reasonable under the circumstances.

A 2014 Attorney General opinion analyzed whether body worn camera recordings fall under the requirements of the Privacy Act. The opinion determined that body worn camera recordings generally are not subject to the Privacy Act, noting that Washington courts have consistently held that conversations between members of the public and law enforcement officers, when the officers are known to be performing official duties, are not generally considered private for purposes of the Privacy Act.

Summary:

Public disclosure and other requirements relating to body worn camera recordings are established under the PRA. Law enforcement and corrections agencies that deploy body worn cameras must develop policies on their use, and a task force is created to examine the use of body worn cameras by law enforcement and corrections agencies.

"Body worn camera recording" is defined as a video and/or sound recording that is made by a body worn camera attached to the uniform or eyewear of a law enforcement or corrections officer from a covered jurisdiction while in the course of his or her official duties and that is made on or after the effective date of the act and prior to July 1, 2019. "Covered jurisdiction" means a jurisdiction that has deployed body worn cameras as of the effective date of the act, regardless of whether the cameras are being deployed on the effective date of the act, and including jurisdictions that have deployed the cameras on a pilot basis.

Public Records Act.
Body worn camera recordings are exempt from the PRA to the extent nondisclosure is essential for the protection of any person's right to privacy under the PRA. A law enforcement or corrections agency may not disclose a body worn camera recording to the extent the recording is exempt from disclosure. Disclosure of a body worn camera recording is presumed to be highly offensive to a reasonable person to the extent it depicts:

- areas of a medical facility, counseling, or therapeutic program office where:
    - a patient is registered to receive treatment, receiving or waiting for treatment, or being transported in the course of treatment; or
    - health care information is shared with patients, their families, or among the care team;
- health care information protected under federal or state health care privacy laws;
- the interior of a residence where a person has a reasonable expectation of privacy;
- an "intimate image" as defined in criminal laws governing disclosure of intimate images;
- a minor;
- the body of a deceased person;
- the identity of or communications from a victim or witness of an incident involving domestic violence or sexual assault. A victim's wishes regarding disclosure or nondisclosure govern if expressed at the time of recording; or
- the identifiable location information of a community-based domestic violence program or emergency shelter.

A request for body worn camera recordings must: specifically identify a name of a person or persons involved in the incident; provide the incident or case number; provide the date, time, and location of the incident or incidents; or identify a law enforcement or corrections officer involved in the incident or incidents.

Except for certain specified persons, a law enforcement agency may require any person who requests body worn camera recordings to pay the reasonable costs of redacting, altering, distorting, pixelating, suppressing, or otherwise obscuring any portion of the body worn camera recording as necessary to comply with applicable exemptions. These costs may not be charged to the following requestors:

- a person directly involved in an incident recorded by the requested body worn camera recording, or that person's attorney;

- a person who requests a body worn camera recording relevant to a criminal case involving that person or that person's attorney;
- an attorney who is representing a person regarding a potential or existing cause of action involving denial of civil rights under the federal or state constitution, or involving a violation of a United States Department of Justice settlement agreement, if the recording is relevant to the cause of action; and
- the executive directors of the Washington state commissions on African American Affairs, Asian Pacific American Affairs, and Hispanic Affairs.

In a court action seeking the right to inspect or copy a body worn camera recording, a person who prevails against a law enforcement or corrections agency that withholds or discloses all or part of a body worn camera recording is not entitled to fees, costs, or awards unless the law enforcement or corrections agency acted in bad faith or with gross negligence.

An agency that charges for redaction of body worn camera recordings must use redaction technology that provides for the least costly commercially available method of redacting body worn camera recordings, to the extent possible and reasonable. The time an agency spends on redaction of body worn camera recordings for which the agency charges redaction costs may not count towards the agency's allocation of, or limitation on, time or costs spent responding to public records requests, as established pursuant to local ordinance, policy, procedure, or state law.

The body worn camera recording exemption is not to be construed to restrict access to body worn camera recordings as otherwise permitted by law for official or recognized civilian and accountability bodies or pursuant to a court order, nor is it intended to modify the obligations of law enforcement or prosecutors under *Brady v. Maryland*, *Kyles v. Whitley*, or relevant statutes or court rules.

A law enforcement or corrections agency must retain body worn camera recordings for at least 60 days and then may destroy the recordings.

Body Worn Camera Policies.
A law enforcement or corrections agency that deploys body worn cameras must establish policies regarding the use of the cameras. The policies must, at a minimum, address:

- when a body worn camera must be activated and deactivated and officer discretion to activate and deactivate the body worn camera;
- how an officer is to respond when a person may be unwilling or less willing to communicate with an officer who is recording the communication with a body worn camera;
- how an officer will document when and why a body worn camera was deactivated prior to the conclusion of an interaction with a member of the public;
- how, and under what circumstances, a law enforcement or corrections officer is to inform a member of the public that he or she is being recorded, including in situations where the person is a non-English speaker or has limited English proficiency or where the person is deaf or hard of hearing;
- how officers are to be trained on body worn camera usage and how frequently the training is to be reviewed or renewed; and

- what security rules apply to protect data collected and stored from body worn cameras.

An agency that deploys body worn cameras by the effective date of the act must establish the policies within 120 days of June 9, 2016. An agency that deploys body worn cameras on or after June 9, 2016 must establish the policies before deploying body worn cameras. The requirement that an agency adopt body worn camera policies expires July 1, 2019.

Cities or towns that are not deploying body worn cameras on June 9, 2016 are strongly encouraged to adopt an ordinance or resolution authorizing the use of body worn cameras before their use within the jurisdiction and to identify a community involvement process for providing input into development of body worn camera policies.

Body worn cameras may be used only by officers employed by general authority Washington law enforcement agencies, officers employed by the Department of Corrections, and personnel for local jails and detention facilities.

Body Worn Camera Task Force.
A task force is created to examine the use of body worn cameras by law enforcement and corrections agencies. The task force consists of legislative members and representatives of: the Governor's office; law enforcement agencies and officers; local governments; prosecutors and defenders; the American Civil Liberties Union; the Washington Coalition for Open Government; the news media; the Washington state commissions on African American Affairs, Asian Pacific American Affairs, and Hispanic Affairs; immigrant or refugee communities; victim advocates; tribal communities; and the public. The Task Force also includes a person with expertise in retaining and redacting body worn camera recordings.

The task force must hold public meetings in locations that include rural and urban communities and communities in the eastern and western parts of the state.

By December 1, 2017, the task force must report its findings and recommendations regarding: costs assessed to requesters; policies adopted by agencies; retention and retrieval of data; model body worn camera policies; the use of body worn cameras in health care facilities subject to federal and state health care privacy laws; and the use of body worn cameras for gathering evidence, surveillance, and police accountability.

The task force must allow a minority report to be included with the task force report if requested by a member of the task force.

Votes on Final Passage:

House	61	36	
Senate	37	9	(Senate amended)
House	57	39	(House concurred)

Effective: June 9, 2016