

Focus on FOIL: Police Dashboard and BodyCam Footage

By Cory Morris

Police Body Camera video should be accessible to the public vis-à-vis the New York State Freedom of Information Law codified in the Public Officers Law. From agencies such as New York City Police Department to Stony Brook Universityⁱ, anyone can request video footage through FOIL. Like other records, agencies that create such records are subject to release such records pursuant to FOIL and Public Officers Law § 89, as amended, directs lower courts to order an award of attorney's fees in certain circumstances when an agency refuses to comply.

It is settled law that video footage is an agency record.ⁱⁱ The legislative purpose in the Freedom of Information Law is mainly accomplished through the definitions of "Agency" and "Record." Pursuant to POL § 86(4), the term "record" is defined "any information kept, held, filed, produced or reproduced by, with or for an agency or

the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes." Although all records of an agency are available, except

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to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (i) of the Law, an agency is not required to create a record in response to a FOIL request.

Longstanding law dictates the release of agency video recordings, even in high security settings, through FOIL.ⁱⁱⁱ Even public broadcast becomes an agency record once the agency endeavors to record it.^{iv} In light of several accounts of police misconduct, federal funding



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should be allocated for state and local Police Body Cameras.^v Statistical data regarding police killing is resounding: "In 2011, police killed six people in Australia, two in England, six in Germany and, according to an FBI count, 404 in the United States." Governor Cuomo stated that New York State will be paying for police worn body cameras ("bodycams") and training for the police who wear the same.^{vi} "[Police Commissioner] Bratton acknowledged the difficulties that would be involved with phasing in body cameras in a large police department like New York's, which employs about 35,000 uniformed officers." Stony Brook bodycams will be "used by law enforcement to demonstrate transparency to their communities; to document statements, observations, behaviors, and other evidence; and to deter unprofessional, illegal, and inappropriate behaviors by both law enforcement

and the public." This should serve the police, who face frivolous lawsuits, and the public, who may face unruly police, equally. With the utilization of such bodycams, the amount of records and information held by local government is growing exponentially.

The Executive Director of the New York State Committee on Open Government, Robert Freeman, "recognize[d] that our police do a remarkable service for the citizens of this state, but current laws keep vital information about police activities from the public [and] Greater transparency is urgently needed." In this same vein, Police Body Camera(s) has incredible potential to uncover government abuse. Some could argue this is not much different from the footage caught by police cruisers in what is commonly called the "Dashboard Camera." The question may very well become that if video is accessible via the Dashboard Camera then why not the police officer itself?

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About Wilbur F. Breslin

A well-known, highly regarded real estate developer, Wilbur F. Breslin has diversified experience in all facets of the real estate industry. He is the owner and developer of numerous commercial

and residential properties in multiple states and has expertise in construction, land planning, real estate appraising, brokerage, tenant negotiations, property management, and financing. Mr. Breslin made his mark on the tri-state landscape through the development of 12 residential communities and 30 retail centers, and the management of over 10 million square feet of real estate. He is renowned for his creative vision in new development and redevelopment, as well as his unparalleled relationships with tenants, government officials and civic associations. Wilbur Breslin's commitment to turning rundown properties into aesthetically pleasing, prosperous sites has become his trademark.

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New York's Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Dashboard camera footage should be considered by the courts as analogous to body camera footage and should be available pursuant to state and federal Freedom of Information Law.

Should the government fail to turn over records, including those in electronic format, it must articulate the reasons why disclosure can be withheld. FOIL requires a "particularized and specific justification"^{vii} for denying access to demanded documents rather than a "blanket" exemption.^{viii} While the government may turn over certain documentation, it may elect to redact other portions of the documentation as following within one of the abovementioned exceptions. Police Body Camera footage should be no different.

On the one hand there is the statutory protections against public disclosure

afforded by the legislature and, on the other, the civil right afforded by the Freedom of Information Law. The Committee on Open Government predicts that "in New York police agencies may attempt to block access based on Civil Rights Law §50-a, which makes confidential '[a]ll [police] personnel records used to evaluate performance toward continued employment or promotion...' " One should note, however, that "police departments who investigate persons who are no longer their employees are not conducting investigations of 'personnel' within the meaning of Civil Rights Law § 50-a (1). The plain meaning of the word personnel identifies individuals with some current employment relationship with an organization." Accordingly, once an officer is dismissed, one may be able to gain access to certain records, including various video footage. Even still, recent decisions may require an *in camera* inspection of such records to determine whether the Civil Rights Law applies.⁹

While the Committee on Open Government asks for the outright repeal

of Civil Rights Law Section 50-a or, alternatively, its amendment, New York Courts have recently affirmed that Civil Rights Law Section 50-a continues to protect police misconduct records. This may include video footage. Whether the need to safeguard Police Body Camera footage will overcome FOIL's presumption of openness and the public's right to know is yet to be seen.

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ⁱ Stony Brook University, *Body Worn Camera Program*, University Police Department (2019), last accessed on January 22, 2019, https://www.stonybrook.edu/commcms/police/safety/body_worn_cameras.

ⁱⁱ Committee on Open Government FOIL Advisory Opinion

("FOIL-AO") FOIL-AO-19365; see FOIL-AO-19202, FOIL-AO-13528.

ⁱⁱⁱ *Matter of Dilworth v. Westchester County Department of Correction*, 93 A.D.3d 722, 724-725 (2nd Dep't. 2012) (see also *Buffalo Broadcasting Co. v. NYS Department of Correctional Services*, 174 AD2d 212, 216 (3rd Dep't. 1992), *lv denied* 79 NY2d 759 (1992); *Matter of Mack v. Howard*, 91 A.D.3d 1315, 937 N.Y.S.2d 785 (4th Dep't. 2012).

^{iv} *Pennington v. Clark*, 16 AD3d 1049 (4th Dep't. 2005).

^v See Andrea Peterson, *President Obama Wants to Spend \$75 Million to Buy Police Bodycams*, Wash. Post (Dec. 1, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/>.

^{vi} Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*, ACLU, P. 2 (Mar. 2015), accessible at:

https://www.aclu.org/sites/default/files/field_document/police_body-mounted_cameras-v2.pdf.

^{vii} Bredderman, Will, "Fairness for All: Cuomo Seeks Criminal Justice and Prison Reform", Observer News (January 21, 2015), <http://observer.com/2015/01/fairness-for-all-cuomo-seeks-criminal-justice-and-prison-reform/>.

^{viii} Ian Lovett, In California, *In California, a Champion for Police Cameras*, New York Times (Aug. 21, 2013), http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-police-cameras.html?pagewanted=all&_r=1.

⁹ *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454,463 (2007); *Gould*, 89 N.Y.2d at 276.

^x *DLJ Restaurant Corp. v. Department of Buildings of City of New York*, 710 N.Y.S.2d 564, 566 (1st Dept. 2000); see also *Matter of Capital Newspapers Div. Of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986).

^{xi} *Matter of Hearst Corp. v. NY State Police*, 132 AD3d 1128, 1130 (3rd Dept 2015).

^{xii} *Matter of Newsday, LLC v. Nassau County Police Dept.*, 136 AD3d 828, 828 (2d Dep't. 2016).

Top 10 Real Estate Laws of 2018 (Continued from page 16)

9. New Real Estate Broker Qualifying Curriculum: On Sept. 1, 2018, new curriculum took effect for licensing real estate brokers. While real estate brokers remain required to take a 45-hour course and two tests to obtain licensing, they now must study an increased number of hours on the topic of agency law coupled with the new topics of license law, advanced fair housing/lending and transactional analysis. Moving forward, the law of agency will dominate the industry. As recent as 2016, agency was added as a required continuing education topic and it remains a constant issue within license law complaints and real estate brokerage

litigation. Attorneys should familiarize themselves with this topic so that they can understand whether the broker with whom they are collaborating has a waived conflict of interest before collaborating on substance.

10. Sexual Harassment: On April 12, 2018, business in New York State was changed forever by way of S7848A. This legislation made New York State the leader in sexual harassment prevention throughout the country. Employers are now required to have sexual harassment policies, trainings, and complaint forms/protocol. There is a ban on confidentiality agreements and mandatory

arbitration clauses for sexual harassment claims. The law extends to government bidders (including those located out-of-state) and it even extends the Executive Law to permit claims by non-employees (i.e., real estate brokers) against an employer for sexual harassment experienced at the workplace. It is noted that the state law doesn't require policies/trainings as to non-employees, but guidance does suggest that these non-employees receive policies/trainings. Additionally, New York City implemented a similar law, Local Law 96, which expressly requires trainings for non-employees. Moving forward,

counsel must advise landlords, developers, contractors, brokers and the like of their annual policies/trainings burden. 2019 is expected to see an uptick in sexual harassment claims now that employees will know their rights. Are you prepared?

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Unwinding an Unwanted Transaction (Continued from page 14)

Our transactions

As indicated above, I was presented with two separate transactions that had to be rescinded in December of 2018. Both had occurred several months earlier during 2018.

In one transaction, a C corporation had distributed a minority interest in a subsidiary corporation to one of its shareholders in complete redemption of the shareholder's stock in the distributing corporation. For some inexplicable reason, both parties believed that the distribution was not a taxable event to either of them; the corporation did not consider Sec. 311(b) and the former shareholder

did not consider Sec. 302(a).³

The redemption distribution was rescinded by having the "former" shareholder return to the distributing corporation the stock in the subsidiary and re-issuing stock in the distributing corporation to the shareholder. Between the date of the transaction and its rescission, no dividend distributions were made by either the corporation or the subsidiary, and no other event occurred that was inconsistent with the rescission of the redemption distribution.

In the second transaction, a partnership had contributed a wholly-owned disre-

garded entity (an LLC) to a newly-formed, and wholly-owned, C corporation subsidiary of the partnership. The partnership erroneously believed that it could obtain loans more easily through a corporation. The LLC membership interests were returned to the partnership in rescission of the contribution. As in the first case, there were no distributions by either the corporation or the LLC, nor did any other events occur that were inconsistent with the rescission.

A useful tool

In general, the best way to avoid a situation that calls for the rescission of a

transaction is to refrain from undertaking the transaction without first vetting it in consultation with one's tax and corporate advisers.

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¹ For example, how might taxpayers rescind a merger? If you're facing this issue, feel free to contact me.

² *Hutcheson v. Commissioner*, T.C. Memo 1996-127.

³ Under IRC Sec. 311(b), a distribution of appreciated property by a corporation to its shareholders is treated as a sale of such property by the corporation. Under IRC Sec. 302(a) and 302(b)(3), the redemption of a shareholder's entire equity in a corporation is treated as a sale of such equity by the shareholder.