



WITHOUT PREJUDICE

October 28, 2020

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Michael Barsky
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Dear Mr. Kanengisser and Superintendent Barsky:

RE: Body-worn cameras consultation

Thank you for your invitation to participate in the Toronto Police Services Board's (TPSB) consultation on its Policy on body-worn cameras (policy) and to provide guidance on the Toronto Police Service (TPS) procedure (procedure) on the same issue. The OHRC is providing this guidance to the TPSB and TPS at the same time, to ensure the policy and procedure are in alignment.

The OHRC has been engaged with the TPS and TPSB on developing its body-worn camera program over several years, and is pleased to continue engaging on this issue. We appreciate the conversation we had with TPSB staff on October 6, where we provided feedback on the OHRC's points of concern with the TPSB/TPS implementation of the cameras. This letter is intended to supplement that conversation.

The OHRC is aware of vocal concerns from Black and other racialized communities about the efficacy and funding required for body-worn cameras. The OHRC has heard directly from Black communities that these cameras will not prevent the deaths of Black people at the hands of the police, and that more meaningful action is necessary. The OHRC also recognizes earlier research that suggests body-worn cameras can be a tool

for accountability for excessive use of force by officers, and notes that this research has been called into question by more recent studies.¹ For this reason, the TPS and TPSB need to consider evolving research on the efficacy of body-worn cameras, and community concerns about body-worn cameras.

For body-worn cameras to support accountability for officer misconduct, procedures around their use must be robust. This must include explicitly requiring supervisors to proactively review footage of officers under their command, to assess whether the officers are providing a service environment free of racial discrimination. We recognize that TPSB committed to updating its policy after our consultation on October 6, by adding:

“Establish a framework for reviewing of recordings by supervisors on a regular basis to ensure compliance with procedures and determine the need for additional training or other measures.”

While we are pleased to see the new requirement that supervisors will regularly review recordings, this does not go far enough. Reviews must be conducted with the explicit objective of identifying, addressing and eliminating racial profiling and racial discrimination. Further, the frequency of the reviews should be specified, and footage from all front-line officers should be reviewed at least every two years.

In addition, robust oversight policies and procedures are needed to ensure that cameras are not used to disproportionately subject certain neighbourhoods, or racialized groups, to higher scrutiny and surveillance.

Significant gaps in accountability and monitoring

Police services have said that body-worn cameras are meant to serve as a tool for accountability and monitoring for policing based on racial profiling or discrimination. This requires that supervisors regularly review camera footage, and act on any potentially-discriminatory conduct observed, through remediation and discipline of individual officers. As currently drafted, the policy and procedure fail to require systematic review of body-worn camera footage to identify and eliminate racially-biased policing and excessive force, and thus fails to ensure the cameras will be used to support accountability and monitoring.

Supervisors should, at least on a quarterly basis, conduct both systematic and random audits of the body-worn and in-car camera recordings of officers under their command, to assess whether officers are providing a service environment free from racial

¹ Evaluating the effects of police body-worn cameras: a randomized controlled trial, The Lab @ DC, Working Paper, October 20, 2017, https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf.

discrimination. These reviews should ensure that footage from all front-line officers is audited at least every two years.

Supervisors should thoroughly review use of force incidents, including data from use of force reports, injury reports, subject and witness officer notes and other relevant reports, and any video from body-worn or in-car cameras, immediately after the incident takes place, to determine whether there are credible non-discriminatory explanations for the use of force. This is subject to the jurisdiction of the Special Investigations Unit (SIU). The reviews should be documented. Where supervisors do not identify a credible non-discriminatory explanation for the use of force, the officer's conduct and supervisor's concerns should be flagged in their personnel file and referred to Professional Standards for a full investigation.

The policy and procedure should also identify the potential remediation and discipline individual officers would face if discriminatory conduct were identified on body-worn camera footage.

The TPS and TPSB should report on the quantity and quality of supervisors' audits every year, and this reporting should identify how many instances of potential racial bias were identified, how many internal conduct complaints were initiated based on reviewing body-worn camera footage, and the nature of any remediation or discipline of individual officers that followed.

The TPS and TPSB should also consult with the public annually about the use of body-worn cameras, to determine if cameras are serving their intended purpose.

The policy should explicitly state that one of the purposes of body-worn cameras is to serve as a tool for accountability for racially-discriminatory service delivery, given evidence of systemic racism, including anti-Black racism, in policing. The policy should also state that use of body-worn cameras must be consistent with Ontario's *Human Rights Code*. We appreciate that after our October 6 consultation, TPSB staff have advised us that this provision has been added to the General section of the policy: "Ensure that all use of body-worn cameras and their recordings is consistent with the Ontario *Human Rights Code*."

Without these important elements, body-worn cameras will be an expensive and perhaps ultimately worthless investment, at a time when communities are calling for defunding and drastic reductions in police budgets.

Use of body-worn camera footage for surveillance

In light of OHRC findings of over-surveillance and over-charging of Black persons by the TPS, extensively documented in *A Disparate Impact*,² we are deeply concerned about

² *A Disparate Impact*, Ontario Human Rights Commission, www.ohrc.on.ca/en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black.

using footage from body-worn cameras in conjunction with the TPS' mug shot database. We are concerned that this use will exacerbate existing racial disparities in the criminal justice system. Thus, we urge the TPSB and TPS to prohibit such a use of body-worn cameras. If the TPSB and TPS choose to allow body-worn camera footage to be used in conjunction with the mug-shot database, we support the recommendation from the Canadian Civil Liberties Association (CCLA), that a full dedicated consultation, privacy impact assessment, and human rights impact assessment be undertaken.

General best practices around body-worn cameras

The OHRC has identified the following elements as best practices in procedures and policies for de-ploying body-worn cameras to front-line officers, in conjunction with the best practices identified by the Civil Rights Principles on Body-Worn Cameras and the Body-Worn Camera Scorecard, projects led by the Leadership Conference on Civil & Human Rights and Upturn.³

The OHRC asks the TPSB and TPS to ensure these are included in their policy and procedure, while recognizing that many of these prescriptions have already been addressed. The OHRC notes that the current policy and procedure do not satisfy provisions (c), (i), (j), and (k), bolded below, and urges the TPSB and TPS to address this immediately. The OHRC would like to see mandatory disclosure to the public on all use of force incidents that invoke the SIU mandate within five days of the incident, but understands the restrictions on this in the regulatory framework governing the work of the SIU.⁴

Policies and procedures governing body-worn cameras should include:

- a. Clear criteria for when officers must record, and require officers to provide concrete, contemporaneous on-camera justifications for failing to record required events. For example, officers should begin recording at the earliest opportunity, prior to any contact with a member of the public, whenever that contact is for an investigative or enforcement purpose, and regardless of whether or not the person is within camera view, unless an exception applies.⁵ The following should be required to be recorded:
 - i. calls for service;
 - ii. all incidents where use of force appears likely, or is used;
 - iii. investigatory stops;
 - iv. traffic and pedestrian stops;
 - v. traffic control;
 - vi. foot and vehicle pursuits;
 - vii. emergency driving situations;

³Leadership Conference on Civil & Human Rights & Upturn, Body Worn Cameras: A Policy Scorecard, <https://www.bwcorescorecard.org/>.

⁴ Ontario Regulation 267/10, *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, www.ontario.ca/laws/regulation/100267.

⁵ Body-worn cameras may not be engaged in places where recording is prohibited by law.

- viii. emergency vehicle responses to in-progress or just-occurred dispatches where fleeing suspects or vehicles may be captured on video leaving the crime scene;
 - ix. high-risk situations, including search warrants;
 - x. situations that may enhance the probability of evidence-based prosecution;
 - xi. situations that the member, through training and experience, believes to serve a proper police purpose, for example, recording the processing of an uncooperative arrestee;
 - xii. any encounter with the public that becomes adversarial after the initial contact; and
 - xiii. any other instance when enforcing the law.
 - xiv. During the recording of an incident, officers should not disengage the BWC until the entire incident has been recorded. In the event of an arrest, the incident is concluded when the subject is transported to the district station.
- b. Clear criteria for when cameras must be off, but audio stays on; such as level 3 and level 4 strip searches and cavity searches; and in healthcare facilities, unless an exception applies;
 - c. **Clear criteria for when cameras should be off, such as at protests, unless officers are directly engaging with protestors,⁶**
 - d. Clear criteria for when recording should be stopped;
 - e. Addressing personal privacy concerns by specifically, among other things, protecting categories of vulnerable individuals (e.g., victims of sexual violence, hospitalized individuals) from being recorded without their informed consent. Privacy guidelines should be developed in consultation with the Information and Privacy Commissioner of Ontario;
 - f. Requiring officers to file an initial written report or statement before relevant footage is reviewed, for all incidents;
 - g. Requiring the police service to securely delete all footage within two - three years, with exceptions for recordings that have been determined to be relevant to a criminal or civil investigation or proceeding, including officer disciplinary proceedings;
 - h. Expressly prohibiting both footage tampering and unauthorized access, and ensuring that all access to recorded footage will be logged;

⁶ The OHRC agrees with the CCLA's concerns that the presumptive use of body-worn cameras at protests may significantly chill freedom of expression and peaceful assembly.

- i. **Expressly allowing individuals who are filing police misconduct complaints to view all relevant footage in an accessible and expedient manner;**
- j. **Prohibit the use of biometric technologies (e.g., facial recognition, including mug shot databases) to identify individuals in footage;**
- k. **Criteria for when body-worn camera footage will be accessible, including:**
 - (a) to individuals who are recorded and to the public;**
 - (b) mandatory release to the public at the earliest opportunity in use of force incidents that invoke the SIU mandate (where officer conduct results in death or serious injury), or incidents where there is compelling public interest, if consent is obtained from the subject or next-of-kin. Consent must be sought as expeditiously as possible. This disclosure requirement shall apply to footage from all officers present during the incident;**
- l. Training to ensure all front-line officers appropriately understand and follow these prescriptions;
- m. Body-worn cameras shall be clearly affixed to an officer's uniform;
- n. TPS shall monitor the extent to which BWC are used in each division, and collect disaggregated race based statistics on interactions captured by the use of body-worn cameras. This information should be collected, analyzed and publicly reported on as part of TPS' Race-Based Data Collection Strategy

Privacy-related issues should be addressed in consultation with the Information and Privacy Commission. Issues relating to free speech and potential chilling effects of filming protests should be addressed in consultation with the CCLA.

The OHRC strongly encourages the TPSB and TPS to ensure that the policies and procedures that govern the use of body-worn cameras are drafted and applied in a way that is consistent with the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*. Incorporating the recommendations provided in this letter and the feedback the OHRC provided during our October 6, 2020 consultation are a vital part of this process.

Sincerely,



Ena Chadha, LL.B., LL.M.
Chief Commissioner