





Ready, Set, Record?

How a new law will affect the use of body cameras by municipal police

Many municipal police departments haven't implemented body-camera technology because state laws have left officers in violation of wiretap laws if they record in a private residence. Yet, turning cameras on and off when responding to an emergency is unrealistic.

However, a new law (Act 22 of 2017) permits law enforcement to use electronic devices to make audio recordings inside a residence. The law, which becomes effective Sept. 5, also exempts the release of audio/video recordings from the Right-to-Know Law (RTKL).

Will this law resolve law enforcement's concerns about the PA Wiretap Law for good? Probably not. But, it's a start that will allow municipal police departments to begin implementing mobile video/audio recorders.

Understanding the Law

To understand the new law as it relates to your police department, a brief history of the PA Wire Tap Law,ⁱ is needed. While providing some exception to law enforcement officers intercepting oral communications, the law precluded the interception of audio recordings inside a residence. In fact, a violation could have subjected a police officer to criminal charges. This caused many municipalities to refrain from implementing the use of body cameras.

What does the new law mean for your department?

It *exempts* the following from the definition of "oral communications":

- An electronic communication; and
- A communication made "in the presence of a law enforcement officer on official duty, who is in uniform or otherwise clearly identifiable as a law enforcement officer, and who is using an electronic, mechanical, or other device which has been approved under §5706(B) (4) relating to exceptions to prohibitions in possession, sale, distribution, manufacture, or advertisement of electronic, mechanical, or other devices, to intercept the communication in the course of law enforcement duties."

By amending the definition of "oral communications," it takes a law enforcement officer's interception of audio/video recordings outside the previously

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limited exception, having the effect of permitting law enforcement officers, on duty, identifiable as such, and using an approved electronic/mechanical device, to intercept video and oral recordings at or in any place, at any time.

The PA State Police will continue to establish the equipment procedures and will now be required to establish standards for onsite and offsite storage.

Recordings and the Right-to-Know Law

Probably the most controversial aspect of the new law is Chapter 67A, Recordings by Law Enforcement Officers, which exempts *requests* for the audio and/or video recordings from the RTKL. Opponents argue that this makes it virtually impossible to obtain copies of the recordings and diminishes their purpose including transparency. Borough officials should be advised (and trained) about Chapter 67A.

These new definitions will be the guide on whether to disclose recordings. Officials must also become familiar with the procedures for disclosure, along with the appeal process.

The newly created procedure, although utilizing the open records officer, is night and day from the RTKL procedures.

Relating only to audio and/or video recordings, a written request must be served on the agency's open records officer within 60 daysⁱⁱ of the date of the recording. The written request, made by personal service or certified mail, must specify:

- The incident/event, including the date, time, and location;
- A description of the requestor's relationship to the incident/event; and
- For those recordings from within a residence, identification of each individual present unless they are unknown and not reasonably ascertainable.

The law enforcement agency then reviews the request to determine if the recording contains:

- Potential evidence in a criminal matter;
- Information pertaining to an investigation where a criminal charge was filed;
- Confidential or victim information where the reasonable redaction would not safeguard potential evidence; or
- Confidential information about an investigation or victim.

If it does, the request may be denied, in writing, along with a statement that the reasonable redaction of the recording will not safeguard "potential evidence, information pertaining to an investigation, confidential information, or victim information."

Within 30 days of receiving the request – unless a longer time has been agreed upon – the law enforcement agency must provide the audio or video recording or identify the basis of denial. If the agency fails to disclose the recording or issue a written denial within the time specified or agreed to, it shall be deemed denied. Of course, the duty to preserve the recording applies during this entire time.

The law enforcement agency may establish reasonable fees. Additionally, a law enforcement agency is not precluded from redacting an audio or video recording for compliance purposes.

The process does not end with a denial.

The requester may file a petition in the Court of Common Pleas within 30 days of denial and pay a filing fee. There are additional requirements if the recording was made inside a residence, including a certification that notice of the petition was served or attempted to be served on each individual present at the time of the recording and on the owner and occupant. If the identity of an individual is unknown and cannot be reasonably ascertained, service is not required.

Service of the petition may be made by personal delivery or certified mail and must be served on the agency's open records

officer within five days of its filing. It is grounds for dismissal if service is not timely made or if the request fails to provide the required particularity.

A court may grant the petition – in whole or in part – assuming the burden of proof is met. The court's consideration of the public's interest in understanding how law enforcement officers interact with the public, the interest of the crime victim, safety and privacy concerns of law enforcement and others, and "the resources available to review and disclose the audio or video recording" is permitted.

Written policies available to the public and posted on a municipal website are also mandated. Some required policies include:

- Training,
- Time periods of operation,
- Maintenance, storage, and retention, and
- Discipline for policy violation.

Your borough should also be aware that the new procedures have no effect on established criminal or civil rules of procedure and the respective rules of discovery still apply. As such, a prosecuting attorney or a law enforcement agency is not precluded from producing in discovery an audio or video recording in the absence of a written request.

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A written agreement would be required between the prosecutor and the law enforcement agency if the audio/video recording contains potential evidence in a criminal matter, confidential information, victim information, or information pertaining to the investigation that the reasonable redaction would not safeguard the potential evidence.

Before your borough purchases approved mobile video/audio recorders, don't forget about practical considerations such as camera and storage costs, implementing

policies, and educating the officers in their proper use. Your open records officer should also receive training.

Should your borough proceed to implement approved devices, their use may enhance the public's perception of the law enforcement agency, the borough's knowledge of officer conduct, and good police practices.

Your borough should contact your municipal solicitor for advice on this new law and before moving forward with the use of body-worn cameras.

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ⁱ 18 Pa.C.S.A. §5704

ⁱⁱ This would necessarily require an audio and video recording retention policy of not less than 60 days.

