

Letter to the San Francisco Police Commission

October 20, 2015

Via electronic mail

President Suzy Loftus  
Vice President L. Julius M. Turman  
Commissioner Thomas Mazzucco  
Commissioner Petra DeJesus  
Commissioner Joe Marshall  
Commissioner Victor Hwang  
Commissioner Sonia E. Melara

San Francisco Police Commission  
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President Loftus, Vice President Turman, Commissioners:

The Police Commission is in the process of adopting a policy to govern the use of body cameras by the San Francisco Police Department (“SFPD”). As the Commission is well aware, a strong policy is necessary if the SFPD body camera program is to meet its stated goals to “demonstrate its commitment to transparency, ensure the accountability of its members, increase the public’s trust in officers, and protect its members from unjustified complaints of misconduct.”<sup>1</sup>

In the interest of meeting these goals, the ACLU of California joins with the Council on American Islamic Relations of San Francisco Bay Area (CAIR-SFBA), Asian Americans Advancing Justice-ALC and Color of Change to strongly support two critical additions to the body camera draft policy presented on September 16, 2015 at a community meeting of the SF Police Commission: 1) requires an officer to make a statement or write an initial report **before** viewing body camera footage when that officer is facing charges of misconduct or is involved in a critical incident (such as an officer-involved shooting or an in-custody death); and 2) establish clear rules for release of the footage, including proactive release of footage of public interest and release on request to the subject of the footage.

Inclusion of these two provisions is imperative for the SFPD body camera policy to achieve transparency, accountability, and public trust. These provisions can be instituted in a way that does not result in the negative consequences raised by some critics, including the SF Police Officers Association.

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<sup>1</sup> San Francisco Police Department Digital Recording Devices § I, August 6, 2015 Draft, San Francisco Police Commission, <http://sf-police.org/index.aspx?page=4846>.

**1. The SFPD policy should require an officer to make a statement or write an initial report before viewing body camera footage when that officer is facing charges of misconduct or is involved in a critical incident.**

The Police Commission should follow the Oakland Police Department,<sup>2</sup> the San Jose Police Department,<sup>3</sup> the Richmond Police Department,<sup>4</sup> and others in adopting such a policy. By requiring pre-review statements of officers, SFPD will build public trust, avoid tainting officer memory, and do all this without unduly burdening SFPD officers.

**Allowing pre-statement review would undermine public trust.** Officers who have been involved in shootings or who are accused of misconduct are the subjects of investigations. When civilians are the subjects of investigations, police do not typically show them all the evidence in police control before they make statements to police. Nor does SFPD propose showing body camera footage to civilian witnesses to police shootings or uses of force before taking their statements. Creating a double-standard for the police will create the appearance of bias—that SFPD will use body camera footage to “protect its own” and help its officers create testimony more credible than their actual memories—and will undercut public trust in the integrity of the investigative process. A good body camera policy must minimize both the perception and the possibility that some officers will seek to cover up or change their stories.

**Allowing pre-statement review interferes with officer memory rather than enhances it.** Some proponents of pre-statement review suggest that allowing an officer to see video makes his or her statement more accurate. However, investigations into critical incidents require inquiry into the officer’s subjective impressions: what was in the officer’s mind at the time he or she pulled the trigger? That evidence is in the officer’s first-hand memory of the incident, not on a video recording, and pre-statement review can taint that important evidence. Psychologists have developed a rich literature on how memory can be influenced, even permanently altered, by information received after the memory is initially formed.<sup>5</sup> By showing this footage to officers, the police department is potentially changing the officer’s memory of the event.

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<sup>2</sup> Oakland Police Departmental General Order I-15.1 § III(A)(1) (adopted Mar. 5, 2014).

<sup>3</sup> San Jose Police Body Worn Camera Policy § 16. Officer Involved Incidents, [http://www.sjpd.org/InsideSJPD/BodyCameras/BWC\\_Policy.html](http://www.sjpd.org/InsideSJPD/BodyCameras/BWC_Policy.html).

<sup>4</sup> Richmond Police Department Policy 450.9, adopted Jan. 5, 2015.

<sup>5</sup> See generally Morgan, Southwick, Steffian, Hazlett, Loftus, *Misinformation can influence memory for recently experienced, highly stressful events*, International Journal of Law and Psychiatry 36 (2013) 11–17, available at [https://webfiles.uci.edu/eloftus/Morgan\\_Misinfo\\_IJLP2013.pdf?uniq=-5q3yfp](https://webfiles.uci.edu/eloftus/Morgan_Misinfo_IJLP2013.pdf?uniq=-5q3yfp); Jeffrey L. Foster, Thomas Huthwaite, Julia A. Yesberg, Maryanne Garry, Elizabeth F. Loftus, *Repetition, not number of sources, increases both susceptibility to misinformation and confidence in the accuracy of eyewitnesses*, Acta Psychologica 139 (2012) 320–326 (repeated viewing increases the chances that officers will remember video as their own perception), available at [https://webfiles.uci.edu/eloftus/Foster\\_Repetition\\_ActaPsych2012.pdf?uniq=7a5h8l](https://webfiles.uci.edu/eloftus/Foster_Repetition_ActaPsych2012.pdf?uniq=7a5h8l); Elizabeth F. Loftus, *Planting misinformation in the human mind: A 30-year investigation of the malleability of memory*, Learn. Mem. 2005 12: 361–366; <http://learnmem.cshlp.org/content/12/4/361.full>; Zaragoza, M. S., Belli, R. F., & Payment, K. E., *Misinformation effects and the suggestibility of eyewitness memory*, in Do Justice and Let the Sky Fall: Elizabeth F. Loftus and Her Contributions to Science, Law, and Academic Freedom 35–63 (M. Garry and H. Hayne eds., 2007),

Even if viewing body camera footage can successfully spur officers to remember additional facts, all the benefits of this practice can be gained with none of the risks of permitting prior review by allowing officers to supplement their previous statements after viewing the footage.

**Allowing pre-statement review produces a less accurate investigation, not a more accurate one.** To the extent reviewing video footage allows the officer to explain the incident with the benefit of the “objective” video record, that still does not constitute an argument for pre-statement review. Such objective accounts can be accomplished equally well by showing the officer footage *after* the officer has made an initial statement. Pre-statement review, on the other hand, makes the entire investigation less reliable, both for the reasons set forth above and because it gives the officer an opportunity to distort the truth to be consistent with video evidence, or at least to bolster the credibility of his or her testimony by having the initial statement match the details of the video evidence.

Of course, an officer’s initial statement of what happened in a fast-paced, stressful situation will not perfectly match the video footage every time. That is normal, and the policy should allow for that. A policy that prohibits prior review does not mean disciplining officers for any omission or discrepancy between an officer’s first account and the body camera footage. But SFPD should not deal with these natural discrepancies by allowing officers to review the video so they can create accurate initial statements. To do so would be to risk the integrity of the investigation in order to give officers a special opportunity to *appear* credible, rather than to be credible in their investigation—an opportunity not afforded to other suspects or witnesses. This would be completely at odds with the body camera program’s goal of holding officers accountable and building public trust in investigations.

**Prohibiting pre-statement review sets up a robust system for accountability, but does not express “distrust” of individual officers.** Some commenters have expressed concern that prohibiting pre-statement review during investigations conveys a distrust of officers that they will perceive as a personal affront. We credit SFPD officers with understanding that the public gives them extraordinary authority and holds them to high standards; that when that authority results in critical incidents like shootings, those incidents must be carefully investigated; that the integrity of those investigations is crucial for maintaining public trust; and that using investigative best practices in such critical investigations — including not allowing pre-statement review of videos — is necessary to maintain the integrity of those investigations. Indeed, officers should view careful and critical investigations into police shootings as an opportunity to rebuild trust with communities, rather than as a “stinging message of distrust.”

**Prohibiting pre-statement review does not unduly burden officers.** Officers are expected to make a statement prior to review of footage only in the narrow circumstances in which an officer is charged with misconduct or was involved in a critical incident involving use of force. During these times the need for accountability, transparency, and public trust is at its

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available at

<http://www.personal.kent.edu/~mzaragoz/publications/Zaragoza%20chapter%204%20Garry%20Hayne.pdf>.

highest, especially if a life has been lost or someone has experienced physical or emotional harm and trauma. Providing a statement before reviewing footage demonstrates investigative integrity for the public, and a desire to be as transparent as possible. The general reporting and paperwork filed by officers after every day, non-extraordinary circumstances will not be increased or even affected by such a policy.

**Prohibitions on pre-statement review of body camera footage are workable. Many of the largest police departments in California are already using them.** Far from being an extreme suggestion, other police departments have already successfully implemented body camera policies requiring statements before officers view body camera footage. The San Jose Police Department, for instance, requires that an officer make a report before reviewing any footage of the incident, with an option to supplement the report later.<sup>6</sup> The Richmond Police Department has similar provisions.<sup>7</sup> After the Oakland Police Department instituted a policy requiring statements before officers reviewed footage,<sup>8</sup> it experienced a dramatic drop in complaints over use of force by its officers.<sup>9</sup> San Francisco should join these other cities by putting in place a policy that has proven effective over and over again.

**2. The SFPD policy should set clear criteria for release of footage, proactively release footage of public interest, and honor requests by the subjects of police encounters.**

**The body camera policy should have clear criteria for releasing footage to the public.** While the SFPD draft policy does state that the SFPD will obey the current public disclosure laws,<sup>10</sup> that statement does not provide the final word on the question of public release. The California Public Records Act provides for a number of exemptions that may *allow* SFPD to withhold footage, but does not *require* them to do so. That law, and the current policy, allows the department freedom to release footage when it shows officers in a good light, and withhold footage that provides evidence of misconduct. The Police Commission should not allow this, and should adopt a policy that governs when the Department will release footage to the public and when it will not.

**Footage of public interest should be proactively released to the public in a set period of time.** Much footage captured by body cameras will have importance to the public, such as footage that shows officer-involved shootings, serious use of force, or incidents in which potential misconduct is alleged. At a minimum, such footage of public interest should be

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<sup>6</sup> San Jose Police Body Worn Camera Policy § 16. Officer Involved Incidents, [http://www.sjpd.org/InsideSJPD/BodyCameras/BWC\\_Policy.html](http://www.sjpd.org/InsideSJPD/BodyCameras/BWC_Policy.html).

<sup>7</sup> Richmond Police Department Policy 450.9, adopted Jan. 5, 2015.

<sup>8</sup> Oakland Police Departmental General Order I-15.1 § III(A)(1) (adopted Mar. 5, 2014).

<sup>9</sup> *Oakland Mayor Says Police Body Cameras Have Cut Use-Of-Force Incidents Significantly In 5 Years*, CBS San Francisco, Dec. 17, 2014, <http://sanfrancisco.cbslocal.com/2014/12/17/oakland-mayor-says-police-body-cameras-have-cut-use-of-force-incidents-by-60-in-4-years-jean-quan-oakland-police-department-opd-officer-involved-shooting/>.

<sup>10</sup> San Francisco Police Department Digital Recording Devices § III(I)(2)(a), August 6, 2015 Draft, San Francisco Police Commission, <http://sf-police.org/index.aspx?page=4846>.

proactively released to the public as soon as possible after the incident and without the need for such formal process. The release should be within a set time—for instance, 28 days after the incident—that allows the department to locate and interview witnesses but does not unnecessarily delay release until the final conclusion of the investigation.

**Footage requested by the subject of the footage should be released.** Body cameras raise many privacy concerns. However, since there is no privacy concern where the subject of an encounter is the one requesting the video, the Department should honor requests by the subject of a police encounter to provide video of that encounter.

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**The San Francisco Police Commission should adopt a policy that both 1) prohibits pre-statement review of body camera footage after an officer-involved shooting, critical incident, or where the officer is under investigation and 2) establishes clear criteria for release of footage, proactively release footage of public interest, and honor requests by the subjects of police encounters.**

The below signed organizations are aligned with the stated goals of an SFPD body camera program to “demonstrate its commitment to transparency, ensure the accountability of its members, increase the public’s trust in officers, and protect its members from unjustified complaints of misconduct.” The best way to achieve this is for the Police Commission to listen to members of the community and adopt these policies.

The SFPD and SF Police Commission have worked hard to create community trust with the body camera program. It would be a lost opportunity and waste of public resources should the body camera program move forward in a way that does not accomplish the goals of transparency, accountability, and building trust with the public.

We hope the Police Commission will adopt these policies.

Sincerely,

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American Civil Liberties Union of California

Yaman Salahi, Staff Attorney, National Security and Civil Rights Program  
Asian Americans Advancing Justice – Asian Law Caucus

Zahra Billoo, Executive Director  
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