

CONFIDENTIAL MEMORANDUM

To: Mayor Myrick

From: Acting Chief Naylor

Date: July 5, 2019

Re: Super Body Worn Camera Analysis

Through beta-testing the Super Body Worn Cameras (SBWCs), a significant area of concern has been identified. The ACLU asserts that the SBWCs violate the privacy rights of persons whose DNA, faces, and voices are captured. Before implementing this technology, we must therefore explore whether such privacy violations are occurring, with reflection upon *Carpenter vs. the U.S.*, which articulated that the 4th amendment protects “people, not places.”¹

Since the SBWCs capture substantial personal information, we must employ a judicious appreciation of a person’s reasonable expectation of privacy. As outlined in the 1928 Supreme Court decision, *Olmstead vs the U.S.*, people have the right to be left alone and that is “the most comprehensive right of civilized men.”² Similarly, in *Griswold vs. Connecticut*, the Supreme Court affirmed the right to privacy against governmental intrusion. Although that holding related to marital privacy, preserving the 4th amendment against any infringement is crucial.³

I support the facial recognition component of the SBWCs, and although a person may not wish to have their photo captured while in public, doing so does not violate a reasonable expectation of privacy, therefore consent is not required. If, however, a person was to be followed and recorded in any way analogous to satellite-based monitoring, then the holding in *State v. Grady* would apply, and a warrant would be required.⁴

With respect to the instrument's voice oscilloscope, I recommend that we do not promote surreptitious voice-recording. California is a two-party consent state, and governmental recording without consent, opens the Department to significant liability.⁵ Additionally, eavesdropping through this device is akin to *Katz v. the U.S.* Although that case involved wiretapping a phone booth, both instances focus upon legitimate expectations of privacy.⁶

Similarly, I do not support the use of SBWCs for DNA collection. Absent criminal charges, covertly collecting a person's genetic profile from their breath, is an intrusion. California laws are explicit regarding DNA collection; Proposition 69 defines specifics, while Penal section 299 cites four provisions for expungement.⁷ Arbitrarily collecting DNA via the SWBCs, without consent, offers no ability for expungement and is unconstitutional.

The facial recognition component is the sole feature which does not constitute an intrusion and requires no consent. However, if implemented, the SBWCs, still must not be utilized in places where reasonable expectations of privacy exist, such as restrooms and locker rooms. Similarly, they should not be activated in houses of worship or domestic violence shelters.⁸

In summation, the public safety interests offered by the SBWCs are impressive, however, we must endeavor to balance technology with Constitutional preservation. Even if officers utilize SBWCs within ten feet of people during consensual encounters, arrests, and detentions, our established trust will erode. For the reasons cited, I recommend exploring less-intrusive public safety strategies. If SBWCs are implemented, then policy must dictate that officers acquire consent before activation. Obtaining consent mitigates constitutional challenges, while inspiring trust towards policing and this technology.

References:

¹ Carpenter V. United States page 3; Lexis Nexis Search Job Number 79522619; Begovich, Michael 2018

² LEPSL 530, Presentation 1.1: Right to Privacy and *Griswold v. Connecticut* (Part 1); Begovich, Michael 2019

³ LEPSL 530, Presentation 1.2 Right to Privacy and *Griswold v. Connecticut* (Part 2); Begovich, Michael 2019

⁴ Lexis Nexis State v. Grady 817 S.E.2d 18 (Grady v. North Carolina 135 S. Ct 1368) Job number 79660200; Begovich, Michael; 2018

⁵ When Body Worn Cameras Become a Matter of the Courts; Police One; Dwyer, Terrence P. Esq; March 2017; <https://www.policeone.com/policing-in-the-video-age/articles/320408006-When-body-worn-cameras-become-a-matter-of-the-courts/>

⁶ LEPSL 530 Module 4 Presentation 1: Ethical Use of Drones for Law Enforcement p. 1; Begovich, Michael; 2019

⁷ Lexis Nexis; In Re C. B. 6 Cal. 5th 118 Job number 79819035; Begovich, Michael 2018 and LEPSL 530 Module 7, Presentation 7.1 Technology vs. Privacy, Making Prudent Managerial Decisions Transcript; Begovich, Michael; 2019

⁸ IACP Law Enforcement Policy Center; Considerations Document Body Worn Cameras; p. 2, 3; April 2019