
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1940 **Hearing Date:** June 28, 2016
Author: Cooper
Version: May 31, 2016
Urgency: No **Fiscal:** Yes
Consultant: JRD

Subject: *Peace Officers: Body-Worn Cameras: Policies and Procedures*

HISTORY

Source: Peace Officers Research Association of California

Prior Legislation: AB 66 (Weber) – 2015, died Assembly Appropriations
AB 69 (Rodriguez) – 2015, Chap. 461, Stats. of 2015
SB 175 (Huff) – 2015, died Assembly Floor

Support: California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Narcotic Officers Association; Fraternal Order of Police; Association for Los Angeles Deputy Sheriff; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Los Angeles County Deputy Probation Officers Union, AFSCME, Local 685; Riverside Sheriffs Association

Opposition: American Civil Liberties Union of California; California Police Chiefs Association; California Public Defenders Association; California State Sheriffs' Association; Electronic Frontier Foundation; Legal Services for Prisoners with Children

Assembly Floor Vote: 71 - 7

PURPOSE

The purpose of this bill is to require law enforcement agencies that employ peace officers to develop body-worn camera policies and that these policies are subject to collective bargaining, as specified.

Existing law defines “peace officer,” as specified. (Penal Code § 830, et seq.)

Existing law makes it a crime for a person, intentionally and without requisite consent, to eavesdrop on a confidential communication by means of any electronic amplifying or recording device. (Penal Code § 632.)

Existing law exempts a number of law enforcement agencies from the prohibition in Penal Code section 632,¹ including the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, police officer of the County of Los Angeles, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority. (Penal Code § 633.)

This bill requires a law enforcement agency, department, or entity that employs peace officers uses body-worn cameras for those officers, the agency, department, or entity to develop a policy relating to the use of body-worn cameras, and requires that any policy be developed in accordance with state and local collective bargaining procedures.

This bill provides that in developing the policy, law enforcement agencies, departments, or entities are required to include the following:

- A peace officer is allowed to review his or her body-worn camera video and audio recordings before he or she makes a report, is ordered to give an internal affairs statement, or before any criminal or civil proceeding.
- A peace officer is not required to review his or her body-worn camera video and audio recordings before making a report, giving an internal affairs statement, or before any criminal or civil proceeding.
- A peace officer involved in an incident involving a serious use of force shall not review his or her body-worn camera recording until accompanied by an assigned independent investigator or a supervisor. The separating and monitoring of the peace officer involved in a serious use of force shall be maintained during the review of the body-worn camera video and audio recordings and this review shall not occur jointly among involved employees. Once the recordings are approved, as to the validity of the body-worn camera recordings and any other relevant recordings are also approved as their validity, an officer may have a legal representative present during the review of the recordings without the independently assigned investigator or supervisor present, before the peace officer makes a report, is ordered to give an internal affairs statement, or before any criminal or civil proceeding.
- The policy shall be available to all peace officers in a written form.
- The policy shall be available to the public for viewing.

This bill provides that in developing the policy, law enforcement agencies, departments, or entities are encouraged to include the following:

- The time, place, circumstances, and duration in which the body-worn camera shall be operational.
- Which peace officers shall wear the body-worn camera and when they shall wear it.
- Prohibitions against the use of body-worn camera equipment and footage in specified circumstances, such as when the peace officer is off-duty.
- The type of training and length of training required for body-worn camera usage.

¹ Penal Code section 633 also exempts listed law enforcement from the prohibitions in sections 631, 632.5, 632.6, and 632.7.

- Public notification of field use of body-worn cameras, including the circumstances in which citizens are to be notified that they are being recorded.
- The manner in which to document a citizen's refusal from being recorded under certain circumstances.
- The use of body-worn camera video and audio recordings in internal affairs cases.
- The use of body-worn camera video and audio recordings in criminal and civil case preparation and testimony.
- The transfer and use of body-worn camera video and audio recordings to other law enforcement agencies, including establishing what constitutes a need-to-know basis and what constitutes a right-to-know basis.

This bill defines “body-worn camera” as a device attached to the uniform or body of a peace officer that records video, audio, or both, in a digital or analog format.

This bill defines “peace officer” as any person designated as a peace officer pursuant to this chapter.

This bill defines “serious use of force” means any of the following:

- Force resulting in death.
- Force resulting in a loss of consciousness.
- Force resulting in protracted loss, impairment, serious disfigurement, or function of any body part or organ.
- A weapon strike to the head.
- Intentional firearm discharge at a person, regardless of injury.

This bill states that it does not apply to a law enforcement agency, department, or entity that has developed a body-worn camera policy, in accordance with collective bargaining laws, before January 1, 2017, as specified.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its “ROCA” policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for Legislation

According to the author:

AB 1940 will require law enforcement agencies that deploy body worn cameras to develop, through the collective bargaining process, policies and procedures on their use, including the recommendation of best practices. AB 1940 will ensure accuracy by allowing peace officers to view the footage for memory recall. The bill will also promote transparency in the cases of serious bodily injury by requiring the officer to view the footage after it has been validated and in the presence of an independent investigator. AB 1940 will require that all peace officers and the public be provided with the body worn camera policies specific to their jurisdiction. Finally, AB 1940 respects and protects existing collective bargained body camera policies.

2. Effect of the Legislation

A number of law enforcement agencies are currently permitted to utilize body-worn cameras. Existing law, however, does not require these agencies to have a policy prior to utilizing them. The need for such a policy was discussed in a recent study released by the Department of Justice and PERF:

When implemented correctly, body-worn cameras can help strengthen the policing profession. These cameras can help promote agency accountability and transparency, and they can be useful tools for increasing officer professionalism, improving officer training, preserving evidence, and documenting encounters with the public. However, they also raise issues as a practical matter and at the policy level, both of which agencies must thoughtfully examine. Police agencies must determine what adopting body-worn cameras will mean in terms of police-community relationships, privacy, trust and legitimacy, and internal procedural justice for officers.

Police agencies should adopt an incremental approach to implementing a body-worn camera program. This means testing the camera in pilot programs and engaging officers and the community during implementation. *It also means carefully crafting body-worn camera policies that balance accountability, transparency, and privacy rights, as well as preserving the important relationships that exist between officers and members of the community.*

(Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, DC: Office of Community Oriented Policing Services, page 51; emphasis added.)

The report recommends that each agency develop its own comprehensive written policy to govern body-worn camera usage, that includes the following:

- Basic camera usage, including who will be assigned to wear the cameras and where on the body the cameras are authorized to be placed;
- The designated staff member(s) responsible for ensuring cameras are charged and in proper working order, for reporting and documenting problems with cameras, and for reissuing working cameras to avert malfunction claims if critical footage is not captured;
- Recording protocols, including when to activate the camera, when to turn it off, and the types of circumstances in which recording is required, allowed, or prohibited;
- The process for downloading recorded data from the camera, including who is responsible for downloading, when data must be downloaded, where data will be stored, and how to safeguard against data tampering or deletion;
- The method for documenting chain of custody;
- The length of time recorded data will be retained by the agency in various circumstances;
- The process and policies for accessing and reviewing recorded data, including the persons authorized to access data and the circumstances in which recorded data can be reviewed;

- Policies for releasing recorded data to the public, including protocols regarding redactions and responding to public disclosure requests; and
- Policies requiring that any contracts with a third-party vendor for cloud storage explicitly state that the videos are owned by the police agency and that its use and access are governed by agency policy.

(*Id.* at 37.)

This bill seeks to implement some of these recommendations, by requiring any agency that uses body-worn cameras to have a policy that is collectively bargained and specified:

- A peace officer is allowed to review his or her body-worn camera video and audio recordings before he or she makes a report, is ordered to give an internal affairs statement, or before any criminal or civil proceeding.
- A peace officer is not required to review his or her body-worn camera video and audio recordings before making a report, giving an internal affairs statement, or before any criminal or civil proceeding.
- A peace officer involved in an incident involving a serious use of force shall not review his or her body-worn camera recording until accompanied by an assigned independent investigator or a supervisor. The separating and monitoring of the peace officer involved in a serious use of force shall be maintained during the review of the body-worn camera video and audio recordings and this review shall not occur jointly among involved employees. Once the recordings are approved, as to the validity of the body-worn camera recordings and any other relevant recordings are also approved as their validity, an officer may have a legal representative present during the review of the recordings without the independently assigned investigator or supervisor present, before the peace officer makes a report, is ordered to give an internal affairs statement, or before any criminal or civil proceeding.
- The policy shall be available to all peace officers in a written form.
- The policy shall be available to the public for viewing.

This bill, additionally, encourages any agency that uses body-worn cameras to include the following in the policy:

- The time, place, circumstances, and duration in which the body-worn camera shall be operational.
- Which peace officers shall wear the body-worn camera and when they shall wear it.
- Prohibitions against the use of body-worn camera equipment and footage in specified circumstances, such as when the peace officer is off-duty.
- The type of training and length of training required for body-worn camera usage.
- Public notification of field use of body-worn cameras, including the circumstances in which citizens are to be notified that they are being recorded.
- The manner in which to document a citizen's refusal from being recorded under certain circumstances.
- The use of body-worn camera video and audio recordings in internal affairs cases.
- The use of body-worn camera video and audio recordings in criminal and civil case preparation and testimony.

- The transfer and use of body-worn camera video and audio recordings to other law enforcement agencies, including establishing what constitutes a need-to-know basis and what constitutes a right-to-know basis.

3. Review of Body-Camera Footage

This bill would require a law enforcement agency that uses body cameras to develop a body-worn camera policy through the collective bargaining process. The bill specifies that the body worn camera policy shall allow a peace officer to view body-camera footage prior to making an incident report or giving an internal affairs statement. The proponents of the bill contend that allowing an officer to view then body-camera footage prior to making a report will insure that the report is accurate and complete. The opponents believe that by allowing a peace officer to review the body-camera footage prior to making a report, the peace officer will tailor or conform the report to reflect only what can be observed in the footage.

SHOULD PEACE OFFICERS BE ALLOWED TO VIEW BODY-CAMERA AUDIO AND VIDEO RECORDINGS PRIOR TO MAKING A REPORT?

4. Argument in Support

According to the Peace Officers Research Association of California:

AB 1940 would require a law enforcement agency, department, or entity, if it employs peace officers and uses body-worn cameras for those officers, to develop a body-worn camera policy. The bill would require the policy to allow a peace officer to review his or her body-worn camera video and audio recordings before making a report, giving an internal affairs statement, or before any criminal or civil proceeding. In addition, all changes and references to the California Public Records Act have been amended out of the bill. Finally, AB 1940 has been amended to be prospective only, protecting MOU's that have already been negotiated prior to January 1, 2015.

PORAC supports the use of body worn cameras when they are implemented and used responsibly. With the addition of a body worn camera policy that would require an officer to view the footage prior to making a statement, we believe that the reports and conclusions will be more detailed, relevant, and inherently more accurate. The other important aspect of this bill is that all of these policies and procedures are collectively bargained.

5. Argument in Opposition

According to the California Public Defenders Association:

This bill would exempt body-worn camera recordings that depict the use of force resulting in serious injury or death from public disclosure pursuant to the act unless a judicial determination is made, after the adjudication of any civil or criminal proceeding related to the use of force incident, that the interest in public disclosure outweighs the need to protect the individual right to privacy. Requiring local law enforcement agencies, as part of their policy on body-worn cameras, to review the recorded material prior to writing a report or in other

situations would have a tendency to allow law enforcement officers to conform their reports or testimony to what the recording may show. This could stand in the way of determining the truth of what actually took place. This would be analogous to allowing, or even mandating, that a student taking a test be allowed to read the answers that would be on the test, before taking the test. While one might get better test results, the grade on the test would not be reflective of what the student actually knows. Thus, in many respects, the requirement of testing becomes a farce.

Further, by limiting access to these recordings, this bill decreases transparency in the actions of law enforcement officers and diminishes public access to recordings of the actions of law enforcement officers.

In last year's session, numerous bills were advanced for the purposes of requiring body-worn cameras by officers in order to improve public safety and confidence in local law enforcement agencies. As you know, these bills were responses to the killings of unarmed African-American males across the country. As we saw in many of those cases, access to this footage—whether taken by a body-camera or by a bystander—is crucial for justice to be sought by the victim or victim's family. Further, the public must be able to hold police officers accountable for their egregious actions, which will *hopefully* lead to use-of-force police changes within the department.

This legislation—by allowing officers to review, and therefore conform their reports to the footage; and ultimately withhold the footage—is a step backward in the fight for greater transparency and improved community police relations.

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