



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 1, 2020

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0326

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity b. When Employees Record Activity	Not Sustained (Lawful and Proper)
# 2	16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity g. Recording Protected Activity / Demonstrations	Not Sustained (Management Action)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity b. When Employees Record Activity	Not Sustained (Lawful and Proper)
# 2	16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity g. Recording Protected Activity / Demonstrations	Not Sustained (Lawful and Proper)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

OPA received numerous complaints alleging that officers failed to activate Body Worn Video at protests occurring over the summer, with the inference that failure to record was purposed to conceal misconduct.

SUMMARY OF INVESTIGATION:

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of the killing of George Floyd by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement. This specific case concerned numerous allegations made by members of the public that officers failed to activate Body Worn Video (BWV) when making contact with and taking action towards protesters. In general, the complaints alleged that the failure to record was widespread throughout the Department and was purposed to conceal numerous acts of misconduct.

On June 1, 2020, OPA commenced its investigation into this matter. On that same day, Seattle Mayor Jenny Durkan issued a statement regarding the decision by officers not to activate BWV. She explained that the then-operative SPD policy, as well as the Seattle Municipal Code (SMC), prohibited generalized recording of protest activity unless officers



took specific law enforcement action or observed ongoing criminal conduct. The former Chief of Police made a similar statement in the following days in which she noted that the restrictions on recording in the policy were responsive to privacy concerns raised by the ACLU and other community groups when BWV was initially rolled out to officers.

As part of its investigation, OPA examined the historical record of City Council deliberations related to the filming and photographing of protests, as well as information surrounding the City's decision to adopt BWV in 2015. In brief, the City has maintained a longstanding prohibition on the recording or photographing of peaceful protests for law enforcement purposes. (See SMC Chapter 14.12.) This enactment, referred to colloquially as the Intelligence Ordinance, was passed in 1979 after news reports emerged that SPD had maintained files on community leaders and civil rights protesters throughout the 1960s and 1970s. Under the ordinance, collection by SPD of certain information is restricted, including information about an individual's "participation...in a demonstration for community purposes." (SMC 14.12.030.) Collecting this information generally requires authorization from a commanding officer holding the rank of lieutenant or above and reasonable suspicion that the subject of collection has engaged in or will engage in unlawful activity. (SMC 14.12.150.) SPD is required by the ordinance to adopt policies which are, at the very least, as restrictive and protective of First Amendment rights as those in the SMC.

In 2015, the City decided to adopt BWV for most SPD officers as part of an effort to reduce misconduct and improve police accountability. The adoption of BWV was also touted by the then-Federal Monitor as being essential to reaching and maintaining full and effective compliance with the Consent Decree. During initial discussions, community and advocacy groups raised concerns about SPD infiltrating or photographing demonstrations. Though no conclusive determination was made that this was a regular tactic utilized by SPD, the City Council's Public Safety Committee held hearings on the issue in which councilmembers expressed concerns that photography or videotaping of demonstrations would have a general "chilling effect" on free speech. The then-Intelligence Auditor (a position since subsumed into the Office of Inspector General for Public Safety) issued an opinion to the City Council that the planned BWV program would be necessarily subject to the restrictions of SMC Chapter 14.12, which prohibited photographing or surveilling protests. Ultimately, the decision was made to adopt a BWV pilot program in conjunction with an SPD Policy making clear that recording an entire protest was prohibited, and that officers could only record protest incidents when they believed criminal conduct was occurring. The Washington ACLU and the Community Police Commission were consulted in the development of this policy and ultimately concurred. In addition, the policy was reviewed and approved by both the Department of Justice and the Federal Monitor and was endorsed by United States District Judge James Robart.

The resulting policy, SPD Policy 16.090-POL-1(5)(b), required SPD employees to record "arrests and seizures" "when safe and practical." See SPD Policy 16.090-POL-1(5)(b). When read consistent with SPD Policy 16.090-POL-1(5)(g), the policy as a whole prohibited recording of an entire demonstration. In a demonstration context, officers were only permitted to activate BWV "when safe and practical" before making a seizure or arrest. The policy did not permit officers to anticipate the need for force, and thus the need to activate BWV. Only supervisors were permitted to anticipate the need to record police action based on "imminent risk to public safety" or "large scale property destruction." As a result, the only time an individual officer was permitted to make the unilateral decision to activate BWV in a protest context was in the moments between perceiving a criminal violation by a member of the public (e.g. assault, obstruction) and taking action to stop that violation.

As discussed above, there was significant public outcry regarding officers' purported failure to record BWV during the recent demonstrations. The desire was expressed that officers record more frequently, if not for the entirety of their shifts. This resulted in a change to the policy. On June 10, 2020, Mayor Durkan issued an executive order requiring



that SPD create a new policy to require recording of protests when SPD officers anticipate they will have contact with the public. On September 16, 2020, SPD issued revised SPD Policy 16.090-POL-1(g). That policy now requires employees assigned to demonstrations and issued with BWV to activate it during the time they have contact with the public. This policy took effect on October 1, 2020.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity b. When Employees Record Activity

OPA's investigation was purposed to determine whether there was evidence of officers purposefully failing to activate BWV in order to prevent their actions and potential misconduct from being recorded. Ultimately, even after looking at multiple protest dates and numerous officers, OPA found no basis to conclude that this occurred. Instead, OPA generally found that officers acted consistent with policy when they did not record incidents and, where they did record, it was in appropriate circumstances. With regard to the incidents that were not recorded, this appears to have been based on the fast-moving conditions of such incidents during demonstrations and the according lack of time available to officers to make the determination that recording BWV was safe and practical and to give the required warnings all *after* perceiving a crime and *before* acting in response to it. In any event, there were no widespread violations of policy identified and OPA, accordingly, recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity g. Recording Protected Activity/Demonstration

As noted above, OPA finds that the SPD policy in place at the time of the demonstrations effectively prohibited recording of many of the incidents that complainants alleged should have been videotaped. Ultimately, this was due to a prior policy judgment by SPD, City government, and community stakeholders that prioritized the non-recording of First Amendment protected activities in order to prevent a "chilling effect" on speech – not because of malfeasance of individual officers. While this judgment was made in good faith, it had the unintended effect of greatly limiting the recording of law enforcement activity that happens in and around a protest. Moreover, in the period of time from the implementation of BWV in 2015 to this summer's protests, it appears that at least a segment of the public's assessment of the need to record BWV versus the impact on an individual's privacy and civil liberties has shifted to weigh more in favor of recording. This resulted in the rolling out of a new version of the policy that functionally mandated recording during the entirety of demonstrations.

OPA credits the City and SPD for quickly addressing this matter. However, OPA recommends that the policy be further considered and, if needed, amplified or altered by City stakeholders, including the Mayor's Office, the City Council, SPD, the City Attorney's Office, and the Accountability Entities. OPA also recommends that the City involve community groups, including the ACLU, as well as community representatives, particularly from those communities that initially expressed concern with the potential infringements on their privacy and civil liberties that could be posed by expansive recording of BWV. Indeed, it is not clear to OPA that many of those who loudly called for



BWV to be on at all times during demonstrations have considered, or are even aware of, some of the compelling and well-researched arguments for more limited application previously articulated by the ACLU and others in 2015. Ultimately, it may be the will of the City with the concurrence of stakeholders to make the new policy permanent as it stands; however, this final decision should not be reactionary but should be made with careful deliberation and the weighing of the many interests.

It is OPA's understanding that the Mayor already intends to convene such a group. Any group should discuss the benefit of recording the entirety of law enforcement's responses to demonstrations versus taking a more targeted approach that could serve to ensure transparency while upholding privacy and constitutional protections.

Lastly, in conjunction with this work, the City Council may need to draft and pass changes to SMC Chapter 14.12 to make it consistent with the expansive nature of SPD's current policy. Otherwise, there will remain a conflict between this chapter – which requires that officers record demonstration activity only where they have reasonable suspicion that a crime is occurring – and what officers have been instructed to do moving forward.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #2 - Allegation #1

16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity b. When Employees Record Activity

As OPA found that no SPD officers purposefully failed to record BWV in order to cover up misconduct and determined that officers largely acted in compliance with the policy in place at the time, OPA recommends that this allegation and Allegation #2, below, both be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #2 - Allegation #2

16.090-POL-1 Recording with ICV and BWV 5. Employees Recording Police Activity g. Recording Protected Activity / Demonstrations

For the same reasons as stated above (see Named Employee #2 – Allegation #1), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**