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COMMENTARY: Making the whole truth public

The fight to release body-camera footage in Section 1983 litigation

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Body-worn cameras were heralded as a promising innovation in the fight against crime and police misconduct. But in the decade since their introduction, victims of police misconduct and their advocates first had to fight to get officers to wear the cameras. Then, advocates had to fight to get officers to turn on the cameras. And now, the latest round of the fight lies in convincing municipalities to actually release the footage.

When it comes to releasing body-worn camera footage to the public, local governments routinely delay releasing it, release only partial or redacted video, or resist releasing footage at all.

In our state, municipalities have tried to hide behind the Minnesota Government Data Practices Act (MGDPA) as a means for keeping body-worn-camera footage from public view. Yet those same government entities are quick to release footage that exonerates officers, even when doing so reveals personally sensitive information protected under that same statute.

For instance, Minneapolis released body-worn camera footage just one or two days after the fatal police shootings of Amir Locke and Tekle Sundberg in 2022, presumably because the use of force appeared justified from the city's perspective. Yet by contrast, it took over a year, and filing a lawsuit, for one of our clients to get the body-worn camera footage of Derek Chauvin's use of force against her.

Our team, the Civil Rights & Police Misconduct group at Robins Kaplan, has expended needless hours engaging in motion practice to get body-camera footage released in Section 1983 cases. We've secured orders from both the District of Minnesota and the 8th Circuit rejecting attempts to keep footage sealed, but the fight to stop the suppression of body-worn camera footage from public view continues unnecessarily.

THE MGDPA POSES NO OBSTACLE TO PUBLIC RELEASE

In the world of Section 1983 litigation, no one can dispute the overwhelming public interest in favor of access to body-worn-camera footage documenting police misconduct. The events in the immediate aftermath of George Floyd's murder are a painful confirmation. Shortly after Floyd died, the Minneapolis Police Department released a statement claiming that Floyd had died due to a "medical incident" and had "physically resisted" officers. Eric Levenson, How Minneapolis Police First Described the Murder of George Floyd, and What We Now Know, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/us/minneapolis-police-george-floyd-death/index.html. Of course, both claims were untrue — but the world learned that only because of video recorded by a brave 17-year-old bystander, Darnella Frazier. Imagine how differently events may have transpired if Floyd's lawyers had to first go to court and fight with the city of Minneapolis for the release of the body-worn-camera footage.

Despite the undeniable public interest favoring access to body-worn-camera footage, the defense bar often hides behind the MGDPA to avoid public release. The MGDPA is a state law governing data collected by government agencies; it attempts to balance the individual privacy interests of persons interacting with the government with the public's collective right to know what the government is doing. Any lawyer whose practice touches the MGDPA knows it is a byzantine statute providing complicated (and at times inconsistent) rules for classification of data.

The section governing body-worn-camera footage, however, is thankfully straightforward. Any data showing the "discharge of a firearm" by a police officer or a use of force that "results in substantial bodily harm" is designated as public data. Minn. Stat. § 13.825, subd. 2(a)(1). If the footage is

part of an active criminal investigation, it is deemed confidential or nonpublic, but only until the investigation is complete. Minn. Stat. § 13.825, subd. 2(a)(3); Minn. Stat. § 13.82, subd. 7.

Moreover, if the subject of body-worn-camera footage wants the footage to be public, the MGDPA requires classifying the data as public, even if it does not show the discharge of a firearm or use of force resulting in substantial harm. Minn. Stat. § 13.825, subd. 2(a)(2). To protect personally identifying information of third parties, the MGDPA requires the government to redact any third-party subjects in the footage who do not consent to release. Thus, by the MGDPA's own terms, the government must publicly release body-worn camera footage to plaintiffs requesting it in litigation, with limited redactions to protect the information of nonconsenting third parties. The statute, simply put, makes that data public. Full stop.

We do not mean to say that the release of body-worn-camera footage does not implicate fraught, and often conflicting, interests. But the Legislature already weighed those competing interests, as documented by the MGDPA's legislative history, and arrived at the compromise embodied in section 13.825. The Legislature, in other words, decided that an individual subjected to force by a police officer has a more compelling interest in the footage than the police have in keeping it shielded from view.

Nevertheless, we repeatedly see government defendants in Section 1983 litigation use the MGDPA as a justification for keeping body-worn-camera footage from the public, such as by seeking protective orders, improperly designating the footage as confidential, or otherwise restricting our clients' ability to share it publicly. This behavior is antithetical to the terms of the MGDPA, which classifies the data as public, and is also contrary to the public's qualified common-law right to access court filings.

What is most troubling, however, about government defendants invoking the MGDPA to keep body-worn camera footage under lock and key is that it wholly ignores the context of Section 1983's enactment. That statute, after all, was passed as part of the Ku Klux Klan Act of 1871 — a bill Congress enacted based on its conclusion, coming out of the Civil War, that the states could not be trusted to ensure the protection of federal rights. See Mitchum v. Foster, 407 U.S. 225, 242 (1972).

Section 1983 was intended to be a vehicle for the vindication of constitutional rights by citizens who had been wronged by state officials and thus shine light on such misconduct. The painful irony that local governments are now, more than 100 years later, leaning on state privacy laws to thwart the release of footage documenting misconduct by state actors reveals why Section 1983 continues to be necessary — and why courts must not allow defendants to use state law to restrict public dissemination of body-worn-camera footage produced in federal civil-rights cases.

In November 2014 photo, Minneapolis police Lt. G.W. Reinhardt holds two of the body cameras the department used as part of a pilot program.(AP File Photo: Jim Mone)

THE FIGHT TO MAKE THE WHOLE TRUTH PUBLIC

Unsurprisingly, the cases in which a police officer's use of force appears unconstitutional are the cases in which local governments fight the hardest to keep body-worn-camera footage from public view.

We first confronted this when representing Soren Stevenson, who was shot in the head at a George Floyd protest by a Minneapolis police officer's "less lethal" launcher. The city of Minneapolis labeled all body-worn camera footage in the case as confidential, nonpublic data, even though the footage captured public protests being broadcast around the world. We moved to unseal our amended complaint (which contained stills from the footage) and asked the court to change the improper confidentiality designations. The city opposed. Though the court did not get the chance to rule on our motion before our client accepted an offer of judgment, it was a preview of what was to come and the ways in which defendants would attempt to contort the MGDPA to suit their desires.

The next installment in our fight to release body-worn-camera footage arose in connection with our representation of John Pope, who was a victim of Derek Chauvin's excessive force back in 2017. Predictably, Minneapolis resisted releasing the footage publicly and moved for a protective order designating it as confidential. This time, the city argued the footage should be confidential because Pope did not make a formal request under the MGDPA to obtain it and because Chauvin's use of force (according to the city) did not result in substantial bodily harm. The city also argued that because countless other sections of the MGDPA could apply, each video needed to be independently analyzed and should be presumed confidential.

U.S. Magistrate Judge Tony N. Leung rejected every one of these arguments. He ordered the city to release the footage, emphasizing that the MGDPA does not control discoverability or confidentiality in federal

civil rights actions. We finally had an order that we could use in the fight that we have now come to expect from government defendants in Section 1983 excessive force cases.

Despite this order, we were unsurprised when the Minneapolis City Attorney's Office resisted releasing body-worn-camera footage in another case involving the same officer as in Stevenson, who shot a 40-millimeter "less lethal" projectile into the eye of another one of our clients at a different George Floyd protest. That client, Ethan Marks, is blind in his right eye as a result of the close-range shot. The defendant officer moved for summary judgment and filed nearly all of his exhibits, including the body-worn-camera footage, in the public docket under temporary seal. The City Attorney's Office moved for continued sealing of the footage after U.S. District Judge Ann D. Montgomery denied the officer summary judgment.

This time, the fight over public access to the body-worn-camera footage made it to the 8th Circuit. While the officer's motion for continued sealing of the footage was still pending with the district court, he pursued an interlocutory appeal of Judge Montgomery's order and moved to file his appellant brief and appendix under seal. We opposed for the same reasons we opposed continued sealing at the district court. The 8th Circuit denied the defendant's motion in a cursory three-sentence order, requiring him to submit an unredacted version within two days.

Soon after, U.S. Magistrate Judge Douglas L. Micko ordered the footage unsealed at the district court, reasoning that the MGDPA did not control the court's analysis, and even if it did, the statute's section governing body-worn-camera footage classified the footage as public data. The trio of orders from Pope and Marks proved helpful in fighting the continued attempts to file body-worn-camera footage under seal.

The resistance to releasing such footage publicly — and the unnecessary motion practice it has spurred — is not limited to city of Minneapolis. In another case, we represent a Champlin police officer who was attacked by an off-leash canine deployed by a Hennepin County sheriff's deputy. Hennepin County filed the body-worn-camera footage under temporary seal at the district court, maintaining, like the city of Minneapolis, that such footage was nonpublic under the MGDPA.

After Judge Montgomery denied the deputy's motion to dismiss, the County Attorney's Office lodged an interlocutory appeal and moved to file the footage under seal at the 8th Circuit, arguing that redacting third parties would not be practicable and that the MGDPA's section on body-worn-camera footage did not apply because our client was injured through an accident and not a "use of force" governed by that provision.

Astoundingly, despite claiming that the footage had to be filed under seal to protect the identities of third parties and that redaction would be impracticable, Hennepin County filed other, unsealed exhibits that divulged the suspect's name, birthdate, address, height, weight, license plate, and other identifying information. This removed any pretense of using the MGDPA to shield personally identifying information of third parties. It is, and always has been, about preventing damaging footage of officers' misconduct from seeing the light of day. The 8th Circuit denied the defendant's motion to file the footage under seal in one sentence, without even providing the County Attorney the opportunity to reply to our opposition.

CONCLUSION

When the Minneapolis Police Department first began using body-worn cameras, the police chief touted them as a "layer of transparency and accountability." Similarly, when Minneapolis released footage of Dolal Idd's fatal shooting just one day after it happened (ostensibly believing the footage exonerated officers), the chief said he wanted residents to "see for themselves" what had happened, and Mayor Jacob Frey relayed that "[h]onesty and accountability are what will lead us forward." Nicholas Bogel-Burroughs, Minneapolis Police Release Body Camera Video of Its First Killing Since George Floyd, N.Y. Times (Dec. 31, 2020), https://www.nytimes.com/2020/12/31/us/george-floyd-minneapolis-police-body-cam.html.

These proclamations ring hollow. Our experience with the city of Minneapolis and other municipalities reveals they are loathe to release body-worn-camera footage when it does not exonerate the involved officers. It's long past time for government entities and the defense bar to stop using the MGDPA as a shield to keep such footage from the public. Minnesotans should be able to "see for themselves" what happened when police officers use force, regardless of whether it was justified or unjustified.

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