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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2018-1

TO: All Law Enforcement Chief Executive Officers

FROM: Gurbir S. Grewal, Attorney General

DATE: February 26, 2018

SUBJECT: Law Enforcement Directive Concerning Public Release of Video Recordings Depicting Police Deadly Force Incidents

This Directive instructs that, in any case involving police use of deadly force as defined in Attorney General Directive 2006-5, law enforcement agencies presumptively will make available, upon formal request by the media or other public requestor, video footage captured by body-worn cameras ("BWCs") and patrol vehicle dashboard-mounted cameras ("dash-cams") once the initial investigation of the use-of-force incident is substantially complete. This typically will occur within 20 days of the incident itself. As discussed in Section 3 below, this Directive does not take effect unless and until the Advisory Committee on Professional Conduct advises that such public release comports with applicable Rules of Professional Conduct.

1. BACKGROUND

A. Balancing the Benefits of Transparency Against the Need for Confidentiality

Records generated during a criminal investigation generally are not made available to the public. Increasingly, and with financial and policy support from the Attorney General's Office, police officers in New Jersey are being equipped with BWCs and/or dash-cams that capture investigative activities in real time. Questions have arisen as to whether, when, and to what extent the public will have access to these recordings depicting police activity.

Particular interest is focused on videos of incidents in which police officers use deadly force. Some advocate that such videos are unique and should, for the sake of transparency, be released immediately. In any criminal investigation, however, if video evidence is released before witnesses are interviewed, the public availability of this evidence may taint witnesses' recollections of the incident and compromise the integrity of the investigation – whether that investigation pertains to a law enforcement officer, a civilian, or both. In any context other than the rare instances in which police officers use deadly force, little or no dispute would exist that a grand jury should be able to carry out its important work confidentially, without piecemeal

public release of evidence. In the special case of police uses of lethal force, however, the law enforcement community must take special care to foster public confidence that the incidents will be investigated impartially, thoroughly, and expeditiously. Law enforcement must balance the public's interest in transparency with the interest of the government and of the individuals subject to criminal investigation in fostering a fair criminal investigatory and judicial process.

B. OPRA and the Common Law Right of Access

The starting point for this analysis is the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., pursuant to which the public may request many kinds of government records. OPRA exempts "criminal investigatory records" from disclosure if such records (1) are not required by law to be made, maintained, or kept on file by a law enforcement agency, and (2) pertain to any criminal investigation. In North Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 569 (2017), the Supreme Court agreed with the Appellate Division's finding that, "when an officer turns on a mobile-video recorder to document a traffic stop or pursuit of a suspected criminal violation of law, that recording may pertain to a 'criminal investigation,' albeit in its earliest stages." The Supreme Court held that, under OPRA, the media was not entitled to access to dash-cam video recordings of police officers' high-speed pursuit and subsequent fatal shooting of a civilian, because the recordings were not required by law to be made or maintained and they pertained to a criminal investigation. Thus, under Lyndhurst, BWC and dash-cam footage that records potential criminal offenses are exempt from OPRA.

However, the Court in Lyndhurst ultimately granted access to the dash-cam footage under the common law right of access, a second legal basis under which the public may seek access to government records. Under the common law, once a requestor establishes a cognizable interest in the records requested, courts balance the requestor's interest in disclosure against the government's interest in confidentiality. Courts at all levels have acknowledged that both the government and the public retain a strong interest in criminal investigations being conducted thoroughly and reliably, without the taint of early disclosure of investigative details. Despite that interest, "the public's interest in transparency is heightened when governmental action leads to the death of a civilian." Lyndhurst at 580. Accordingly, the Lyndhurst Court found that the media was entitled to the dash-cam footage under the common law because the public's interest in disclosure of the recordings outweighed the State's interest in preventing disclosure. Such footage could "inform the public's strong interest in a police shooting that killed a civilian . . . without placing potential witnesses and informants at risk," and could be "released without undermining the integrity of an investigation once investigators, shortly after an incident, have interviewed the principal witnesses . . .". Id.

This Directive therefore assumes, consistent with the Supreme Court in Lyndhurst, that BWC and dash-cam footage depicting police officers' investigations of crimes — including, but by no means limited to, video showing officers' use of deadly force — falls within OPRA's exemption for criminal investigatory records and therefore could be subject to compelled disclosure, if at all, only pursuant to the common law right of access.

C. Building on Ongoing Initiatives to Improve Police-Community Relations

On July 28, 2015, the then-Acting Attorney General issued a Law Enforcement Directive Regarding Police Body-Worn Cameras and Stored BWC Recordings ("BWC Directive"). The

BWC Directive encourages police departments to equip patrol officers with these electronic recording devices, and establishes uniform statewide standards governing use of BWCs and access to BWC footage. That same day, the then-Acting Attorney General also issued a Supplemental Directive Amending Attorney General Law Enforcement Directive No. 2006-5 ("2015 Independent Prosecutor Directive"). The 2015 Independent Prosecutor Directive ensures that all police uses of deadly force are thoroughly investigated by specialized teams that have no relationship with the subject officers; that all lethal force incidents involving a municipal police officer are investigated by the County Prosecutor, and that the police department employing the subject officer is excluded from the investigation; that all such cases are presented to a grand jury, unless the Attorney General or Director of the Division of Criminal Justice ("Director") determines that the justifiability of force is not in material dispute; that the Attorney General's Office, through the Division of Criminal Justice, supervises and reviews *de novo* the County Prosecutor's investigation and any determination that a case should be closed without grand jury presentation; and that the investigating agency issue a detailed public statement of facts at the conclusion of every case. Both the BWC Directive and the 2015 Independent Prosecutor Directive embrace a common overarching theme: for law enforcement agencies to fulfill their core mission, they must earn and retain the trust, respect, and support of the communities they protect and serve.

Police BWCs raise special privacy concerns. BWCs will capture images of crime victims in the moments after they have been victimized, and images of witnesses to those crimes. BWCs will capture images of the interior of private residences. They will capture images of police incident-response tactics and communications protocols, the release of which could put officers and members of the public in danger. We recognize, however, that where police video equipment records an event of extraordinary public significance, the common-law balancing test may tip in favor of disclosure at some point. Recordings of officers' use of deadly force may be one such category of video where, at least in some cases, courts may compel disclosure under the common law, finding that the public has a strong interest in ensuring that police deadly force is used appropriately and that investigations are conducted transparently and fairly.

Accordingly, pursuant to my authority under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, I hereby DIRECT all law enforcement agencies and officers to implement and comply with the following procedures, standards, and practices concerning the public disclosure of police deadly-force BWC and dash-cam recordings.

2. GUIDANCE TO LAW ENFORCEMENT

A. General Rule: Presumptive Disclosure Upon Substantial Completion of Initial Investigation

When an investigation is conducted pursuant to Attorney General Law Enforcement Directive No. 2006-5 and/or the 2015 Independent Prosecutor Directive, it shall be the responsibility of the Director or the County Prosecutor to determine on a case-by-case basis whether and when a deadly-force recording will be made publicly available.[1] Unless the

[1] This Directive applies to all force incidents as defined in Paragraph 1 of Directive 2006-5, specifically: "[A]ny use of force by a law enforcement officer involving death or serious bodily

Director, or the County Prosecutor with the Director's express approval, finds specific and compelling reasons to delay public disclosure of a deadly-force recording, such recording shall be issued publicly (1) upon substantial completion of the initial investigation and (2) upon formal request by a member of the public or media (pursuant to the common law right of access).[2]

It shall be within the discretion of the Director or County Prosecutor to determine precisely when the initial investigation is substantially complete. Typically, this will occur after principal, material eyewitnesses to a use-of-force event have been interviewed and after physical and documentary evidence most relevant to the actual use of force has been gathered. This does not, however, mean that the entire investigation must be substantially complete before disclosure of a deadly-force recording.

While it is impossible to place precise temporal parameters on substantial completion of the initial investigation, generally such initial investigation should be concluded within 20 days of the use-of-force event. The initial investigation may in some cases be substantially complete before 20 days after the event. In such cases, the Director or County Prosecutor may, in his or her discretion, authorize release of the deadly-force recording sooner than 20 days after the incident occurred.

Conversely, in some cases, it may take more than 20 days to substantially complete the initial investigation. In such cases, the Director or County Prosecutor may decline to authorize release of a deadly-force recording until such initial investigation is substantially complete. The Director or County Prosecutor must document the reasons that additional time is necessary, and an estimate of when substantial completion will be achieved. Such documentation must be submitted for approval to the Attorney General or designee. The written memorialization of reasons is confidential and privileged attorney work product. Appropriate reasons for an extension beyond the 20-day period include but are not limited to: the need to review and/or redact videos to protect the privacy of victims or other persons depicted; and the need to complete interviews with principal eyewitnesses or to complete other essential aspects of initial investigation.

B. Consultation With Persons Depicted In a Recording or Their Families

Before releasing a deadly-force recording, the Director or County Prosecutor should consult with persons appearing in the recording (not including bystanders or people appearing only in the background) or, in the case of decedents, with their families. For example, if a video

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injury to a person, or where deadly force is employed with no injury, or where any injury to a person results from the use of a firearm by a law enforcement officer."

[2] As the Lyndhurst Court held, video footage of police lethal force incidents is not subject to OPRA because it falls within the "criminal investigatory records" exemption. However, as the Lyndhurst Court also opined, the common law right of access stands on different footing, and may (depending on the circumstances of a given case) weigh in favor of public disclosure. In all cases, the media or a member of the public must formally request access to trigger the potential release of lethal-force video footage by the County Prosecutor or Director, upon substantial completion of the initial investigation.

tends to show that a decedent acted with the intent to cause police officers to end that decedent's life, the decedent's family members may prefer that the video not be released. Prosecutors may and should take those wishes into account in deciding how to proceed. Although this Directive permits the Director or County Prosecutor to authorize digital obscuring of civilians or of police officers who use deadly force, Prosecutors may take into account objections from affected persons, including law enforcement officers, that such steps will not adequately protect them. Where public release of a video would unduly compromise the safety or privacy of any person, including a law enforcement officer, the Prosecutor may seek approval from the Attorney General or a designee not to release the recordings, or to release at a later date.

C. Editing Disclosed Copies of Deadly-Force Recording to Protect Privacy Rights

As necessary and within the discretion of the Director or County Prosecutor, the copy of any deadly-force recording publicly released pursuant to this Directive may be digitally modified to obscure the identity of any person, including (but not limited to) any law enforcement officer who is the subject of a criminal investigation, unless the identity of such person or officer already has been officially disclosed or confirmed. The editing shall be done in a way that does not conceal any actions by any person constituting the use of force. Further, and as made clear in the 2015 Independent Prosecutor Directive, under no circumstances may any person alter in any manner the master copy of any recording.

D. Notification to County Prosecutors and Attorney General

Law enforcement officials who receive OPRA or common-law requests for BWC or dash-camera videos must, per existing policies (including the BWC Directive at Section 11.1), notify the County Prosecutor or Director of such requests within one business day of receipt. In cases involving requests for disclosure of police deadly-force recordings, the County Prosecutor (or the State Police, if it receives such a request) shall notify the Attorney General, the Director, or a designee within 24 hours of receiving the request.

3. ETHICAL CONSIDERATIONS AND EFFECTIVE DATE

New Jersey Rule of Professional Conduct 3.6 prohibits an attorney from "mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule of Professional Conduct 3.8(f) provides that a prosecutor must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." In its March 16, 1989 notice to the bar concerning extrajudicial statements, the Supreme Court noted that "the public production of any physical evidence" is "inappropriate." And in a February 17, 2017 opinion, the Advisory Committee on Professional Ethics ("Advisory Committee") held that "extrajudicial statements featuring displays of seized drugs, weapons, or other contraband do not accord with the Rules of Professional Conduct 3.6 and 3.8 and are not permitted." (Op. at 1).

Public release by prosecutors of BWC or dash-cam footage of police lethal-force incidents upon substantial conclusion of the initial investigation implicates similar but not identical ethical concerns as public display of seized contraband. Every police lethal force case will result in a criminal investigation – of the involved police officer, of a civilian, or in some instances, both. By releasing video footage upon substantial completion of the initial

investigation, the prosecutor will make public evidence that relates to a criminal case that has not yet been tried or, in most instances, charged.

To ensure that prosecutors stay well within the bounds of ethical conduct, my Office has submitted a request to the Advisory Committee seeking clarification on whether the public release of lethal-force recordings upon substantial completion of the initial investigation complies with applicable Rules of Professional Conduct. In that submission, my Office argues that such a public release does not conflict with any Rule of Professional Conduct. It is impossible to know in advance, of course, how the Advisory Committee will rule on this request. Therefore, this Directive does not take effect unless and until the Advisory Committee advises that such public release comports with all applicable Rules of Professional Conduct.

4. PRESERVATION OF PRIVILEGE TO MAINTAIN CONFIDENTIALITY AND NON-ENFORCEABILITY BY THIRD PARTIES

This Directive is issued pursuant to the Attorney General's constitutional and statutory authority to ensure the uniform and efficient enforcement of criminal justice throughout the State. Neither this Directive, nor the release of any recording pursuant to this Directive, shall constitute a waiver of any privilege to maintain the confidentiality of a record that a law enforcement agency may have under OPRA, any other statute, or the common law right of access. This Directive does not create any new requirement that any record be made, maintained or kept. Nothing in this Directive shall be construed to create any promises or any rights beyond those established under the Constitution, statutes, regulations, and decisional law of New Jersey. This Directive is to be implemented by the Division of Criminal Justice and County Prosecutors, and creates no promises or rights that other persons or entities may enforce.

5. SUPERSEDURE

Any provision of the BWC Directive or the 2015 Independent Prosecutor Directive that is inconsistent with any provision of this Directive is hereby superseded to the extent of such inconsistency. All provisions of the BWC Directive and the 2015 Independent Prosecutor Directive that are not inconsistent with this Directive shall remain in full force and effect.

Gurbir S. Grewal
Attorney General

ATTEST:

Elie Honig
Director, Division of Criminal Justice
Dated: February 26, 2018