

Piecemeal Transparency

Most cops now have cameras but who gets to see the footage remains murky

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When Arcata police officers Matthew O'Donovan and Don Arminio pulled into the Shell gas station on the corner of 14th and G streets at about 6:45 p.m. on May 17, the cameras in their patrol cars were rolling. Under a cloudless early evening sky, the cameras caught everything that reportedly followed: The suspect, 26-year-old Joshua Hoffman, drinking from an open container in the parking lot, Hoffman aggressively swinging a metal cane over his head as officers approached, the officers commanding him to stop and, ultimately, Arminio shooting Hoffman four times when the San Diego man charged in his direction.

When the multi-agency Critical Incident Response Team turned the findings of its investigation over to Humboldt County District Attorney Maggie Fleming last week, it included the footage from dash cameras in the officers' patrol cars, as well as that of a Humboldt State University police unit that arrived as backup. Additionally, investigators included footage from about a half dozen security cameras sprinkled throughout the gas station. The footage — some taken from the dash cameras designed to collect evidence and lend transparency in precisely these kinds of high-stakes incidents, and the rest from private security cameras — reportedly combines to offer a complete view of the event, from the moment Hoffman entered the Shell station acting erratically to the time he was loaded in an ambulance almost an hour later. (Hoffman survived the shooting.)

Video from police patrol car dash cameras is also the central piece of evidence in another officer-involved-shooting currently under review by Fleming and her office, that of 20-year-old Killian Shane O'Quinn, who was killed by a California Highway Patrol Officer during a November, 2015 shootout in Eureka. In both cases, Fleming is expected to use the footage as her primary piece of evidence to determine if she believes any of the officers involved in the shootings acted criminally and, if so, what charges are warranted.

As evidence-collecting tools, the video cameras mounted either on patrol car dashboards or near their rearview mirrors are clearly working. But when it comes to transparency, another stated

goal of the seemingly ever-growing world of police video technology (Eureka police fully deployed bodyworn cameras throughout the department in April), one could argue the technology hasn't delivered as promised.

To be clear, that's no fault of the technology. Rather, it's the result of a technology being governed by records laws written decades before its invention and a Legislature that's been slow to react, leaving California's 58 counties and court systems to navigate the situation on their own. The results have been predictably piecemeal, but the undeniable trend is that counties and departments are opting not to release video footage of critical incidents, fearful of public backlash, civil liability and simply setting a precedent that would come back to bite them down the road.

Meanwhile, as public opinion polls indicate the average person wants to see police agencies using video technology and wants the footage from it to be made public, the California Legislature is contemplating tightening the rules so even less footage sees the light of day.

Earlier this month, San Diego County District Attorney Bonnie Dumanis dropped what can only be described as a game changer. Under intense pressure from the public and with the backing of local law enforcement chiefs, Dumanis released video from 10 officer-involved shootings in the county stretching back to 2014 and announced a new policy: San Diego will now release video footage from all police use of force incidents.

The new protocol is the product of weeks of discussions between Dumanis, the San Diego County Chiefs Association and the Sheriff's Association, with input from other stakeholders, including elected officials, local media, citizens and the American Civil Liberties Union. Under the new plan, as soon as Dumanis' office finishes reviewing an officer-involved use of force case, it will either issue a letter exonerating the officer, accompanied by the release any existing video footage of the incident, or it will charge the officer with a crime and retain the footage as evidence.

In a joint letter to the community published in the *San Diego Union Tribune*, Dumanis, San Diego County Sheriff Bill Gore and San Diego Police Chief Shelley Zimmerman described the protocol as a "groundbreaking effort to be as transparent as possible ... in the pursuit of truth and accountability for everyone." The letter concludes, "public trust and confidence in law enforcement is a shared responsibility and that should never be taken for granted."

As executive director of the First Amendment Coalition, Peter Schemer has been watching the police video footage debate closer than most in California. In fact, his organization hosted a series of forums on the subject last year that saw journalists, officers and lawyers share the stage to debate the issue. "I think San Diego's is a very enlightened approach," Schemer said by phone last week. "This is what should happen everywhere."

San Diego's policy seems to have legs in a large part because it represents a compromise. It's the first in the state to presume that these videos should be made public and to do so as a matter of protocol. But the policy also recognizes the integrity of the legal system and postpones the release of any footage until after the district attorney's office has decided whether to pursue criminal charges.

The policy has the attention of officials in Humboldt County. In an email to the *Journal*, Fleming said it "certainly could be a good fit" locally, and both Arcata Police Chief Tom Chapman and Eureka Police Chief Andrew Mills voiced some support for the idea. In fact, the idea has gotten so much traction that the local law enforcement chiefs association — which includes the heads of all local police agencies, the DA and representatives from the Department of Fish and Wildlife, State Parks, the U.S. Marshals Service and probation — is in the process of planning a half-day retreat to discuss it further.

"It seems reasonable and well thought out," Mills said of the San Diego policy, adding that the element of public transparency has the potential to push departments to a "better level" of policing. "You can become myopic, just seeing things through your own lens and those of the people you associate with, but when you have a larger community discussion (about an incident), it can be really helpful."

Chapman said he has developed a better appreciation for the nuances involved in these debates since Hoffman's shooting, the first officer-involved shooting of someone in Arcata in more than 30 years. It's clear Chapman feels his officers acted appropriately in that situation, and the video would have helped convey that to the public.

"I could have quickly shown what the officers faced and the justification for the use of deadly force," he said. "While there will always be criticism — they could have done this, they should have done that — I think the video could quickly show what those officers were faced with and instill confidence and trust in their actions."

But Chapman said he also realizes that an agency can't release the videos of incidents they believe were handled correctly unless they are also willing to release footage of the ones that weren't. That's daunting from a public relations standpoint, he said, but more so from the civil liability side of things, as one of his duties is minimizing his city's exposure to lawsuits.

Mills had more of a let-the-cards-fall-where-they-may attitude on this, saying that when his department mishandles a situation, it needs to own up to it. For his part, Scheer said he actually thinks the release of all use-of-force videos would make the public much more sympathetic toward the police and the decisions they have to make during dynamic, real-time conflicts. "It should be in police departments' interest to get these things out there to the public," Scheer said.

That may be true, Chapman said, but this is also an enormously complicated conversation with lots of repercussions.

"It's tough to balance all of these things," he said, turning to the often-overlooked human component. "The other consideration I think you have to have is for the people, the human beings, involved in these things and the emotional trauma they have, for the police officers involved, the person who was shot, their family and friends, who then have to see that video. These are literally life and death, harrowing, intense moments that are life changing. It's really difficult to say, 'Let's throw that out for people to view.'

"It would be much cleaner if the Legislature said, 'In California, this is what we do.' Then it's clear for me. Then, we have rules and we play by those rules."

So far, the Legislature has been unwilling, or unable, to do that. Instead, as law enforcement agencies throughout the state over the last decade or so have begun widely deploying video technology — first in patrol cars and now body-worn cameras — the Legislature has left it to the state's public records act to determine how they handle the footage.

The California Public Records Act — which was incorporated as a part of the state's constitution last year — essentially operates under the premise that all documents held by public agencies are inherently open to public disclosure, meaning they can be reviewed or copied by anyone who asks. "Access to information concerning the conduct of the people's business is a fundamental right of every person in the state," the CPRA reads.

But the act contains a number of wide-reaching exemptions that give agencies the option of withholding certain things from the public eye. Law enforcement agencies in particular are given enormous discretion in how they respond to records requests, as the law dictates they release the essentials — the who, what, when and where — of calls for service and arrests, but little else. Just about everything else can be said to fall into the police investigative file exemption, which holds that police can refuse to make public anything that is or ever has been part of an investigation, whether it's one that's ongoing or one that closed 50 years ago.

Both locally and throughout the state, police agencies regularly use the investigative file exemption to deny access to video footage as a matter of policy. Chapman said his rationale is simple: He wants to take his discretion out of what the Arcata Police Department releases and what it doesn't, so he can't be criticized for playing favorites or only releasing what makes officers look good. "Putting one out but not putting another out undermines the confidence and trust in the integrity of the process we have," he said. So Chapman's answer is to deny any request for video that comes in under the act, as he believes all fall under the investigative file exemption, making the release of the videos discretionary.

It's worth noting that while an opinion poll from the nonprofit Cato Institute found overwhelming public support for requiring officers to wear body cameras, with 92 percent of the public supporting the idea, the public is more split on whether the video captured by the cameras should be made public. A YouGov poll on the issue found that 51 percent of those polled believe

the footage should be made public, while 28 percent believe it should not. Twenty-one percent of respondents were unsure.

One voice in the debate seems louder in the California Legislature than others. The Police Officers Research Association of California (PORAC), law enforcement's primary lobbying organization in the state, is sponsoring the only three bills regarding police video footage that remain under consideration this legislative session. All of them worry transparency advocates, like Scheer.

Assembly Bill 1940, authored by Assemblymember Jim Cooper (D-Elk Grove), would require all police agencies using body cameras in the state to allow officers to review footage of a critical incident before writing a report, giving an internal affairs statement or being interviewed in a criminal or civil proceeding. PORAC argues requiring that officers be allowed to review the footage will allow for more detailed, accurate statements. But others worry such a practice would allow officers to change their statements to fit what the video shows, clouding some of the transparency the technology promises to provide.

For his part, Mills said he made sure when Eureka implemented its new body camera policy that it expressly prohibits officers from reviewing the footage after critical incidents, thinking the prohibition results in a "cleaner process."

"I want the community to have confidence that (our critical incident investigations) aren't cooked," Mills said.

Chapman, meanwhile, doesn't agree with the bill, but instead feels it should be the investigating officers' call whether it's in the best interest of an investigation to have officers review footage before making a statement. There are investigative strategies, Chapman said, that could dictate either path, depending on the facts and circumstances of a specific incident. "The investigators need that discretion to make the determination on a case-by-case basis," Chapman said, adding that's exactly how his department would approach the issue with any suspect or witness in a case, balancing the opportunity of getting a more detailed and accurate statement against the risk of the video shaping someone's version of events.

The second bill, Assembly Bill 2533 by Miguel Santiago (D-Los Angeles), would require departments or municipalities to give officers three business days' notice before releasing video footage involving the officer under the California Public Records Act. PORAC believes this is an officer safety issue, giving officers time to protest a video's release in court if they feel it would put them or their families at risk. But others — including a variety of newspapers that have weighed in on the issue — worry the safety issue is overblown and the bill's intent is really to make it harder for agencies to release videos generally.

The final bill, Assembly Bill 2611 by Evan Low (D-Campbell), would explicitly update the CPRA to block the release of any police video depicting the death of an officer or anything

"morbid and sensational" enough to be "highly offensive." If you think about it, use-of-force videos inherently depict violent and sometimes deadly encounters, so it's hard to imagine how one would go about drawing the line between the public interest and "highly offensive."

All three bills have passed the Assembly with near unanimous votes, including those of North Coast Assemblyman Jim Wood. In a statement emailed to the *Journal*, Wood explained his votes: "This package of bills represents the Legislature's ongoing effort to develop laws around this new technology that ensures both transparency and guarantees the rights of everyone involved are protected. It is a difficult balancing act and I think my colleagues got it right."

North Coast State Sen. Mike McGuire hasn't taken a stance on the bills, which should get their first hearings in the Senate this week. In an email to the *Journal*, McGuire said dash and body cameras can provide increased transparency and accountability, and that he looks forward to discussing the issues with the bills' authors in the coming weeks.

Other than Mills and Chapman weighing in on A.B. 1940, local officials said they haven't been tracking the legislation closely enough to chime in on it. But Scheer has.

"It's a wonderful case study in how the political process at the state level in particular can be very disconnected from the sort of grassroots political momentum," Scheer said, explaining that while public sentiment and even that of police chiefs throughout the state is shifting toward public disclosure, the police lobby is fighting against it. "It's the classic case of a special interest being exceptionally well organized."

Against this backdrop, the *Journal* will walk into an appellate court in San Francisco as this edition hits newsstands to argue that the public should get to see a video of Eureka police officers arresting a 14-year-old boy shortly before midnight on Dec. 6, 2012. The arrest led to assault charges being filed against one of the officers, former Sgt. Adam Laird, charges that were later dismissed after a flurry of experts weighed in to say Laird's use of force was reasonable and justified. (Laird argued in his defense that he was being singled out for prosecution and discriminated against because of his political beliefs and staunch support of a controversial former Eureka police chief.)

Back in May of 2015, Humboldt County Superior Court Judge Christopher Wilson granted a *Journal* petition seeking release of the video, determining it was in the public interest to see exactly what happened on California Street that night. But the city quickly appealed Wilson's ruling, arguing that the video is a confidential personnel record and therefore warranted the fierce statutory protections state law grants police officer personnel files.

Virtually from the outset of this case, the *Journal* has argued that the video in question is not a police officer personnel record. The video — recorded on a city street with taxpayer purchased equipment and depicting officers carrying out the duties entrusted to them by the public —

existed independently of any complaint filed against Laird or any internal investigation into his conduct, the *Journal* argued, meaning it can't retroactively be deemed a confidential personnel.

The appellate court recently sent out a request that parties to the case focus oral arguments on June 23 squarely on whether the video can be considered a confidential personnel record, implying that the court has disregarded the technicality arguments both sides put forward in briefings and intends to weigh in on the heart of the matter. The case — and others like it throughout the state — has the potential to create case law, or binding legal interpretations of how long-standing laws apply to this new technology. And until the Legislature takes on the task of determining what police agencies should be required to make public, its courts will make that decision one small piece at a time, as agencies throughout the state institute different policies and try to navigate the new technological and political landscapes of policing in the 21st century.

The current state of legal limbo seems frustrating to all involved. Chapman said he wants to see state lawmakers decide the matter firmly, setting rules for all to follow, regardless of what public sentiment or liability concerns surround a specific incident. "The Legislature needs to make this choice and it needs to be statewide," Chapman said. "It shouldn't be piecemeal. It would be so much cleaner if the Legislature said, 'In California, this is what we do.' Then it's clear. Then, we have rules and we play by those rules, whatever they may be."

It's hard to say exactly how the issue moves forward from here. Scheer thinks the best way to end public mistrust of police officers and hold departments fully accountable is to make the release of use of force videos automatic. Law enforcement officials in San Diego seem to agree with him. Will Humboldt follow suit? Will local residents get to see exactly what happened with Joshua Hoffman at that Shell gas station before he was shot four times by officers last month?

For now, the Legislature is leaving those decisions to the prosecutors and police chiefs involved. Well, them and the transparency advocates who will continue filing lawsuits and the courts that will continue deciding them.