



August 17, 2020

Mr. Jim Hart
Chair
Toronto Police Services Board
40 College Street
Toronto, ON
M5G 2J3

Dear Mr. Hart:

RE: Item 3c on the Toronto Police Service Board's August 18, 2020 Virtual Public Meeting Agenda (Approval of Body-Worn Camera Contract Award and Project Implementation)

I am writing to provide the written deputation of the Information and Privacy Commissioner of Ontario (IPC) to the Toronto Police Services Board (the Board) regarding the Toronto Police Service (TPS) Body-Worn Camera (BWC) Program being considered by the Board.

To begin, let me thank you for your August 4, 2020 reply to my letter of July 27, 2020, and your offer to meet to discuss access and privacy issues, including those related to the proper governance of BWCs. I know our respective staff are in the midst of scheduling that meeting and I look forward to further discussions with the Board.

As you are aware, the TPS and the Board have consulted the IPC on many important programs and initiatives in the past, including, for example, with respect to policies and procedures related to street checks and race-based data collection. We remain committed to continuing this collaborative relationship with the TPS and the Board.

With respect to the BWC Program more specifically, my office received a copy of Procedure 15-20 Body Worn Camera (the Procedure) on July 27, 2020 for review and comment. We submitted our recommendations in a letter from Assistant Commissioner David Goddis to Superintendent Michael Barsky dated August 14, 2020. These recommendations build upon IPC recommendations previously made in the context of the BWC Pilot Project of 2014-2016, and reiterate the comments we made on the Privacy Impact Assessment of the full BWC Program in June 2020. These recommendations are also informed by the work my office has done with other Canadian privacy commissioners in developing the [Guidance for the Use of Body-Worn Cameras by Law Enforcement Authorities](#).



The IPC's overarching position on BWCs

The IPC recognizes the potential value of implementing police BWC systems. Recent civilian deaths in both Canada and the United States are tragic reminders of the importance of creating and obtaining accurate recordings documenting a variety of police-civilian encounters and the public's growing expectation to receive accurate and timely information about those encounters. Receiving accurate and timely information is critical to being able to hold government accountable.

In addition to transparency and accountability, individuals also hold dear their sense of privacy and expect it to be protected from the unwarranted gaze of the state when in private dwellings or in public places. Accordingly, it is critical that a BWC governance framework be put in place that respects both the public's need for transparency and accountability in policing and the equally compelling need to respect their reasonable expectation of privacy. As I explained in my July 27, 2020 letter to the Board, with the appropriate governance framework in place, BWC systems can be implemented in a manner that achieves both these goals and ultimately earns public trust.

An Appropriate BWC governance framework

Meeting the public's expectation with respect to transparency and accountability

It is essential that any investment in BWCs pays sufficient transparency and accountability dividends. After all, it is increasingly well understood that transparency and accountability are essential to the effective delivery of law enforcement. This is reflected in the goals of the TPS' BWC Program. If the Program does not come with adequate transparency and accountability mechanisms, BWCs will not be able to enhance public trust and police legitimacy, including with respect to bias free service delivery. In my view, the following mechanisms are critical for enhancing transparency and accountability as part of an appropriate BWC governance framework.

1. The Board and the TPS should commit to making BWC policies and procedures readily available to the public and publicly commit to working with the IPC to address the following recommendations by the end of 2020.
2. To help ensure that a full picture of the initial stages of police-civilian encounters is captured, the BWC's pre-event recording capacity should be leveraged to capture a longer period (for example, 60 rather than 30 seconds), and include both audio and video recording.
3. BWC recordings should be mandatory for the full duration of any calls for service and all other investigative-type encounters that involve a member of the public, subject to only a very limited number of exceptions. In particular, any mandated exceptions to the duty to record should be kept to a minimum, and any such exceptions should be clearly defined.

4. Officer discretion to deactivate a BWC's recording functions and a supervisor's authority to order such deactivation should also be significantly limited and clearly defined.¹
5. Officer discretion to block or reduce a BWC's recording capacity should also be significantly limited and clearly defined.
6. Officer and supervisor decisions to deactivate a BWC should be accompanied by stricter record keeping requirements.
7. Accountability and transparency as part of a comprehensive governance framework further require:
 - The timely disclosure of all relevant BWC recordings to the bodies responsible for independent oversight of police (e.g. the Ontario Independent Police Review Director and the Special Investigations Unit), and
 - The proactive public interest-based disclosure of BWC footage to the public in special circumstances to address compelling concerns about human rights and the police use of force.

While some of the changes described above will require the collection of more personal information, we believe this increase is both necessary and proportionate, subject to the correlative access controls and privacy protections outlined below. As will be further described, controls regarding access to, and the use and disclosure of, the recordings should be implemented to address any privacy and confidentiality concerns.

Protecting the public's reasonable expectation of privacy

Even when deployed and governed in a responsible manner, BWCs come with a significant cost to the privacy rights of the public. In seeking to capture a more accurate record of the full range of investigative encounters with the public, BWCs will generate large amounts of video and audio records. Law-abiding individuals going about their everyday activities, vulnerable persons experiencing some form of crisis, and innocent family members or friends in close proximity of a suspect's arrest may all unwittingly become subject to this form of surveillance.

In this context, it is critical that TPS procedures and Board policies recognize and protect the public's right to privacy in public spaces. While it is not clear what, if any, expectation of privacy police officers have while on duty and in the midst of an investigative encounter with a member of the public, individual members of the public do have statutory and constitutional privacy rights even in the public domain. The Supreme Court of Canada has repeatedly recognized that members

¹ On this specific point, we wish to clarify the IPC's position on the deactivation of BWCs which former Police Chief Mark Saunders refers to in his report to the Board dated July 29, 2020 (found at Item 3c of the Board's August 18, 2020 Virtual Public Meeting Agenda). At page 11 of the Report, there is reference to the IPC which appears to suggest that we support the proposed methodology for deactivating BWCs. As currently phrased, this may lend confusion to the IPC's position on this point. To clarify the public record on the issue, ever since the TPS's BWC Pilot Project until the present day, the IPC has consistently re-iterated our call for a *reduction* in the discretion provided to officers when it comes to deactivating BWC recording functions.

of the public have a reasonable, if diminished, expectation of privacy in public spaces. It follows that, if police are to deploy BWCs, the program must be designed and governed in a manner that is capable of accomplishing legitimate social objectives without incurring a disproportionate cost to fundamental rights and freedoms, including the right to privacy.

8. Accordingly, the BWC governance framework must recognize and protect the public's reasonable expectation of privacy.
9. Explicit limits and controls with respect to the use and disclosure of BWC recordings should be put in place, including detailed role-based access controls and explicit limitations on the use and disclosure of BWC recordings for secondary purposes.
10. Enhanced notices should be provided to the public informing them of the existence and use of BWCs worn by officers.
11. Meaningful opportunity should be afforded to members of the public to provide or refuse consent to BWC recordings in private places.
12. Use of personal information in BWC recordings used for officer training should be restricted when other less privacy-invasive alternatives are available.
13. The TPS should commit (and the Board should so direct the TPS) to adhere to a moratorium on the use of any facial recognition-related technologies in conjunction with BWCs – other than in the context of “mug shot” matching – until after the release of the privacy guidance being prepared by federal, provincial, and territorial privacy authorities and consultation with the IPC.

Conclusion

We appreciate that to meet the above recommendations, substantial changes will be required to the TPS BWC procedure and other TPS and Board governance tools. In this context, we understand that both the Board and the TPS are committed to improving the BWC Program in the coming weeks, months, and years. In addition, we appreciate the Board's commitment to engage with the IPC regarding the development of a BWC policy that addresses personal privacy, transparency and accountability.

At the same time, we understand that if the Board approves the BWC Program at its August 18, 2020 public meeting, the TPS hopes to purchase and begin deploying BWCs in the ensuing weeks. Full deployment of BWCs for all uniformed officers is not expected for some months. Given that there appears to be some urgency with moving ahead, we are reluctant to call on the Board to put a full stop to any purchase of BWCs pending full implementation of the necessary governance framework. From a practical perspective, therefore, we would not object to the Board approving a contract and moving ahead with the purchase of appropriate equipment, provided that:

- the selected vendor and equipment are capable of supporting the TPS' ability to comply with the various privacy and security requirements the IPC raised with the TPS during our consideration of the BWC Program, including the Privacy Impact Assessment,

- the Board and the TPS continue to work with the IPC to ensure that the necessary governance framework is in place (as per recommendations above), and
- officers are trained on this framework well before BWCs are widely deployed in Toronto.

Accordingly, we recommend that the Board pass a motion on August 18, 2020 committing the Board and the TPS to:

- develop, enact and implement the necessary elements of a BWC governance framework well before BWCs are widely deployed in Toronto or by the end of 2020, whichever comes first,
- make the necessary changes to the Procedure (and other implementation tools) to accord with the overarching BWC governance framework, and
- consult the IPC throughout the development of the framework.

We look forward to continuing to work with both the Board and the TPS on these critical matters. Please note that, in the spirit of transparency, we will be posting this letter on our website and ask that you attach it to the public agenda and minutes of the Board.

Sincerely,

A handwritten signature in black ink, appearing to read "Kosseim", with a large, stylized initial "K" and a long horizontal flourish underneath.

Patricia Kosseim
Commissioner