Who Watches the Watchmen's Tape?: FOIA's Categorical Exemptions and Police Body-Worn Cameras

Joseph Wenner
I. INTRODUCTION

On June 10, 2015, South Carolina Governor Nikki Haley signed a bill requiring all state and local law enforcement officers to wear body cameras.\(^1\) Surrounded by the family of Walter Scott—a black man who had been shot and killed by a North Charleston police officer two months earlier—Governor Haley said the measure “is going to make sure Walter Scott did not die without us realizing that we have a problem.”\(^2\) Policy-makers largely praised the law as a sensible and justified response to increased reports of police violence.\(^3\)

Yet before the South Carolina Legislature sent the bill to Governor Haley, it added a blanket exemption for body-worn camera videos from the state’s Freedom of Information Act.\(^4\) The amendment plainly reads: “Data recorded by a body-worn camera is not a public record subject to
disclosure under the Freedom of Information Act.”

Thus, instead of being subject to a presumption of disclosure like other South Carolina public records, body-worn camera videos are disclosed at law enforcement’s discretion.

In order to promote more accountability among law enforcement, many commentators have portrayed body-worn cameras as a panacea of transparency. Touting the videos’ benefits, federal judges have mandated their use and the Department of Justice recommends them as a best practice. The use of body-worn cameras as a tool for additional accountability, however, must be reassessed if their availability to the public can be curtailed through blanket exemptions to Freedom of Information laws.

Body-worn camera videos may be unconditionally exempted from Freedom of Information law disclosure requirements through either legislative or judicial means. South Carolina illustrates the legislative method: providing a specific statutory exemption from the Act’s provisions. The other method is judicial. Under federal Freedom of Information jurisprudence—and that of many states—courts may deem certain public records to be categorically or generally exempt. Courts make such exemptions by determining that the factual circumstances surrounding a type of record will normally lead it to be covered by an existing exemption to the Freedom of Information statute. They therefore exempt all records of that type.

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6 South Carolina law states that “Public record” includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” S.C. CODE ANN. § 30-4-20(c) (2015). Other state and federal definitions are similar.
7 Bowers, supra note 4.
9 See, e.g., Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013) (mandating the implementation of police-worn body cameras for a one-year period as a remedy for alleged police abuse).
13 Id.
of law enforcement, federal courts have deemed rap sheets, mug shots, autopsy photographs, and witness statements to be categorically exempt from Freedom of Information Act requests.\textsuperscript{14}

This Comment examines whether police body-worn camera videos are or should be eligible for a categorical exemption. Unlike South Carolina, the vast majority of states have not passed specific body-worn camera exemptions.\textsuperscript{15} Additionally, due to the recent implementation of body-worn cameras, little litigation exists to shed light on when such videos must be disclosed.\textsuperscript{16} Should judicially determined categorical exemptions be applied to police body-worn camera videos, it would shift the perspective of many analyses of body-worn camera benefits.\textsuperscript{17} Specifically, examining how existing exemptions apply to body-worn camera videos can provide insights on their likely effect on police accountability and transparency.\textsuperscript{18}

There are both state and federal Freedom of Information laws. Although state statutes vary in their details and procedures, most follow the broad contours of the federal Freedom of Information Act (FOIA).\textsuperscript{19} Importantly, most state statutes mimic FOIA’s presumption of disclosure for records covered under their respective statutes.\textsuperscript{20} This Comment will use FOIA as an interpretive guide for both future state and federal litigation. By focusing its analysis on national FOIA cases, this Comment outlines the legal contours of body-worn camera video disclosure.


\textsuperscript{16} See Pafudi, supra note 8, at 1807.

\textsuperscript{17} See, e.g., JAY STANLEY, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL, AM. CIVIL LIBERTIES UNION (Mar. 2015).


\textsuperscript{20} See, e.g., Stearn v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 910 N.E.2d 85, 94 (Ill. 2009) ("Public records are presumed to be open and accessible."); Fink v. Lefkowitz, 393 N.E.2d 463, 465 (N.Y. 1979) ("[T]he public is vested with an inherent right to know and . . . official secrecy is anathematic to our form of government.").
The Comment proceeds in three parts. Part II provides a statutory overview of FOIA. After the history and broad themes of the statute are clear, Part II examines FOIA's Exemption 7—the Law Enforcement Exemption. Specifically, this Comment outlines the two subsections of Exemption 7 likely to apply to body-worn camera videos: 7(A) covering records that are likely to interfere with law enforcement investigations; and 7(C) covering records that could reasonably lead to an unwarranted invasion of personal privacy. Part III analyzes the case law on both 7(A) and 7(C) that has crafted categorical exemptions that shield certain types of records. Once the analysis establishes the outlines and principles justifying these categorical exemptions, Part IV forms an argument in two parts. First, it posits that state courts likely will not make police body-worn cameras categorically exempt according to FOIA precedent. Next, the Comment concludes that examining the applicability of exemptions to body-worn camera videos on a case-by-case basis strengthens their transparency benefits without unduly eroding personal privacy or the integrity of ongoing investigations.

II. FOIA AND THE LAW ENFORCEMENT EXEMPTION

Statutory and case law provide the American public with a right to access the records of government agencies. In the federal system, FOIA is the governing statute. Though it establishes a presumption of disclosure for public records, FOIA recognizes that countervailing interests in specific contexts—including law enforcement—may weigh against the interests of disclosure. Before addressing categorical exemptions under FOIA, this section explores the foundation of how FOIA and the courts applying it examine relevant interests. Part II.A traces the history of FOIA and its basic framework. Part II.B then explains how federal FOIA precedent can influence state courts interpreting their own public records laws. Finally, Part II.C examines FOIA's Law Enforcement Exemption. It focuses on the contours of two specific subcomponents: 7(A) covering records reasonably likely to interfere with law enforcement investigations; and 7(C) covering records that could reasonably lead to an unwarranted invasion of personal privacy.

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A. The Freedom of Information Act

When enacted in 1966, FOIA established the statutory right of the public to obtain information from federal government agencies.\textsuperscript{24} Previous disclosure requirements under the Administrative Procedures Act were “full of loopholes which allow[ed] agencies to deny legitimate information to the public” and “cover up embarrassing mistakes or irregularities[.]”\textsuperscript{25} Fearful of an unaccountable and unelected bureaucratic malaise, Congress framed transparency as a key component of democracy.\textsuperscript{26} President Johnson echoed this justification when signing FOIA into law, declaring that “[a] democracy works best when the people have all the information that the security of the Nation permits.”\textsuperscript{27}

The statute intends to “implement a general philosophy of full agency disclosure.”\textsuperscript{28} Accordingly, § 552(a)(3) “requires every agency upon any request for records which ... reasonably describe such records to make such records promptly available to any person.”\textsuperscript{29} Historically, FOIA was constructed with paper records in mind.\textsuperscript{30} Both statutory amendments and case law have since clarified that electronic audio and visual files also qualify as government records.\textsuperscript{31} In pursuit of disclosure, FOIA also flips the typical burdens of administrative law.

\textsuperscript{24} Id.
\textsuperscript{25} S. REP. NO. 89-813, at 3 (1965).
\textsuperscript{29} Id. at 755 (quoting 5 U.S.C. § 552(a)(3)) (internal quotation marks omitted).
\textsuperscript{30} S. REP. NO. 89-813, at 4 (1965).
\textsuperscript{31} The Electronic Freedom of Information Act (EFOIA) amendments were made law in 1996. See Martin E. Halstuk & Charles N. Davis, The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation, 54 ADMIN. L. REV. 983, 1013–14 (2002) (citing H.R. Rep. No. 104-795, at 11–12 (1996)) (“The main reason why Congress drafted the amendments was because legislators wanted to add certain electronic provisions to the FOIA to make clear that the statute [sic] applied to electronically recorded and stored information.”) [hereinafter Halstuk & Davis, The Public Interest Be Damned]; see also N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that an audiotape of Space Shuttle Challenger astronauts is a “record” and noting that “FOIA makes no distinction between information in lexical and ... non-lexical form[,]”); Save the Dolphins v. U.S. Dep't of Commerce, 404 F. Supp. 407, 410–11 (N.D. Cal. 1975) (finding that a movie is a “record” for purposes of FOIA).
While an agency decision usually must be upheld unless a plaintiff demonstrates the decision was arbitrary and capricious, FOIA specifically shifts the burden to the withholding agency “to sustain its action” of nondisclosure. The statute also empowers the district court to review the matter de novo.

B. FOIA’s Interaction with State Law

Though state Freedom of Information laws are jurisdictionally separate, state courts often interpret state statutes based on federal precedent. New York’s public disclosure law, the Freedom of Information Law (FOIL), is a helpful illustration of how influential FOIA can be on state law. The Court of Appeals of New York has noted that FOIL’s “legislative history... indicates that many of its provisions... were patterned after the Federal analogue.” Even New York’s “law enforcement exemption is modeled on 5 USC § 552(b)(7).” As a result, New York courts find that “[f]ederal case law and legislative history are instructive when interpreting such provisions.” Numerous other state courts use federal precedent as persuasive authority due to the similar parallels between their state’s public record laws and FOIA. Of course, these similarities are not universal across all state public record laws. Therefore, state courts looking to use federal FOIA as persuasive authority typically specify statutory parallels first before analyzing any federal court’s reasoning.

34 Id. at 141.
36 Id.
38 See, e.g., Montenegro v. City of Dover, 34 A.3d 717 (N.H. 2011) (noting that the court “look[s] to the decisions of other jurisdictions, since other similar acts, because they are in pari materia, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved?”); Evening News Ass’n v. City of Troy, 339 N.W.2d 421, 428 (Mich. 1983) (finding “[t]he similarity between the [state] FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations”); Jenson v. Schiffman, 544 P.2d 1048, 1052 (Or. Ct. App. 1976) (determining “the current version of 5 U.S.C. § 552(b)(7) constitutes a persuasive catalog of the principle purposes to be served by our comparable statute”).
39 See Mercer v. South Dakota Attorney Gen. Office, 864 N.W.2d 299, 304 (S.D. 2015) (“Here, we have no similar statutory language related to an ‘unwarranted invasion of personal privacy’”) (quoting 5 U.S.C. § 552(b)(7)(C)).
closer the parallels, the more persuasive state courts find federal FOIA.41

C. The Law Enforcement Exemption

While FOIA's broad provisions favor the disclosure of information to the public, its mandate is not absolute.42 Section 552(b) lists nine exemptions from FOIA's disclosure requirements.43 Courts have held that these exemptions are discretionary, still allowing an agency to disclose potentially exempt information if that agency concludes that there would be no resulting harm from public disclosure.44 When a requested document contains only some information that falls within an exemption, any “reasonably segregable portion” of the document should be released to the requester once the exempted information is redacted.45 In keeping with this tradition of full disclosure, the exemptions themselves are also construed narrowly.46 Moreover, only the government can raise these interests in the context of FOIA litigation.47

One of FOIA's exemptions is the Law Enforcement Exemption, numerically and interchangeably referenced as Exemption 7.48 Congress's preeminent concern in enacting Exemption 7 was the fear

marks omitted).

41 See Cox, supra note 19, at 413.
46 See Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) (noting that courts have “repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide maximum access”).
47 See Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (holding that “FOIA is purely a disclosure statute and affords . . . no private right of action to enjoin agency disclosure”).
48 5 U.S.C. § 552(b)(7). The Exemption covers “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: A. could reasonably be expected to interfere with law enforcement proceedings; B. would deprive a person of a right to a fair trial or an impartial adjudication, C. could reasonably be expected to constitute an unwarranted invasion of personal privacy; D. could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; E. would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or F. could reasonably be expected to endanger the life or physical safety of any individual.”
that disclosure requirements would "harm [the] Government's case in court" by allowing litigants premature access to key investigatory documents. These concerns have since expanded to protect six specific interests as enumerated by the statute. A 1974 amendment further clarified legislative intent by replacing investigatory "files" with "records." In making "records" the operative word, Congress elucidated that the Exemption did not endlessly protect material simply because it was in an investigatory file. This focused the inquiry on the nature of the requested document itself. The 1986 FOIA amendments, however, deleted the word "investigatory" and added the words "or information" so that Exemption 7 protections are potentially available to all "records or information compiled for law enforcement purposes.

As written, the relevant portion of the statute sets forth a two-step framework. In order to qualify for any of the Exemption 7 subsections, the government must first demonstrate that the requested material constitutes "records or information compiled for law enforcement purposes." The D.C. Circuit has set the majority test for this threshold inquiry: a criminal law enforcement agency must demonstrate that (1) the investigatory activities giving rise to the requested documents were related to the enforcement of federal laws; and (2) the nexus between the investigation and one of the agency's law enforcement duties is based on a "colorable claim" of rationality. Other circuits have adopted similar deferential "rational nexus" standards.

51 Id. at 91.
52 Id. at 332.
53 Id. at 331.
56 Pratt v. Webster, 673 F.2d 408, 420 (D.C. Cir. 1982); see also Keys v. Dep't of Justice, 830 F.2d 337, 340-42 (D.C. Cir. 1987) ("An objective finding of such a nexus is refutable only by persuasive evidence that in fact another, non-qualifying reason prompted the investigation.") (internal quotation marks omitted).
57 See Davin v. Dep't of Justice, 60 F.3d 1043, 1045 (3d Cir. 1995) ("[T]he simple recitation of statutes, orders and public laws is an insufficient showing of a rational nexus to a legitimate law enforcement concern."); Church of Scientology v. Dep't of Army, 611 F.2d 738, 748 (9th Cir. 1979) ("An agency which has a clear law enforcement mandate . . . need only establish a 'rational nexus' between enforcement of federal law and the document for which an exemption is claimed."); see also Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992) (holding that the district court should not
After the agency has met this threshold inquiry, the government proceeds to the second part of the test: demonstrating that disclosure would result in one of the six harms covered by Exemption 7's subcomponents. Of these exemptions, two in particular pose significant questions for body-worn cameras and categorical exemptions. Exemption 7(A) protects records that could reasonably be expected to "interfere with enforcement proceedings." Exemption 7(C) protects records that could "reasonably be expected to constitute an unwarranted invasion of personal privacy." The following sections analyze the case law establishing the general contours of Exemptions 7(A) and 7(C) in order to contextualize Part III's analysis of the emergence and application of categorical exemptions.

1. Exemption 7(A): interference with law enforcement proceedings.

When seeking nondisclosure under subsection (A) of Exemption 7, agencies must demonstrate that the release of the requested records "could reasonably be expected to interfere with enforcement proceedings." As with the larger Law Enforcement Exemption, 7(A) is primarily concerned with opportunistic uses of FOIA by targets of investigations.

A record must meet two requirements to avoid disclosure under Exemption 7(A). First, the government must show that the record relates to an active or pending enforcement proceeding. Lifting a phrase directly from the Congressional Record of the 1974 FOIA amendments, courts have upheld the exemption when there is a "concrete prospect" that an investigation will lead to a law enforcement proceeding. Courts interpret the "prospect" through the general nature of the possible proceeding, not the specific circumstances of the case. This still requires agencies to specify the nature of pending proceedings. "Concrete prospects," however, appear to provide few

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58 John Doe Agency v. John Doe Corp., 493 U.S. 146, 156 (1989); see also supra note 48.
65 Mapother v. Dep't of Justice, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (finding that the court did not need to determine that a particular individual—in this case a former Austrian president—would likely initiate proceedings to deem such proceedings "reasonably anticipated").
temporal limitations. The D.C. Circuit took an expansive view in Juarez v. United States Department of Justice, finding that the government meets the first prong “so long as the investigation continues to gather evidence for a possible criminal case.” A possible implication of this interpretation is that the government may bar disclosure by holding an impending investigation open indefinitely. The limits of Juarez, however, have not been fully tested by lower courts.

Under the second prong of 7(A), the government must also demonstrate how disclosure could reasonably be expected to interfere with the specified law enforcement proceeding. Reasonable likelihood of interference is adequate; the government “need not establish that release of a particular document would actually interfere with an enforcement proceeding.” Courts have recognized two particular harms: where disclosure would reveal “the size, scope and direction of [the] investigation” or “allow for the destruction or alteration of relevant evidence, and the fabrication of fraudulent alibis.” The agency still must explain this harm to the court and make this demonstration “by more than [a] conclusory statement.”

2. Exemption 7(C): unwarranted invasion of personal privacy.

Assuming that the contested record was “compiled for law enforcement purposes,” Exemption 7(C) erects two additional textual requirements. First, the records must “reasonably be expected” to interfere with privacy. Second, this privacy interference must be “unwarranted.” Courts have interpreted this to mean that the costs of the invasion must outweigh the benefits of disclosure. Thus, federal courts engage in a balancing test before applying the exemption,

217, 229 (D.D.C. 2009) (holding that Mapother required that “proceedings must be more narrowly defined than” unspecified and ambiguous future proceedings).
67 518 F.3d 54 (D.C. Cir. 2008).
68 Id. at 59.
69 See, e.g., Dickerson v. U.S. Dept of Justice, 992 F.2d 1426 (6th Cir. 1993) (finding that the FBI investigation into the disappearance of Jimmy Hoffa was still open and there was a reasonable prospect of proceedings even though disputed documents had been collected fifteen years earlier).
70 Solar Sources, Inc. v. United States, 142 F.3d 1033, 1037 (7th Cir. 1998) (emphasis in original).
71 Boyd v. Criminal Div. of U.S. Dept of Justice, 475 F.3d 381, 386 (D.C. Cir. 2007).
74 Id.
weighing the public interest in disclosure against the privacy rights of the affected individual. As the analysis below demonstrates, courts perform this balancing test under a "presumption of legitimacy" for government conduct.

Textual comparisons of these components with other sections of FOIA demonstrate that Congress intended Exemption 7(C) to be relatively broad. Exemption 6 also protects privacy, covering "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Courts have found that two textual differences make the language of Exemption 7(C) broader than the language in Exemption 6, one difference for each textual component. First, while Exemption 6 specifies disclosures that "would constitute" an invasion of privacy, Exemption 7(C) refers to any disclosure that "could reasonably be expected to constitute" such an invasion. Second, while Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). These changes suggest that Congress wanted to ensure that agencies would face a lower burden in justifying nondisclosure under Exemption 7(C) than under Exemption 6.

Two Supreme Court cases deal extensively with Exemption 7(C). Because they offer key insights into categorical exemptions, they will be discussed at length in Part III. Here, however, it is important to identify several principles that apply to all litigation under this exemption. First, United States Department of Justice v. Reporters Committee For Freedom of Press establishes that citizens' right to know "what their government is up to" is the only cognizable public interest under FOIA. Thus, courts will only recognize a public interest if disclosure furthers the "central purpose" of FOIA by "shed[ding] light on an agency's performance of its statutory duties[.]" Any other interest is outside FOIA's scope.

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76 Id.
77 Compare 5 U.S.C. § 552(b)(7)(C), with § 552(b)(6).
79 Reporters Comm., 489 U.S. at 756.
80 Id.
81 HAMMITT ET AL., supra note 12, at 228.
84 Id. at 773.
85 Id.
86 Id.
When balancing the public and privacy interests, the Supreme Court established the governing two-prong test of Exemption 7(C) in *National Archives & Records Administration v. Favish.*  Under the first "sufficient reason" prong, the requester must identify a "significant" public interest beyond just disclosure for its own sake if disclosure implicates a privacy interest. Next, the requester is required to demonstrate that the information is "likely to advance" the identified public interest. If this interest is related to a claim that government officials acted improperly in performing their duties, the requester must produce "clear evidence" that would lead a reasonable person to believe that the alleged government malfeasance might have occurred. The court created a "presumption of legitimacy" for the government's official conduct, explaining that allegations of government misconduct are "easy to allege and hard to disprove." Although FOIA requesters generally do not need to state the reasons they want certain information, *Favish* eliminates this presumption once the agency cites Exemption 7(C).

### III. CATEGORICAL EXEMPTION PRINCIPLES

When interests implicated by exemptions are frequently present, entire classes of records can be categorically exempted from FOIA requests. The use of categorical exemptions allows courts to eschew the *in camera* and document-by-document review that typifies most FOIA proceedings. Typically, courts make such exemptions by determining that the qualities of a type of record will normally lead it to be covered by an existing exemption to the Freedom of Information statute. This section examines how courts have determined whether a particular document type may be categorically exempt under Exemption 7(A) or 7(C). Part IV then applies these principles to body-worn cameras.

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88 Id. at 172 (The Court declined to "attempt to define the reasons that will suffice" as a significant public interest.).
89 Id.
90 Id. at 173.
91 Id.
92 Id.
93 Id.
94 HAMMITT ET AL., supra note 12, at 9.
95 Id.
A. Exemption 7(A): Interference with Law Enforcement Proceedings

The Supreme Court first allowed agencies to categorically exempt records from FOIA's disclosure requirements in *NLRB v. Robbins Tire and Rubber Co.* There, a company charged with an unfair labor practice sought disclosure of the statements of witnesses the National Labor Relations Board (NLRB) intended to call at a hearing. The Court found that the exemption allowed the NLRB to withhold disclosure of all of the statements. In doing so, the Court refused to restrict agency determinations of “interference” to only case-by-case bases; instead, it found that Exemption 7(A) allowed agencies to make categorical distinctions across certain types of evidence that apply beyond the immediate case in which that distinction was made. In its analysis, the Court considered the text of the statute as well as specific facts in the case that rendered applying a categorical exemption appropriate.

First, the Court noted that the text of the law appears to allow agencies to make such generic determinations. Interestingly, its textual analysis attempts to distinguish 7(A)'s language from that of the other “subdivisions”:

There is a readily apparent difference between subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases – “a person,” “an unwarranted invasion,” “a confidential source” – and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about “enforcement proceedings,” it appears to contemplate that certain generic determinations might be made.

The Court did not believe legislative history precluded categorical exemptions either. Referencing again back to the 1974 amendments, the Court noted that Congress wanted to clarify that “material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.”

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86 Id. at 216.
87 Id. at 241.
88 Id. at 249.
89 Id. at 223–24.
90 Id. at 227 (quoting *FREEDOM OF INFORMATION ACT AND AMENDMENTS SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS* 333 (1975) (internal quotation marks
Eliminating "blanket exemptions" for investigatory files however, did not mean that generic determinations of likely interference for types of documents were also eliminated. The Court saw the two determinations as distinguishable, and that Congress had only barred the former.

Analyzing the facts, the Court identified a unique potential for witness intimidation in the context of NLRB unfair labor practice proceedings. Typically, witness statements would not be available until a witness actually testified. Thus, the Court determined that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an 'interference' with NLRB enforcement proceedings: that of giving a party litigant earlier and greater access to the Board's case than he otherwise would have."

Robbins Tire has since been applied to other law enforcement proceedings where courts have determined that disclosure of a functional category of documents would equate to giving litigants premature access to the government's evidence and strategy. The D.C. Circuit requires functionally-defined categories so that courts may assess how release of the documents would result in interference. For example, the court found that documents "identified only as teletypes, or airtels, or letters . . . provide no basis for a judicial assessment[]."

B. Exemption 7(C): Unwarranted Invasion of Personal Privacy

In Reporters Committee, the Supreme Court expanded its holding from Robbins Tire to establish the appropriateness of "categorical balancing" under Exemption 7(C). In this case, the Court found that the government may categorically deny FOIA requests for rap sheets.

\[\text{omitted})\]

101 Id. at 236.
102 Id. (The Court noted that "[a]lthough Congress could easily have required in so many words that the Government in each case show a particularized risk to its individual 'enforcement proceeding' it did not do so[]." (citation omitted).
103 Id. at 240.
104 Id. at 241.
105 Id.
106 See Bevis v. U.S. Dep't of State, 801 F.2d 1386, 1389–90 (D.C. Cir. 1986) (finding that the FBI "must define its categories functionally" before a court can determine if a generic determination is appropriate).
107 Id. at 1390.
108 Id. (internal quotation marks omitted).
110 Id. at 780.
Noting that individual distinctions can be disregarded when the balance of interests in a particular category characteristically tips in one direction, the Court explained that:

When the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of “what the Government is up to,” the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided.111

As a result, in such categories, “the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication should be avoided.”112 Although it cited Robbins Tire in support, the Court curiously skimmed over the part of Robbins Tire’s textual analysis that contrasted 7(C)’s singular tense with 7(A)’s plural tenses, which implied that categorical distinctions were only justified for 7(A).

1. Privacy interests are high in a law enforcement context.

Reporters Committee illustrates how courts establish privacy interests for categorical exemptions. Justice Stevens’s majority opinion specified that an individual’s privacy interest in restricting the disclosure of a rap sheet was “in avoiding disclosure of personal matters.”113 He rejected arguments that this privacy interest was minimal because the information collected on a rap sheet was publicly available elsewhere as individual pieces; Justice Stevens reasoned if the pieces of information “were ‘freely available,’ there would be no reason to invoke the FOIA to obtain access to [them].”114 The opinion bolstered this conclusion by pointing to congressional, state, and FBI policies specifically designed to limit disclosure of rap sheets.115

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111 Id. (internal citation omitted).
112 Id.
113 Id. at 762. The appellate court defined “rap sheets” as “FBI records on individuals whose fingerprints have been submitted to the FBI in connection with arrests and, in certain instances, employment, naturalization and military service.” Reporters Comm. For Freedom of the Press v. Dep’t of Justice, 816 F.2d 730, 732 n.2 (D.C. Cir. 1987).
114 Reporters Comm., 489 at 764.
115 Id. at 764–66; see also Gregory Nathaniel Wolfe, Comment, Smile for the Camera, the
Following this decision, courts have continually recognized the "strong [privacy] interest" of individuals, whether they be suspects, witnesses, or investigators, "in not being associated unwarrantedly with alleged criminal activity." 116 For example, in Fitzgibbon v. CIA, 117 the D.C. Circuit affirmed that individuals mentioned in an FBI investigatory file have a strong privacy interest in preventing disclosure. 118 The court found that "[i]t is surely beyond dispute that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." 119 As a result, courts continue to find that for those involved in law enforcement investigations, "the individual's privacy interest is quite clear." 120 Accordingly, courts have applied this logic to find categorical exemptions for autopsy photographs and mug shots. 121

Courts have also found that a privacy interest exists for government employees being investigated for improper conduct. Indeed, as the D.C. Circuit has indicated, "[government employees] do not surrender all rights to personal privacy when they accept a public appointment." 122 Indeed, courts typically find a strong privacy interest in documents pertaining to law enforcement officials. 123


116 Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting Stern v. FBI, 737 F.2d 84, 91–92 (D.C. Cir. 1984)); see also Neely v. FBI, 208 F.3d 461, 464–65 (4th Cir. 2000) (finding that FBI Special Agents and third-party suspects have “substantial interest[s] in the nondisclosure of their identities and their connection[s] to particular investigations”); Quiñon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996) (ruling that “[p]ersons involved in FBI investigations—even if they are not the subject of the investigation—have a substantial interest in seeing that their participation remains secret”).


118 Id. at 767.

119 Id. (quoting Branch v. FBI, 658 F. Supp. 204, 209 (D.D.C. 1987) (internal quotation marks omitted)).

120 Id.

121 World Publishing Co. v. U.S. Dep’t of Justice, 672 F.3d 825, 827 (10th Cir. 2012) (mug shots); Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1252–53 (10th Cir. 2011) (autopsy photographs). But see Detroit Free Press, Inc. v. U.S. Dep’t of Justice, 73 F.3d 93, 97 (6th Cir. 1996) (finding that no privacy interests are implicated by the release of mug shots in cases where the defendant has already appeared in court).


The D.C. Circuit in *SafeCard Services, Inc. v. SEC* \^{124} combined the reasoning behind the traditional recognition of the strong privacy interests inherent in law enforcement records with the holding of *Reporters Committee* to conclude that the categorical withholding of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C). \^{125} It introduced the “compelling evidence” test for evaluating the weight of the public interest in the exceptional case where a categorical exemption otherwise applied:

\[
\text{[U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to . . . enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant.} \^{126}
\]

Since the decision, two other circuits have adopted this compelling evidence test in approving categorical distinctions. \^{127}

2. Limited public interests make overcoming a privacy interest difficult.

Under *Reporters Committee*, the public interest recognized under FOIA is specifically limited to FOIA's “core purpose” of "shed[ding] light on an agency's performance of its statutory duties[]." \^{128} Whether an invasion of privacy is warranted depends on "the nature of the requested document and its relationship to the 'basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'" \^{129} Accordingly, information that does not reveal the operations and activities of the government does not satisfy the public interest requirement. \^{130}

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\^{124} 926 F.2d 1197 (D.C. Cir. 1991).

\^{125} See id. at 1206.

\^{126} Id. at 1205–06.

\^{127} See World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 831 n.1 (10th Cir. 2012) (adopting compelling evidence test in context of mug shot disclosure); Neely v. FBI, 208 F.3d 461, 464–66 (4th Cir. 2000) (adopting compelling evidence as proper interpretation of *Reporters Committee*).


\^{129} Id. at 772 (citations omitted).

\^{130} Id. at 773.
Allegations of government misconduct must be substantiated in order to establish a sufficient public interest. Unsubstantiated allegations of official misconduct are insufficient to establish a public interest in disclosure; Favish made it clear that "bare suspicion" of misconduct is inadequate and that a requester must produce evidence that would be credible in the eyes of a reasonable person. Thus when public official misconduct is the justification for disclosure, the requester must make a "meaningful evidentiary showing" in order to prove a sufficient public interest.

If a requester does identify a public interest that qualifies for consideration under Reporters Committee and Favish, the requester must also demonstrate that the public interest in disclosure is sufficiently compelling to, on balance, outweigh legitimate privacy interests. When this burden is met, courts have found that the balance tilts in favor of disclosure and that release of third-party information is justified. American Civil Liberties Union v. Department of Defense provides an example. There, the Second Circuit found that the production of photographs depicting prisoner abuse by government forces in Iraq and Afghanistan, once the court redacted identifying features to protect identities of the prisoners depicted, raised only minimal privacy concerns insufficient to allow the withholding of photographs under Exemption 7(C).

IV. CATEGORICAL EXEMPTIONS AND BODY-WORN CAMERAS

Having established the contours of FOIA, sections 7(A) and 7(C) of the Law Enforcement Exemption, and the categorical exemption framework, the remainder of this Comment applies the law to police body-worn camera videos. As the preceding section demonstrates, courts make categorical exemptions based on properties that are inherent in the contested record category—those that do not change based on the factual circumstances of any particular case. Accordingly, the Comment proceeds in two sections. Part IV.A demonstrates that state courts following FOIA precedent would be hesitant to make police body-worn cameras categorically exempt. Next, Part IV.B concludes that examining the applicability of exemptions to

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132 Id.
133 Id. at 175.
134 543 F.3d 59 (2d Cir. 2008), vacated on other grounds 558 U.S. 1042 (2009).
135 Id. at 86–87.
136 See supra Part I.
body-worn camera videos on a case-by-case basis strengthens their transparency benefits without unduly eroding personal privacy or the integrity of ongoing investigations.

The analysis below contains two assumptions. First, it assumes that body-worn camera videos qualify as public records. Second, it assumes that these videos satisfy the threshold requirement of Exemption 7: that the records are compiled for law enforcement purposes.137 There may be colorable arguments against this assumption if state laws have a more finely wrought framework for this requirement.138 A more in depth comparison, however, is outside the scope of this Comment’s focus on categorical exemptions.

A. State Courts that Follow FOIA Precedent Will Be Unlikely to Carve Out Categorical Exemptions for Police Body-worn Camera Videos

A court considering categorically exempting body-worn camera videos under federal FOIA precedent would have two prominent options under the Law Enforcement Exemption. To apply 7(A), the court must conclude that disclosing videos would reasonably interfere with ongoing investigations. To apply 7(C), the court must find that releasing body-worn camera videos categorically results in an unwarranted invasion of personal privacy. Examining the use and nature of body-worn cameras, however, indicates that neither of these requirements can be categorically satisfied.

1. A video’s potential to interfere with an ongoing investigation under 7(A) varies with the factual circumstances of a particular case.

Unlike their treatment of 7(C), case law and Congress have provided relatively consistent justifications for the use of 7(A). The exemption is consistently applied to prevent litigants from gaining premature access to records that would expose and undermine the extent of the government’s investigation.139 This creates the two-prong test: (1) identifying an ongoing investigation and (2) establishing a reasonable likelihood of interference with that proceeding.140

137 Pratt v. Webster, 673 F.2d 408, 421–22 (D.C. Cir. 1987).
138 See, e.g., N. J. Media Grp., Inc. v. Twp. of Lyndhurst, 116 A.3d 570, 591–92 (N.J. Super. Ct. App. Div. 2015) (finding that dashboard camera recordings were “not required by law to be made” and were therefore not considered to be made for law enforcement purposes under state law).
139 See supra Part II.C.
140 Id.
The majority of commentators envision the use of body-worn camera videos in the context of individual police encounters (as opposed to investigations of systematic police misconduct).\footnote{See, e.g., Fanny Coudert et al., Body-Worn Cameras for Police Accountability: Opportunities and Risks, 31 COMPUTER L. & SEC. REV. 749, 750–54 (2015); Wesley G. Jennings et al., Cops and Cameras: Officer Perceptions of the Use of Body-Worn Cameras in Law Enforcement, 42 J. CRIM. JUST. 549, 550 (2015).} One can imagine the scene: An officer or a group of officers attempts to make an arrest. In the process of making the arrest, the arrestee is injured or killed. The family members allege police brutality, while the officers claim their actions are justified.\footnote{See, e.g., Al Baker et. al., Beyond the Chokehold: The Path to Eric Garner’s Death, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0 [https://perma.cc/T8FB-4E2Y] (“Officer Pantaleo testified to trying a takedown move during the arrest and said he began holding Mr. Garner’s neck out of fear that they would both crash through a glass storefront.”).} In this context, the first prong of the 7(A) test is likely to be satisfied. Police departments will begin an official investigation, either into the conduct of the officer or the arrestee. Either creates an ongoing investigation with a “concrete prospect” of a law enforcement proceeding.\footnote{See Carson v. U.S. Dep’t of Justice, 631 F.2d 1008, 1018 (D.C. Cir.1980); see also Statement of Sen. Hart, supra note 50.} The key question, therefore, is whether the public release of the officer’s body-worn camera video, if part of a functional category, is reasonably likely to interfere with these proceedings.

\textit{a. “Body-worn camera videos” is not a functional category}

As explained in Part III, the First, Fourth, and D.C. Circuits require that agencies seeking to exempt a category of investigatory material must functionally define their categories.\footnote{See supra Part IV.A.2.} A functional definition allows the court to analyze whether the alleged harm of disclosure is reasonably likely to occur.\footnote{Bevis v. Dep’t of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986).} \textit{Bevis} demonstrates the distinction.\footnote{Id. at 1390.} In this case, the FBI described some files as “the identities of possible witnesses and informants,” and “reports on the location and viability of potential evidence.”\footnote{Id.} The D.C. Circuit accepted these descriptions as functional. In rejecting other descriptions such as “letters,” the court stated that such nominal descriptions “provide no basis for a judicial assessment of the FBI’s assertions” of interference.\footnote{Id.}
A police department faces the same critique in attempting to categorically shield “body-worn camera videos” from disclosure. Such a description does not indicate what is depicted on the video. It does not allow the court to determine how the videos may reasonably interfere with the ongoing investigation.149 Without a more functional explanation of the context of the video, the court’s analysis is nearly impossible to undertake.150

While not all courts have explicitly adopted this functionality requirement, it carries significant weight. First, appellate courts give the D.C. Circuit’s FOIA jurisprudence is particular weight, in part due to its near-monopoly over administrative law cases.151 Second, the requirement has never been explicitly rejected. Therefore, any court following FOIA precedent is likely to follow this functional category requirement.

b. The subject of an individual investigation will likely be aware of the information and evidence contained in the video

Upon analyzing FOIA precedent, a police department will provide a functional description in their attempt to block the disclosure of body-worn camera videos. A possible description would be “All Police Body-Worn Camera Videos of Officer A’s Encounter with John Doe on 1/1/2016.”

With this description, proponents of categorical disclosure will attempt to analogize between the likely dynamic of body-worn camera litigation under Exemption 7(A) and that of other requests that courts have deemed to reasonably interfere with law enforcement proceedings. Simple comparisons between the witness statements in Robbins Tire and potential videos reveal several similarities. Both represent key evidence in relevant proceedings. Both will likely play significant roles in the defense and prosecution’s cases.

However, a key difference is that subjects of investigations would likely already be aware of the videos’ contents. The witness interviews in NLRB investigations always have the same potential for interference with law enforcement.152 There, defendants did not know the identities of witnesses, nor did they know the content of their statements.153 This

149 In re Dept of Justice, 999 F.2d 1302, 1310 (8th Cir. 1993).
150 Id.
153 Id.
information would only be disclosed at the relevant NLRB hearing.\textsuperscript{154} In contrast, the body-worn camera video captures an event of which both parties would be aware, since they are the very subjects of the video. Perspectives of the content’s implications may differ, and the specifics of a party’s narrative may depend on the clarity of the video’s depiction.\textsuperscript{155} But this is not equivalent to the wholesale discovery of opposing witnesses that would have occurred in \textit{Robbins Tire}. Moreover, both parties would also likely know the video itself exists, as police departments typically publicize their use of body-worn cameras.\textsuperscript{156}

When both parties are aware of the existence and content of requested documents, the likelihood of interference understandably decreases. The court in \textit{Campbell v. United States Department of Health and Human Services}\textsuperscript{157} recognized this. In directing the district court to “conduct a more particularized and focused review” of documents the government attempted to be categorically exempted under section 7(A), the court noted that the potential investigatory target already had access to the requested information.\textsuperscript{158} Under similar reasoning, the court in \textit{Coastal States Gas Corp. v. United States Department of Energy}\textsuperscript{159} rejected a government claim that regional energy review opinions were exempted under 7(A).\textsuperscript{160} Because such reviews were already shared with the investigatory targets over the course of routine regulation, it was “unlikely they would contain anything which is not already known[.]”\textsuperscript{161} As a result, the prospect of interference was equally unlikely.\textsuperscript{162} Each of these courts cited the 1974 amendments when they rejected categorical exemptions, noting that Congress

\textsuperscript{154} Id.

\textsuperscript{155} See, e.g., Scott \textit{v. Harris}, 550 U.S. 372 (2007) (holding that a dashboard camera video depicting a police car tapping the rear bumper of a fleeing suspect’s car and the resulting crash did not provide sufficient support to the plaintiff’s \textsection{} 1983 to survive a summary judgment dismissal, reversing a lower court).

\textsuperscript{156} See, e.g., Kevin Rector, \textit{Baltimore Officers on Body Camera Pilot: ‘When Can We Get These Back?’}, BALT. SUN (Dec. 21, 2015, 8:28 PM), http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-body-camera-update-20151221-story.html [https://perma.cc/EG9D-M8EV] (reporting that Baltimore Police Officers were making a public effort to expand the availability of body cameras).

\textsuperscript{157} 682 F.2d 256 (D.C. Cir. 1982).

\textsuperscript{158} Id. at 265.

\textsuperscript{159} 617 F.2d 854 (D.C. Cir. 1980).

\textsuperscript{160} Id. at 870.

\textsuperscript{161} Id.

\textsuperscript{162} Id.
crafted the language to prevent premature discovery by targets of criminal cases.\textsuperscript{163}

There may be select cases where a party is unaware of its presence on a body-worn camera video. In such circumstances, courts should be justifiably concerned with interference in the investigation. However, this is not likely to be the norm. There will undoubtedly be cases where both the police officer and the arrestee are aware of the videotape and its content, lowering FOIA's value as a preemptive discovery tool. Therefore, when applied to body-worn cameras, this precedent similarly tips the balance away from invoking the categorical exemption under 7(A).

\begin{quote}
c. The police department would likely still be able to "shape and control" immediate and future investigations
\end{quote}

Proponents of categorical exemptions may seek to expand the scope of harms relevant under 7(A) beyond that of the record's corresponding investigation. They may try to argue the record's release will interfere with other or future investigations. In doing so, they would cite cases like \textit{J.P Stevens & Co. v. Perry}.\textsuperscript{164} There, the Fourth Circuit found that the diminished ability to "shape and control investigations" along with a greater difficulty to perform "future investigations" were cognizable harms.\textsuperscript{165} Even assuming that these "future investigations" were concrete enough to satisfy 7(A)'s first requirement, however, police departments would still need to establish that body-worn camera videos would interfere with these investigations on a categorical basis.

Those who seek to limit access to body-worn camera videos routinely contend that the increased publicity associated with disclosure of a controversial police interaction would create a ripple effect of interference across future investigations.\textsuperscript{166} However, courts have viewed unspecified or general claims of harm resulting from increased publicity skeptically, suggesting that they are outside the scope of 7(A)'s cognizable harms. \textit{Goldschmidt v. United States Department of Agriculture}\textsuperscript{167} is instructive. There, the court emphasized that the scope of 7(A)'s harm is explicitly limited to the

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\textsuperscript{163} See id.; Campbell, 682 F.2d at 261--62.  \\
\textsuperscript{164} 710 F.2d 136 (4th Cir. 1983).  \\
\textsuperscript{165} Id. at 143.  \\
\end{flushright}
prospective interference with the law enforcement proceedings.\footnote{Id. at 276.} “Congress never intended 7(A) to be so broad as to prohibit disclosure where, as here, publicity surrounding an establishment’s violations ‘interferes’ with enforcement by embarrassing” parties involved with the investigation.\footnote{Id. at 277–78.} Otherwise, the exemption would be too broad; “it is difficult to imagine a situation in which publicity surrounding an investigation might not have some detrimental effect on the target’s behavior or attitude.”\footnote{Id. at 278.}

At select times, increased publicity could lead to interference with the investigation to which the record pertains—exposing a long-term covert investigation is one example. But this would properly be assessed through an ad hoc review in select circumstances. A court would be unlikely to find that the release of any body-worn camera video would result in interference. Therefore, a categorical exemption is inappropriate.

2. Despite strong privacy interests asserted in body-worn camera videos, public interests can still meet 7(C)’s strict requirements.

A court seeking to apply Exemption 7(C) follows the tripartite framework established by Reporters Committee and Favish: (1) identify the nature and extent of the privacy rights affected by disclosure, (2) identify the nature and extent of the public interests in disclosure, and (3) weigh the competing interests against each other to determine if disclosure would cause an “unwarranted” invasion of privacy.\footnote{See supra Part III.B.2.} Even with the standards that limit relevant public interests and the broad applicability of 7(C), requests for body-worn camera videos should be able to avoid being categorically exempt from disclosure under FOIA.

\textit{a. Privacy interests}

Courts are likely to identify strong privacy interests in body-worn camera videos. Two different groups will likely have such interests: the police and those interacting with the police. Additional parties inadvertently captured on these videos can likely be redacted to protect their privacy.\footnote{See Am. Civil Liberties Union v. Dep’t of Defense, 543 F.3d 59 (2d Cir. 2008), vacated on other grounds 558 U.S. 1042 (2009) (finding that redacted photographs raised only minimal...}
Courts typically find strong privacy interests for all parties involved in a criminal investigation. The core of Reporters Comm.'s privacy analysis concluded that individuals have an "interest in avoiding disclosure of personal matters[.]" Logically then, "individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity." Courts recognize that such allegations carry with them the threat of harassment and personal embarrassment. This explains the strong privacy interests in rap sheets, mug shots, and autopsy photographs. Indeed, each of these examples offers strong parallels to videos produced by police-worn body cameras. First, body-worn cameras have captured individuals in highly contentious and controversial actions with police. Private individuals face public scrutiny after any interaction with the police. Second, for the police officers themselves, allegations of misconduct will likely bring equal—if not more—public scrutiny.

One could attempt to distinguish body-worn cameras from these other records because there is no direct indication of an individual's name in a video. For example, the rap sheets in Reporters Comm. and the mug shots in *Karantsalis* each came with the individual's name appended to the document in question. One could argue that without the name as identifying information, the individuals on the video could not be "associated" with alleged criminal activity. But this difference is superficial and temporary at best. Most videos are part of a larger story privacy concerns); see also Mike Carter, *YouTube Channel Showcases Seattle Police Videos*, SEATTLE TIMES (Feb. 25, 2015, 1:59 PM), http://www.seattletimes.com/seattle-news/spd-to-launch-youtube-channel-to-showcase-police-videos/ [https://perma.cc/HS66-MRZN] (reporting that the Seattle Police Department is developing source code to automatically redact body-worn camera video footage).


175 See, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 765–67 (D.C. Cir. 1990); Abramson v. FBI, 566 F. Supp. 1371, 1375 (D.D.C. 1983) (public disclosure of the fact that an individual was investigated by the FBI brings with it the threat of personal embarrassment).

176 See Reporters Comm., 489 U.S. at 780 (rap sheets); World Publishing Co. v. U.S. Dep't of Justice, 672 F.3d 825, 827 (10th Cir. 2012) (mug shots); Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1252–53 (10th Cir. 2011) (autopsy photographs); *Karantsalis* v. U.S. Dep't of Justice, 635 F.3d 497, 504 (11th Cir. 2011) (mug shots).

177 Divine et al., supra note 18, at 7.


180 See Reporters Comm., 489 U.S. at 780; *Karantsalis*, 635 F.3d at 503.
that has already captured the public’s attention when released.\textsuperscript{181} Therefore, the public would likely know who was depicted in the video, just as in \textit{Favish} when requesters knew the identity of the victim in the crime scene photographs.\textsuperscript{182} Moreover, even if the public did not already know the identities of the recorded parties, this would not be the case for long. For example, communities of Internet users have successfully identified subjects of videos via crowdsourcing.\textsuperscript{183} The spread of facial recognition technology also reduces any hope for maintaining anonymity.\textsuperscript{184}

Still, it is not clear which way this cuts. One could argue that if the identity of the officer, or the arrestee, is already known to the public as a result of other authorized disclosure methods, it decreases any privacy interest associated with the release of the video.\textsuperscript{185} But this underestimates the very nature of body-worn cameras. Part of the reason they are so widely supported is that they are a particularly vivid record.\textsuperscript{186} They offer a raw depiction of any police interaction. More than merely a name on a page, the video captures the act itself. Courts have recognized that an audio recording is more invasive to privacy interests than the transcript of the same conversation.\textsuperscript{187} It is not difficult to extend this logic to body-worn camera videos, even when the

\textsuperscript{181} See Kindy, supra note 11.


\textsuperscript{184} See Bryce Clayton Newell, \textit{Crossing Lenses: Policing’s New Visibility and the Role of “Smartphone Journalism” as a Form of Freedom-Preserving Reciprocal Surveillance}, 2014 U. ILL. J.L. TECH. \& POL’Y 59, 90 (“[T]he increasing effectiveness of facial recognition software . . . means that simply recording an image of a person [on a police body-worn camera] can lead to further identification.”).

\textsuperscript{185} See Schmerler v. FBI, 696 F. Supp. 717, 725 (D.D.C. 1988) (holding that the names of FBI agents involved in a murder investigation could not be withheld when their involvement had been fully revealed by authorized disclosures), \textit{rev’d on other grounds} 900 F.2d 333 (D.C. Cir 1990) (finding the material was exempt under the 7(D) exemption and not addressing 7(C) arguments). \textit{But see} Bast v. U.S. Dep’t of Justice, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (finding that mere previous publicity in popular media cannot compel release).


\textsuperscript{187} See N.Y. Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990).
identities of the parties and allegations of the interaction are already known. Therefore, a court should identify a strong privacy interest.

One might think that the victims of police misconduct would favor the disclosure of the videos documenting their encounters with the police. However, only the government can raise these interests in the context of FOIA litigation. As a result, the victim’s privacy interests will still likely play large roles in any litigation that arises. Favish’s determination that FOIA-related privacy interests include the surviving family members of deceased subjects of a FOIA request could lead to an interesting dynamic and provide the government more opportunity to claim the existence of a privacy interest. Videos of police encounters, particularly where an individual is injured or killed, can be extremely graphic. A court, therefore, would identify a privacy interest similar to that identified in Favish, where the family of the deceased had a privacy interest in the graphic nature of suicide photos.

b. Public interest

Although there are strong privacy interests inherent in body-worn camera videos, these are not insurmountable under the 7(C) balancing test. The criminal context does not preclude public interests from outweighing the privacy interests of both law enforcement agents and victims of crime. Here, courts will recognize that the release of body-worn camera footage provides a particularly powerful public interest.

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188 But see Gaynor Hall, Laquan McDonald’s Family Does Not Want Police Shooting Video Released, WGN TV (Nov. 20, 2015, 9:56 PM), http://wgn.tv.com/2015/11/20/laquan-mcdonalds-family-does-not-want-police-shooting-video-released [https://perma.cc/QQK7-TVPD] (reporting that the family of Chicago police shooting victim Laquan McDonald “[did] not want the video released because it would be too painful for their family and the community to watch over and over again”).

189 See Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (holding that “FOIA is purely a disclosure statute and affords . . . no private right of action to enjoin agency disclosure”).


192 Favish, 541 U.S. at 160.

193 See, e.g., Butler v. Dep’t of Justice, No. 86-2255, 1994 WL 55621, at *5 (D.D.C. Feb. 3, 1994) (noting that the strong public interest in seeing that due process rights are respected overwhelms the reduced privacy interests of FBI agents as public officials).
i. Police videos meet the “core purpose” test because they depict “what the government is up to.”

The biggest barrier to disclosure under 7(C) has been the “core purpose” test’s restriction of qualifying public interests.194 Moreover, since Favish, courts define the public interest that can be balanced against any privacy interest in the challenged records even more narrowly; it must specifically relate to the alleged government misconduct.195

A video of any police interaction, however, is an actual depiction of “what [the] government’s up to.”196 This differs greatly from the context of Reporters Committee, where the disclosure request for an individual’s rap sheet “seeks no official information about a Government agency, but merely records [what] the Government happens to be storing.”197 The same critique can be applied to mug shots and autopsy photographs. Conversely, body-worn camera videos would depict “official action” of the police department.198

In the context of alleged law enforcement violations, moreover, courts have been particularly favorable to finding a strong public interest in allegations of police misconduct. In Outlaw v. Department of Army,199 the court ruled that Exemption 7(C) did not permit withholding allegedly exculpatory photographs of a murder victim from a requester who was convicted by court martial twenty-five years earlier.200 The court found that the “privacy interest is outweighed by the public interest in the contribution to the administration of justice by the Army that disclosure could effect [sic].”201 “The public interest in seeing that [the plaintiff’s] due process rights are protected in his criminal case is significant.”202 Given the numerous high-profile examples of video evidence contradicting official police accounts of shootings, courts are likely to find such a public interest in body-worn camera videos.203

195 Favish, 541 U.S. at 175.
197 Id. at 780 (internal citation omitted).
198 Id. at 780.
200 Id. at 506.
201 Id.
203 See, e.g., John Kass, The Video That Might Rip Chicago Apart—And Why You Need To See
ii. Requests to disclose videos would be supported by evidence that overcomes the "presumption of legitimacy."

Even if this public interest is related to a claim that government officials acted improperly in performing their duties, the requester must produce "clear evidence" that would lead a "reasonable person" to believe that the alleged government malfeasance might have occurred. A court following the D.C. Circuit's compelling evidence test could erect an even higher barrier to disclosure. Together these create a Favish presumption of legitimacy in agency actions.

Nevertheless, body-worn camera videos would often meet each of these tests. Typically, there is a specific reason or controversy that prompts interest in a specific police interaction. And usually this specific interaction comes with additional evidence that suggests possible misconduct—property damage, bodily injury, or specific allegations from witnesses. This will certainly be more than "bare suspicion" of misconduct. Accordingly, courts will determine that body-worn camera videos both (1) relate to FOIA's "core purpose" of uncovering government activity; and (2) could be accompanied by "compelling evidence" that government malfeasance may have occurred. Because this meets SafeCard's requirements, it cuts against categorically exempting such videos from disclosure.

Police departments might still argue that the release of other information that sheds light on the video's content reduces the public interest in the release of the video itself. Thus, law enforcement would contend that courts should defer to the "presumption of

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206 Favish, 541 U.S. at 174.
207 Divine et al., supra note 18, at 3.
208 See, e.g., Police Cam Footage Released supra note 191.
209 Favish, 541 U.S. at 174.
210 See Martin E. Halstuk, When Is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court's "Sufficient Reason" and "Presumption of Legitimacy" Standards, 16 U. Fla. J.L. & PUB. POL'Y 361, 394–95 (2005) (noting that "[T]he government can argue that an asserted public interest has been served, or diminished, if an agency has already released a large amount of information in response to a request.")
legitimacy,” and find that the balance categorically tips against disclosure. After examining the privacy interests of police officers, however, this argument has already been addressed. Video disclosure implicates greater public interests than textual descriptions for similar reasons that video disclosure implicates greater privacy interests than textual descriptions—its clarity sets it apart. Moreover, in a public interest context, these arguments may be stronger. The videos provide the more detailed depiction of “what the government is up to,” and thus directly relate to FOIA’s core public interest.

It is important to note that while this might be encouraging for the prospect of disclosing specific body-worn camera videos, its logic might not necessarily apply equally to larger scale requests. For example, larger investigations into department-wide misconduct might not have that same “substantiated allegation” of misconduct. Thus, this cuts against the potential prospect of using police-worn body camera videos as part of more exploratory efforts into police misconduct. Still, this concern is not enough to exempt body-worn cameras categorically. Requests for body-worn camera videos of discrete police encounters could reasonably serve a substantial public interest, suggesting that categorical exemptions under 7(C) are inappropriate.

B. Ad Hoc and In Camera Reviews Support the Public Interests of Disclosure Without Eroding the Valid Interests the Law Enforcement Exemption Protects

In addition to the precedent supporting an ad hoc, case-by-case analysis of body-worn camera videos, there are several normative benefits that courts would lose if they categorically applied either Exemption 7(A) or 7(C) to police body-worn camera videos. Primarily, body-worn camera videos provide minimal public benefit if not available for public viewing. But ad hoc reviews would also both increase the credibility of the videos and more closely follow the spirit of FOIA exemptions and amendments.

211 Favish, 541 U.S. at 174.
212 See Part IV.A.2.a, supra at 127.
213 Id.
214 Cameron T. Norris, Your Right to Look Like an Ugly Criminal: Resolving the Circuit Split over Mug Shots and the Freedom of Information Act, 66 VAND. L. REV. 1573, 1596 (2013) (noting that large-scale investigations are often frivolous or tangential to valid concerns).
1. Body-worn cameras serve little public purpose unless their footage is available to the public.

Most categories of public records serve legitimate purposes regardless of whether they are disclosed to the public at large.215 This is evident even in a law enforcement context. Investigatory material, rap sheets, and crime scene photos all serve key roles in law enforcement's investigatory process. Police body-worn cameras, however, lose much of their public purpose unless they are reasonably available to the public at large. If one accepts that a main purpose of body-worn cameras is “to strengthen officer performance... and to enhance agency transparency[,]”216 then it is incongruous to categorically exempt them from disclosure.

Some could respond that even if disclosure is solely at the discretion of the police, body-worn cameras still serve a valid purpose “in impro[v]ing evidence collection.”217 For example, they could simply serve as evidentiary material, like any other security or dashboard camera.218 There are two problems with this. First, if body-worn cameras are only used for evidentiary purposes, it likely increases the critique that body-worn cameras are simply a part of a mass surveillance system.219 Second, most justifications for body-worn cameras focus on their transparency benefits. Attorney General Loretta Lynch declared that “[b]ody-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve[.]”220 In announcing that all Metropolitan Police officers would wear body-worn cameras, Washington, D.C. Mayor Muriel Bowser claimed that “[t]hey increase accountability among all parties involved.”221 These are only two examples of the near-identical language with which elected officials describe body-worn cameras. At least in their public justifications, policy makers do not intend body-worn cameras to serve merely evidentiary purposes. If categorical exemptions are applied to body-worn cameras, however, that will be their only function.

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215 Divine et al., supra note 18, at 6.
216 See PRESIDENT’S TASK FORCE, supra note 10, at 31.
217 Id.
218 Id.
219 Stanley, supra note 17.
220 Berman, supra note 8.
2. Ad hoc reviews increase the credibility of body-worn cameras as a resource.

Much of the justification for police body-worn cameras focuses on their use in police brutality cases. While they certainly can be used to strengthen a claim against the police for unnecessary use of force, they can just as well do the opposite. Among cases where parties use videotape evidence, the officers were exonerated ninety-three percent of the time. Therefore, the use of body-worn cameras can be helpful in generally determining the validity of complaints as well.

If police wish to take advantage of the evidentiary benefits that body-worn cameras provide, however, they cannot be generally exempt from public disclosure. As several commentators have noted, “[i]f the body cam footage is available to the public through straightforward procedures, then police will be shielded from claims that the footage they use defensively is deceptively edited or otherwise without context.” Categorically exempting body-worn cameras would create a regime governed by police discretion. Any oversight method in the hands of those it is supposed to oversee would likely lose credibility.

3. Ad hoc reviews are an opportunity for courts to return to the legislative spirit of the FOIA amendments.

The legislative history of the Law Enforcement Exemption offers some support that agencies should make case-by-case determinations when applying the law enforcement exemption. Prior to the 1974 amendments, Exemption 7 formerly referred to investigatory “files,” rather than “records.” From that language, courts “had permitted Exemption 7 to be applied whenever an agency could show that the document sought was an investigatory file compiled for law enforcement purposes.” Concerned “that agencies would use that rule

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225 Divine et al., supra note 18, at 8.

226 Id.

227 Divine et al., supra note 18, at 8.

228 Id.
to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for all the contents," Congress changed the word "files" to "records."\textsuperscript{229} As a result, Exemption 7 requires the agency to demonstrate that a particular record—not simply its overall file—was "compiled for law enforcement purposes."\textsuperscript{230}

Commentators have argued that categorical exemptions clash with the seemingly individualistic focus of the 1974 amendments, along with FOIA's overall presumption of disclosure.\textsuperscript{231} While the Supreme Court has found otherwise, this does not mean that all records should have a presumption of being categorically exempt. On the contrary, courts should still consider this legislative intent within the standards of categorical exemptions. As Part IV.A demonstrates, precedent suggests that body-worn camera videos should not be categorically exempt.\textsuperscript{232} With this in mind, reverting to the original legislative intent additionally supports rejecting the application of categorical exemptions for body-worn cameras.

V. CONCLUSION

When a state decides to statutorily exempt body-worn camera videos from the state's public records law, the legislature makes two implicit assumptions. First, it assumes that FOIA precedent does not support a judicial categorical exemption of police body-worn camera videos. Second, it assumes that a categorical exemption is needed to protect recognized state interests. As this Comment's analysis demonstrates—using the federal model as an example—this legislature is correct in its first assumption but wrong in the second.

It is first correct that existing FOIA precedent alone provides little support for applying categorical exemptions to police body-worn cameras. Categorical exemptions are a form of shorthand analysis, applied when interests favoring disclosure are at their nadir and the possibilities of interference and privacy violations are at their apex. Body-worn camera videos do not present such a balance of interests. In particular, the ability of body-worn cameras to literally show "what the

\textsuperscript{229} Id.
\textsuperscript{230} Id.; see also Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1059–60 (3d Cir. 1995) ("[T]here can be no question that the 7(C) balancing test must be conducted with regard to each document, because the privacy interest and the interest of the public in disclosure may vary from document to document."); Campbell v. U.S. Dep't of Justice, 193 F. Supp. 2d 29, 38 (D.D.C. 2001) (finding that "[T]he FBI relied on an untenable position that once an investigation is justified, all documents related to that investigation are eligible for exemption from FOIA.").
\textsuperscript{231} See Halstuk & Davis, The Public Interest Be Damned, supra note 31, at 1002.
\textsuperscript{232} See supra Part IV.A.
government is up to” creates a strong public interest favoring their disclosure. While the analysis demonstrates that Favish, Reporters Committee, and Robbins Tire have each gradually expanded the “narrow” reach of FOIA’s Law Enforcement Exemption, applying categorical exemptions to body-worn camera videos is still outside this reach.

The legislature errs, however, in its assumption that an ad hoc analysis precludes the protection of legitimate state interests. The ad hoc application of the Law Enforcement Exemption is a fact-intensive analysis. There can be reasonable justifications for withholding body-worn camera videos. And when those circumstances arise, courts can effectively apply Exemptions 7(A) or 7(C) through an appropriate ad hoc review of the videos’ content. Public availability of the videos certainly is consistent with the desire to increase police transparency and public accountability. But the fulfillment of these goals is not paired with the complete abdication of privacy interests and the integrity of law enforcement investigations. State legislatures should recognize that these would still likely be accepted under existing freedom of information frameworks. Transparency advocates should make this clear. Otherwise, states may be prone to follow South Carolina’s example and inappropriately expand categorical exemptions.

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233 See supra Part IV.A.2.b.

234 Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973) (noting that courts have “repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide maximum access”).

235 See supra Part IV.B.1.