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Barring Access to the Truth: North Carolina's Limiting Approach to Police Body-Camera Footage

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Barring Access to the Truth: North Carolina's Limiting Approach to Police Body-Camera Footage

ABSTRACT

Police body-cameras are innovative, truth-detecting tools. When it comes to controversial citizen-law enforcement interactions, they can depict an accurate portrayal of the events. No speculation, no controversy—just the truth. And with the truth, the existing tension between law enforcement officials and the general populace can begin to ease. Although these body-cameras are widely used, states such as North Carolina have enacted legislation that severely restricts access to such footage.

North Carolina General Statutes section 132-1.4A does two things. First, it requires individuals captured in footage to seek judicial approval for the disclosure or release of footage. Second, it completely bars access to footage for all other members of the public. Restricting access under section 132-1.4A creates incredible uncertainty as to how the statute interacts with North Carolina's discovery rules. It also stalls public policy goals aimed at easing the tension between law enforcement officers and the public.

To address these concerns, section 132-1.4A must be amended to reflect a more moderate piece of legislation. General disclosure should be the norm in the absence of a few limited exceptions. If no exception applies, the burden must be placed on law enforcement agencies to prove why disclosure should not be permitted. This proposal embodies the purpose behind the initial implementation and utilization of police body-cameras—to provide access to the truth.

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INTRODUCTION

Police body-worn cameras are increasingly being utilized as tools for depicting clear and accurate accounts of citizen-law enforcement interactions.¹ Although body-camera use has been expanded, corresponding legislation by a number of states has circumscribed the public's access to captured footage.² In 2016, North Carolina adopted its own version of restrictive legislation.³ North Carolina General Statutes section 132-1.4A not only fails to recognize police body-camera footage as a public record—it goes one step further by creating a presumption of nondisclosure for individuals who are captured in footage.⁴ These individuals are required to maneuver through a procedural process where law enforcement agencies and courts consider disclosure or release requests by balancing a number of factors.⁵

By creating a presumption of nondisclosure, section 132-1.4A effectively opposes the principle of presumptive discoverability provided

1. Press Release, U.S. Dep't of Justice, Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://perma.cc/U3ZP-ACDT>.

2. *See infra* Part I.A.

3. Lauren Horsch, *It's Now Up to Judges to Release Police Body Cam Footage. Here's How That's Going*, NEWS & OBSERVER (Mar. 9, 2018 2:15 PM), <https://perma.cc/397J-LKLD>.

4. N.C. GEN. STAT. § 132-1.4A (2017); *see infra* Part I.B.

5. *See infra* Part I.B.

under the North Carolina Rules of Civil Procedure (NCRCP).⁶ The newly enacted statute undermines this presumption by impermissibly shifting the burden to individuals seeking the footage to show that it should be disclosed for discovery purposes.⁷ On the other hand, there is no language within the NCRCP explicitly stating or indicating that police body-camera footage constitutes a unique exception to presumptive discoverability. Under those rules alone, the burden would be placed on the law enforcement agency, tasking them with the challenge of showing why the footage should not be disclosed. Accordingly, we have some uncertainty as to which law applies when an individual decides to seek access to the footage during the typical discovery process of a lawsuit.⁸

Furthermore, section 132-1.4A will likely result in considerable damage to recent public policy efforts to subdue national strife in the arena of violent citizen and law enforcement interactions.⁹ The statute provides for a narrow list of individuals who are eligible to seek release and disclosure of footage on the condition of law enforcement or judicial approval.¹⁰ All other members of the public are barred from seeking such footage on their own initiative. The reality is simple—the circumstances under which police body-camera footage is released or disclosed are incredibly confined. This restrictive system is devoid of any public transparency, leaving limited avenues to ascertain the truth in controversial citizen-law enforcement interactions. The statute thwarts the key objectives of the body-camera initiative by limiting the public's ability to ascertain the truth, deter excessive police force, and provide justice when it is required.¹¹

This Comment explores the myriad of negative consequences associated with North Carolina General Statutes section 132-1.4A. Part I discusses the underlying goals of police body-worn cameras and the emergence of legislative efforts to circumscribe public access to created footage—including North Carolina's version in section 132-1.4A. Part II analyzes two possible issues arising from section 132-1.4A's enforcement: (1) opposition to discovery provisions under the NCRCP, and (2) counteraction of public policy goals in relation to police body-worn cameras. Part III proposes a solution to these problems by suggesting three amendments to North Carolina General Statutes section 132-1.4A that will

6. *See infra* Part II.A.

7. N.C. GEN. STAT. § 132-1.4A(d); *see infra* Part II.A.

8. *See infra* Part II.A.

9. *See infra* Part II.C.

10. N.C. GEN. STAT. § 132-1.4A(c).

11. *See infra* Part II.C.

collectively broaden access to police body-camera footage. These amendments would provide the following: (1) that the NCRCP apply if footage is sought during pending litigation by a civilian for the use of force by a law enforcement officer; (2) a new expedited process for civilians who are captured in body camera footage subjected to use of force that places the burden on law enforcement; and (3) new language providing that the burden lie with the law enforcement agency even when a general member of the public is requesting body-camera footage. Such changes are necessary to promote and ensure the underlying goals behind the use of these cameras, including public transparency, officer accountability, and an ultimate ease of the mounting tension amongst members of the public.

I. POLICE BODY-CAMERA FOOTAGE: PURPOSE AND EFFECT

This Part explores the various ways in which states have chosen to regulate public access to police body-camera footage. It analyzes the benefits and drawbacks of absolute disclosure versus absolute nondisclosure. The restrictive nature of North Carolina General Statutes section 132-1.4A is then viewed against the backdrop of the NCRP.

A. *The Emergence and Subsequent Regulation of Police Body-Worn Cameras*

America has been, and continues to be, plagued by countless instances of violent citizen-law enforcement interactions. On August 9, 2014, an unarmed Michael Brown was shot and killed by Officer Darren Wilson in Ferguson, Missouri.¹² Just two months later on October 20, 2014, Laquan McDonald was killed after being struck by sixteen bullets fired from the gun of Officer Jason Van Dyke in Chicago, Illinois.¹³ And in an incident that hits closer to home, on September 20, 2016, Keith Lamont Scott was shot and killed by Officer Brently Vinson in Charlotte, North Carolina.¹⁴ These are just a few of the many incidents where black citizens have had fatal encounters with law enforcement officials. Undertones of racial profiling and discrimination in relation to these shootings has led to

12. *Controversial Police Encounters Fast Facts*, CNN (last updated Jan. 21, 2019), <https://perma.cc/ZXF9-VGBS>.

13. *Id.*; Ray Sanchez, *Chicago Police Officer Jason Van Dyke Found Guilty of Second-Degree Murder in Laquan McDonald Killing*, CNN (last updated Oct. 6, 2018), <https://perma.cc/2QRC-ATVT>.

14. Ruby Durham, *Two Years Later: Keith Lamont Scott Shooting*, WCNC (Sept. 20, 2018 7:39 AM), <https://perma.cc/QJY7-E8EB>.

nationwide social movements spurred by feelings of bitterness and resentment towards law enforcement officials.¹⁵

Ensuing public outcry and mounting tensions have left public officials scrambling to uncover solutions with hopes of abating the conflict. One widely embraced solution has been the use of police body-cameras.¹⁶ This approach involves law enforcement officers and officials attaching a camera to their uniform, allowing all on-duty activities to be recorded—including any interactions with the public. The risk of uncertainty in police interactions is significantly diminished with the presence of actual footage. Not only does its presence help to serve justice when police misconduct occurs, it also acts as a preventative mechanism by deterring instances of future misconduct. Furthermore, the use of these cameras serves as a protective tool for law enforcement officials falsely accused of misconduct.¹⁷ Body cameras serve the interests of everyone involved.

Although the use of police body-worn cameras has vastly expanded, states vary tremendously in laws prescribing public access to such footage. As of 2016, twenty-one states have enacted statutory provisions addressing the public's access to such footage.¹⁸ These laws vary from state to state in scope of access and the extent of restrictive measures.¹⁹ Some states, such as California, Nevada, and Maryland classify police body-camera footage as a public record—leaving no exceptions that might bar disclosure.²⁰ Such laws guarantee that the public knows the truth. Unrestricted access ensures absolute transparency and accountability.

Conversely, Illinois, Alabama, and South Carolina completely prohibit public disclosure of such footage.²¹ In particular, section 12-21-3.1 of the Alabama Code provides that “[l]aw enforcement investigative reports, records, field notes, witness statements, and other investigative writings or

15. Vanessa Williamson, *New Data Show that Police Violence Predicts Black Lives Matter Protests*, BROOKINGS (May 17, 2018), <https://perma.cc/3A4M-FNP9> (discussing research addressing the strong correlation between police violence and Black Lives Matter (BLM) protests). “BLM protests were more likely to occur in localities where more black people have previously been killed by police.” *Id.*

16. *See, e.g.*, Press Release, U.S. Dep’t of Justice, *supra* note 1. As a part of its 2015 body-worn camera pilot program, the Federal Justice Department “awarded grants totaling more than \$23.2 million to 73 local . . . [law enforcement] agencies in 32 states to expand the use of body-worn cameras . . .” *Id.*

17. *See infra* Part II.B.

18. *States Impose Wildly Different Policies in Releasing Police Videos*, PEW (Oct. 11, 2016), <https://perma.cc/4895-339R>.

19. *Id.*

20. *See id.* Click on any given state on the map to see a short statement regarding that individual state’s approach to disclosing police body-camera footage.

21. *Id.*; ALA. CODE § 12-21-3.1 (1975).

recordings are privileged [c]ommunications protected from disclosure.”²² A number of underlying policy considerations justify limiting public access to police body-camera footage.²³ Lawmakers must consider the privacy rights of individuals captured in these videos. Police see people at the ““worst moments of their lives,”” making public inspection or acquisition of these incidents candidates for exploitation.²⁴ Additionally, broad-scale public disclosure of footage could impose a substantial burden upon law enforcement agencies.²⁵ Storing every piece of captured footage on top of processing countless disclosure requests, requires both time and resources that could be utilized elsewhere. Disclosure could also impede an officer’s ability to effectively perform his or her job. With the possibility of public disclosure, a witness may be less likely to cooperate with the police, thus failing to provide critical information.²⁶ In light of these considerations, it is understandable why some states might desire restricted access.²⁷

Absolute disclosure and absolute prohibition are polarizing views. While absolute disclosure promotes transparency and accountability, it fails to protect individual privacy or consider law enforcement efficiency. Conversely, absolute prohibition provides the opposite effect. It succeeds in protecting individual privacy interests while promoting law enforcement efficiency. However, transparency and accountability are not promoted—therefore failing to satisfy the purpose of body cameras. All in all, both polarizing approaches fail to consider the important interests provided for by the other opposing view.

The majority of states fall somewhere in between unrestricted disclosure and absolute nondisclosure.²⁸ Many fall on the more restrictive end of the spectrum when it comes to allowing access to footage—disclosure is limited under many circumstances).²⁹ However, other states take a more liberal approach to disclosure where the public has

22. ALA. CODE § 12-21-3.1(b) (emphasis added).

23. See Brian Liebman, Note, *The Watchman Blinded: Does the North Carolina Public Records Law Frustrate the Purpose of Police Body Worn Cameras?*, 94 N.C. L. REV. 344, 347 (2015).

24. *Id.* (quoting Matt Pearce, *Growing Use of Police Body Cameras Raises Privacy Concerns*, L.A. TIMES (Sept. 27, 2014 6:00 AM), <https://perma.cc/WS6G-X8JW>).

25. See *id.* (noting that body-cameras can “painstakingly document[]” police work); *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18 (stating that “storing footage is expensive”).

26. *Id.*

27. *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18 (expressing that 21 states have passed laws and “more could be on the way to locking down body camera footage”).

28. *Id.*

29. *Id.*

presumptive access, but defined exceptions exist that may prohibit disclosure.³⁰ For example, Missouri and Georgia legislatures have enacted laws granting public access to footage unless it is taken in a private place or shows victims.³¹ Additionally, Oklahoma passed a law providing for the general disclosure of body-cam footage except for recordings that include “nudity, children, criminal informants, victims of sex crimes or domestic violence and the personal information of innocent people.”³² General disclosure laws ensure that public access is permitted and allow for transparency between law enforcement and the public. However, the presence of certain exceptions mitigates the potential harmful effects of general disclosure—particularly with regard to concerns involving individual privacy and the efficiency of law enforcement agencies.

Furthermore, the American Civil Liberties Union (ACLU), a non-profit entity whose mission is “to vigorously defend individual freedoms,”³³ has drafted model legislation to strike a balance between public access and privacy.³⁴ The ACLU’s proposed law would “only require police to keep and release recordings that show use of force, result in a felony-level arrest or complaint, or have been requested by a law enforcement officer or subject of a video.”³⁵ The ACLU approach is therefore a more moderately crafted provision for disclosure purposes. On the other hand, North Carolina has veered to the more restrictive end of the spectrum through its creation of North Carolina General Statutes section 132-1.4A.

B. North Carolina’s Approach—North Carolina General Statutes Section 132-1.4A

Although it does not provide an absolute bar to disclosure, North Carolina’s law on body-camera footage still falls on the more restrictive end of the disclosure spectrum. North Carolina’s section 132-1.4A provides that police body-camera “[r]ecordings are not public records as defined by G.S. 132-1.”³⁶ However, the law limits when, to whom, and

30. *Id.*

31. *Id.*

32. *Id.*

33. *ACLU History*, ACLU, <https://perma.cc/4HB3-LB36> (last visited May 2, 2019).

34. *See A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, ACLU (June 2018), <https://perma.cc/68KQ-6PHW>; *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18.

35. *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18.

36. *Id.* § 132-1.4A(b); *see also id.* § 132-1(a)–(b) (“‘Public record’ . . . shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material,

what portions of a recording may be disclosed or released.³⁷ Disclosure (where the individual is simply permitted to view the footage) and release (where the individual acquires an actual copy of the footage) are possible, but only for individuals deemed eligible pursuant to the enumerated list provided by subsection (c) of the statute.³⁸ This list is essentially limited to only two types of individuals: those whose image or voice are captured in the recording, and those who are eligible to serve as a “personal representative” of a person whose image or voice is captured in footage.³⁹

An eligible person “requesting disclosure of a recording must make a written request to the head of the custodial law enforcement agency”⁴⁰ The initial decision to grant or deny the request is within the absolute discretion of the agency.⁴¹ When making its decision, the agency may, but is not obligated to, consider a list of six factors presented in subsection (d).⁴² Some of the more notable factors include: whether the disclosure would reveal highly sensitive information regarding an individual, whether the disclosure would impose harm or jeopardize the safety of an individual, and the protection of an active or inactive (internal or criminal)

regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. . . . [T]he people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.”).

37. N.C. GEN. STAT. § 132-1.4A(c)–(h).

38. *Id.* § 132-1.4(c) (“The head of the custodial law enforcement agency may only disclose a recording to the following: (1) A person whose image or voice is in the recording. (2) A personal representative of an adult person whose image or voice is in the recording, if the adult person has consented to the disclosure. (3) A personal representative of a minor or of an adult person under lawful guardianship whose image or voice is in the recording. (4) A personal representative of a deceased person whose image or voice is in the recording. (5) A personal representative of an adult person who is incapacitated and unable to provide consent to disclosure.”).

39. *Id.*

40. *Id.*

41. *Id.* § 132-1.4A(d).

42. *Id.* (“The custodial law enforcement agency may consider any of the following factors in determining if a recording is disclosed: (1) If the person requesting disclosure of the recording is a person authorized to receive disclosure pursuant to subsection (c) of this section. (2) If the recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law. (3) If disclosure would reveal information regarding a person that is of a highly sensitive personal nature. (4) If disclosure may harm the reputation or jeopardize the safety of a person. (5) If disclosure would create a serious threat to the fair, impartial, and orderly administration of justice. (6) If confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.”).

investigation.⁴³ If disclosure is denied, a party may appeal the denial to the superior court.⁴⁴ The court may order disclosure “only if the court finds that the law enforcement agency *abused its discretion* in denying the request for disclosure”—a difficult burden to overcome.⁴⁵

A party eligible for disclosure pursuant to subsection (c) may also obtain permissive release of the portions of the footage “that are relevant to the person’s request.”⁴⁶ To accomplish this, a person must petition directly to the superior court for review of the request.⁴⁷ During the course of its review, the court is required to consider a list of eight enumerated standards provided by subsection (g).⁴⁸ Many of these standards are the same as the factors applied by custodial law enforcement agencies in sub-section (d). However, some additional standards include whether the release is necessary to advance a compelling government interest, as well as whether the release is sought to obtain evidence to determine legal issues in a current or potential court proceeding.⁴⁹ This later standard will be an important point of discussion in a subsequent section of this piece.⁵⁰ After considering these standards, the court then decides whether or not to release the footage, as well as attach any necessary conditions or restrictions.⁵¹

43. *Id.*

44. *Id.* § 132-1.4A(e).

45. *Id.* (emphasis added). Under North Carolina law, “[t]he test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *GE Betz, Inc. v. Conrad*, 752 S.E.2d 634, 648 (2013) (quoting *Little v. Penn Ventilator Co.*, 345 S.E.2d 204, 212 (1986)) (internal quotation marks omitted).

46. *Id.* § 132-1.4A(f).

47. *Id.* § 132-1.4A(e).

48. *Id.* § 132-1.4A(g) (“[T]he court shall consider the applicability of all of the following standards: (1) Release is necessary to advance a compelling public interest. (2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law. (3) *The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.* (4) Release would reveal information regarding a person that is of a highly sensitive personal nature. (5) Release may harm the reputation or jeopardize the safety of a person. (6) Release would create a serious threat to the fair, impartial, and orderly administration of justice. (7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation. (8) There is good cause shown to release all portions of a recording.”) (emphasis added).

49. *Id.* § 132-1.4A(g)(1), (3).

50. *See infra* Part II.A.2.

51. N.C. GEN. STAT. § 132-1.4A(f).

C. *The Issue: The Gap Between Section 132-1.4A and the North Carolina Rules of Civil Procedure*

Regardless of whether a particular instance is dealing with the disclosure or the release of footage, the burden is bestowed upon the person seeking such disclosure or release to show that the footage should not be withheld.⁵² This observation is the pivotal point of transition into the primary focus of this discussion.

Consider the following hypothetical: An individual experiences an instance of what she believes to be a plausible case of police misconduct, resulting in bodily harm or emotional distress. A criminal investigation of the matter is completed and resolved, however, the harmed individual would like to file suit against the officer or city (where the police department is located) in civil district court.

In accordance with North Carolina General Statutes section 132-1.4A, the party filing suit would have the burden of showing the necessity of disclosure or release of the footage exposing the interaction.⁵³ However, under the NCRCP, parties in opposition to the disclosure of such materials requested by the other party have the burden of showing why the materials should not be disclosed.⁵⁴ Presumptive access to opposing party information is the foundational principle of the discovery process because the basic purpose of discovery “is to facilitate disclosure of material and relevant information to a lawsuit so as to permit the narrowing of issues and facts for trial.”⁵⁵ Therefore, the problem with section 132-1.4A is its contradiction of the broad presumption of discovery under the NCRCP.⁵⁶ It impermissibly shifts the burden away from the party in opposition to the party seeking the discoverable material. Such a shift would present a prospective plaintiff with a significant obstacle to acquiring indispensable evidence to prove her claim.

Going back to the hypothetical, pursuant to section 132-1.4A, an individual seeking to file suit would have two options—seek disclosure of the footage from a law enforcement agency or seek release of the footage from a superior court.⁵⁷ Both options would present the prospective plaintiff with the ultimate burden of showing why the relevant factors (pursuant to disclosure) or standards (pursuant to release) provide support

52. *Id.* § 132-1.4A(c) (“A person requesting disclosure of a recording must make a written request to the head of the custodial law enforcement agency . . .”).

53. *Id.*

54. N.C. GEN. STAT. § 1A-1 Rule 26(b)(5)(a) (2017).

55. *Benfield v. Benfield*, 366 S.E.2d 500, 504 (N.C. Ct. App. 1988).

56. *See* N.C. GEN. STAT. § 132-1.4A(f).

57. *See id.* § 132-1.4A(d), (f).

for the sought disclosure or release.⁵⁸ The key phenomenon is that by having this burden, the prospective plaintiff is dealt an additional procedural hurdle. A hurdle that could very well bar access to the courts and possible judicial redressability, that would otherwise not occur under the ordinary discovery process pursuant to the NCRCP.⁵⁹

II. NORTH CAROLINA'S ILL-ADVISED APPROACH TO POLICE BODY-CAMERA FOOTAGE

This Part introduces and discusses the problems created by section 132-1.4A. First, it is unclear as to how the statute interacts with the North Carolina Rules of Civil Procedure. Can prospective litigants acquire footage under the ordinary rules of discovery, or must they navigate through the procedural hurdles provided by section 132-1.4A? Secondly, this Part analyzes the negative public policy ramifications created by the statute. By restricting access to footage, section 132-1.4A undermines the goals of public transparency and accountability with regard to potential instances of police misconduct.

A. *Modifying the North Carolina Rules of Discovery*

1. *North Carolina's Broad Presumption of Discovery*

Traditionally, under the North Carolina Rules of Civil Procedure, a presumption exists that all documents and other materials requested by a given party during the discoverable pre-trial period of lawsuit are subject to full disclosure by the opposing party.⁶⁰ North Carolina General Statutes section 1A-1, Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending action.”⁶¹ North Carolina case law further supports this notion, persistently reaffirming that “Rule 26 provides for a broad scope of discovery.”⁶² This “broad scope” aligns perfectly with “[t]he [identified] purpose of the discovery rules, [which] is to allow the parties access to and facilitate the disclosure of relevant, nonprivileged

58. *Id.*

59. *See Benfield*, 366 S.E.2d at 504.

60. N.C. GEN. STAT. § 1A-1 Rule 26(b)(1) (2017).

61. *Id.*

62. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 805 S.E.2d 664, 667 (N.C. 2017).

information ‘so as to permit the narrowing and sharpening of basic issues and facts to go to trial.’”⁶³

If a party is presented with a discovery request and is adamant about not handing over the requested material, then that party is faced with the burden of showing that such material is privileged or otherwise should not be subject to disclosure:

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.⁶⁴

Consider again the previous hypo in Part I(C). If the plaintiff alleging police misconduct requested release of the relevant body-cam footage from the defendant-city during the course of discovery, the footage would be presumed to be discoverable under the NCRCP.⁶⁵ The defendant-city would then have to state its reasons for withholding the footage, with a court ultimately deciding whether to release the footage.⁶⁶ This has incredible implications for an individual seeking to utilize the footage to develop her claim. If the government is presented with the ultimate burden of arguing against disclosure, the likelihood of accessibility is enhanced for the plaintiff—ensuring she is equipped with all available evidence necessary to argue her claim.

2. *The Conflicting Language Presented by Section 132-1.4A.*

North Carolina General Statutes section 132-1.4A alters the normal discovery progression laid out by the NCRCP by eliminating the

63. *Analog Devices, Inc. v. Michalski*, No. 01 CVS 10614, 2006 WL 3287382, at *4 (N.C. Bus. Ct. Nov. 1, 2006) (quoting *Willoughby v. Wilkins*, 310 S.E.2d 90, 100 (1983)).

64. N.C. GEN. STAT. § 1A-1 Rule 26(b)(5)(a), *see also* N.C. GEN. STAT. § 1A-1 Rule 34(a) (2017) (“Any party may serve on any other party a request (i) to produce and permit the party making the request, or someone acting on that party’s behalf, to inspect and copy, test, or sample any designated documents, electronically stored information, or tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.”); *see also* N.C. GEN. STAT. § 1A-1 Rule 34(b) (“The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.”). Note that the burden is on the party in objection to discovery—the party requesting the materials does not have to establish its need for them.

65. *See* N.C. GEN. STAT. § 1A-1 Rule 26(b)(5)(a).

66. *Id.*

presumption of discoverability specifically when dealing with police body-camera footage. In order to acquire the release or disclosure of such footage, the plaintiff would submit its request to the law enforcement agency or court (contingent upon whether disclosure or release is sought) where a number of factors would be considered in coming to a decision.⁶⁷ Therefore, the party seeking discovery (the plaintiff in our hypothetical) has essentially switched places with the other party (the defendant). Section 132-1.4A and the NCRCP are on complete opposite ends of the spectrum when it comes to the discoverability of police body-camera footage and which party is presented the ultimate burden.

There is an argument that the two dueling bodies of law properly overlap with one another. The third factor in assessing the release of footage is “[t]he person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.”⁶⁸ Hence, an argument could be made that this lone factor provides an overlap with the NCRCP by briefly recognizing the relationship between the process of acquiring such footage and the use of it as evidence in a pending or active lawsuit. However, nothing else exists to affirmatively suggest that the two provisions coincide with one another. Section 132-1.4A fails to expressly mention the NCRCP or how the provision specifically carves out an exception to the ordinary rules regarding discovery. Likewise, the NCRCP fail to address specific materials such as police body-camera footage. Rather, the NCRCP simply recognize the ability of parties to deny certain discovery requests by asserting a privilege⁶⁹ or acquiring a protective order.⁷⁰

Thus, there remains an immense and obvious lack of clarity as to how section 132-1.4A and NCRCP precisely coincide with one another. This lack of clarity will inevitably transpire into a lawsuit, tasking the judiciary with ascertaining the true relationship between section 132-1.4A and the NCRCP. To avoid such an outcome, a legislative amendment is necessary to ascertain the true relationship between the two provisions.

67. *Id.* § 132-1.4A (d), (g). The factors are listed out in footnotes 42 and 48.

68. N.C. GEN. STAT. § 132-1.4A(g) (emphasis added).

69. N.C. GEN. STAT. § 1A-1 Rule 26(b)(5)(a) (“When a party withholds information otherwise discoverable by claiming that the information is privileged . . .”).

70. *Id.* § 1A-1 Rule 26(c) (“Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense . . .”).

3. *Police Body-Camera Footage—Privileged Material?*

There is no North Carolina statute or case law addressing the issue as to whether police body-camera footage qualifies as privileged matter. However, if it were considered privileged matter, it would be categorically barred from the discovery process, and North Carolina General Statutes section 132-1.4A would present no cause for concern.

To address the question of what constitutes privileged matter within North Carolina, the North Carolina General Statutes present a myriad of privileges that may be asserted to bar disclosure during the discovery phase of litigation.⁷¹ However, police body-camera footage is absent from this list of statutorily provided privileges. Because the General Assembly has explicitly mandated a set of privileges, its exclusion of police body-camera footage should be construed as a purposeful decision. North Carolina case law has created several statutory canons of construction to assist the judiciary when it is tasked with construing and interpreting statutory language. One such tool, *expressio unius est exclusio alterius* (the explicit expression of one thing provides for the exclusion of another) “provides that the mention of specific exceptions [to a general rule] implies the exclusion of others.”⁷² The General Assembly has explicitly provided a variety of privileges creating exceptions to the general presumption of discovery.⁷³ This omission of police body-camera footage should be construed as a purposeful and deliberate act of the North Carolina legislature pursuant to the principles of *expressio unius est exclusio*

71. W. David Lee, *Privileged Communications*, UNC SCH. OF GOV. 1 (2006). A corresponding handout to Senior Resident Judge W. David Lee’s presentation at a Superior Court Judges’ Conference in 2006. The handout is provided on the UNC School of Government Website. Examples of relational communications in North Carolina include: Physician-Patient Privilege, N.C.G.S. § 8-53 (2017); Husband-Wife Privilege, § N.C.G.S. 8-56 (2017); Psychologist-Patient Privilege, N.C.G.S. § 8-53.3 (2017); Social Worker Privilege, N.C.G.S. § 8-53.7 (2017). See Lee, *supra* note 71, at 1–2, 7–9, 10–12. These relational privileges are in addition to the well-known constitutional privilege against self-incrimination (a witness is not compelled to answer any question that may incriminate him). U.S. CONST. amend. V; see also Lee, *supra* note 71.

72. *Morrison v. Sears, Roebuck & Co.*, 354 S.E.2d 495, 498 (N.C. 1987). The court used the doctrine of *expressio unius est exclusio alterius* to conclude “that in products liability actions arising from breaches of *implied* warranties, unlike those arising from breaches of *express* warranties, the defenses provided by N.C.G.S. § 99B-2(a) [were] available to defendants.” *Id.* at 499. In coming to this decision, the court noted that N.C.G.S. § 99B-2(a) “specifically excepts actions for breach of *express* warranties from the defenses it provides in product liability actions.” *Id.*; see also *Campbell v. First Baptist Church of Durham*, 259 S.E.2d 558, 563 (N.C. 1979) (“Under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others).

73. See Lee, *supra* note 71.

alterius. Accordingly, police body-camera footage should not be properly characterized as privileged material.

The North Carolina Rules of Civil Procedure presume that *all* documents and other materials must be disclosed at the request of opposing counsel during the course of pre-trial discovery.⁷⁴ However, section 132-1.4A specifically removes police body-camera footage from this expansive pool of presumptive disclosure. Because police body-camera footage is unlikely to be considered privileged matter, absent section 132-1.4A, it would be subject to the NCRCP's broad presumption of discovery. Consequently, litigants captured in such footage would have presumptive access. However, a lack of clarity remains as to how the NCRCP and section 132-1.4A coincide with one another and whether an exception does in fact exist. It is necessary that this issue be sufficiently addressed in light of the significant and dueling effects of both provisions—one giving litigants captured in footage presumptive access for evidence purposes,⁷⁵ and the other restricting access by subjecting requested disclosure to court approval.⁷⁶

B. Public Policy Ramifications

In addition to the host of legal concerns that North Carolina General Statutes section 132-1.4A presents, the statute could result in considerable damage to recent public policy efforts to subdue national strife in the arena of violent citizen-law enforcement interactions. By restricting access to police body-camera footage, continued enforcement of section 132-1.4A will thwart the intended purpose of the cameras—to ascertain the truth, deter excessive police force, and provide justice when it is required.

Video footage of police shootings have helped spur renewed focus and energy for reforms aimed at decreasing violent police-civilian encounters. As highlighted below, a host of academic studies have proven the effectiveness of police body-camera footage as a tool for mitigating mounting tensions between officers and civilians. A randomized, controlled study released by the Las Vegas Metropolitan Police Department in 2017 found that police body cameras reduced officer misconduct and the

74. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 805 S.E.2d 664, 667 (N.C. 2017).

75. N.C. GEN. STAT. § 1A-1 Rule 26(b)(5)(a) (2017); *see also* N.C. GEN. STAT. § 1A-1 Rule 34(a) (2017).

76. N.C. GEN. STAT. § 132-1.4A(d), (f).

use of force during the course of civilian interactions.⁷⁷ Furthermore, a field experiment conducted by the Rialto California Police Department highlighted the encouraging effects that transpired from the use of police body cameras.⁷⁸ When police officers were equipped with cameras during the conducted test period, use of force incidents reduced by 50%.⁷⁹ Furthermore, citizen complaints against officers decreased by an incredible 90%.⁸⁰ As these controlled studies suggest, tensions have eased and will likely continue to do so through the increased utilization of police body-worn cameras.

In addition to addressing concerns for the public, one study has shown that law enforcement officials generally have positive perceptions of body-cameras.⁸¹ Many officers believe that the cameras provide an “extra set of eyes” by creating a clearer depiction of citizen-encounters.⁸² This clearer depiction offers “a more complete narrative of what actually transpired [during a given encounter] when the facts of the incident are contested.”⁸³ It is evident that these law enforcement officials see body-cameras as a means to protect themselves against false accusations of misconduct.⁸⁴ Providing this layer of protection was undoubtedly one of the intended policy purposes behind the utilization of these cameras.

North Carolina General Statutes section 132-1.4A contradicts the intended purpose of police body-worn cameras. Body cameras allow for clear and precise accounts of controversial civilian-officer encounters. The presence of such evidence protects all parties—both law enforcement and civilians—captured or recorded in such footage.⁸⁵ The footage serves as reliable and concrete evidence as to “the necessity and reasonableness of [an] officer’s actions” when use of force occurs.⁸⁶ Put simply, the footage allows for the truth. Consequently, there has been a reduction in incidents where police misconduct goes unpunished, as well as incidents where law

77. Anthony Braga et. al., *The Benefits of Body-Worn Cameras: New Findings From a Randomized, Controlled Trial at the Las Vegas Metropolitan Police Department* 8–9 CNA (Sept. 28, 2017), <https://perma.cc/J65Y-A3TZ>.

78. Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509 (2015).

79. *Id.* at 523.

80. *Id.* at 524.

81. Gisele Galoustian, *Study Reveals Police Officers’ Views of Body-Worn Cameras*, FLA. ATLANTIC U. NEWS DESK (Nov. 14, 2018), <https://perma.cc/5X6P-7EMZ>.

82. *Id.*

83. *Id.*

84. *Id.*

85. Liebman, *supra* note 23, at 356.

86. *Id.* at 357.

enforcement officials are falsely accused and sometimes convicted of police misconduct.⁸⁷ However, laws that restrict public access to footage—such as section 132-1.4A—do nothing but undermine these positive effects, which are the very goals that policy-makers have sought to accomplish through the use of body-cameras.

The continued enforcement of section 132-1.4A will likely assist in diminishing the progress that has already accrued in the effort to decrease violent police-civilian encounters. It will do so by frustrating efforts to ascertain the truth, enhancing the likelihood of unpunished police misconduct on one end of the spectrum and false accusations where such misconduct did not occur on the other end.⁸⁸ Lack of public disclosure retracts the progress made by promoting uncertainty and distrust amongst the populace—culminating in a mounting and unstable tension.⁸⁹ The continued enforcement of section 132-1.4A as written will undoubtedly contribute to the growing distrust.

III. NORTH CAROLINA SHOULD AMEND NORTH CAROLINA GENERAL STATUTES SECTION 132-1.4A. TO PROVIDE PRESUMPTIVE ACCESS TO POLICE BODY-CAMERA FOOTAGE

North Carolina General Statutes section 132-1.4A poses several red-flags. These include, but are not limited to, its tension with typical North Carolina discovery procedures and its overall detrimental effect on policy efforts to mitigate mounting tensions between law enforcement officials and civilians.

In order to halt the materialization of these harmful effects, the North Carolina General Assembly should adopt a bill amending section 132-1.4A as follows: (1) the use of language making clear that the North Carolina Rules of Civil Procedure apply if footage is sought during pending litigation by a civilian subject to use of force by a law enforcement officer; (2) provide that section 132-1.4A include a new expedited process for civilians who are captured in body camera footage subjected to use of force that places the burden on law enforcement. Ideally, this would involve the civilian filing a sworn statement requesting footage and, unless the law

87. *Id.*

88. *Id.*

89. See Frank Newport, *Public Opinion Context: Americans, Race and Police*, GALLUP (July 8, 2016), <https://perma.cc/G54D-C6YH> (addressing the attitudes of the American public, including blacks and whites, toward law enforcement and the criminal justice system. Surveys show a significant difference in how black and white Americans view police officers. Additionally, Gallup reported that 35% of Americans expressed that they were worried “a great deal” about race relations in 2016—a 15% increase from 2007.).

enforcement agency could articulate a particular overriding policy or public safety consideration (or if the form does not contain sufficient information to enable the identification of the footage), the footage would have to be produced to the civilian within a reasonable time. Denials would still be appealable to the superior court; and (3) new language should provide that the burden lie with the law enforcement agency even when a general member of the public is requesting body-camera footage. However, there should be more factors that a law enforcement office or agency could reasonably cite to oppose such production. Like the Oklahoma statute, portrayals of nudity, children, criminal informants, victims of sex crimes and domestic violence, and the personal information of innocent people could constitute exceptions to general disclosure.⁹⁰

The first portion of the proposed amendment would clear all confusion regarding how the statute interacts with the NCRCP. If an individual alleges misconduct by a law enforcement officer, the NCRCP apply when that particular individual seeks such footage during the discovery phase of pending litigation. This approach enhances the likelihood that individuals will have the necessary evidence to argue their claims in court. Application of the NCRCP eliminates the need for claimants to prove two cases—one to obtain critical evidence and then another for the actual claim itself.

This proposed amendment would also promote and enhance the public policy goals of police body-cameras. As evidence suggests, both incidents of police misconduct and citizen complaints against officers are reduced.⁹¹ By broadening access to body-camera footage for the public at large, transparency, accountability, and furthered public trust are all achieved. However, such public access would still be restrained to a certain degree through the consideration of factors that support nondisclosure.⁹² Such footage would not be considered a “public record” for the purposes of section 132-1.⁹³ This intermediate approach would strike the proper balance between the benefits of transparency, and the interest in ensuring individual privacy and police efficiency.

CONCLUSION

As the use of police body-worn cameras continues to expand, corresponding laws are necessary to regulate the extent to which captured footage is subject to public disclosure. Section 132-1.4A simply goes too

90. *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18.

91. *See Braga*, *supra* note 77; *Ariel*, *supra* note 78.

92. *States Impose Wildly Different Policies in Releasing Police Videos*, *supra* note 18.

93. N.C. GEN. STAT. § 132-1.4A(b) (2017).

far by creating a presumption of nondisclosure for individuals captured in particular footage. This principle is in opposition to the idea of presumptive discoverability provided by the North Carolina Rules of Civil Procedure and it remains unclear whether the two laws do in fact overlap with one another. Furthermore, through the implementation of these restrictive measures, the statute effectively undermines the policy goals behind the utilization of police body-worn cameras.

The North Carolina General Assembly should amend North Carolina General Statutes section 132-1.4A to provide for application of the NCRCP to requests for disclosure or release, while explicitly asserting that the burden be placed on law enforcement entities to provide reasons for nondisclosure. The incorporation of these changes would expand access to police body-camera footage—for both individuals captured in the footage and for the public at large. This inflated access is necessary to ascertain the truth and to provide justice for all parties involved in controversial police-civilian interactions.

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