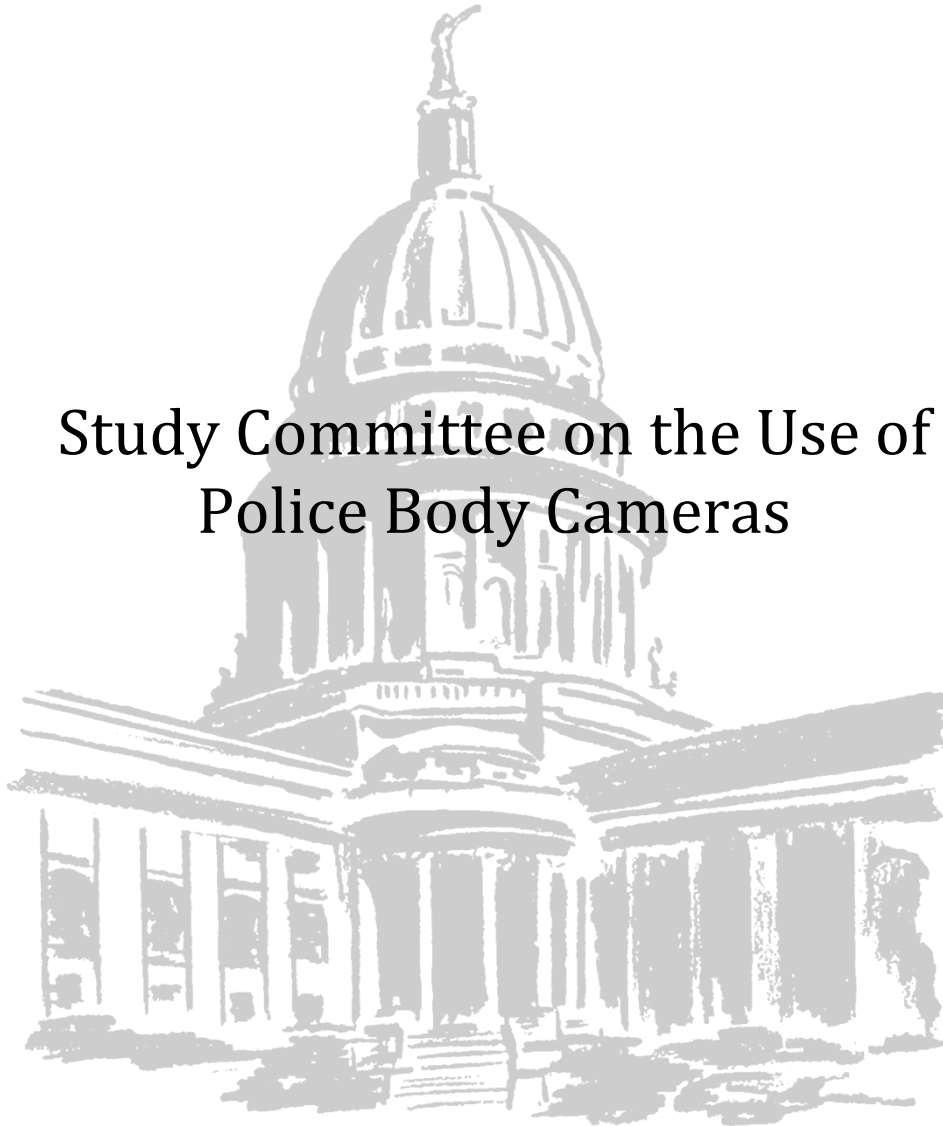


Report to the Joint Legislative Council

Study Committee on the Use of Police Body Cameras



January 7, 2019

LCR 2019-02

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STUDY COMMITTEE ON THE USE OF POLICE BODY CAMERAS

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January 7, 2019

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PART I

KEY PROVISIONS OF COMMITTEE RECOMMENDATION

The Study Committee on the Use of Police Body Cameras recommends the bill draft described below¹ to the Joint Legislative Council for introduction in the 2019-20 session of the Legislature.

LRB-0396/2, RELATING TO BODY CAMERAS ON LAW ENFORCEMENT OFFICERS

LRB-0396/2 addresses various privacy and public records issues that may arise as a result of the use of a body camera by a law enforcement officer. Key provisions include:

- A requirement that a law enforcement agency that deploys a body camera on a law enforcement officer adopt and administer a written policy governing the use, maintenance, and storage of the camera.
- A requirement that a law enforcement agency train an officer who wears a body camera on the use of the body camera, and train an employee who handles body camera data on proper storage, retention, and release of that data.
- The establishment of a minimum retention period by a law enforcement agency for “routine” body camera data.
- A requirement for longer retention by a law enforcement agency for certain “critical incident” body camera data or data that is relevant for administrative or judicial proceedings.
- The establishment of a public policy presumption against release of body camera data that shows certain victims, minors, or those having a reasonable expectation of privacy.
- Authority for a law enforcement agency to redact identifying images or sounds from certain body camera data before public release, and clarification that such a redaction may be challenged as a denial of release.

¹ After the final meeting of the study committee, Chair Testin notified members that he would recommend to the Joint Legislative Council the adoption of an amendment that was offered and withdrawn during the November 13, 2018 meeting. The letter from the chair to members describing this amendment was included in the materials sent with the mail ballot and is reproduced in **Appendix 4**.

PART II

COMMITTEE ACTIVITY

ASSIGNMENT

The Joint Legislative Council established the Study Committee on the Use of Police Body Cameras and appointed the chairperson by an April 9, 2018 mail ballot. **Appendix 2** identifies the membership of the Joint Legislative Council at the time the mail ballot was approved. The committee was directed to review law enforcement policies regarding the use of body cameras and recommend legislation to establish uniform procedures regarding the retention and release of body camera video for state and local law enforcement agencies.

Membership of the study committee was appointed by a June 4, 2018 mail ballot. The final committee membership consisted of two representatives, two senators, and six public members. A list of committee members is included as **Appendix 3** to this report.

SUMMARY OF MEETINGS

The committee held four meetings on the following dates:

- July 26, 2018.
- September 13, 2018.
- October 17, 2018.
- November 13, 2018.

At the committee's July 26, 2018 meeting, the study committee heard testimony from several invited speakers.

Amanda Essex, criminal justice senior policy specialist, National Conference of State Legislatures, provided the committee with an overview of other states' consideration and action on police body camera and data management legislation, including proposals on written body camera usage policies, studies on body camera best practices, and funding for the use of body cameras. She noted best practice recommendations by national organizations for data storage, retention, and disclosure. Following the presentation, Ms. Essex answered committee members' questions about the cost of body camera data storage, whether states have included criminal penalties in their legislation for violation of body camera policies, the application of public records laws, and body camera auditing laws.

Paul Ferguson and Spencer Gustafson, Wisconsin Department of Justice (DOJ), provided the committee with a detailed overview of the Wisconsin public records law, noting in particular its presumption of complete public access to public records except in exceptional cases. Mr. Ferguson

described the roles of various individuals involved in a public records request and provided an overview of what constitutes a record. He outlined how DOJ processes a public records request, including an explanation of the balancing test by which an authority weighs the public interest in disclosure of the record against the public interest and public policy against disclosure. Mr. Gustafson provided the committee with a demonstration of video and audio redaction techniques utilized by DOJ. Following the presentation, Mr. Ferguson and Mr. Gustafson answered committee members' questions about the feasibility of DOJ storing local law enforcement police body camera data, the adequacy of current public records law for body camera data retention and disclosure, and an individual's right to privacy, including an individual accused of a crime.

Laken Ferreira, associate government affairs manager, Axon, provided the committee with an overview of her company, Axon, which sells body cameras, other hardware, and corresponding software and allowed committee members to inspect a sample body camera. Following the presentation, Ms. Ferreira answered committee members' questions about the structure of Axon contracts with its customers, the operation of its body cameras, the security of its hardware and software, and its training of officers in the technology.

Hector de la Mora and Andrew T. Phillips, attorneys, von Briesen & Roper, described their experience representing local governments and law enforcement agencies in matters relating to police body cameras. They reviewed previous legislative proposals and advocated for legislation to prevent the absence of body camera data from being a presumption against a law enforcement agency in a court proceeding. Following the presentation, Attorneys de la Mora and Phillips answered committee members' questions about potential abuse of data collection, advisable limits on public access to body camera data, and the practicality of their favored legislative proposals.

After the conclusion of the presentations, Chair Testin facilitated a preliminary discussion of various options for consideration. The committee discussion addressed such issues as the activation of body cameras, the need for statewide policies, unforeseen implications of future technology, civil liberties, and the desire not to discourage law enforcement from deploying body cameras.

At the September 13, 2018 meeting, the study committee heard testimony from several invited speakers and discussed topics summarized in the Legislative Council Study Committee Memorandum, *Potential Discussion Points for September 13, 2018 Meeting* (August 30, 2018).

Doug Wiorek, sergeant, and Terrence Gordon, inspector, Milwaukee Police Department (MPD), described MPD's experience implementing police body cameras. Sergeant Wiorek demonstrated MPD equipment, explained data storage costs, discussed MPD policy regarding activation of cameras, and described length of data retention by MPD. Inspector Gordon discussed the administrative policies associated with retention, redaction, and release of MPD records in response to thousands of requests per year. Following the presentation, Sergeant Wiorek and Inspector Gordon answered committee members' questions about access to and release of MPD records, maintenance and retention of video records, and procedures for activating MPD body cameras and notifying an individual being recorded.

Heath Straka, president, Wisconsin Association for Justice, presented the position of his organization on the use of police body cameras. Mr. Straka emphasized that body camera data should remain a public record, access to the data fosters accountability and dispute resolution, and

body cameras do not lead to increased legal exposure for law enforcement agencies. He also made several legislative recommendations on behalf of his organization in the areas of veto power over release, retention periods, contemplation of civil litigation, and privacy protections. Following the presentation, Mr. Straka answered committee members' questions about a victim's ability to prevent release of data and about maintenance of video footage.

Following the presentations, Chair Testin and Legislative Council staff facilitated committee discussion regarding the following areas broached by the Legislative Council memorandum: law enforcement body camera policy requirements, retention of body camera data, and release of body camera data.

Policy Requirements

Committee members generally agreed that body camera policies prescribed by state law should preserve local government discretion in addressing the needs of local law enforcement. Some members preferred merely requiring that a local policy be in place and available to the public, while others wanted to provide guidance in state law as to when a camera would be activated. Members discussed funding for camera acquisition and data storage.

Retention

Committee members generally agreed that a retention period of 120 to 180 days is minimally sufficient for noncritical incident data, with several members indicating that they would like permanent retention. Members also indicated that critical incident data should be retained at least three or four years, pending legal or administrative proceedings on the footage.

Release

Committee members were divided on whether to maintain the current presumption of disclosure of body camera footage when the balancing test was applied under the open records law or to provide a specific release exemption in order to protect the privacy of a victim or witness. Members debated whether redaction technology affords sufficient privacy. Several members indicated that an individual should have the right to refuse to be recorded. Some members indicated that the open records law is sufficient to handle sensitive information like body camera footage, but others expressed concern with a lack of uniformity in release by different record holders under existing law.

Following discussion, Chair Testin indicated that he would work with Legislative Council staff to draft a bill that reflected the committee's discussion.

At the October 17, 2018 meeting, the study committee reviewed the preliminary bill draft, LRB-0396/P2, relating to police body cameras, which includes portions of both 2017 Assembly Bill 351 and 2017 Assembly Bill 557, and new material. Among the new material is a provision that incorporates aspects of current law related to the so-called "Woznicki fix," which provides that certain specified individuals have a right to be notified and seek judicial review of an authority's decision to release certain records that may be considered to be of a highly personal nature. A robust discussion followed the explanation of the bill draft by Legislative Council staff.

The committee unanimously agreed to change the bill draft in the following areas: (1) removal of privacy protection for witnesses of a sensitive or violent crime; (2) removal of language regarding the “Woznicki fix”; (3) removal of categorical exclusion on release of “routine” footage, nudity, and matter subject to certain legal privilege; (4) addition of express authority for a requester to challenge a redaction or refusal to release; and (5) removal of express authority to destroy “routine” data after the 120-day retention period.

Members discussed minimum retention periods for body camera data that records a custodial arrest, death, or injury, “Terry stop,” or use of force, particularly with regard to whether the requirement that such data be retained until final disposition of any case or complaint to which the data pertain would be sufficient in all circumstances. Some members felt that a case or complaint might not be initiated until after the 120-day retention period and expressed the desire for a period of the lesser of three years or final disposition of any case or complaint. The committee rejected by roll call vote a motion to modify the bill draft to reflect that three-year period (Ayes, 4; Noes, 5; Absent, 1).

Members discussed whether the bill draft should require a law enforcement agency’s written policy to include situations in which it was presumed that a body camera would be activated. A motion to modify the bill draft in that regard was offered, but then withdrawn.

Members discussed whether the bill draft should require a law enforcement agency’s written policy to include disciplinary measures for violations of the policy. The committee rejected by roll call vote a motion to modify the bill draft in that regard (Ayes, 3; Noes, 6; Absent, 1).

Chair Testin directed Legislative Council staff to prepare a new bill draft that reflected the decisions of the committee.

At the final committee meeting on November 13, 2018, the study committee reviewed the preliminary bill draft, LRB-0396/P4, relating to police body cameras, which incorporated the changes adopted by the committee at its last meeting.

Members discussed whether to insert the term “investigation” on page 4, line 13, between “any” and “case” so that body camera data would be retained to the conclusion of an investigation, without regard to whether a case or complaint had been filed. The committee was unsure whether “investigation” was already implicit in the bill draft and whether there would be confusion regarding when an investigation was complete. A motion to modify the bill draft to accomplish the insertion was offered but then withdrawn.²

The committee discussed whether to replace all forms of the term “censor” with the more commonly used statutory term “redact.” A motion was offered and approved by voice vote to effectuate those replacements.

The committee discussed the sufficiency of the change it had approved at the last meeting to insert a provision granting express authority for a requester to challenge a redaction or refusal to release. Because the bill draft, in the event of data showing a minor, a victim, or an individual in a location with a reasonable expectation of privacy, allows a record custodian only the binary option

² See **Appendix 4**.

of refusing release or redacting, the members thought it was not clear that a requestor would be afforded the opportunity to challenge for unredacted data. A motion was offered and approved by voice vote to merely authorize (“may”) rather than dictate (“shall”) that binary option.

With regard to data that was used in a civil, criminal, or administrative proceeding, the committee discussed whether the three prerequisites for destruction of such data—final disposition of the proceeding, a determination from the court or hearing examiner that the data is no longer needed, **and** an order from the court or hearing examiner—should be stated instead in the alternative. The committee also discussed whether to clarify that “final disposition” included the appeals process. A motion was offered and approved by voice vote to modify the bill draft in both regards.

Chair Testin thanked committee members and staff for their service, directed Legislative Council staff to produce a revised bill draft reflecting the committee’s actions during the meeting, and notified the members that they would be sent a mail ballot to approve the final draft.

PART III

RECOMMENDATION FOR INTRODUCTION BY THE JOINT LEGISLATIVE COUNCIL

LRB-0396/2, RELATING TO BODY CAMERAS ON LAW ENFORCEMENT OFFICERS

Background

Open Records Law in General

Wisconsin's open records law is contained in ss. 19.31 to 19.39, Stats. Section 19.35, Stats., essentially codifies case law and generally requires that a record held by an authority remain open for inspection and copying. Broadly speaking, an "authority" is a state body, local body, or elected official having custody of a record. Further, an authority usually delegates to a named individual the responsibilities of acting as a legal custodian who will respond to requests for access to records. [ss. 19.32 (1) and 19.33, Stats.]

Wisconsin's open records law provides that a record must remain open for inspection and copying unless:

1. There is a clear statutory exception to this requirement;
2. There exists a limitation on inspection and copying under the common law; or
3. On a case-by-case basis, a record custodian decides that the harm done to the public by disclosure of a record outweighs the public's interest in access to the record.

Release of Records

An authority receiving a record request must either fill the request or notify the requester of the authority's determination to deny the request in whole or in part, including specific reasons for the denial. Every written denial of a request by an authority must inform the requester that if the request for the record was made in writing, then the determination to deny the request is subject to review by mandamus or upon application to the attorney general or a district attorney. [ss. 19.35 (4) (a) and (b), and 19.37 (1), Stats.]

Law Enforcement Records

Wisconsin courts have generally held that while there may be a strong presumption of openness under the open records law, law enforcement investigative records are of a category of records that are particularly sensitive and may have a greater adverse effect on public interests if they are released.³ Despite this recognition, the Wisconsin Supreme Court has held that decisions

³ See *Linzmeier v. Forcey*, 2002 WI 84, ¶ 30.

against release must be made on a case-by-case basis.⁴ With this in mind, the Wisconsin attorney general has indicated that the following policy interests represent some of the arguments against disclosure of law enforcement records:

- Interference with police business.
- Privacy and reputation.
- Uncertain reliability of “raw investigative data.”
- Revelation of law enforcement techniques.
- Danger to individuals identified in the record.

Record Retention in General

Section 19.21 (4) (b), Stats., generally permits a town, city, or village to establish records retention periods by ordinance unless a specific period of time is required by statute. With the exception of certain public utility records, the retention period established by ordinance may not be less than seven years, unless a shorter period is fixed by the Public Records Board (PRB). Section 19.21 (5) (c), Stats., establishes a similar seven-year general retention provision (and exception for retention periods fixed by the PRB) for counties.

Law Enforcement Record Retention

Section 16.61 (3) (e), Stats., permits the PRB to establish the minimum period of time for retention of records for any county, city, town, or village (local governmental units) in Wisconsin. In the case of police body camera video recordings, the PRB has not established a specific minimum retention period. Rather, the board has encouraged local governmental units to seek appropriate legal counsel when establishing a retention schedule for PRB approval and directed the local governmental unit to the state agency retention requirement for monitoring and surveillance recordings for basic policy guidance.

The monitoring and surveillance recordings schedule requires a minimum retention of 120 days before destruction, but generally permits the retention of such records as long as needed for legal or program purposes. The 120-day retention period is generally required because this is the time limit for an individual to file a claim against a governmental body or state employee.⁵ Legal counsel is specifically recommended because claims for federal civil rights violations, including excessive use of force, in particular, may be filed for up to three years after an incident.⁶

Description

The bill draft addresses various issues related to the use of body cameras by law enforcement officers, including policies on the use of the cameras, retention by the law enforcement agency of data collected by the cameras, and release of such data to the public.

⁴ See *Id.* at ¶ 42.

⁵ See ss. 893.80 and 893.82, Stats.

⁶ See 42 U.S.C. s. 1983 and s. 893.53, Stats.

Law Enforcement Agency Policies, Training, and Compliance Related to Body Cameras

The bill draft does not require a law enforcement agency to deploy body cameras on its officers, but if an agency deploys such cameras, the bill draft requires the agency to adopt and administer a written policy addressing the use, maintenance, and storage of the cameras and their data. The policy must include any limitations imposed by the agency on situations, persons, or encounters that may be recorded by a body camera. The bill draft also requires the agency to train officers who wear body cameras, and employees who handle body camera data, on the proper use of the cameras and the proper storage and release of the data. The agency must post the policy on the agency's website and must periodically review the agency's compliance with the policy.

Retention of Body Camera Data

The bill draft establishes 120 days from the date of recording as the default amount of time during which body camera data must be retained by a law enforcement agency and clarifies that such agency is the custodian of data obtained by its body cameras for purposes of the open records law. Unless the data is the subject of an open records request, the agency is not required to retain the data beyond the minimum 120-day period except under specific circumstances.

Data that depicts any of the following must be retained until the final disposition of any case or complaint⁷ to which that data relates:

- The death of an individual;
- Actual or alleged physical injury to an individual;
- A custodial arrest;
- A search during an authorized temporary questioning (known as a "Terry stop"); or
- The use of force by an officer (other than the use of a firearm to dispatch an injured wild animal).

Data must be retained if directed by a law enforcement officer or agency, a board of police and fire commissioners, a prosecutor, a defendant, or a court that determines that the data has evidentiary value in a prosecution. An entity making the directive must submit a preservation order within 120 days from the date of the recording.

Data that is used in a criminal, civil, or administrative proceeding must be retained until final disposition of such proceeding, including appeals, or until a determination or an order by the court or hearing examiner that the data is no longer needed.

Release of Body Camera Data

The bill draft provides that body camera data is generally subject to release in response to an open records request, but includes exceptional treatment favoring privacy over public release

⁷ See **Appendix 4** for an amendment recommended by Chair Testin to include an "investigation" along with a "case or complaint."

for data on certain individuals. To qualify for exceptional treatment, the individual must be: (1) the victim of a sensitive or violent crime; (2) a minor; or (3) in a location in which the individual has a reasonable expectation of privacy, **and** must be: (1) visible or audible in the recording; (2) known to the law enforcement agency; (3) not suspected of committing a crime or violation of law in connection with the officer's presence at the location that was recorded; and (4) not a law enforcement officer acting in an official capacity (unless the officer is a victim or alleged victim of a crime or violation of law while present at the location that was recorded). For such an individual, the law enforcement agency may refuse to release the body camera data or may redact the individual's face or other information that would allow the individual to be identified. The bill draft clarifies that the decision to redact or to refuse to release data may be challenged under the open records law.

STUDY COMMITTEE VOTE

The study committee voted by a November 20, 2018, mail ballot to recommend the following bill draft to the Joint Legislative Council for introduction in the 2019-20 session of the Legislature. The vote on the bill draft was as follows:

- LRB-0396/2, relating to body cameras on law enforcement officers, passed by a vote Ayes, 9 (Sen. Testin; Reps. Spiros and Taylor; and Public Members Croninger, Dorl, Friedman, Hart, Kass, and Klatt); and Noes, 1 (Sen. Larson).

JOINT LEGISLATIVE COUNCIL

[s. 13.81, Stats.]

<u>SENATE MEMBERS</u>	<u>ASSEMBLY MEMBERS</u>
Roger Roth, Co-Chair Senate President Appleton	Robert Brooks, Co-Chair Assistant Majority Leader Saukville
Alberta Darling JFC Co-Chair River Hills	Tyler August Speaker Pro Tempore Lake Geneva
Scott Fitzgerald Majority Leader Juneau	Joan Ballweg Markesan
Howard Marklein President Pro Tempore Spring Green	Peter Barca Kenosha
Mark Miller Monona	Dianne Hesselbein Assistant Minority Leader Middleton
Terry Moulton Chippewa Falls	Gordon Hintz Minority Leader Oshkosh
Jerry Petrowski Marathon	John Nygren JFC Co-Chair Marinette
Fred A. Risser Madison	John Spiros Marshfield
Jennifer Shilling Minority Leader La Crosse	Jim Steineke Majority Leader Kaukauna
Lena Taylor JFC Ranking Minority Member Milwaukee	Chris Taylor JFC Ranking Minority Member Madison
Van Wanggaard Racine	Robin Vos Speaker Rochester

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 senators and 5 representatives appointed as are members of standing committees.

STUDY COMMITTEE ON THE USE OF POLICE BODY CAMERAS

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STUDY ASSIGNMENT: The Study Committee is directed to review law enforcement policies regarding the use of body cameras and recommend legislation to establish uniform procedures regarding the retention and release of body camera video for state and local law enforcement agencies.

10 MEMBERS: 2 Representatives; 2 Senators; and 6 Public Members.

LEGISLATIVE COUNCIL STAFF: Dan Schmidt, Principal Analyst; Steve McCarthy and Ethan Lauer, Staff Attorneys; and Miranda Machgan, Support Staff.

LETTER TO MEMBERS FROM CHAIR TESTIN

Wisconsin State Senate
24th Senate District



Serving Wood, Portage, Adams,
Waushara, Monroe, and Jackson

PATRICK TESTIN
STATE SENATOR

November 19, 2018

Dear Members of the Study Committee on the Use of Police Body Cameras,

Thank you again for your service and work for the study committee. Enclosed is a mail ballot requesting approval of the committee bill draft. The bill draft incorporates the changes agreed to by the committee at our last meeting. Please complete and sign the mail ballot by November 29, 2018, and return it to Legislative Council staff.

As you may recall from our last meeting, the committee discussed a motion by Representative Taylor to amend the bill draft by adding the material "investigation," between the words "any" and "case" on page 4, line 13. Representative Taylor withdrew her motion to allow for further consideration by members.

If the committee's mail ballot vote recommends approval of the committee bill draft, I intend to introduce an amendment to the bill draft for consideration by the Joint Legislative Council to add "investigation," between the words "any" and "case" on page 4, line 13.

Please contact my office or Legislative Council study committee staff with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Testin".

Patrick Testin
State Senator
24th Senate District

COMMITTEE MATERIALS LIST

[Copies of documents are available at www.legis.wisconsin.gov/lc]

July 26, 2018 Meeting

- Presentation, *Police Body Cameras: Public Records Law and Retention Considerations*, by Paul Ferguson and Spencer Gustafson, Wisconsin Department of Justice (July 26, 2018).
- Presentation, *Axon Presentation for the Wisconsin Study Committee on the Use of Police Body Cameras*, by Laken Ferreira, Associate Government Affairs Manager (July 26, 2018).
- Handout, *Police Body Cameras*, by Doug Wiorek, Milwaukee Police Department (July 26, 2018).
- Presentation, *State Activity Addressing Police Body Cameras and Data Management Practices*, by Amanda Essex, Criminal Justice Senior Policy Specialist, National Conference of State Legislatures (July 26, 2018).
- Handout, *Police Body Camera Follow-Up Information*, from Amanda Essex, Criminal Justice Senior Policy Specialist, National Conference of State Legislatures (September 10, 2018).
- Staff Brief 2018-03, *Study Committee on the Use of Police Body Cameras* (July 18, 2018).
- Presentation, *Regulation of Use of Body Cameras and Their Data by Law Enforcement*, by Andrew T. Phillips and Hector de la Mora, Attorneys, von Briesen & Roper (July 26, 2018).
- Minutes of the July 26, 2018 meeting.

September 13, 2018 Meeting

- Handout, *Body Worn Cameras Standard Operating Procedure*, Milwaukee Police Department (September 14, 2018).
- Presentation, *Police Body Cameras*, by Doug Wiorek, Milwaukee Police Department (September 13, 2018).
- LC Study Committee Memorandum, *Potential Discussion Points for September 13, 2018 Meeting* (August 30, 2018).
- Presentation by Heath Straka, President, Wisconsin Association for Justice (September 13, 2018).

- Minutes of the September 13, 2018 meeting.

October 17, 2018 Meeting

- LC Study Committee Memorandum, *Description of LRB-0396/P2, Relating to Police Body Cameras* (October 10, 2018).
- LRB-0396/P2, relating to body cameras on law enforcement officers.
- Minutes of the October 17, 2018 meeting.

November 13, 2018 Meeting

- LRB-0396/P4, relating to body cameras on law enforcement officers.
- Minutes of the November 13, 2018 meeting.

November 20, 2018 Mail Ballot

- LRB-0396/2, relating to body cameras on law enforcement officers.
- Results of the November 20, 2018 mail ballot.
- Letter to Members of the Study Committee on the Use of Police Body Cameras, from Senator Testin, Chair of the Committee (November 19, 2018).