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FISCAL IMPACT REPORT

SPONSOR Cervantes **ORIGINAL DATE** 02/16/21 **LAST UPDATED** 03/16/21 **HB** 220/aSJC/aSFI#1/aSFI
SHORT TITLE Exceptions for Body Cameras **SB** #2
ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
DPS	NFI	NFI	NFI	NFI	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 254, House Bill 263, Senate Bill 192, Senate Bill 227, Senate Bill 274

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Public Defender Department (PDD)
 Office of the Attorney General (NMAG)
 Sentencing Commission (NMSC)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of SFI#2 Amendment

The Senate floor #2 amendment to Senate Bill 220 as twice amended, requires requests for body-worn camera footage to name the recording using either the computed-aided dispatch record number, the police report number, the name of a police officer or other individual, approximate date and time, approximate date and location, or other criteria determined by a law enforcement agency. The amendment clarifies that no request for such footage is enforceable under the Inspection of Public Records Act if it does not comply with this requirement.

Synopsis of SFI#1 Amendment

The Senate floor #1 amendment to Senate Bill 220 as amended, strikes the entirety of the Senate Judiciary Committee amendment. The SFI#1 amendment exempts “an explosive recovery and

disposal operation to render safe or disassemble an explosive or incendiary device and materials” from the requirements for law enforcement officers to record their activities.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 220 adds a provision to 29-1-18 NMSA 1978 to require law enforcement officers’ body-worn cameras automatically begin recording, without manual activation, when an officer responds to a call for service or assistance, unholsters a firearm or taser, or engages a law enforcement vehicle’s lights.

The amendment calls for manual activation of the camera when an officer initiates an investigative or other encounter with the public; however, it preserves the intent of the bill as introduced to prohibit requiring an officer to record death notifications or undercover operations sanctioned in advance by a law enforcement agency.

Synopsis of Original Bill

Senate Bill 220 provides an exception to the requirements for law enforcement officers to wear body cameras and record their activities while responding to calls for service and during any other law enforcement or investigative encounters with the public. Under SB220, officers cannot be required to record death notifications or undercover operations sanctioned in advance by a law enforcement agency.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

SB220 does not contain an appropriation and does not appear to have any significant operating budget impacts. By striking the entirety of the SJC amendment, SFI#1 amendment removes the \$1.2 million fiscal impact previously estimated for the technology required under the SJC amendment.

SIGNIFICANT ISSUES

LFC’s analysis of the bill that originally established requirements for law enforcement officers to wear body cameras during most encounters with the public during the first 2020 special legislative session (Senate Bill 8) noted the requirements in the bill could be interpreted to apply to undercover law enforcement officers, law enforcement officers meeting with informants, law enforcement officers conducting interviews in environments with other recording mechanisms (such as within police station interview rooms), and law enforcement officers interacting with victims who may have privacy concerns when being recorded.

That analysis also cited responses from the Public Defender Department (PDD) and the Administrative Office of the Courts raising concerns an amendment removing a previously included prohibition on recording “general activity” might present privacy concerns and potentially lead to litigation. PDD stated such concerns may arise “if officers use body cameras to surreptitiously record the public, or record persons in protected spaces or engaging in First Amendment protected activities without authorization for an undercover investigation.” PDD

added that “Expanding privacy protections and increasing the tangible remedies for failures to comply with the bill’s provisions would increase its effectiveness and better balance the public interests at play.”

SB220 appears to aim to resolve such issues; however, PDD raises concerns that the bill does not fully succeed in doing so. The agency notes that SB220 does not define “undercover operations sanctioned in advance by law enforcement agency.” Because of this, PDD expresses concerns that a law enforcement agency or district attorney office may take a broad view of this phrase that could lead to unintended consequences. DPS also expresses concern that this phrase is unclear.

DPS believes the added exemption is useful but expresses concern it appears to prohibit an agency from requiring its officers to record death notifications or undercover operations. While there are a number of these situations in which mandated recording could be problematic, there are also situations in which recording would be useful. For example, DPS notes death notifications are often confrontational and may include an investigative component, as those notified may be suspects in the crime, and prohibiting such recordings would make it difficult to properly document the investigation. DPS suggests agencies should be given the flexibility to require recordings when appropriate, but that an exemption to the Inspection of Public Record Act be made for death notifications.

The Administrative Office of the District Attorneys (AODA) states that notification of death is not part of an investigation and it is reasonable no longer require it be recorded. AODA further notes that recording an undercover operation may expose the clandestine nature of the operation during the event by exposure of the camera to subjects of the operation.

The Sentencing Commission (NMSC) notes, as the use of body worn cameras by law enforcement agencies has expanded throughout the nation, there has been an increased focus on needed exceptions to the general rule that officers should use the cameras when on duty. The Brennan Center for Justice has compiled a table showing exceptions in various jurisdictions around the nation.¹ DPS suggests the Legislature consider some additional exceptions, which are outlined under Amendments, below.

RELATIONSHIP

SB220 relates to Senate Bill 192, which creates a new section of statute requiring law enforcement agencies and law enforcement officers disclose evidence favorable to an accused in a criminal case and allows for the suspension or revocation of a police officer’s certification for failure to do so. Because body camera recordings may be used as evidence, any exceptions to the requirement that law enforcement officers record their activities may impact available evidence that must be disclosed.

SB220 relates to House Bill 254, House Bill 263, and Senate Bill 274, which provide for a reporting mechanism and the assignment of a prosecutor following the use of deadly force by a law enforcement officer resulting in great bodily harm or death, and provide for an independent investigation. Because body camera recordings may be used as evidence, any exceptions to the

¹ https://www.brennancenter.org/sites/default/files/Privacy_and_First_Amendment_Protections_Chart_0.pdf

requirement that law enforcement officers record their activities may impact available evidence for the investigation and prosecution provided for in these bills.

SB220 relates to Senate Bill 227, which provides for reporting law enforcement officer uses of force. Because body camera recordings may be used as evidence, any exceptions to the requirement that law enforcement officers record their activities may impact available evidence for such reports.

AMENDMENTS

DPS suggests the Legislature consider several other areas of the bill for clarification or exemption from mandatory recording.

- Clarification of which officers should be considered as routinely interacting with the public (per Subsection A), particularly as it applies to officers who work in a “plain clothes capacity.”
- Specific definition of the types of encounters that qualify as “any other law enforcement or investigative encounter” that requires a body-camera be activated per Subsection A. The agency notes several examples that may be considered a “law enforcement or investigative encounter” where continuous recording may not be desirable or practical, including 8 to 12 hour shifts providing security during the legislative session and the state fair, being approached by community members for non-law-enforcement purposes (such as requesting directions), and providing testimony at or attending city council meetings, Legislative committee hearings, and court proceedings.
- Provision to consider hardware or software malfunctions as potential exemptions from liability for not being able to record an interaction.
- Provision to address sudden, unexpected incidents as potential exemptions from liability for not being able to record an interaction.
- Exemption from being required to activate body-cameras when conducting investigations that are otherwise being recorded with audio and video on another device, such as during interviews by investigators at offices already equipped with cameras. DPS notes that this would reduce redundancy of recordings and strain on available storage capacity.