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ATTORNEY GENERAL

September 29, 2023

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Dear Mr. Van Raalte:

We received your letter requesting advice from this Office as to “the proper use of body worn cameras (BWC) when police are in the presence of victims, suspects, witnesses as well as private citizens and others, that are completely unrelated to any police investigation, in open treatment areas of a hospital, i.e. emergency room, trauma bay also known as a resuscitation bay, where limited privacy exists and numerous patients, staff and others are present.”

#### Law/Analysis

Section 23-1-240 of the South Carolina Code (Supp. 2022) addresses the use of body-worn cameras. According to this provision, “[s]tate and local law enforcement agencies, under the direction of the Law Enforcement Training Council, shall implement the use of body-worn cameras pursuant to guidelines established by the Law Enforcement Training Council.” S.C. Code Ann. § 23-1-240(B). The Legislature charged the Law Enforcement Training Council with establishing guidelines

specifying which law enforcement officers must wear body-worn cameras, when body-worn cameras must be worn and activated, restrictions on the use of body-worn cameras, the process to obtain consent of victims and witnesses before using body-worn cameras during an interview, the retention and release of data recorded by body-worn cameras, and access to the data recorded by body-worn cameras pursuant to subsection (G). The Law Enforcement Training Council shall provide the guidelines to state and local law enforcement agencies.

S.C. Code Ann. § 23-1-240(C). Section 23-1-240 also requires state and local law enforcement agencies to develop their own policies and procedures for the use of body-worn cameras pursuant to the Law Enforcement Training Council’s guidelines, who then reviews and approves the agencies’ policies. S.C. Code Ann. § 23-1-240(D).

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We obtained a copy of the Law Enforcement Training Council guidelines, which state body-worn cameras (“BWC”) must be worn and activated “[w]hen a uniformed officer arrives at a call for service or initiates any other law enforcement or investigative encounter between an officer and a member of the public . . . .” These guidelines also include restrictions on the use of BWCs.

BWC shall be used only in conjunction with official law enforcement duties. The BWC shall not generally be used to record communications with other police personnel without the permission of the chief executive officer (CEO), encounters with undercover officers or confidential informants, when on break or otherwise engaged in personal activities, unless for a direct law enforcement purpose such as a crime in progress or the recording of the location is material to a criminal investigation. Furthermore, officers should use discretion where there is a victim of rape or sexual assault. Additionally, to respect the dignity of others, unless articulable exigent circumstances exist, officers will try to avoid recording persons who are nude or when sensitive human areas are exposed.

According to the guidelines, an officer is required to activate his or her BWC when he or she arrives at a call or is performing other law enforcement or investigative functions involving the officers and a member of the public. There are no restrictions in the guidelines as to specific locations, but officers may use discretion when the situation involves a victim or rape or sexual assault or persons who are nude or exposed in some way. The guidelines do not specifically address the use of BWCs in medical facilities or limit their use in these types of facilities in any way.

In your letter, you explain that a local hospital directed the North Charleston Police Department (“NCPD”) to turn off their BWCs “when entering facility treatment areas where limited privacy can be provided, i.e. emergency department, trauma bays/resuscitation bays, based on its concerns for compliance with the Health Insurance Portability and Accountability Act (HIPAA) and its desire to protect the privacy interests of its patients.” The HIPAA Privacy Rule applies to “covered entities,” which includes health care providers, health insurers, and health care clearinghouses. 45 C.F.R. §§ 164.500-164.534. It does not cover law enforcement officers. Accordingly, we agree with your assessment that law enforcement officers would not be prohibited by HIPAA from activating their BWCs in a medical facility.

Nonetheless, general privacy concerns should be taken into consideration to avoid a violation of the Fourth Amendment of the United States Constitution as well as the South Carolina Constitution. The South Carolina Constitution protects

[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable

cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

S.C. Const. art. I, § 10 (year) (emphasis added).

Our courts recognize this right regarding medical information recently stating:

We have found that the right to privacy may be implicated in many ways, from requiring a witness to divulge medical information during a criminal trial to forcing a convicted felon to take medication so that he may be competent enough to be executed. See State v. Blackwell, 420 S.C. 127, 151, 801 S.E.2d 713, 725 (2017) (noting the novel issue before the Court was “whether a criminal defendant’s constitutional right to confront a witness trumps a witness’s state constitutional right to privacy and statutory privilege to maintain confidential mental health records”) (footnotes omitted) and Singleton v. State, 313 S.C. 75, 90, 437 S.E.2d 53, 62 (1993) (finding compulsory medication implicated a prisoner’s state constitutional right to privacy).

Planned Parenthood S. Atl. v. State, 438 S.C. 188, 205, 882 S.E.2d 770, 779 (2023), reh’g denied (Feb. 8, 2023). However, we did not find a case directly addressing a situation in which use of a BWC in a medical facility constituted a violation of a person’s right to privacy under South Carolina law. Therefore, we believe the NCPD must balance the privacy interests of individuals located in the public areas of a medical facility with its duty to record when arriving at a call or performing other law enforcement or investigative functions. This determination is a matter of policy. As we noted in prior opinions of this Office, questions of policy are beyond the scope of an opinion of this Office. Op. Att’y Gen., 2021 WL 1832302 (S.C.A.G. Mar. 15, 2021). Moreover, the Legislature specifically placed responsibility for developing such policies on state and local law enforcement agencies with direction from the Law Enforcement Training Council. Therefore, we must defer to the individual agency and the Law Enforcement Training Council to develop such policies.

### **Conclusion**

This Office cannot make decisions regarding policy, as such are beyond the scope of our opinion. Additionally, the statutes governing the use of BWCs specifically place authority to develop policy in state and local law enforcement officials under the guidance and approval of the Law Enforcement Training Council. The Law Enforcement Training Council set forth guidelines indicating BWCs should be activated whenever an officer is responding to a call or engaged in any other law enforcement or investigative activity involving a member of the public without restrictions as to location. Additionally, we agree with your assessment that the privacy provisions under HIPAA are not applicable to law enforcement agencies and therefore, would not prohibit them from using BWCs inside medical facilities. However, the NCPD should consider privacy concerns when drafting policies for the use of BWCs so as not unreasonably invade the privacy of

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the victims and witness who are interacting directly with law enforcement as well as those who may be present while the BWC is in use.

Sincerely,



Cydney Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



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Robert D. Cook  
Solicitor General