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FREDERICK DAVIE
CHAIR

To: Members of the Board
From: Olan Carayannis, Director of Quality Assurance and Improvement
Date: July 5, 2019
Re: BWC and Document Request Issues with the NYPD

Since February 2018, the CCRB has experienced difficulty obtaining evidence from the NYPD that previously had been routinely available for the Agency's investigations. Prominent among these difficulties is obtaining Body-Worn Camera (hereafter "BWC") footage from the NYPD, but the Agency also has difficulty obtaining key documentary evidence.

Body-Worn Camera Footage

The CCRB has had issues obtaining reliable and timely information regarding BWC footage. Beginning in March 2019, the CCRB noted a concerning number of BWC requests remained unfulfilled. In the previous month, only 23 requests remained open. In March, that number rose to 104. By April 2019, only 31 requests were closed within 20 business days (the equivalent of approximately one month), and 318 requests remained open. The trend continued in May 2019, when none of the CCRB requests submitted that month were fulfilled. In the three-month span from March 2019 to May 2019 alone, 734 requests for BWC recordings were not completed. Between the first and second quarters of 2019, the number of requests still open jumped from 14 percent to 95 percent, a 338 percent increase. As of June 26, 2019, the CCRB had 788 unfulfilled requests for BWC footage from IAB, some of which had been made months earlier.

The NYPD reportedly attributed the increased response time to the influx of Freedom of Information Law (FOIL) requests for BWC recordings that must now be fulfilled pursuant to the ruling in *Matter of Patrolmen's Benevolent Association of the City of N.Y., Inc. v. De Blasio*, 169 A.D.3d 518, *recalled and vacated by* 171 A.D.3d 636 (1st Dept. 2019). According to the Department, the increased number of FOIL requests has overloaded the BWC Unit's search team.¹ It is unclear if this is the sole cause of the delays.

Unless there is a significant change, the backlog of CCRB requests for video evidence will continue to increase and will impair the CCRB's ability to complete investigations within the 18-month statute of limitations. While the Department indicated that it allocated four additional people to

¹ Yasmeen Khan, *More Than a Third of Police Misconduct Investigations Waiting for Body Camera Footage*, GOTHAMIST (June 17, 2019), https://gothamist.com/2019/06/17/ccrb_body_camera_videos.php, ("Devora Kaye, an NYPD spokesperson, said getting the video ready for release to the public can be time-consuming and may involve pixelating faces in some instances to protect the privacy of sex crime victims or others, as required by law. Kaye added that the department has assigned additional personnel to address the backlog of requests.")

review BWC requests, the CCRB is not confident that this will address the backlog in a way that will allow the Agency to complete its investigations in a timely manner.

According to Patrol Guide Procedure 212.123 18(c), Members of Service (hereafter “MOS”) have the right to view their BWC footage prior to being interviewed for a disciplinary proceeding, which includes a CCRB interview. The delay in receiving BWC footage from the NYPD means that investigators are either waiting much longer to interview MOS, possibly resulting in degraded memories due to the passage of time, or conducting interviews without having viewed the video footage, which places the investigator at a distinct disadvantage. Indeed, investigators may never receive the video evidence, and thus cannot verify claims made by MOS about what is depicted in the BWC footage, and cannot determine if there are additional witnesses, officers, or FADO allegations involved in the case.

Based on information gleaned from multiple district attorneys’ offices, this is not the process followed when the NYPD provides prosecutors with BWC footage. Following an arrest, MOS send BWC footage directly to the ADA assigned the case. If the ADA needs additional BWC video, they can contact the MOS or the command directly to obtain the additional evidence. In some offices, it is our understanding that the ADA may be able to directly access a searchable database of BWC recordings. The CCRB has never been afforded such a capability.

False Negatives

On 147 occasions between October 2017 and June 2019, the CCRB made multiple requests in order to obtain any or all of the BWC recordings in a single case. However, the CCRB cannot accurately track the number of cases in which it has received “false negatives”—negative responses to requests for video evidence when video evidence in fact exists—because the Agency does not know what video the NYPD possesses.

There have been several instances where the NYPD denied the existence of BWC footage, only for the CCRB to later discover that the NYPD possessed BWC recordings all along. In one case, the NYPD told the CCRB three times that no video of an incident existed, yet the footage was later leaked to the Daily News. In 18 instances, the CCRB learned that BWC recordings existed during MOS interviews when the MOS told the investigator that he/she viewed BWC footage of the incident prior to the interview, despite the CCRB being told that there was no BWC footage. The NYPD acknowledged accidentally providing false negatives in 19 complaints, but it is impossible to know how many videos are not retrieved by the NYPD’s search process, of which the CCRB is never advised.

Concurrent Investigations

Since February 2018, the NYPD has reserved the right to refuse to provide BWC footage to the CCRB when there is a concurrent investigation by the Internal Affairs Bureau, Force Investigations Division, or other investigatory body (such as the Office of the Chief of Department) in 41 cases. Six of those cases were being investigated by the Force Investigations Division, which often investigates high-profile media cases involving force allegations that are also in the CCRB’s jurisdiction. Waiting for the Force Investigation Division to complete its investigation limits the CCRB’s ability to independently investigate these complaints.

Sealed Arrests and the Family Court Act

In March 2018, the NYPD began refusing to provide video evidence to the CCRB that depicted an incident where the underlying arrest was subsequently sealed unless the CCRB provided a signed waiver or an unsealing order. The NYPD considers the entire incident sealed in these instances, and thus all videos related to that arrest become unavailable to the CCRB. Since then, 81 requests have been denied because the case associated with the BWC recording was sealed. This number is only expected to increase.

A recent decision from the New York Supreme Court² held that the NYPD is legally barred from using any documents relating to an arrest that was sealed pursuant to Criminal Procedure Law §§ 160.50 and 160.55 (hereafter “CPL §§ 160.50/160.55”). This ruling also impacted the Agency because the CCRB is equally barred from viewing such records absent a signed waiver or a court order. The NYPD currently has a blanket policy of denying all BWC requests that are in any way related to a sealed case pursuant to CPL §§ 160.50/160.55. There is no caselaw or statutory provision specifying that BWC recordings are even subject to sealing, therefore, at a minimum, the NYPD should be conducting case-by-case analyses to determine whether BWC footage should be provided to the CCRB. Exempting instances where, based on the circumstances, the NYPD can establish that the BWC footage was integral to the arrest or prosecution of the sealed case, BWC recordings should be turned over to the CCRB.

The prohibition on using sealed records conflicts with Patrol Guide Procedure 212.123 18 (c), which requires MOS be provided the opportunity to view his/her video evidence prior to a disciplinary proceeding. To date, the CCRB is unaware of any change to the Patrol Guide or general operations of the NYPD to ensure that MOS are not viewing video footage that relates to a sealed case. Indeed, the CCRB is aware of multiple instances where the CCRB was denied access to video footage pursuant to CPL §§ 160.50/160.55, yet the MOS was able to view the video prior to his/her CCRB interview. Insofar as there is no change in policy and procedure at the NYPD, MOS will continue to have direct access to their BWC footage, even when the CCRB does not. The backlog in BWC requests will cause the number of BWC videos unavailable to the CCRB to increase drastically, because the likelihood that an arrest is sealed rises with the length of time since the arrest.

During this same period, the NYPD similarly refused 82 requests to provide video footage without a signed waiver for any video depicting individuals under the age of 18 citing the Family Court Act. While the CCRB has been denied access to these videos, the CCRB has no evidence of any NYPD procedures or policies that prevent MOS from accessing these videos prior to their interview at the CCRB, just as they do with recordings the NYPD categorizes as sealed.

Documentary Evidence Withheld or Redacted

In addition to the enumerated issues with BWC requests, the CCRB has had several issues with obtaining documentary evidence. The “Prisoner Holding Pen Roster” is exemplary of the issue. The Prisoner Holding Pen Roster is a handwritten log of arrestees in the holding cells of a precinct stationhouse at a given time. Typically, the log is updated by an MOS every 15 minutes, and the movement of any of the arrestees for any reason is noted in the log. In cases where a civilian

² *R.C. v. City of New York*, 2019 NY Slip Op 29134 (Supreme Court, New York County) (Tisch, J., April 29, 2019).

sustained injury or alleges misconduct while in the holding cells, this log is invaluable for identifying civilian and MOS witnesses. Often this is the only document that can provide such information. Since April 2018, the NYPD has refused to provide these logs in unredacted form because they “may” contain arrests sealed pursuant to CPL §§ 160.50/160.55, without ever checking to determine whether the arrests are in fact sealed. As a result, NYPD redacts all of the names in logs except for the name of the civilian witness known to the CCRB, thus neutralizing the effectiveness of the document. The NYPD acknowledged that some of the arrests on the log may not be sealed, but for efficiency sake, they redact the entirety of the log.

As mentioned above, the recent court decision³ bars the NYPD from viewing any documents relating to an arrest which was sealed. However, the Prisoner Holding Pen Roster is a paper log in the command and the redactions appear to be on the CCRB’s copy alone. The CCRB is unaware of any policies or procedures put in place by the NYPD to ensure that MOS are not accessing these documents once the arrest has been sealed.

Conclusion

The NYPD’s court-ordered BWC program was intended to be a tool for oversight of the NYPD. With almost 800 requests for BWC footage backlogged, 41 cases denied solely on the grounds that IAB or another entity is investigating the case, and video blanketly being denied on the ground that the underlying arrest was sealed, the NYPD’s current practices are inhibiting the CCRB’s ability to adequately provide civilian oversight. The CCRB is currently in a position where it is missing necessary evidence in hundreds of cases, and is in jeopardy of exceeding the statute of limitations in those cases. Absent some action, the CCRB will have difficulty fulfilling its mandate, further eroding the public’s trust in the CCRB and New York City’s commitment to effective oversight.

³ *Ibid.*