

Writer's Direct Dial (612) 676-2301
jmichels@ricemichels.com

March 28, 2011

Chief Thomas E. Smith
St. Paul Police Department
367 Grove Street
St. Paul, MN 55101

RE: Video Images of Police Officers

Dear Chief Smith:

Dave Titus asked me to write to you regarding the release of video or photographic images of police officers pursuant to a request for data under the Data Practices Act. Based on my review of the Data Practices Act and the Police Officers' Disciplinary Procedures Act ("PODPA"), I am of the opinion that a Minnesota law enforcement agency cannot release the video image of an officer's face or identifying information (badge or nameplate), except in very limited circumstances (as part of a photo-lineup conducted as part of an internal investigation). This does not preclude the release of the video, but would require that the image of the officer's face or other identifying information be pixilated. My analysis is set out below.

Data Practices Act

I appreciate the fact that in Data Practices Act ("DPA") questions, the governmental unit is caught between conflicting obligations to the privacy concerns of the subject of the data and the rights of the requesting party to access to public data. In addressing these situations, the agency must find the proper balance between the competing interests. As you may know, the Personnel Data section of the DPA, Minn. Stat., provides that all personnel data is private unless the Act makes it public. There is nothing in §13.43 that makes a photo or video of the employee public data.

The next question is whether squad video is properly classified as "personnel data." This issue is not settled in Minnesota. To the extent that squad video is collected and retained to monitor or review the actions of officers, it does fall within the definition of personnel data. Since data may be subject to more than one classification, the fact that squad video may also be criminal or investigative data, such classification does not preclude the applicability of the provisions of the personnel data section of the Act.

My conclusion is supported by the Minnesota Department of Administration, which issues opinions on data practices issues. There is one opinion from 1998 that specifically rules that photos of a police officer collected by the employing agency are private personnel data. There are no opinions that deal specifically with squad video. However, there is one video opinion of interest. An opinion was given regarding a data request for a video (basically game film recorded by the team) of a Wayzata HS basketball game. The opinion categorized the video as

Chief Tom Smith
March 28, 2011
Page 2

“video of a public event”, thus making it similar in nature to a squad video. The opinion did contain a discussion regarding the capture of school employees on the video as being potential personnel data. More to the point, the opinion addressed other video in the school and specifically said that capture of images of school employees on school surveillance cameras would be personnel data. To me, squad video is much more like the surveillance cameras than video of the basketball game. Thus, although there is no definitive answer to the question under the Data Practices Act, the better balance of interests seems to follow treating images as private personnel data. The public interest in disclosure can be satisfied by pixelating the images of the officers and their badges. The DPA analysis is irrelevant, however, because the images are clearly protected under PODPA.

Dave advised me that the City takes the position that PODPA does not apply because the video is not gathered as part of the disciplinary process. However, such a conclusion mistakenly relies on the title of the Act. Titles of statutes are not controlling or limiting. By its language, PODPA applies “to law enforcement agencies and governmental units.” The statute does NOT limit application of the language regarding disclosure of photographic images of officers to when those entities are conducting an investigation of or imposing discipline against officers. There are two provisions of PODPA that transcend the disciplinary process – release of photos (subd. 12) and disclosure of financial records (subd 11). My conclusion is supported by the plain language of the statute that states the subdivisions applicable to the investigative process are 4 through 10. This means, that the other subdivisions have broader application. As you know, PODPA provides for the recovery of damages AND attorney fees.

Thus, under both PODPA and the DPA, the better course of action for the City of St. Paul is to either: decline disclosure of squad video without the consent of the officer; or pixelate the images to prevent identification of the officer. I appreciate that this involves more work and more cost, but neither law allows for non-compliance based on economic considerations. We trust that the City will comply with its obligations to protect the privacy interests of its police officers. Please call me if you have any questions.

Sincerely,

James P. Michels

cc: Dave Titus