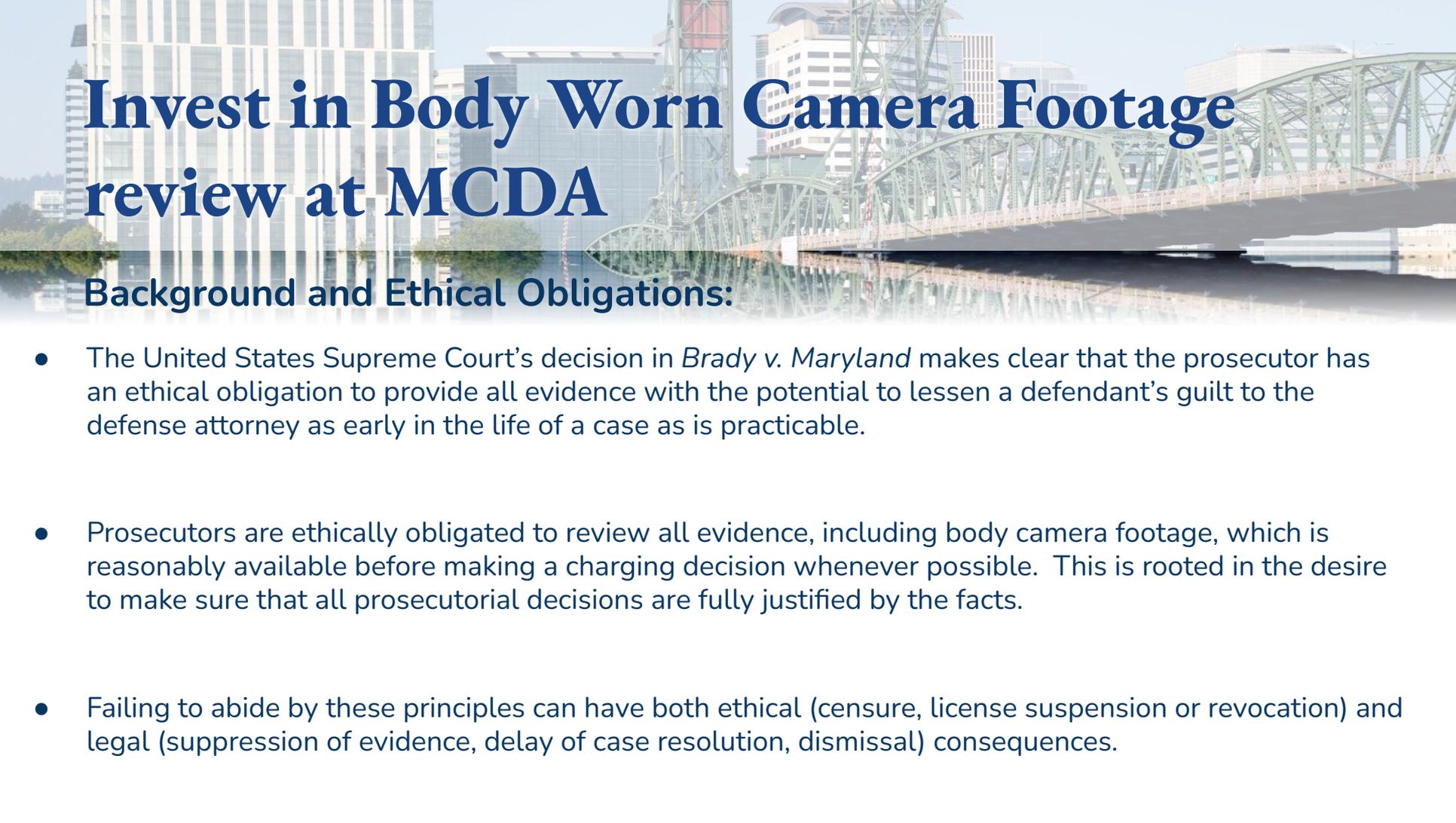


# **Multnomah County District Attorney's Office**

**District Attorney Mike Schmidt**

Presenters: Policy Director, Aaron Knott  
Deputy District Attorney, Victor Mercado

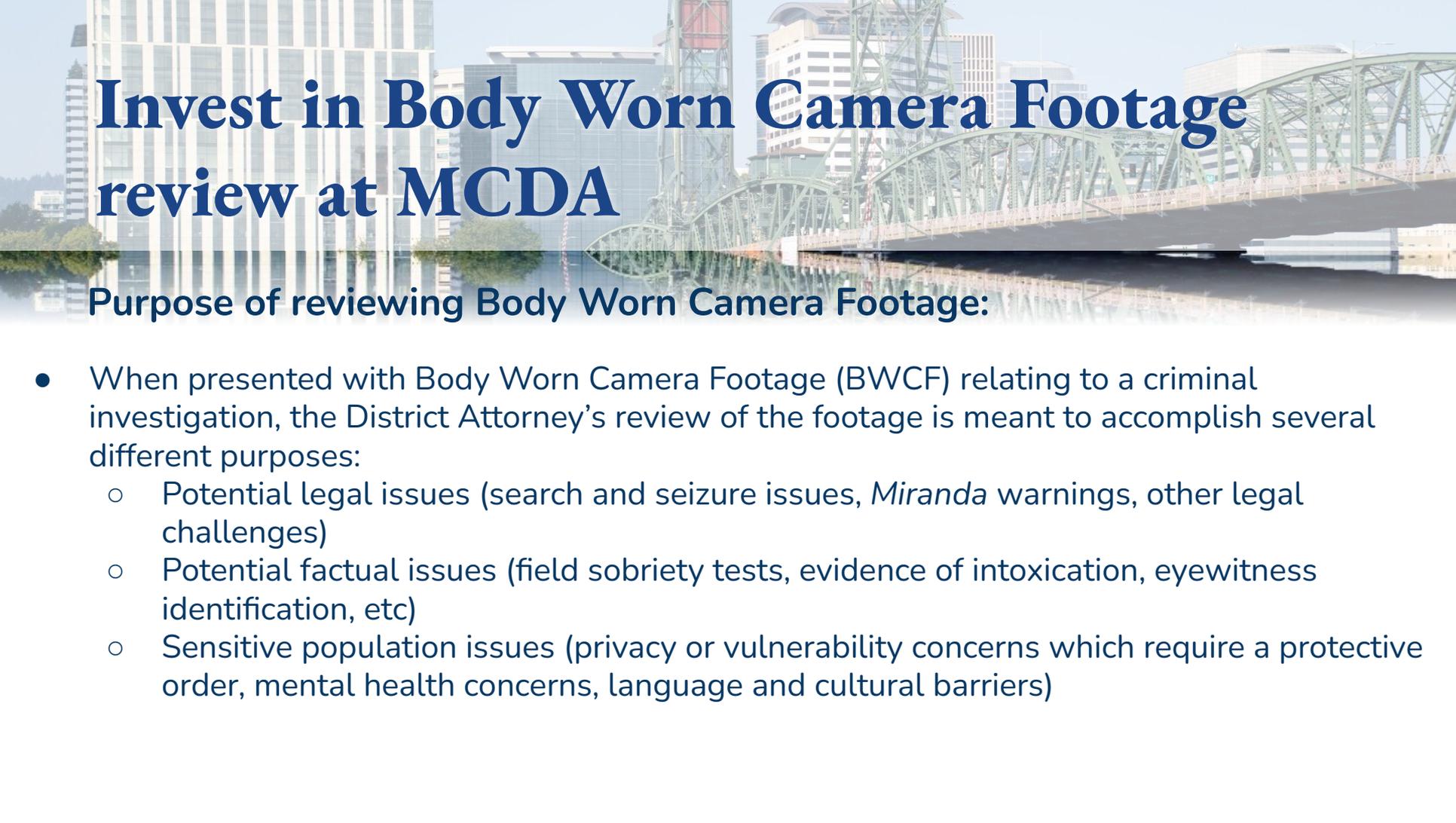
June 8, 2022



# Invest in Body Worn Camera Footage review at MCDA

## Background and Ethical Obligations:

- The United States Supreme Court's decision in *Brady v. Maryland* makes clear that the prosecutor has an ethical obligation to provide all evidence with the potential to lessen a defendant's guilt to the defense attorney as early in the life of a case as is practicable.
- Prosecutors are ethically obligated to review all evidence, including body camera footage, which is reasonably available before making a charging decision whenever possible. This is rooted in the desire to make sure that all prosecutorial decisions are fully justified by the facts.
- Failing to abide by these principles can have both ethical (censure, license suspension or revocation) and legal (suppression of evidence, delay of case resolution, dismissal) consequences.



# Invest in Body Worn Camera Footage review at MCDA

## Purpose of reviewing Body Worn Camera Footage:

- When presented with Body Worn Camera Footage (BWCF) relating to a criminal investigation, the District Attorney's review of the footage is meant to accomplish several different purposes:
  - Potential legal issues (search and seizure issues, *Miranda* warnings, other legal challenges)
  - Potential factual issues (field sobriety tests, evidence of intoxication, eyewitness identification, etc)
  - Sensitive population issues (privacy or vulnerability concerns which require a protective order, mental health concerns, language and cultural barriers)



# Invest in Body Worn Camera Footage review at MCDA

## Purpose of reviewing Body Worn Camera Footage:

- The timing of the review of BWCF can have a significant impact on how effectively it is used. **Pre-charging** review is considered the best practice, as it allows the contents of BWCF to be used by a deputy district attorney in deciding how or whether to charge a case. It also allows for the early identification of any serious factual or legal impediments that may not have been apparent from the police reports and other evidence.
- The early identification of these issues is a way of protecting a defendant from being charged with a crime and potentially held in custody on charges that will later be dismissed or reduced once the BWCF is reviewed.



# Invest in Body Worn Camera Footage review at MCDA

## BWCF and COVID-19:

- In January 2020, Gresham Police Department launched their BWC program. In March and April, MCDA reviewed 106 BWC cases each month before the impact of the pandemic quickly reduced case referrals, which dropped as low as 40 cases in May of 2021.
- While case count levels have begun to rebound, they remain below pre-pandemic rates. The logistical issues caused by current funding levels largely reflect pandemic-level case referral rates, and will worsen as cases continue to rebound.

*Q1: Describe your office's current practice for reviewing body worn camera footage from the Gresham Police Department, Port of Portland, and Portland State, including how that review interacts with the current structure of the court's criminal proceedings.*



# Invest in Body Worn Camera Footage review at MCDA

## Question #1: Current Practices at MCDA

- Background – Case Timing
  - There are three types of cases: Custody cases, citations, and “direct present” cases.
  - Custody cases exist when a defendant is arrested. In these cases, the defendant typically appears in court the next business day after arrest, and so any review of BWCF must be complete by the morning after arrest in order to be factored into an initial charging decision.
  - Citation cases exist when a defendant is given a citation to appear in court on a particular date and remains out of court prior to that time.
  - “Direct Present” cases are presented to MCDA by law enforcement without an arrest or citation.



# Invest in Body Worn Camera Footage review at MCDA

## Question #1: Current Practices at MCDA

- Timelines to review BWCF by case type:
  - Custody – The morning following arrest.
  - Citations – Roughly 30 days
  - Direct Present – No legal limit other than the statute of limitation, but internal policy favors completing review within 60 days.

\*At current funding levels, MCDA is able to review BWCF in only a portion of custody cases prior to charging. This review prioritizes any case involving death or physical injury and domestic violence cases. This means that all other cases, including most custody property crimes and all citations and direct present cases, will not be reviewed until after the charging decision has been made. This process is currently managed and overseen by the 0.75 FTE DDA 3 position currently budgeted.



# Invest in Body Worn Camera Footage review at MCDA

## Question #1: Current Practices at MCDA

- Discovery
  - Any BWCF associated with an existing open criminal case must by law be provided to the defense as soon as is practicable via a process known as “discovery.” Any delay in furnishing BWCF can lengthen the duration of a case. Internal review of BWCF should be completed prior to the furnishing of this footage to the defense, for ethical reasons and simply in order to understand the full nature of the evidence.
  - The administrative duties of compiling and providing this discovery to the defense is handled by the current 0.75 FTE Legal Assistant 2 position.

## Q2: Metrics

- *What percentage of footage reviewed precharge in FY2022 came from each law enforcement agency?*
- *What percent of charging decisions in which BWC evidence was material to the decision?*
- *What percent of cases prosecuted in which BWC evidence was used?*



# Invest in Body Worn Camera Footage review at MCDA

**Question #2:** What percentage of footage reviewed precharge in FY2022 came from each law enforcement agency?

- Total Hours of Footage *Received* for 2022 (Jan – Apr): 579 Hours and 37 Minutes
- Total Hours of Footage *Reviewed* for 2022 (Jan – Apr): 231 Hours and 11 Minutes
- Percentage of Submitted Footage Reviewed by Body Worn Camera Unit: Approx. 40% of custody footage.

*\*This does not include citations or direct presents. Total percentage of ALL cases reviewed estimated between 15-20%.*

# Invest in Body Worn Camera Footage review at MCDA

Question #2: What percentage of footage reviewed precharge in FY 2022 came from each law enforcement agency?

Percentages of Footage Received by Agency:

- Gresham Police Department: 93% (536 Hours and 30 Minutes)
- Port of Portland Police Department: 5% (31 Hours and 22 Minutes)
- Portland Police Bureau\*\* (Cover Officers from Another Agency): ~1% (7 Hours and 43 Minutes)
- Portland State University Police Department: ~1% (4 Hours and 2 minutes)

Percentage of Footage Reviewed by Agency:

- Gresham Police Department: 97% (224 Hours and 57 Minutes)
- Port of Portland: 3% (6 Hours and 14 Minutes)
- Portland State University: 0% (0 Hours)
- Portland Police Bureau (Cover Officers from Another Agency): 0% (0 Hours)



# Invest in Body Worn Camera Footage review at MCDA

**Question #2: What percent of charging decisions in which BWC evidence was material to the decision?**

- This is not a discrete data point within our tracking system, and is impossible to know. Body worn camera footage can make a case stronger or weaker, but is often one bit of evidence among many. The degree of materiality can't be removed from the larger case strategy.



# Invest in Body Worn Camera Footage review at MCDA

**Question #2: What percent of cases prosecuted in which BWC evidence was used?**

- BWCF is simply treated as evidence at trial. That said, the presence of the pandemic has badly distorted our data over the last 2 years as very few trials have occurred. However, dashcam footage, which is already widely implemented, is frequently used as a trial exhibit in relevant cases.
- In cases where the BWCF clearly establishes guilt, this evidence may assist in resolving a case and may be shown by a defense attorney to their client to illustrate the strength of the evidence against them. While this undoubtedly helps to resolve cases, the frequency with which it occurs is not shared with MCDA. Similarly, BWCF which weakens the state's case may be incorporated into negotiations, resulting in a reduced sentence or the dismissal of charges.

### Q3: Staffing and Support

- *Does the current staffing level of 1.5 FTE allow your office to meet those standards.*
- *Are there technology solutions for reviewing footage that would not require staff?*
- *When the Portland Police Bureau comes online, what resources will be needed to meet your legal and ethical obligations for reviewing the footage?*



# Invest in Body Worn Camera Footage review at MCDA

**Question #3: Does the current staffing level of 1.5 FTE allow your office to meet those standards?**

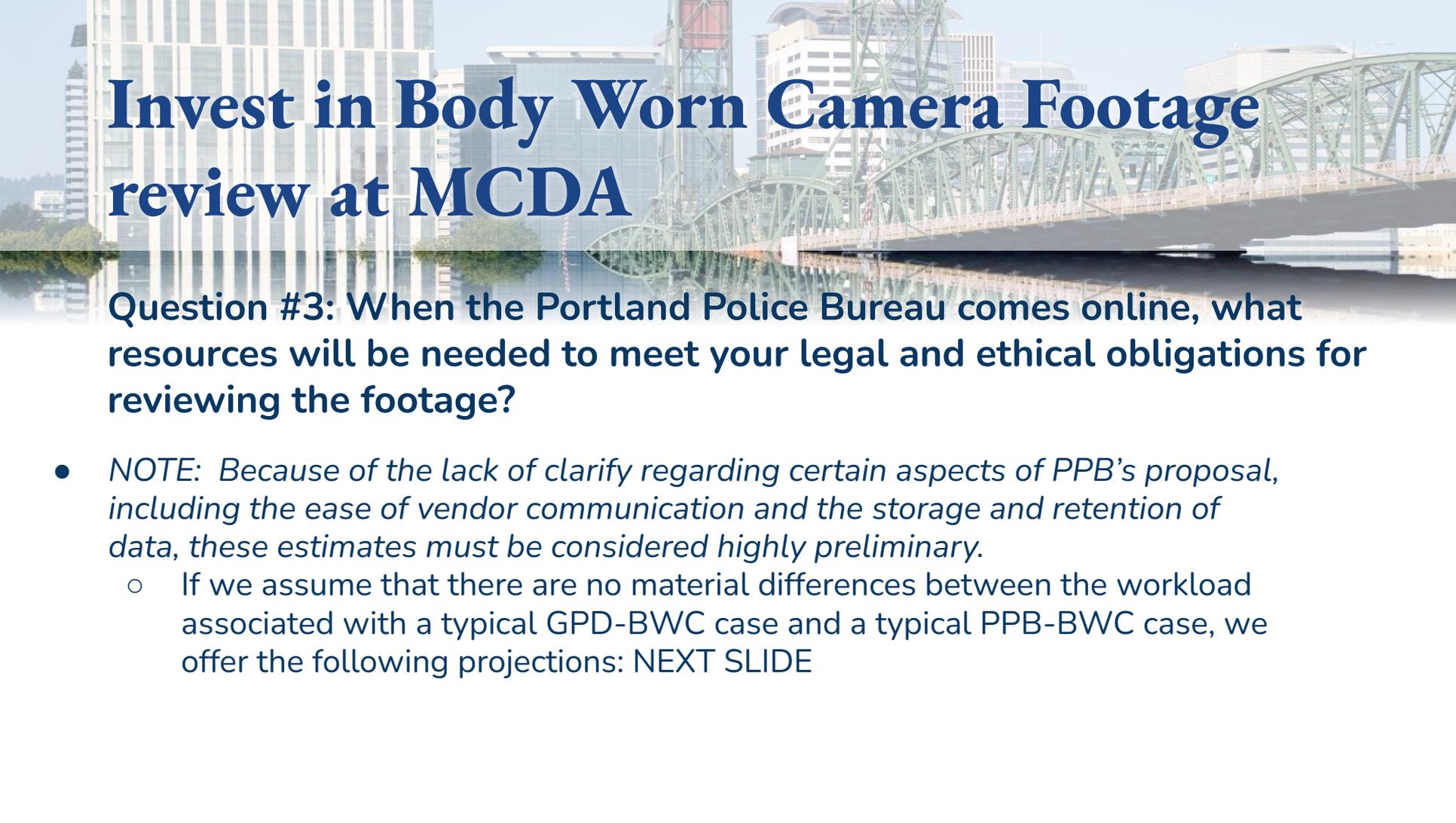
- No. We are unable to review BWCF prior to a charging decision in most cases. We assign the limited resource available to the highest priority cases and reach all others post-charging as quickly as possible. **There is not enough staff available to review video prior to a charging decision.**
- Additionally, the discovery function assigned to the 0.75 FTE is unsustainable at current staffing levels.
  - 2020 – 367 criminal and 38 juvenile BWC discovery packages prepared
  - 2021 – 583 criminal and 20 juvenile BWC discovery packages prepared
  - 2022 (to date) – 206 criminal and 12 BWC discovery packages prepared



# Invest in Body Worn Camera Footage review at MCDA

**Question #3: Are there technology solutions for reviewing footage that would not require staff?**

- Most legal and factual determinations simply require human review.
- Discovery processing costs could be offset by a move to electronic discovery, which would allow greatly heightened synergy between PPB databases, MCDA and public defense providers, but this could only occur as part of a larger overhaul of MCDA's discovery system, which is currently paper based and reliant on physical thumb drives and other digital media rather than a cloud-based digital system.
- Currently, Gresham uses Motorola and Port of Portland use Axon to host and process their data. Both of these programs require different access procedures and are not inherently cross-compatible.



# Invest in Body Worn Camera Footage review at MCDA

**Question #3: When the Portland Police Bureau comes online, what resources will be needed to meet your legal and ethical obligations for reviewing the footage?**

- *NOTE: Because of the lack of clarify regarding certain aspects of PPB's proposal, including the ease of vendor communication and the storage and retention of data, these estimates must be considered highly preliminary.*
  - If we assume that there are no material differences between the workload associated with a typical GPD-BWC case and a typical PPB-BWC case, we offer the following projections: NEXT SLIDE

## **Option A – Precharge Review In All Cases**

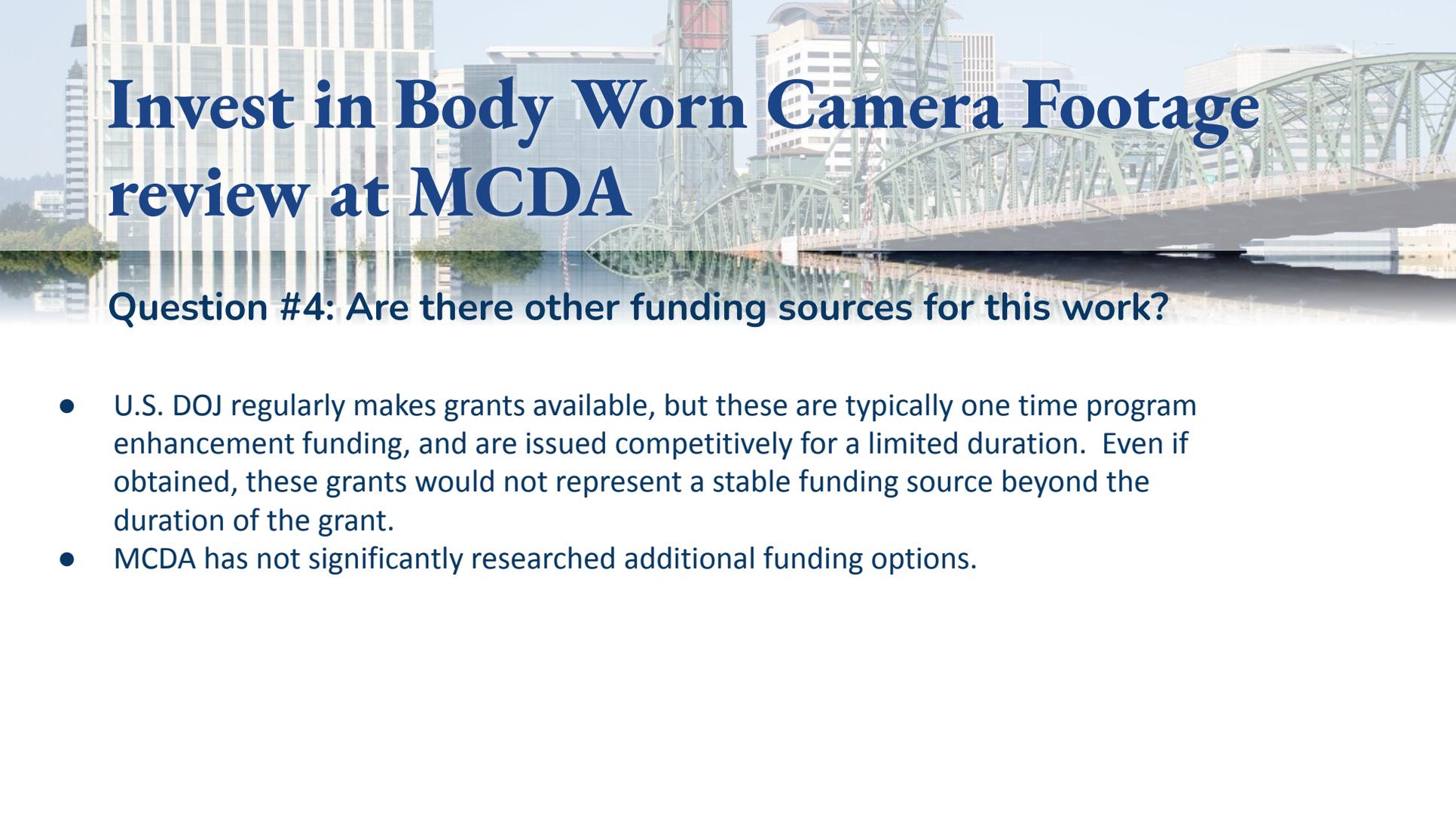
- This would reflect the identified best practice of reviewing all felonies prior to the issuance of charges.
  - FTE: 21.55 (mix of additional supervising DDAs, investigators and legal assistants)
  - \$2,785,400

## **Option B – Post-Charging Review**

- MCDA would discontinue the practice of reviewing footage prior to making a charging decision. Cases which are rejected for prosecution would not be reviewed.
  - FTE: 10.05
  - \$991,800

## **Option C – Constitutionally Minimal Review**

- Under this option, MCDA would not review BWCF. The bare minimum of administrative staff would interface with the police agencies, identify the footage, recover any missing footage, and provide discovery in accordance with our constitutional obligations.
  - FTE: 4.05
  - \$517,000



# Invest in Body Worn Camera Footage review at MCDA

## Question #4: Are there other funding sources for this work?

- U.S. DOJ regularly makes grants available, but these are typically one time program enhancement funding, and are issued competitively for a limited duration. Even if obtained, these grants would not represent a stable funding source beyond the duration of the grant.
- MCDA has not significantly researched additional funding options.

## Q4: Policy and Accountability

- *What are your office practices and procedures when you encounter potential officer misconduct?*
- *Has BWCF been used in any law enforcement use of force or misconduct proceedings? If so, how many and what was the outcome?*
- *Will your office share footage with the newly created Portland Police Accountability Commission if they have concerns of officer misconduct?*
- *Have there been any policy or procedure changes or recommendations resulting from review of BWC evidence?*



# Invest in Body Worn Camera Footage review at MCDA

**Question #5: What are your office practices and procedures when you encounter potential officer misconduct?**

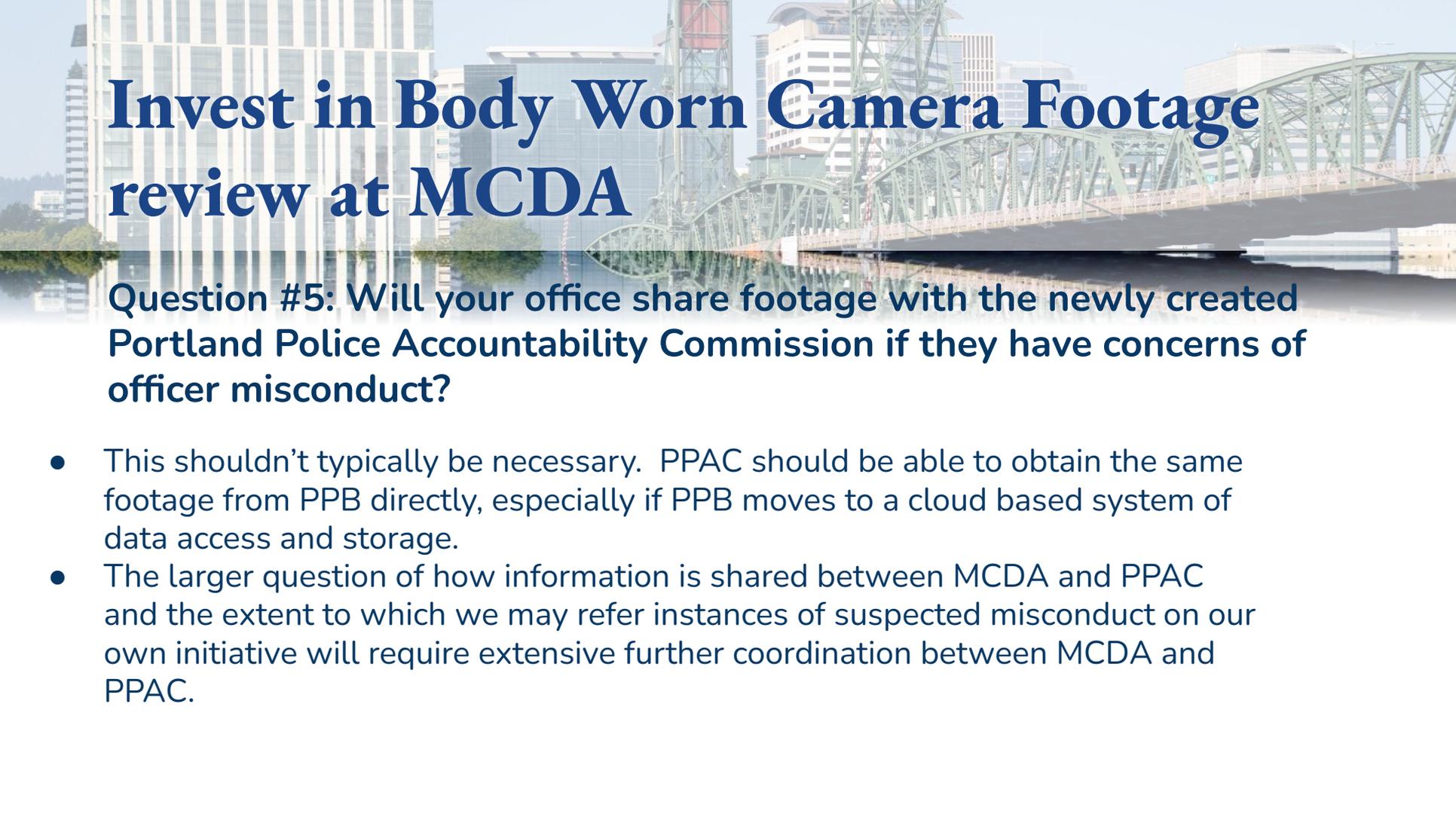
- MCDA is not involved in findings of officer misconduct, which are based on internal law enforcement policies and administrative procedures, not all of which will be immediately apparent to a reviewing attorney.
  - MCDA attorneys tend to be more concerned with:
  - The possible commission of crimes by a law enforcement officer
  - Law enforcement behavior which results in the suppression of evidence, which may not constitute “misconduct.” (example: changing definitions of a “stop,” invocations of counsel)



# Invest in Body Worn Camera Footage review at MCDA

**Question #5: Has BWCF been used in any law enforcement use of force or misconduct proceedings? If so, how many and what was the outcome?**

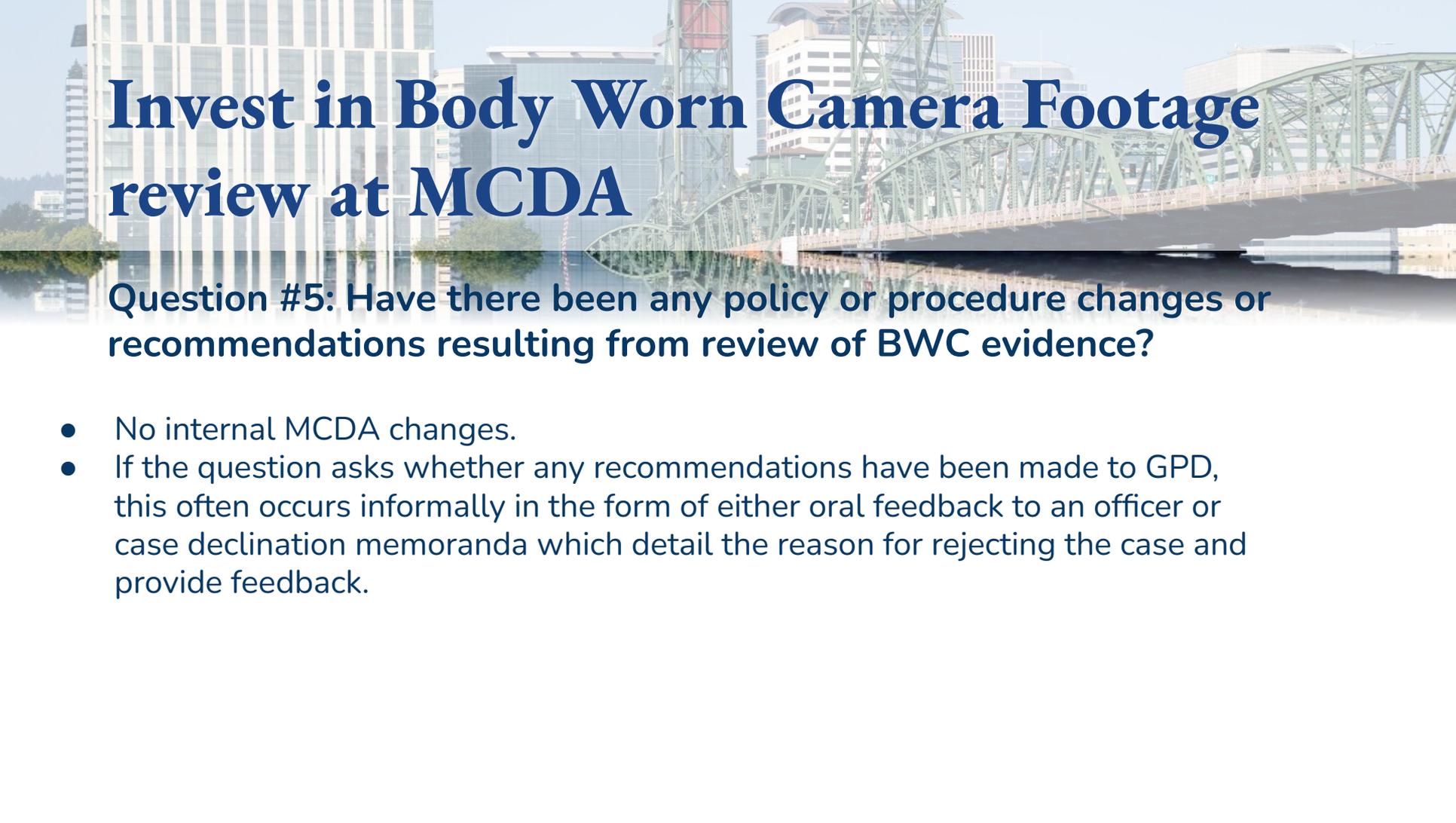
- Yes. BWCF has been used in critical incident grand jury investigations involving alleged excessive use of force by GPD. While the sample size is relatively small, this footage is now frequently incorporated into the grand jury presentations in these cases. No use of force case involving BWCF has gone to trial during the period the GPD BWC policy has been in effect.



# Invest in Body Worn Camera Footage review at MCDA

**Question #5: Will your office share footage with the newly created Portland Police Accountability Commission if they have concerns of officer misconduct?**

- This shouldn't typically be necessary. PPAC should be able to obtain the same footage from PPB directly, especially if PPB moves to a cloud based system of data access and storage.
- The larger question of how information is shared between MCDA and PPAC and the extent to which we may refer instances of suspected misconduct on our own initiative will require extensive further coordination between MCDA and PPAC.



# Invest in Body Worn Camera Footage review at MCDA

**Question #5: Have there been any policy or procedure changes or recommendations resulting from review of BWC evidence?**

- No internal MCDA changes.
- If the question asks whether any recommendations have been made to GPD, this often occurs informally in the form of either oral feedback to an officer or case declination memoranda which detail the reason for rejecting the case and provide feedback.