

**EVERYONE WANTS TO SEE
THE ENTIRE HISTORY OF YOU***

*Caesar Kalinowski IV***

Cite as: 14 Wash. J.L. Tech. & Arts 34 (2018)

<http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1861/14WJLTA034.pdf>

ABSTRACT

Starting with heavy, immobile cameras and progressing to immediately shareable, discreet cellphone videos, the last century has expanded our ability to record ourselves and others—whenever and wherever—to formerly unfathomable heights. Black Mirror, a technology-based, sci-fi miniseries now produced by digital entertainment giant, Netflix, tracks this trajectory to its logical end in “The Entire History of You.” In this not-so-distant, sci-fi future where Google Glass is replaced by an “Augmented Reality Contact Lens and Grain,” everything we see and hear is immediately recorded and uploaded. Effectively, we no longer need memories to recall the past.

But as with all new technologies, and indeed all Black Mirror episodes, the Grain technology reveals an inherent flaw in humans: when everything is recorded, humans cannot relax in the comfort of hazy recollection or secret memories. In the context of the legal system, both government prosecutors and adverse civil parties will seek discovery of everything one has seen and heard. This article examines the constitutional and privacy issues raised by Grain technology, which will undoubtedly be here soon.

* © 2018 Caesar Kalinowski IV

** University of Washington School of Law, Class of 2017. Thank you to Tina & Caesar Kalinowski III for showing me Blade Runner when I was too young; Tania Culbertson for her invaluable feedback and assistance; and my wife Mariko for her endless support.

TABLE OF CONTENTS

Introduction.....35
I. Invasion of Privacy36
II. Searches, Seizures, and Arrests38
III. Compelling Production by Defendant41
IV. Compelling Production by a Third Party.....44
V. Compelling Production By the Government46
Conclusion48

INTRODUCTION

“You know, half the organic memories you have are junk.”¹

Black Mirror, which has been labeled “TV’s Magic 8-Ball”² for its technological prescience, is a collection of self-contained episodes that tackle plausible technological advances and the effect those advances have on our world. While many episodes take place in the United Kingdom, this article assumes that similar technology exists contemporaneously in the United States and analyze various episodes with an eye towards U.S. law.

In the show’s third episode, “The Entire History of You,”³ people in this alternate universe have almost uniformly been implanted with a digital recording device known as a “grain”, which allows them to review video and audio playback of every moment they experience.⁴ Using a handheld remote, memories are shuffled through like episodes on Netflix; they can be encrypted, deleted, or

¹ *Black Mirror: The Entire History of You* (Channel 4 television broadcast Dec. 18, 2011).

² G. Clay Whittaker, ‘*Black Mirror*’ Is TV’s Magic 8-Ball, THE DAILY BEAST (Sept. 14, 2015 1:05 PM), <https://www.thedailybeast.com/black-mirror-is-tvs-magic-8-ball> (“It becomes difficult to discuss the impact and predictions of dystopian programs a few years after they’re created. At some point the conversation has to switch from ‘will they be right’ to ‘are they right.’ In many aspects *Black Mirror* was early in capturing certain aspects of life that have become familiar to us since.”).

³ *Black Mirror: The Entire History of You* (Channel 4 television broadcast Dec. 18, 2011).

⁴ The files are referred to as “grain recordings.”

displayed on TV screens. Grains can also be stolen (a process known as “gouging”), with the stored memories then sold to voyeuristic “millionaire Chinese pervs.” Because the memory recordings in the gouged grain would be lost, new buyers are given 30 years’ worth of backup space to store memories (in the “cloud”).

Initially, we are introduced to Liam Foxwell, a young lawyer interviewing with a law firm. On his way to the airport, Liam reviews his recent interview performance through real time video footage displayed on a retinal screen and stored in an implanted “grain” behind his ear.⁵ At the airport, Liam consents to have his memories screened by security agents to review the people Liam came into contact with over the last 72 hours.⁶ Once home, Liam uses his grain during arguments with his wife to settle disputes, scrutinize body language, and uncover an affair.⁷

Given this ability to definitively resolve any dispute as to who said what, what someone knew, or where someone was at any given time, the implications of such technology are clear. Police, insurance agencies, and aggrieved parties would assuredly seek discovery of pertinent recordings, leading to issues regarding privacy, government searches or seizures of an individual’s grain, self-incrimination, and the production of evidence. Due in part to the similarity between the grain’s functions and already-ubiquitous cell phone technology, existing law is likely sufficient to address the attendant constitutional and privacy rights of U.S. citizens with grains.

I. INVASION OF PRIVACY

The first major issue implicated by grains is the right to privacy. In this world where almost everyone is automatically recording everything they do and see, anyone a person interacts with (or views) is also being recorded by default. Harmlessly walking down the street? Recorded on a grain. Checking into a hotel room for an adulterous tryst? Recorded on a grain. Going on a drunken rant? Recorded on a grain. Every moment that someone else is

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

present, they are recording you and that memory is accessible, reproducible, and displayable for anyone to see.

Unlike in the European Union, the “‘right to be forgotten,’ . . . is not recognized in the United States.”⁸ Under federal law, “[a]bsent some special circumstance (such as an attorney-client privilege), no right of privacy or other protection attaches to words spoken by one individual to another individual; the speaker assumes the risk that his auditor may repeat the conversation to others.”⁹ Unfortunately for secretive individuals, there are no federal laws that prohibit a second party from recording them as they go about their business.

Looking to the future, the federal government is highly unlikely to create any such laws. The right to record video or audio, at least “in traditional public fora—streets, sidewalks, plazas, and parks—is . . . necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”¹⁰ Any attempt by the government to establish content or non-content related restrictions on recording, would be subject to either strict scrutiny¹¹ or intermediate scrutiny,¹² respectively.

State law, however, often does provide a more robust right to privacy. Several state constitutions explicitly create such a right.¹³

⁸ *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (citing *Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, ECLI:EU:C:2014:616 (May 13, 2014)).

⁹ *United States v. Cox*, 836 F. Supp. 1189, 1197 (D. Md. 1993).

¹⁰ *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 594–95 (7th Cir. 2012).

¹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”) (quoting *Wisconsin Right to Life, Inc. v. Fed. Election Comm’n*, 551 U.S. 449, 464 (2007)).

¹² *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (for non-content restrictions on speech, the government must show a sufficiently important or substantial interest that is unrelated to suppression of free expression).

¹³ *See, e.g.*, ALASKA CONST. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this

The Restatement (Second) of Torts also concludes that “[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.”¹⁴ Three of the four causes of action most commonly recognized by the Restatement would very likely apply to grain recordings: (1) unreasonable intrusion upon the seclusion of another;¹⁵ (2) unreasonable publicity given to the other’s private life;¹⁶ and (3) publicity that unreasonably places the other in a false light before the public.¹⁷ Subject to the vagaries of state law, any post-recording publication of personal, offensive, or misleading recordings could subject the recorder to additional state law liability.

II. SEARCHES, SEIZURES, AND ARRESTS

The next issue arises in the contexts of grain searches and

section.”); CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”); FLA. CONST. art. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”); WASH. CONST. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 652A(1) (AM. LAW INST. 1977).

¹⁵ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

¹⁶ RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”).

¹⁷ RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) (“One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”).

seizures. Given the vast amount of information potentially captured by a grain, the government would surely seek control over grain recordings in criminal prosecutions. If guilt or innocence could be easily determined by viewing the alleged event unfold in real time, gathering any other evidence would be unnecessary. The Fourth Amendment, however, would still likely provide adequate protections for a person's grain rights.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."¹⁸ Thus, when "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has occurred.¹⁹ "The Fourth Amendment is not concerned only with trespassory intrusions on property[,] but also "when the government violates a subjective expectation of privacy that society recognizes as reasonable."²⁰

Accordingly, the Supreme Court has created a two-part inquiry to examine if the government needs a search warrant before searching or seizing a citizen's property (here, a grain).²¹ First, the individual must have "manifested a subjective expectation of privacy in the object of the challenged search."²² Second, society must "[be] willing to recognize that expectation as reasonable."²³ While the subjective inquiry is case specific, it is easy to deduce that a person with a grain stored in his or her body, which contains every conceivable piece of private data, would subjectively expect their grain's contents to be private. In regard to the objective inquiry, it can be assumed that by virtue of an individual's internal possession and control over their own grain and historical privacy of one's own

¹⁸ U.S. CONST. amend. IV.

¹⁹ *United States v. Jones*, 565 U.S. 400, 407 n.3 (2012).

²⁰ *Id.* at 414 (Sotomayor, J., concurring) (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

²¹ *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz v. United States*, 389 U.S. 347 (1967)).

²² *California*, 476 U.S. at 211.

²³ *Id.* (citing *Katz*, 389 U.S. at 347).

thoughts,²⁴ society recognizes that person's privacy expectation as reasonable.²⁵ In short, because of the internal placement of the grain and the collective magnitude of the information stored on that grain, the Fourth Amendment would require a search warrant for the search or seizure of a grain absent exceptional circumstances.

While many exceptions, such as "exigent circumstances,"²⁶ are highly fact intensive and cannot be addressed in the abstract, the search incident to arrest ("SITA") exception can be decided as a matter of law. The Supreme Court "endorsed a general rule that arresting officers, in order to prevent the arrestee from obtaining a weapon or destroying evidence, could search both 'the person arrested' and 'the area within his immediate control.'"²⁷ Later,, the Court analyzed the SITA exception to the Fourth Amendment's warrant requirement in the context of cellular phones.²⁸ The Court held that the exception did *not* apply because it found that cell phones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" in that they contain "a digital record of nearly every aspect of [peoples'] lives—from the mundane to the intimate."²⁹ Although the Court noted the possibility of data being remotely wiped to destroy any evidence, it found that such tampering was not prevalent and the government

²⁴ See generally *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

²⁵ The Supreme Court has repeatedly recognized that physical invasions of the body by the state implicate privacy and liberty rights. See *Cruzan by Cruzan v. Dir. Missouri Dep't of Health*, 497 U.S. 261, 342 (1990) ("The sanctity, and individual privacy, of the human body is obviously fundamental to liberty. 'Every violation of a person's bodily integrity is an invasion of his or her liberty.'") (Stevens, J., dissenting) (quoting *Washington v. Harper*, 494 U.S. 210, 237 (1990)).

²⁶ See *Missouri v. McNeely*, 569 U.S. 141 (2013) ("A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in "hot pursuit" of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause.") (internal quotations and citations omitted).

²⁷ *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2175 (2016) (quoting *Chimel v. California*, 395 U.S. at 763) (internal quotation marks omitted).

²⁸ *Riley v. California*, 134 S. Ct. 2473 (2014).

²⁹ *Id.* at 2490 (citing *Ontario v. Quon*, 560 U.S. 746, 760 (2010)).

had more targeted ways to address that concern.³⁰

Looking at grain technology, the Court would likely find *Riley* instructive. Like cell phones, grains store an immense treasure trove of personal and intimate information. Also, like cell phones, information on grains cannot be used as a weapon that would threaten an arresting officer's life.³¹ While "The Entire History of You," did not address the possibility of remote wiping, we might assume that other technological advances will allow police to take control of a person's grain remote, block incoming signals, or make a copy of the data to preserve evidence. Simply put, grains, "[w]ith all they contain and all they may reveal, [would] hold for many Americans 'the privacies of life.'"³² As such, whether incident to arrest or as part of an investigation, the Fourth amendment would likely protect grain recordings from search and seizure.

An important caveat is that like Liam's interaction with the airport security agent, an individual could consent to have his or her grain recordings reviewed.³³ Assuming that consent is not the result of government coercion or police gamesmanship, it would waive any Fourth Amendment or Fifth Amendment self-incrimination claims by a defendant.³⁴

III. COMPELLING PRODUCTION BY DEFENDANT

Once a person is arrested and a search warrant is obtained, the next question is whether the police could force the person to turn over his or her grain recordings. The Self-Incrimination Clause of the Fifth Amendment provides that no "person . . . shall be

³⁰ *Riley*, 134 S. Ct. at 2486–87.

³¹ *Id.* at 2485 ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape.").

³² *Id.* at 2494–95 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Although this quote speaks about cell phones, the same could apply to grains.

³³ *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (holding that "[t]he Fourth Amendment test for a valid consent to search is that the consent be voluntary").

³⁴ *See Schneckloth v. Bustamonte*, 412 U.S. 218, 221 (1973).

compelled in any criminal case to be a witness against himself.”³⁵ This “privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.”³⁶ To be considered “testimonial,” the information sought itself must explicitly or implicitly relate to “a factual assertion or disclose information” to be considered “compelled” testimony.³⁷ The Fifth Amendment’s right against self-incrimination ultimately “respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.”³⁸

Less clear, however, is the status of the law with regard to production of physical items that tend to incriminate a person. The Supreme Court held that “a compulsory production of the private books and papers of the owner . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment[.]”³⁹ But the Supreme Court has also “long held that the privilege does not protect a suspect from being compelled by the State to produce ‘real or physical evidence.’”⁴⁰ The distinction, it seems, turns on whether the personal effects (or body part) are testimonial in nature, or whether the defendant was compelled by the state to create the material.⁴¹

The Court in *Fisher v. United States*, however, held that “the Fifth Amendment would not be violated by the [compelled production of] papers [which] on their face might incriminate the [defendant].”⁴² The Court recognized that the act of producing the documents may be testimonial to the extent that the act of production concedes “the existence of the papers demanded and their

³⁵ U.S. CONST. amend. V.

³⁶ *Schmerber v. California*, 384 U.S. 757, 761 (1966).

³⁷ *Doe v. United States*, 487 U.S. 201, 210 (1988).

³⁸ *Couch v. United States*, 409 U.S. 322, 327 (1973).

³⁹ *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

⁴⁰ *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Schmerber*, 384 U.S. at 764).

⁴¹ See *Andresen v. Maryland*, 427 U.S. 463, 472-73 (1976) (upholding the introduction of seized business papers because “[t]he records seized contained statements that petitioner had voluntarily committed to writing”).

⁴² *Fisher v. United States*, 425 U.S. 391, 409 (1976).

possession or control by the taxpayer,” or because the production serves to authenticate the materials.⁴³ Accordingly, multiple courts of appeals’ physical evidence self-incrimination analysis now focuses on whether demanding the information compels its creation and, if not, “whether the act of producing it would constitute compelled testimonial communication.”⁴⁴

Here, a grain is definitely in possession of the defendant, located within his or her body, and contains recordings of what the defendant said and observed. Although the recording, and any statements made in the recordings, would be considered voluntary (at the time of their creation), the production of those recordings would not be voluntary. In the most literal sense, a defendant compelled to produce the grain recordings of what they said would be forced “‘to disclose the contents of his own mind’ that implicates the Self-Incrimination Clause.”⁴⁵

A much closer call occurs in the context of arguably non-testimonial grain recordings, such as video of a crime scene or the dimensions of an instrument. Like producing a shirt for the jury’s consideration,⁴⁶ the “evidence” contained in the grain’s videos could be viewed as real or physical evidence. In those cases, the Court would still find that the defendant is not required to produce his or her grain recordings because it would constitute compelling of personal testimony (in the form of what was seen). It also does not fall neatly into the categorical exception for real or physical evidence⁴⁷ because it directly implicates the defendant’s control or knowledge of evidence. In that way, it is so connected with the defendant’s personal thoughts and actions as to implicate the self-

⁴³ *Id.* at 409–10.

⁴⁴ *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993) (citing *United States v. Doe*, 465 U.S. 605, 612 (1984); *Andresen*, 427 U.S. at 473; *Fisher*, 425 U.S. at 409–10).

⁴⁵ *Doe*, 487 U.S. at 211 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)).

⁴⁶ *See Holt v. United States*, 218 U.S. 245, 252–53 (1910) (compelling production of a shirt).

⁴⁷ *See, e.g., Fisher*, 425 U.S. at 409.

incrimination concerns inherent in the Fifth Amendment's protection.

IV. COMPELLING PRODUCTION BY A THIRD PARTY

But what about compelling the production of third parties' grain recordings? Could the police force a witness to a crime to turn over their internal video feed? The answer is very likely, yes.⁴⁸ The Supreme Court has made clear "that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial."⁴⁹ Police informants or undercover agents will likely have no problem producing their grain recordings, even those containing the surreptitiously-recorded admissions of a defendant, without violating the Fourth or Fifth Amendment.⁵⁰

Under Federal Rule of Criminal Procedure 17(c)(1), the state may use a subpoena to "order the witness to produce any books, papers, documents, data, or other objects the subpoena designates."⁵¹ In order for a witness to quash such a subpoena, they would have to show:

- (1) that the documents are evidentiary and relevant;
- (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
- (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;

⁴⁸ *Couch v. United States*, 409 U.S. 322, 328 (1973) ("The Constitution explicitly prohibits compelling an accused to bear witness 'against himself': it necessarily does not proscribe incriminating statements elicited from another.").

⁴⁹ *United States v. Nobles*, 422 U.S. 225, 234 (1975).

⁵⁰ *See United States v. White*, 401 U.S. 745, 751 (1971); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("[T]his Court nor any member has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.").

⁵¹ Fed. R. Crim. P. 17(c)(1).

and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’⁵²

Absent such a showing, a third-party witness’s grain recordings would have to be turned over to the state upon subpoena.⁵³

Although not specifically addressed in this *Black Mirror* episode, it is foreseeable that a grain might both store recordings locally *and* back up those recordings online in the cloud. If the recordings are stored on a remote server, the state would still be able to access to them through the Stored Communications Act.⁵⁴ Under 18 U.S.C. § 2703(c), the state could obtain any content or non-content information contained within a server by obtaining a search warrant.⁵⁵ Absent a privilege or a failure to comply with applicable

⁵² United States v. Nixon, 418 U.S. 683, 699–700 (1974).

⁵³ Other statutes also provide an avenue for disclosure in certain types of criminal investigation. Under 21 U.S.C. § 876(a) (date of code edition cited), for example, the Attorney General has the authority to “require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation” of a violation of the Controlled Substances Act.

⁵⁴ 18 U.S.C. § 2703(c) (date of code edition cited) (“Records concerning electronic communication service or remote computing service.--(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).”).

⁵⁵ Under 18 U.S.C. 2510(8), “‘contents’, when used with respect to any wire, oral, or electronic communication, includes any information concerning the

law, the government would very likely be able to compel third parties—whether witnesses to the crime or holders of the information—to produce copies of grain recordings.

V. COMPELLING PRODUCTION BY THE GOVERNMENT

Analogous to police body cams, defendants would also prize access to the arresting officers' grain recordings in order to establish malfeasance or refute the government's theory of the case. But how much of the grain footage should be produced? Do the officers' have an individual right to privacy that could protect certain recordings? While state laws vary on the subject, federal officers' grain recordings would likely be obtainable with few exemptions.

Like tort claims for invasion of privacy, state statutes provide the most likely basis for requesting grain productions. As such, the states are relatively unburdened when it comes to legislating who can and cannot have access to police recordings.⁵⁶ While many states have public records request statutes,⁵⁷ some states specifically exempt body camera videos from disclosure under certain statutes⁵⁸ or limit requests to certain individuals.⁵⁹ Generally speaking, these exemptions from disclosure are not complete bars, but instead ban production of videos taken within traditionally private areas such as private residences, mental health facilities, or other places where citizens have a reasonable expectation of privacy.⁶⁰ With few exceptions, the person being recorded by a body camera is authorized to obtain those

substance, purport, or meaning of that communication[.]”

⁵⁶ Adam Marshall, *Police Bodycam Videos: The Wild West of Open Records Requests*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Feb. 21, 2018), <https://www.rcfp.org/bodycam-video-access>.

⁵⁷ See CAL. GOV'T CODE § 6250 *et seq.* (1998); WASH. REV. CODE 42.56.010 *et seq.* (2017).

⁵⁸ See S.C. CODE ANN. § 23-1-240(G)(1) (2015) (“Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.”).

⁵⁹ See S.C. CODE ANN. § 23-1-240(G)(5) (2015) (listing individuals “who may request and must receive data recorded by a body-worn camera”).

⁶⁰ See, e.g., FLA. STAT. § 119.071(1)(2) (2018).

recordings.⁶¹

Under the Freedom of Information Act (“FOIA”),⁶² citizens may request the full or partial disclosure of previously unreleased information and documents controlled by the United States government. Like body cameras, federal employees’ grain recordings would be subject to release under this statute as a document controlled by the government. Section 552(b)(7) of the FOIA outlines certain exemptions for disclosures, including material that “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” which weighs “the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.”⁶³ So, although individuals are authorized to request all documents or videos pertaining to them,⁶⁴ other individuals’ privacy rights—even those of federal law enforcement officers—may be invoked to defeat a records request.⁶⁵

Ultimately, the current law regarding government disclosures of information is sufficiently broad—and the grain technology is sufficiently similar to body cameras—that little would need to be changed with the advent of grain recordings. Individuals recorded by police would still have access to those recordings in criminal and most civil cases. Any exemptions to grain disclosures would likely align with current exemptions, which focus on the government’s interest in preventing ongoing crime or protecting third parties’ individual privacy rights.

⁶¹ See, e.g., FLA. STAT. § 119.071(1)(4)(a) (2018); S.C. CODE ANN. § 23-1-240(G)(5)(a) (2015).

⁶² 5 U.S.C. § 552 (Year of edition of statute).

⁶³ *Davis v. U.S. Dep’t of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (internal quotation marks omitted).

⁶⁴ 5 U.S.C. § 552a(d)(1) (Year of edition of statute).

⁶⁵ See *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115–16 (D.C. Cir. 2007) (affirming exemption of “names, addresses, telephone numbers, social security numbers, and other such private information regarding law enforcement officials, a ‘judicial protectee,’ other government employees, unnamed ‘third-party individuals,’ and [a third party]”).

CONCLUSION

Grain recordings, which would show accurate depictions of an individual's visual and auditory perceptions, would be invaluable evidence for private litigants, criminal defendants, and the government. As with any technology that makes it easier to attain the truth of a matter but implicates a privacy right, grain recordings would be very likely protected under the Fourth and Fifth Amendment. Additionally, while production of grain recordings would likely be routine in civil matters, criminal defendants would still have adequate protections against self-incrimination to limit the government's ability to obtain those recordings.