

Martinez, Maritza

Subject: Controlled Equipment

Importance: High

From: Ismail Ramsey <izzy@ramsey-ehrllich.com>

Sent: Sunday, July 3, 2022 8:45 PM

To: Kitt Saginor <ksaginor@gmail.com>

Cc: Barbara Atwell <batwell@thesoundwell.com>; Jennifer Tu <JTU@afsc.org>; John Lindsay-Poland <JLindsay-Poland@afsc.org>; John Moore III <j.edwardmoore@gmail.com>; Lee, Katherine <KLee@cityofberkeley.info>; wendyalfsen@gmail.com <wendyalfsen@gmail.com>

Subject: Re: Controlled Equipment

WARNING: This is not a City of Berkeley email. Do not click links or attachments unless you trust the sender and know the content is safe.

Director Lee—

Can you please add this to the public agenda packet.

I also ask that no one reply to this email, to avoid any appearance of a Brown Act or city open government policy violation, despite the Council's pandemic exception for subcommittees.

Would you also please distribute to Department and BPA.

Thanks. Izzy

On Sun, Jul 3, 2022 at 7:22 PM Kitt Saginor <ksaginor@gmail.com> wrote:

Board Members Moore and Ramsey,

I am writing to you in advance of the Controlled Equipment Subcommittee meeting scheduled for Tuesday, July 5th at 11:30

Several members of the public who attended your last meeting, including myself, have four sets of requests concerning your work on Policy 709. We will be grateful if we may speak to the need for these changes beyond the short time allowed for public comment at the start of the meeting.

- 1. If you are amenable to some participation in the subcommittee's discussion by members of the public, we would like for you to elevate to panelist at least Wendy Alfsen and Kitt Saginor.**
- 2. Please complete your review of Rifles (adding deployment criteria) and Disposition of Tear Gas Inventory as described in AFSC June 28 memo sections #3-5 (memo attached). Background information on deployment is presented and discussed in a second attachment.**
- 3. Within this email we are suggesting language changes to multiple sections.**

In 709.4.1 at the beginning of the section on Less Lethal Launchers (middle of page 15), please insert the following language after that heading:

Less Lethal Launchers:

Deployment and Use of all Less Lethal Launchers shall conform to Less Lethal Projectile Guidelines set forth in Section 303.9 and Crowd Control Requirements set forth in Section 303.10, of Berkeley Police Department Policy 303.

Penn Arms 40mm Single Launcher (Description, purpose/authorized use, fiscal impact, legal and procedural, and training)

Further down that same page,

PURPOSE and AUTHORIZED USE:

Except as otherwise provided in BPD 303.9, kinetic energy projectiles and chemical agents shall not be used to disperse any assembly, protest, or demonstration (Penal Code Section 13652)

Purpose: The purpose of kinetic energy impact projectiles, commonly referred to as "less lethal" is to preserve life, minimize the use of force and allow time for de-escalation.....

We request that this same language be inserted within the Purpose and Authorized Use section for every type of less lethal, i.e.

- Penn Arms 400 mm Single Launcher (page 15)
- Milkor LTL Multi-launcher page 17)
- FN 303 and FN Pava Impact Projectile (page 19)
- CTS7290 Diversionary Device (page 20)
- Long Range Acoustic Device (page 22)
- Chlorobenzylidene Malononitrile and Oleoresin Capsicum (page 25)
 - Or replace this section - Berkeley's ban precludes use of canisters
- Oleoresin Capsicum Canisters (OC) (page 27)
 - Or replace this section - Berkeley's ban precludes use of canisters
- Oleoresin Capsicum spray (page 28)

In order to conform to the prohibition of tear gas use (June 9, 2020, and confirmed June 22, 2022), please make the following changes:

Add the phrase "prohibited for any assembly, protest or demonstration per BPD Policy 303.3" Immediately following the name of the equipment type in Policy 709.4.1 for

- **Type:** Chlorobenzylidene malononitrile (CS) (page 24)
- **Type:** Oleoresin capsicum (OC) (page 26)
- **Type:** Oleoresin capsicum (OC) spray (page 27)

Change the section concerning Chlorobenzylidene Malononitrile (p. 25-26):

PURPOSE and AUTHORIZED USE:

Authorized uses: Tear gas may NOT be used for crowd control, crowd dispersal. Tear gas may be used against barricaded suspects, only pursuant to Policy 303, based on the circumstances. Only the Chief of Police may authorize the delivery and use of tear gas ...

In Section 709.5 (page 29) please add language as follows:

709.5 APPROVAL

The Chief of Police or authorized designee shall obtain approval from the governing body by way of an ordinance adopting the military equipment policy. As part of the approval process, the Chief of Police or the authorized designee shall ensure the proposed military equipment policy is submitted to governing body, after it has been reviewed by the Police Accountability Board as provided for in the Police Equipment & Community Safety Ordinance (BMC 2.100 et seq), and is available has been easily accessible and available to the general public" on the department website at least 30 days prior to any public hearing concerning the military equipment issue (Government Code 7071).

In Section 709.6.1 (page 30), please amend as follows:

709.6.1 TEMPORARY USE IN EXIGENT CIRCUMSTANCES

The Berkeley Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances, without following the **acquisitions** requirements in BMC 2.100.040, however the department must take the following actions....”

In Sections 709.9 (page 31), please amend as follows:

709.9 MILITARY EQUIPMENT QUESTIONS AND COMPLAINTS

Any member of the public may direct their questions **or complaints** regarding this policy and ordinance to a Sergeant in the Professional Standards Bureau at 510-981-5734 or 510-981-5974. Concerns may also be directed to police@cityofberkeley.info. Questions will be answered in a timely manner by a member of the Berkeley Police Department. 709.9.1

MILITARY EQUIPMENT CONCERNS AND COMPLAINTS

Any member of the public may direct their concerns **or complaints** regarding this policy and any of the military equipment to Internal Affairs Bureau at 510-981-5706.

4. Please seek support for PAB to continue work on these issues beyond the July 26th deadline.

On June 21, City Council voted to:

Refer all other internal policies relevant to controlled equipment to the Police Accountability Board and Berkeley Police Department to review and conform to the approved Controlled Equipment Impact Statements, and local/state laws for City Council consideration by July 26, 2022. ([Annotated Agenda](#))

There are numerous relevant policies. It will not be possible for the PAB to provide adequate review so quickly. Here's some draft phrasing, which we know you will improve upon -

The PAB recommends that City Council refer policies [insert numbers] to the Police Accountability Board and Berkeley Police Department for continued review in conjunction with the requirements of AB 481 and local laws, and make appropriate recommendations to the City Council regarding those use policies by October 15, 2022.

Thank you!

Kitt Saginor
ksaginor@gmail.com
415-860-4173

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Izzy Ramsey
Ramsey & Ehrlich LLP
(510)548-3600

June 28, 2022

To: Berkeley Police Accountability Board Subcommittee on Controlled Equipment Reporting

From: John Lindsay-Poland and Jennifer Tu (American Friends Service Committee)
Barb Atwell and Wendy Alfsen (Berkeley Friends Meeting Racial Justice Action Team)
George Lippman (Racism and Criminal Justice Reform Group, for identification only)
Gala King II (Interfaith Movement for Human Integrity); Donna Mandel (Berkeley resident)

Dear members of the Berkeley Police Accountability Board Subcommittee on Controlled Equipment Reporting,

We are Berkeley residents and county neighbors who have been closely following the recent proceedings on implementing both Berkeley's local police controlled equipment reporting ordinance, and the new state law (AB481). We offer six recommendations to strengthen the current proposed policy's accountability measures and to responsibly address unused and banned equipment. We include specific language change recommendations to the proposed policy. We know the July 20 deadline (to meet the Council's July 26 deadline) is coming up fast; please let us know if we can support the Subcommittee further as you work on this issue in the coming weeks. This is not an exhaustive list of use policy recommendations regarding BPD 709, 428, and specific equipment policies, but critical to community safety.

Contents

- 1. Identify PAB as independent oversight entity**
- 2. Consideration by PAB of equipment policies after approval of Policy 709**
- 3. Deployments of assault rifles and sniper rifles**
- 4. Use and disposition of .50 Caliber Barrett rifle**
- 5. Disposition of teargas in BPD inventory**
- 6. Amend use policies for impact projectiles to conform with AB 48**

1. Identify PAB as independent oversight entity

The use policies for military equipment required by AB 481 must include several components, including "The mechanisms to ensure compliance with the military equipment use policy, including which *independent persons or entities have oversight authority*, and, if applicable, what legally enforceable sanctions are put in place for violations of the policy." Italics added (Section 7070(d)(6))

Berkeley's Controlled Equipment ordinance also requires independent oversight, and specifically names the Police Accountability Board to serve this role to review controlled

equipment policies and recommend that the City Council “adopt, amend or reject” the policies. (Berkeley Municipal Code 2.100.040)

Policy 709 does not identify an independent oversight entity, but proposes that:

“The Department’s Audit and Inspection Sergeant will ensure that the Department members comply with this policy. The Audit and Inspection Sergeant will conduct an annual audit with the assistance from members of the Processional Standards Bureau. Any violations will be referred to the Internal Affairs Bureau and handled in accordance with General Order P-26 (Personnel Complaint Procedures). All instances of non-compliance will be reported to the City Council via the annual military equipment report.”

We propose that the Subcommittee recommend to amend Policy 709 to identify the PAB as the independent oversight entity for the policy, consistent with the City’s police equipment and community safety ordinance, by amending the last sentence of 709.11 Compliance:

All instances of non-compliance will be reported to the Police Accountability Board and City Council via the annual military equipment report.

And by adding the following to the same section:

709.11 The Berkeley Police Accountability Board shall be the independent oversight entity required for this policy, and shall review and make recommendations to the City Council, with the same procedures and requirements of the Police Equipment and Community Safety Ordinance, as described in Berkeley Municipal Code 2.100.040.

2. Consideration of equipment policies subsequent to approval of Policy 709

The Controlled Equipment ordinance foresaw that the Police Accountability Board would not be able to review all equipment policies in a short period of time, stating that:

“To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment, and the Police Accountability Board shall consider this ranking in determining the order in which to perform its review.”

Because AB 481 provides 180 days for governing bodies to review proposed military equipment policies, PAB members reasonably expected to have more time to review Policy 709, submitted in April. Just as the Police Review Commission reviewed BPD’s Lexipol policies, and because

this subcommittee has limited time to review nine policies for military equipment, we suggest that the subcommittee recommend that:

“The City Council requests that the Police Accountability Board continue to review use policies for types of equipment under the purview of AB 481 and make appropriate recommendations to the City Council regarding those use policies.”

3. Policy for deployment of assault rifles (patrol and sniper rifles)

References:

Colt M4 (patrol rifle): Policy 709, pp. 3-4

Remington 700 (sniper rifle): Policy 709, pp. 4-6

We recognize that Department officers view rifles as a means to protect life. At the same time, the display of assault rifles has a chilling and fear-inducing effect on community members. That is why authorized uses – deployments or displays – of rifles should be clearly and carefully defined.

Current policy for deployment of assault rifles is contained in Policies 349 (patrol rifles) and 354 (sniper rifles), as well as in Policy 300 on Use of Force. Existing and proposed BPD policies for *deploying* assault rifles are general and as a whole, have much more specificity and clarity on the authorization to *fire* the weapon than for authorization to *deploy* or *display* the weapon. Guidelines for *firing* the weapon are extensively detailed in Policy 300. However, AB 481 requires policies for *use* of equipment - that is *deployment* - a standard that is clearly broader than for *use of force*.

Policy 349 focuses most attention on selection of rifle operators and the rifles themselves. Policy is that assault rifles are to “exercise expeditious control over critical incidents or potentially violent situations.” (Section 349.2, Policy Manual p. 235) The guidance on authorized use is: “In light of known or potential risks, a TRO should deploy the firearm which best meets the needs of the police response, and in which he/she has the greatest accuracy and operational confidence.” (Section 349.6, Policy Manual p. 236).

We propose that this policy describe prohibited uses that are not appropriate, as well as considerations to take into account for pre-planned operations (typically by the SRT). For this, we reference the Oakland PD patrol rifle policy and armored vehicles policy.

Proposed language on uses of patrol rifles:

In Policy 709, p. 3, add the following paragraphs to the “Authorized Uses” section:

“Commanders shall only authorize the deployment of patrol rifles or sniper rifles when the specific capabilities of the rifles are necessary to bring an incident to a safe conclusion. Any authorized departure of a rifle from its place of storage, excluding movement of the rifles at the start or end of a shift, shall be considered a deployment.

All uses that are not authorized by this policy are prohibited. For purposes of clarity, the following are specifically noted as prohibited uses:

- Recruitment, public relations, or promotional activities
- Crowd control
- Display during routine patrol operations

Pre-planned deployments of patrol rifles and sniper rifles

Commanders shall determine whether to deploy patrol rifles based on credible intelligence, and consider the following variables when determining whether to deploy patrol rifle and sniper rifles:

- Whether the use of an alternative operation location would diminish the need to use a patrol rifle or sniper rifle.
- Whether the subject is beyond the effective range of Departmental pistols or shotguns.
- Whether the subject is known to wear or is suspected of wearing body armor.
- Potential presence of minors, elderly, medically compromised, people with physical, mental or intellectual disabilities, people with limited English proficiency, or other vulnerable people. (Note: This variable should be given special consideration due to the potential for trauma.)
- Potential presence of uninvolved persons. (Note: This variable should be given special consideration due to the potential for trauma.)
- Potential traumatic effect of the presence of assault rifles on neighbors and other bystanders.
- Lack of knowledge on relevant characteristics of the operation location and persons present.
- Reliability of intelligence source for information on the operation location and persons present.
- For night-time operations, potential effects on sleeping or just-awakened persons.
- Whether the subject is known to possess or is suspected of possessing a deadly weapon or firearm (including caliber and type)
- Potential skills of persons present to use firearms or other weapons, including experience in law enforcement, military, or other armed groups.
- Whether the targeted person(s) have a history (within a time period relevant to the suspected crime) involving the criminal use of firearms or other weapons.”

4. .50 Caliber Barrett rifle

(pp. 6-7 of Policy 709): BPD should eliminate this weapon from its inventory, as it is not appropriate for civilian law enforcement. Barrett .50 caliber rifles are very large sniper rifles that typically require a tripod or other mounting device. BPD recognizes that it is “infrequently” used. BPD says it is for “disabling an engine block.” BPD acquired this weapon from Dept of Justice 15 years ago, and many other departments of BPD’s size and larger do not have this weapon. Last month Alameda County Supervisor Nate Miley spoke out against the Alameda County Sheriff’s Office possession of this type of weapon. The Berkeley use report says this weapon was not deployed at all in the last year. The staff time required to train on this weapon is not a good use of City resources.

Proposal on .50 caliber Barrett rifle

Policy 709, Barrett rifle, p. 6: Replace the section on “Authorized Uses” with the statement:

“The Barrett rifle is not authorized for use by the Berkeley Police Department or by any outside department or agency called to respond to mutual aid in Berkeley. Berkeley Police Department will dispose of its Barrett rifle within three months.”

5. Disposition of CS and OC canisters (tear gas)

Reference: Policy 709, pp. 25-28

Berkeley’s prohibition on the use of tear gas and other chemical agents is a City Council action of June 9, 2020.¹ It is also reflected in BPD’s Policy 300 on Use of Force, and was ratified by the City Council’s approval on June 21, 2022 of amended Policy 303 and Impact Statement. According to BPD’s controlled equipment use report, within the last year the Department did not deploy either OC canisters or CS gas at all. In addition, AB 48 significantly limits the use of such chemical agents.

However:

- Policy 709 would authorize the use of CS gas and OC canisters (pp. 25-28) for “crowd control” and “crowd dispersal”. The proposal refers to OC canisters (not the handheld pepper spray carried on individual officers’ belts) as “tear gas” (p. 26).

¹ Action: M/S/Carried (Davila/Harrison) to establish an official City of Berkeley policy 1) prohibiting the use of tear gas by the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, and 2) prohibiting the use of pepper spray or smoke for crowd control by the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, during the COVID-19 pandemic, until such time that the City Council removes this prohibition. Vote: All Ayes.

- Policy 709 sections on chemical agents do not reference the language of AB 48 (Penal Code § 13652).
- Policy 709 does not reference Berkeley’s prohibition on the use of “tear gas” by BPD or any “outside department or agency called to respond to mutual aid in Berkeley”, enacted in June 2020 by the City Council.

Proposal on Tear Gas

Policy 709, CS gas, p. 26: Replace the section on “Purpose and Authorized Uses” for CS gas, with the statement:

“CS gas is not authorized for use by the Berkeley Police Department or by any outside department or agency called to respond to mutual aid in Berkeley. Berkeley Police Department will phase out its possession of CS gas within three months.”

Policy 709, OC canisters, p. 27: Replace the section on “Purpose and Authorized Uses” for OC canisters, with the statement:

“OC canisters are not authorized for use by the Berkeley Police Department or by any outside department or agency called to respond to mutual aid in Berkeley. Berkeley Police Department will phase out its possession of OC canisters within three months.”

6. Amend use policies for impact projectiles to conform with AB 48

Reference: Policy 709, pp. 15-20

On June 21, the City Council amended the Impact Statement for the BPD’s less lethal impact projectiles and launchers (Penn Arms 40MM Single Launcher; Milkor Multiple Launcher; and FN 303 Launcher and FN Pava Impact Projectile) to conform with state law on use of force, AB 48. However, Policy 709 describes authorized uses for these weapons without reference to the limitations of AB 48 or even the Penal Code (Section 13652).

Policy 709 sections on these weapons should be amended in the same manner as City Council amended the Impact Statement, by incorporating the language of Section 13652.

Background Information on Deployment is an Included Use of AB 481 Military Equipment properly included in Policy 709

AB481 specifies 'deployment' in its first Finding,

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB481

"The acquisition of military equipment and its DEPLOYMENT in our communities adversely impacts the public's safety and welfare.... Military equipment is more frequently DEPLOYED in low-income Black and Brown communities, meaning the risks and impacts of police militarization are experienced most acutely in marginalized communities." [emphasis added]

AB481 also requires that a policy is needed before "collaborating with another law enforcement agency in the DEPLOYMENT OR OTHER USE of military equipment" PC7073(a)(4) (emphasis added)

It is clear from this language in AB481 that deployment is one of the forms of use of military equipment. "Use" is not defined as limited to "use of force." "Use of force" is not mentioned anywhere in AB 481. Both the AB 481 preamble and collaboration policy prerequisites reference "deployment", but neither "use of force" nor "deployment" are included in definitions of "military equipment use policy" [7070 (d)] or "use reports" [7072(a)]. "Not mentioned" criteria would preclude "use of force" as well as "deployment." Rifle policies, like Control Devices BPD Policy 303, properly include both. Please add deployment use criteria to BPD Policy 709.

The bill would specify these provisions do not preclude a county or local municipality from implementing additional requirements and standards related to the purchase, use, and reporting of military equipment by local law enforcement agencies.