



Police Review Commission

ACTION CALENDAR
December 19, 2017

To: Honorable Mayor and Members of the City Council
 From: Police Review Commission
 Submitted by: George Lippman, Chairperson, Police Review Commission
 Subject: Repealing the Revised Oleoresin Capsicum (Pepper Spray) Policy Passed September 12, 2017

RECOMMENDATION

Adopt a Resolution repealing the recent change in the Berkeley Police Department's use of Oleoresin Capsicum (OC, or pepper spray).

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On September 12, 2017, the City Council approved a change in the longstanding policy governing the Berkeley Police Department's use of pepper spray. The context for this change was the series of protests and demonstrations centered in Berkeley this year and concerns about violent clashes. The revised policy allows police to use pepper spray on specific individuals within a crowd who are committing acts of violence upon police or others. Previously, the use of pepper spray was prohibited in crowd control situations.

However, studies showing the uncertain efficacy of pepper spray, detrimental health effects on those exposed to it, and risk of affecting innocent bystanders, call into question whether applying pepper spray in a crowd, regardless of the specific circumstances, is ever justified or acceptable.

BACKGROUND

On September 16, 1997, the City Council adopted a policy for the Berkeley Police Department use of pepper spray that included "No pepper spray will be used as crowd control." This policy was incorporated in successive versions of the BPD's General Order U-2, Use of Force, up to the March 9, 2017 version in effect before Council's September 12, 2017 action. Under Section 20, "Prohibited Uses of Force":

- (b) Oleoresin Capsicum (pepper spray) for use as a crowd control technique is prohibited. On September 16, 1997, the City Council passed a policy recommendation that says, in part, "no pepper spray will be used for crowd control by the Berkeley Police Department."

This year, following outbreaks of violence against people engaged in First Amendment activities, and in anticipation of more of the same during “Free Speech Week” the last week in September, the City Manager and Chief of Police requested a change in the pepper spray policy to make it available to officers as a use of force option against violent offenders. The Council approved this policy change on September 12, 2017.

Consequently, the BPD revised General Order U-2, Section 20(b), on September 13, 2017, to state that pepper spray should not be directed against persons engaged in peaceful, non-violent expression of First Amendment rights, or to disperse a crowd, move a crowd, or against subjects involved in passive resistance.

Responding to questions of whether the revised language accurately reflected the Council’s action, the BPD on September 20, 2017 further revised General Order U-2, Section 20(b) to incorporate the Council’s September 12, 2017 motion, which “re-affirmed and further amended the Council’s policy regarding the use of pepper spray as such use relates to crowd control, expression of First Amendment speech, and addressing acts of violence by specific individuals within a crowd.” The order further states that officers shall not use pepper spray as a crowd control technique to disperse or move a crowd, nor direct it against persons engaged in legal speech or other protected First Amendment expression, or those committing unlawful acts by non-violent or passive resistant means.

The Police Review Commission is concerned that even the limited application of pepper spray in a crowd situation is dangerous. Health hazards to the intended target of OC is documented in a survey of studies summarized in a North Carolina Medical Journal article.¹ Also troubling is the potential for adverse effects on those in the vicinity of the target. The International Network of Civil Liberties Organizations/Physicians for Human Rights declared in their study of crowd control weapons that when delivering chemical weapons by firing a grenade or canister, the risk of affecting bystanders is high.²

Finally, while the PRC asks for the immediate reinstatement of the pre-September 12, 2017 language to General Order U-2, it also requests additional language to prohibit pepper spray use against individuals in a crowd. This added wording will prevent the ban on pepper spray use “as a crowd control technique” or “for crowd control” from being interpreted to impliedly permit use of pepper spray to stop criminal behavior of an individual in the crowd.

At its October 25, 2017 meeting, the PRC voted to recommend to the City Council that it adopt the attached resolution calling for reinstatement of the September 1997 pepper

¹ Smith, C. G., & Stopford, W. (1999) “Health Hazards of Pepper Spray.” *North Carolina Medical Journal*, 60(5), 268-274.

<http://web.archive.org/web/20000817004624/http://www.ncmedicaljournal.com/Smith-OK.htm>

² The International Network of Civil Liberties Organizations (INCLLO) and Physicians for Human Rights (2016) “Lethal in Disguise: The Health Consequences of Crowd-Control Weapons.” https://www.aclu.org/sites/default/files/field_document/weaponreport_final_web_1.pdf

spray policy. M/S/C (Prichett/Matthews) -- Ayes: Allamby, Lippman, Matthews, Prichett, Yampolsky; Noes: None; Abstain: Ford; Absent: Perezvelez, Roberts.

ENVIRONMENTAL SUSTAINABILITY

Eliminating the risk of collateral or ambient exposure to OC, and additional untested chemicals commonly combined with OC, will increase the air quality surrounding a targeted civilian, and reduce the danger of harm to those with a compromised health status such as asthma.

RATIONALE FOR RECOMMENDATION

Oleoresin Capsicum can have severe and long-lasting health effects on its intended target and those in the immediate vicinity. An officer's best efforts to spray only an individual violent offender with OC can be thwarted by wind or a volatile crowd, thus resulting in accidental exposure of bystanders. Therefore, all uses of pepper spray within a crowd should be banned.

ALTERNATIVE ACTIONS CONSIDERED

No practical alternatives to this recommendation exist.

CITY MANAGER

See companion report.

CONTACT PERSON

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Attachments:

1: Resolution

RESOLUTION NO. ##,###-N.S.

REPEALING THE REVISED OLEORESIN CAPSICUM (PEPPER SPRAY) POLICY
PASSED SEPTEMBER 12, 2017

WHEREAS, the Police Review Commission advises and makes recommendations to the public, the City Council and the City Manager “concerning all written and unwritten policies, practices, and procedures of whatever kind and without limitations, in relation to the Berkeley Police Department, other law enforcement agencies and intelligence and military agencies operating within the City of Berkeley, and law enforcement generally...” (Ordinance No. 4644-N.S., Sec. 10); and

WHEREAS, in 1997 community activists proposed a ban on use of Oleoresin Capsicum (OC, or pepper spray), and a compromise was achieved in City Council in which OC was banned for use in crowd situations, and the following language was placed in the BPD General Order U-2 “Use of Force”: “Oleoresin Capsicum (pepper spray) for use as a crowd control technique is prohibited”; and

WHEREAS, the September 12, 2017 Council action reaffirmed the 1997 Council policy on OC “as such use relates to crowd control, expression of First Amendment speech,” etc., and affirms that “Oleoresin Capsicum (pepper spray) shall not be used as a crowd control technique to disperse a crowd or move a crowd,” and “shall not be used on persons engaged in legal speech or other expression that is protected by the First Amendment, nor on those committing lawful acts by non-violent or passive resistance means (e.g. sitting or lying down to block a street or doorway)”; and

WHEREAS, notwithstanding these policy pronouncements, the September 12, 2017 Council action allows police use of “pepper spray upon specific individuals in a crowd who are committing acts of violence upon police or others”; and

WHEREAS, studies summarized in a University of North Carolina/Duke University report show significant and sometimes lasting negative effects from use of OC, including acute asthma and respiratory arrest; 70 in-custody deaths beginning in 1993 involved the use of OC spray during arrests, with pre-existing conditions listed as causes or contributors to the deaths, and a 1993 North Carolina death “precipitated by pepper spray”;³ and

WHEREAS, the same UNC study expressed caution about other chemicals that different brands mix with OC, noting, “Inhalation of high doses of some of these chemicals can produce adverse cardiac, respiratory and neurologic effects, including arrhythmias and sudden death”; and

WHEREAS, the UNC study casts doubt on the efficacy of OC, stating that “It is important to remember that subjects who are highly aggressive, agitated, intoxicated, or suffering

³ Smith, C. G., & Stopford, W. (1999) “Health Hazards of Pepper Spray.” *North Carolina Medical Journal*, 60(5), 268-274.
<http://web.archive.org/web/20000817004624/http://www.ncmedicaljournal.com/Smith-OK.htm>

from mental illness may have altered perception of and response to pain, and consequently may not be affected by – or may even become enraged after – being sprayed”; and

WHEREAS, a study by an international consortium of civil liberties groups and the Physicians for Human Rights states that “Chemical irritants are an indiscriminate weapon by design; because of their indiscriminate nature – especially when delivered by firing a grenade or a canister – limiting the exposure to individuals or small groups is difficult, and the risk of affecting bystanders and individuals other than the intended targets is high.”⁴

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby reverses its action of September 12, 2017,⁵ and returns the policy on the use of OC (pepper spray) to the 1997 policy,⁶ except that the policy shall not be interpreted to allow the use of OC against individuals within a crowd; and requests the Berkeley Police Department to immediately reinstate the related language on OC in General Order U-2, “Use of Force,” with the addition of an express prohibition on the use of OC against individuals within a crowd.

⁴ The International Network of Civil Liberties Organizations (INCLO) and Physicians for Human Rights (2016) "Lethal in Disguise: The Health Consequences of Crowd-Control Weapons." https://www.aclu.org/sites/default/files/field_document/weaponreport_final_web_1.pdf

⁵ Annotated Agenda, Special Meeting of the Berkeley City Council for Tuesday, Sept. 12, 2017, Action Calendar Item #1. https://www.cityofberkeley.info/Clerk/City_Council/City_Council__Agenda_Index.aspx

⁶ “Oleoresin Capsicum (pepper spray) for use as a crowd control technique is prohibited. On September 16, 1997, the City Council passed a policy recommendation that says, in part, ‘no pepper spray will be used for crowd control by the Berkeley Police Department.’” General Order U-2, Section 20(b), March 9, 2017 (version in effect before Council’s Sept. 12, 2017 action).

