



Office of the Mayor

REVISED AGENDA MATERIAL

Meeting Date: January 30, 2018

Item Number: Aa

Item Description: Proposed Ordinance: Surveillance Technology Use and Community Safety

Submitted by: Mayor Jesse Arreguin

This item has been revised based on input from the City Manager, City Attorney, and Berkeley Police Department. The amended proposed ordinance adopts strong surveillance approval and reporting requirements, while ensuring legal and operational feasibility.

ORDINANCE NO. -N.S.

ADDING CHAPTER X.XX TO THE BERKELEY MUNICIPAL CODE, ACQUISITION AND USE OF SURVEILLANCE TECHNOLOGY ~~USE AND COMMUNITY SAFETY~~ ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Title

This ordinance shall be known as the Surveillance Technology Use and Community Safety Ordinance.

Section 2. That Chapter x.xx is hereby added to the Berkeley Municipal Code to read as follows: Findings

Chapter X.XX

Acquisition and Use of Surveillance Technology

x.xx.010 Purposes

A) The City Council finds as follows:

- 1) Through the enactment of this ~~Chapter ordinance~~, the City seeks to establish a thoughtful process regarding the procurement and use of Surveillance Technology ~~surveillance technology~~ that carefully balances the City's interest in protecting duty to protect public safety with its interest in protecting duty to protect the privacy and civil rights of its community members.
- 2) B) Transparency is essential when the City is considering procurement and use of Surveillance Technology ~~surveillance technology~~.
- 3) C) Although such technology may be beneficial to public order and safety, it has the potential to put both privacy and civil liberties at risk. ~~In U.S. history, government surveillance has had a disproportionately repressive effect on marginalized racial, ethnic, religious, and LGBT communities and social change movements.~~
- 4) D) Decisions ~~No decisions~~ relating to Surveillance Technology ~~surveillance technology~~ should occur with ~~without~~ strong consideration of the impact such technologies may have on civil rights and civil liberties, as with all ~~including those~~ rights guaranteed by the California and United States Constitutions.

- 5) ~~E) Surveillance Technology may involve technology involves immediate, as well as ongoing, financial costs. -Before the City acquires any Surveillance Technology surveillance technology, it must evaluate all costs associated with the procurement, installation, use and maintenance of the technology.~~
- F) ~~Decisions regarding whether and how Surveillance Technologies surveillance technologies should be funded, acquired, or used should be governed by the City Council as the elected representatives of the City.~~
- 6) ~~G) In addition give significant weight to applicable local, state, and federal law, legally public input.~~
- 7) ~~Legally enforceable safeguards, including robust transparency, oversight, and accountability measures, are important must be in the protection of place to protect civil rights and civil liberties before any surveillance technology is acquired or deployed.~~
- 8) ~~H) Data if a surveillance technology is approved, data reporting measures will enable must be adopted that empower the City Council and public to confirm verify that mandated civil rights and civil liberties safeguards have been strictly observed.~~

X.XX.020Section 3. Definitions

The following definitions apply to this Chapter Ordinance:

- 1) ~~1) “Surveillance Report” means an annual written report concerning a specific surveillance technology that includes all of the following:~~
 - a) ~~A description of how the surveillance technology was used, including the quantity of data gathered or analyzed by the technology;~~
 - b) ~~Whether and how often data acquired through the use of the surveillance technology was shared with outside entities, the name of any recipient entity, the type(s) of data disclosed, and the justification for the disclosure(s);~~
 - c) ~~Where applicable, a breakdown of what physical objects the surveillance technology software was installed upon; for surveillance technology software, a breakdown of what data sources the surveillance technology was applied to;~~
 - d) ~~Where applicable, a breakdown of where the surveillance technology was deployed geographically, by whatever geographical unit is used by the City entity;~~
 - e) ~~A summary of each community complaint received by the City entity or applicable reviewing commission about the surveillance technology;~~

- ~~f) The results of any non-privileged internal audits, any information about violations or potential violations of the Surveillance Use Policy, and any actions taken in response; Entity~~
- ~~g) Information about any data breaches or other unauthorized access to the data collected by the surveillance technology, including information about the scope of the breach and the actions taken in response;~~
- ~~h) Information that helps the community assess whether the surveillance technology has been effective at achieving its identified purposes;~~
- ~~i) Statistics and information about public records act requests;~~
- ~~j) Total annual costs for the surveillance technology, including personnel and other ongoing costs, and what source of funding will fund the technology in the coming year; and~~
- ~~k) Any request by the City entity for modifications to the Surveillance Use Policy and a detailed basis for the request.~~

2) ~~“City entity” means any department, bureau, division, or unit of the City of Berkeley.~~

3) ~~2) “Surveillance Technologytechnology” means anany electronic device, system utilizing an electronic device, or similar technological tool used, designed, or primarily intended to remotely and surreptitiously collect, ~~retain, process, or share~~ audio, electronic, visual, location, thermal, olfactory, biometric, or similar information specifically associated with, or capable of being associated with, any individual or group. Examples of covered Surveillance Technologysurveillance technology include, but are not limited to: cell site simulators (Stingrays); automatic license plate readers; body worn cameras; gunshot detectors (ShotSpotter); facial recognition software; thermal imaging systems, except as allowed under Section 2(d); ; ~~body-worn cameras;~~ social media analytics software; gait analysis software; and video cameras that record audio or video; and can remotely transmit or can be remotely accessed; ~~and personal communication devices.~~~~

“Surveillance Technologytechnology” does not include the following devices or hardware, unless they have been equipped with, or are modified to become or include, a Surveillance Technologysurveillance technology as defined in Section 2 (above):

~~8(3):~~ (a) Routineroutine office hardware, such as televisions, computers, and printers, that is in widespread public use and will not be used for any surveillance ~~or law enforcement~~ functions;

(b) Handheld Parking CitationTicket Devices, that do not automatically read license plates;

~~(PTDs); (c) Manually manually-operated, portable non-wearable, handheld digital cameras, audio recorders, and video recorders that are not designed to be used remotely surreptitiously and whose functionality is limited to manually capturing, viewing, editing and manually downloading video and/or audio recordings, but not including body worn cameras;~~

~~4) ; (d) Devices surveillance devices that cannot record or transmit audio or video or be remotely accessed, such as image stabilizing binoculars or night vision goggles or thermal imaging cameras used for fire operations, search and rescue operations and missing person or probable cause searches; ; (e) manually-operated technological devices used primarily for internal municipal entity communications and are not designed to surreptitiously collect surveillance data, such as radios and email systems; (f) municipal agency databases that do not contain any data or other information collected, captured, recorded, retained, processed, intercepted, or analyzed by surveillance technology; or (g) electrocardiogram machines.~~

(e) Manually-operated technological devices that are not designed and will not be used to surreptitiously collect surveillance data, such as two-way radios, email systems and city-issued cell phones;

(f) Municipal agency databases;

(g) Medical equipment used to diagnose, treat, or prevent disease or injury, including electrocardiogram machines.

(h) Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, prevent, and protect the City of Berkeley and its community members from potential cybersecurity events (e.g. reconnaissance or monitoring systems, intrusion, interference or attack on our systems); and cybersecurity capabilities, technologies and systems used by the City of Berkeley in cybersecurity monitoring and cyber-forensic based investigations and prosecutions of illegal activity;

(i) Stationary security cameras affixed to City property or facilities.

3) “Surveillance Technology Report” means an annual written report by the City Manager covering all of the City of Berkeley’s Surveillance Technologies that includes all of the following information with regard to each Surveillance Technology:

(a) **Description:** A description of all non-privileged and non-confidential information about use of the Surveillance Technology, including but not limited to the quantity of data gathered and sharing of data, if any, with outside entities. If sharing has occurred, the report shall include general, non-privileged and non-confidential information about categories of recipient entities and purposes for such sharing;

(b) **Complaints:** A summary of each complaint, if any, received by the City about the Surveillance Technology;

(c) **Audits and Violations:** The results of any non-privileged internal audits, any information about violations or potential violations of the Surveillance Use Policy, and any actions taken in response;

(d) **Effectiveness:** Information that helps the community assess whether the Surveillance Technology has been effective in achieving its identified outcomes;

(e) **Costs:** Total annual costs for the Surveillance Technology, including personnel and other ongoing costs.

5) 4) “Surveillance Impact Report” means a publicly-released written report produced prior to acquisition of a Surveillance Technology that, if the surveillance technology were to be used or deployed, includes the following:

6) (a) **Description:** Information describing the Surveillance Technology surveillance technology and how it works, including product descriptions from manufacturers;

7) (b) **Purpose:** Information on the proposed purposes(s) for the Surveillance Technology surveillance technology;

8) (c) **Location:** The general location(s) it may be deployed and reasons for deployment; in the location(s);

9) (d) **Impact:** An assessment identifying any potential impact on civil liberties and civil rights including but not limited to potential disparate or adverse impacts on any communities or groups;

10) (e) **Mitigation:** Information regarding specific, affirmative technical and procedural measures that can will be implemented to appropriately safeguard the public from any impacts impact identified in subsection (d);

11) (f) **Data Types and Sources:** A list of the all sources of data proposed to be collected, analyzed, or processed by the Surveillance Technology surveillance technology, including “open source” data;

12) (g) **Data Security:** Information about the steps that can will be taken to ensure that adequate security measures are used to safeguard the data collected or generated by the technology from unauthorized access or disclosure;

13) (h) **Fiscal Cost:** The fiscal costs for the Surveillance Technology surveillance technology, including initial purchase, personnel and other ongoing costs, including to the extent practicable costs associated with

compliance with this and other reporting and oversight requirements, as well as ~~and~~ any current or potential sources of funding;

14) (i) Third Party Dependence and Access: Whether use or maintenance of the technology will require data gathered by the technology to be handled or stored by a third-party vendor on an ongoing basis, and whether a third-party may have access to such data;

15) (j) Alternatives: A summary of potentially viable ~~all~~ alternative methods (whether involving the use of a new technology or not) considered before deciding to use the proposed Surveillance Technology ~~surveillance technology~~, including an overview of the costs and benefits associated with each potentially viable ~~alternative and an explanation of why the proposed technology is preferable;~~ and,

16) (k) Experience of Other Entities: To the extent such information is available, a Track Record: A summary of the experience of (if any) other entities, especially government entities, ~~have had~~ with the proposed technology, including any, if available, quantitative information about the effectiveness of the proposed technology in achieving its stated purpose in other jurisdictions, and any known adverse information about the technology (such as unanticipated financial or community costs and benefits, failures, or civil rights and civil liberties abuses).

17) 5) "Surveillance Use Policy" means a publicly-released and legally-enforceable policy for use of the Surveillance Technology ~~surveillance technology~~ that at a minimum specifies the following:

18) (a) Purpose: The specific purpose(s) that the Surveillance Technology ~~surveillance technology~~ is intended to advance;

19) (b) Authorized Use: The uses that are authorized, the rules and processes required prior to such use, and the uses that are prohibited;

20) (c) Data Collection: Information collection ~~The information that is allowed and prohibited may be collected by the surveillance technology.~~ Where applicable, list any data sources the technology will rely upon, including "open source" data;

21) (d) Data Access: A general description of the title and position of the employees and entities authorized to ~~Data Access: The individuals who may~~ access or use the collected information, and the rules and processes required prior to access or use of the information;

22) (e) Data Protection: A general description of the ~~The~~ safeguards that protect information from unauthorized access, including encryption and access control mechanisms;

- 23) (f) Data Retention: The time period, if any, for which information collected by the surveillance technology will be routinely retained, ~~the reason such retention period is appropriate to further the purpose(s)~~, the process by which the information is regularly deleted after that period lapses, and the specific conditions that must be met to retain information beyond ~~such~~that period;
- 24) (g) Public Access: How collected information may be accessed or used by members of the public;
- a) ~~(h) Third Party Data Sharing~~: ~~If and how other City or non-City entities can access or use the information, including any required justification or legal standard necessary to do so and any obligations imposed on the recipient of the information;~~
- 25) Training: ~~Training~~The training required for any employee~~individual~~ authorized to use the Surveillance Technology~~surveillance technology~~ or to access information collected ~~by the surveillance technology, including any training materials;~~
- 26) (i) Auditing and Oversight: Mechanisms~~The mechanisms~~ to ensure that the Surveillance Use Policy is followed, ~~including the job title category and number of personnel assigned to ensure compliance with the policy, internal recordkeeping of the use of the technology or access to information collected by the technology, technical measures to monitor for misuse, any independent person or entity with oversight authority,~~ and the legally enforceable sanctions for intentional violations of the policy; and
- 27) (j) Maintenance: The mechanisms and procedures to ensure maintenance of that the security and integrity of the Surveillance Technology~~surveillance technology~~ and collected information ~~will be maintained.~~
- 28) 6) _____ -“Exigent Circumstances~~circumstances~~” means a City Entity~~entity~~’s good faith belief that an emergency involving ~~imminent~~ danger of death or serious physical injury to any person, or imminent danger of significant property damage, requires use of the Surveillance Technology~~surveillance technology~~ or the information it provides.
- 29)“~~Appropriate reviewing commission~~” means ~~the existing citizens commission with reviewing responsibilities over the City entity. If no such commission exists, the City Manager may designate a citizens commission to act as the reviewing commission or ask the City entity to submit reports directly to the City Manager.~~
- 30)“~~Personal communication devices~~” means ~~mobile telephones, personal digital assistants, wireless capable tablets and similar wireless two-way communications and/or portable Internet accessing devices, whether procured or subsidized by a City entity or personally owned, that are used in the regular course of business.~~

~~Section 4.~~ **X.XX030 City Council Approval Requirement**

~~1) (1)~~ 1) A City ~~Entity~~entity shall notify the ~~Chair~~ of the appropriate reviewing ~~commission prior to the entity:~~

~~Seeking or soliciting funds for surveillance technology, including but not limited to applying for a grant; or~~

~~Soliciting proposals with a non-City entity to acquire, share or otherwise use surveillance technology or the information it provides.~~

~~Upon notification by the City entity, the Chair shall place the item on the agenda at the next meeting for which it may be properly noticed, for discussion and possible action. At this meeting, the City entity shall inform the reviewing commission of the cost of the proposal, the need for the funds or equipment, or shall otherwise justify the action the entity intends to take. The reviewing commission may vote its approval to proceed, object to the proposal, recommend that the entity modify its proposal, or take no action. Neither opposition to the act or failure by the reviewing commission to act shall prohibit the City entity from proceeding. The City entity is still bound by subsection (2) regardless of the action taken by the reviewing commission under this subsection.~~

~~A City entity must obtain City Council approval, except in Exigent Circumstances, by placing an item on the Action Calendar at a duly noticed meeting of the City subsequent to a regularly scheduled, non-consent City Council meeting prior to any of the following:~~

~~(a) Accepting state or federal funds for the purchase of, or in-kind or other donations of, Surveillance Technologysurveillance technology;~~

~~(b) Acquiring new Surveillance Technologysurveillance technology, including but not limited to procuring such technology without the exchange of monies or consideration;~~

~~(c) Using new Surveillance Technologysurveillance technology, or using Surveillance Technology previously approved by the City Councilexisting surveillance technology for a purpose, ~~in a manner or in a~~ mannerlocation not previously approved by the City Council; or~~

~~(d) Entering into an agreement with a non-City ~~Entity~~entity to acquire, share or otherwise use Surveillance Technologysurveillance technology or the information it provides.~~

2) A City ~~Entity~~entity must submit for review a Surveillance Impact Report and obtain City Council approval of a Surveillance Use Policy prior to engaging in any of the activities described in ~~subsection~~ Section (1) (2)(a)-(d).

X.XX.040Section 5. Temporary Acquisition and Use of Surveillance Equipment

Notwithstanding the provisions of this ~~Chapter ordinance~~, a City ~~Entity~~ entity may ~~borrow, temporarily acquire and/or temporarily use~~ Surveillance Technology surveillance technology in Exigent Circumstances exigent circumstances without following the requirements in provisions of this ordinance before that acquisition or use. Sections (4) and (5). However, a City ~~Entity~~ entity that borrow, acquires or temporarily uses Surveillance Technology in Exigent Circumstances surveillance technology in exigent circumstances must:

~~(1) Provide written~~ provide notice of that acquisition ~~and/or~~ use to the City Council ~~and appropriate reviewing commission in writing~~ within 30 days following the commencement of such Exigent Circumstance;

~~those circumstances;~~ ~~(2) If~~ if it is anticipated that the use will continue beyond the Exigent Circumstance exigent need, submit a proposed Surveillance Impact Report and Surveillance Use Policy, as applicable, t to the City Council ~~regarding that surveillance technology~~ within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council commencement of those circumstances pursuant to Sections (4) and (5) ~~Section 4~~; and

~~(3) Include the Surveillance Technology~~ include that surveillance technology in the City Manager's ~~entity's~~ next annual Surveillance Technology Report to the City Council following the commencement of those circumstances.

X.XX.050 Section 6. Information Required

- ~~1) Prior to seeking City Council approval under Section 4, the City entity shall submit the Surveillance Impact Report and proposed Surveillance Use Policy to the appropriate reviewing commission for its review at a regularly noticed meeting.~~
- ~~2) The reviewing commission shall recommend that the City Council adopt, modify, or reject the proposed Surveillance Use Policy.~~
- ~~3) After receiving the recommendation of the reviewing commission, the City entity seeking approval under Section 4 shall submit to the City Council a Surveillance Impact Report and a proposed Surveillance Use Policy at least forty-five (45) days prior to the City Council meeting. The City Council shall publicly release in print and online the Surveillance Impact Report, proposed Surveillance Use Policy, and reviewing commission recommendation at least thirty (30) days prior to the City Council meeting.~~
- ~~4) The City Council, or its appointed designee, shall continue to make the Surveillance Impact Report and Surveillance Use Policy, and updated versions thereof, available to the public as long as the City entity continues to utilize the surveillance technology in accordance with its request pursuant to Section 4.~~

Section 7. Determination by City Council that Benefits Outweigh Costs and Concerns

The City Council shall only approve any action described in Section 4 ~~(12)~~ or Section 5 of this ~~Chapter ordinance~~ after ~~first considering the recommendation of the appropriate reviewing commission, and subsequently~~ making a determination that the benefits to the community of the Surveillance Technology, used according to its Surveillance Use Policy, surveillance technology outweigh the costs; that the proposal will appropriately safeguard civil liberties and civil rights to the maximum extent possible while serving its intended purposes; and that, in the City Council's judgment, no feasible alternative with similar utility and a lesser ~~economic cost or~~ impact on civil rights or civil liberties ~~could~~ would be implemented as effective.

X.XX.060 Section 8. Compliance for Existing Surveillance Technology

Each City ~~Entity~~ entity possessing or using a Surveillance Technology surveillance technology prior to the effective date of this ordinance ~~The City Manager~~ shall submit to the Action Calendar for the first City Council meeting in November of 2018, a Surveillance Impact Report and a proposed Surveillance Use Policy for each Surveillance Technology possessed or used prior to the effective date of this ordinance, in compliance with Section 4 (2) 6 and no later than one hundred eighty (180) days following the effective date of this ordinance for review and approval by the City Council pursuant to Section 4. If such review and approval has not occurred within ninety (90) days of the City Council submission date, the City entity shall cease its use of the surveillance technology until such review and approval occurs.

X.XX.070 Section 9. Oversight Following City Council Approval

- 1) ~~The~~ A City Manager entity that obtained approval for the use of surveillance technology must submit to the Council Action Calendar a written Surveillance Technology Report, covering all of the City's Report for each such surveillance technology to the City Council within twelve (12) months of City Council approval and annually thereafter on or before November 1.
 - a) ~~Prior to submission of the Surveillance Technologies, annually at~~ Report to the first regular City Council meeting in November. After review of, the City entity shall submit the Surveillance Technology Report, to the appropriate reviewing commission for its review.
 - b) ~~The reviewing commission shall recommend to the City Council~~ may ~~make~~ that the benefits to the community of the surveillance technology outweigh the costs and that civil liberties and civil rights are appropriately safeguarded; that use of the surveillance technology ~~cease;~~ or propose

modifications to the ~~Surveillance Use Policies~~ or ~~direct~~ Policy that will resolve the use of one or more concerns.

2) ~~Based upon information provided in the Surveillance Technologies cease~~ Report and after considering the recommendation of the reviewing commission, the City Council shall determine whether the requirements of Section 7 are satisfied. If the requirements of Section 7 are not satisfied, the City Council shall direct that use of the surveillance technology cease and/or require modifications to the Surveillance Use Policy that will resolve any deficiencies.

3) ~~No later than January 15 of each year, the City Council shall hold a public meeting and publicly release in print and online a report that includes, for the prior calendar year:~~

a) ~~A summary of all requests for City Council approval pursuant to Section 4 or Section 8 and the pertinent reviewing commission recommendation, including whether the City Council approved or rejected the proposal and/or required changes to a proposed Surveillance Use Policy before approval; and~~

b) ~~All Surveillance Reports submitted.~~

~~Section 10. Enforcement~~

X.XX.080 Public Access to Surveillance Technology Contracts

1) ~~Any violation of this Ordinance, or of a Surveillance Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in any court of competent jurisdiction to enforce this Ordinance. An action instituted under this paragraph shall be brought against the city entity, the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Surveillance Use Policy (including to expunge information unlawfully collected, retained, or shared thereunder), any third party, except a city employee, with possession, custody, or control of data subject to this Ordinance.~~

a) ~~Prior to the initiation of any legal proceeding under subsection 1), the City of Berkeley or City entity must be given notice of the violation(s) and an opportunity to correct such violation(s) within 30 days of receipt of the notice.~~

2) ~~Any person who has been subjected to a surveillance technology in violation of this Ordinance, or about whom information has been obtained, retained, accessed, shared, or used in violation of this Ordinance or of a Surveillance Use Policy, may institute proceedings in any court of competent jurisdiction against any person who committed such violation and shall be entitled to recover actual damages.~~

3) ~~A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under paragraphs (1) or (2).~~

Section 11. Secrecy of Surveillance Technology

~~It shall be unlawful for the City to enter into any surveillance-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.~~

To the extent permitted by law, the City shall continue to make available to the public ~~publicly disclose~~ all of its surveillance-related contracts, including ~~any and all~~ related non-disclosure agreements, if any.

Section X.XX.090 Enforcement

This Chapter does not confer any rights upon any person or entity other than the City Council to cancel or suspend a contract. The Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Council by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If it is shown that the violation is the result of arbitrary or capricious action or conduct by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$7,500 if he or she is personally obligated to pay such fees. any regardless of any contract terms to the contrary.

X.XX.100Section 12. Whistleblower Protections

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016 and including any updates thereto, shall apply to employees reporting good faith suspicions of violations of this ordinance or of misconduct or misuse of any Surveillance Technology.

X.XX.110

~~1) It shall be a violation of Section 12 for the City or anyone acting on behalf of the City to take or fail to take, or threaten to take or fail to take, an adverse employment action with respect to any employee or applicant for employment, because:~~

~~a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of a surveillance technology or surveillance data based upon a good faith belief that the disclosure evidenced a violation of this Ordinance.~~

Section 13. Severability

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

~~The provisions in this Ordinance are severable. If any part of provision of this Ordinance, or the application of this Ordinance to any person or circumstance, is held invalid, the remainder of this Ordinance, including the application of such part or provisions to other persons or circumstances, shall not be affected by such holding and shall continue to have force and effect.~~

~~Section 14. Construction~~

~~The provisions of this Ordinance, including the terms defined in Section 3, are to be construed broadly so as to effectuate the purposes of this Ordinance.~~

~~Section 15. Effective Date~~

~~This Ordinance shall take effect on [DATE].~~

ORDINANCE NO. -N.S.

ADDING CHAPTER X.XX TO THE BERKELEY MUNICIPAL CODE, ACQUISITION AND USE OF SURVEILLANCE TECHNOLOGY

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Title

This ordinance shall be known as the Surveillance Technology Use and Community Safety Ordinance.

Section 2. That Chapter x.xx is hereby added to the Berkeley Municipal Code to read as follows:

Chapter X.XX

Acquisition and Use of Surveillance Technology

x.xx.010 Purposes

- A) Through the enactment of this Chapter, the City seeks to establish a thoughtful process regarding the procurement and use of Surveillance Technology that carefully balances the City's interest in protecting public safety with its interest in protecting the privacy and civil rights of its community members.
- B) Transparency is essential when the City is considering procurement and use of Surveillance Technology.
- C) Although such technology may be beneficial to public order and safety, it has the potential to put both privacy and civil liberties at risk.
- D) Decisions relating to Surveillance Technology should occur with strong consideration of the impact such technologies may have on civil rights and civil liberties, as with all rights guaranteed by the California and United States Constitutions.
- E) Surveillance Technology may involve immediate, as well as ongoing, financial costs. Before the City acquires any Surveillance Technology, it must evaluate all costs associated with the procurement, installation, use and maintenance of the technology.
- F) Decisions regarding whether and how Surveillance Technologies should be funded, acquired, or used should be governed by the City Council as the elected representatives of the City.

- G) In addition to applicable local, state, and federal law, legally enforceable safeguards, including robust transparency, oversight, and accountability measures, are important in the protection of civil rights and civil liberties.
- H) Data reporting measures will enable the City Council and public to confirm that mandated civil rights and civil liberties safeguards have been strictly observed.

X.XX.020 Definitions

The following definitions apply to this Chapter:

- 1) “City Entity” means any department, bureau, division, or unit of the City of Berkeley.
- 2) “Surveillance Technology” means an electronic device, system utilizing an electronic device, or similar technological tool used, designed, or primarily intended to remotely and surreptitiously collect audio, electronic, visual, location, thermal, olfactory, biometric, or similar information specifically associated with, or capable of being associated with, any individual or group. Examples of covered Surveillance Technology include, but are not limited to: cell site simulators (Stingrays); automatic license plate readers; body worn cameras; facial recognition software; thermal imaging systems, except as allowed under Section 2(d); social media analytics software; gait analysis software; and video cameras that record audio or video and can remotely transmit or can be remotely accessed.

“Surveillance Technology” does not include the following devices or hardware, unless they have been equipped with, or are modified to become or include, a Surveillance Technology as defined in Section 2 (above):

- (a) Routine office hardware, such as televisions, computers, and printers, that is in widespread public use and will not be used for any surveillance functions;
- (b) Handheld Parking Citation Devices, that do not automatically read license plates;
- (c) Manually-operated, portable digital cameras, audio recorders, and video recorders that are not to be used remotely and whose functionality is limited to manually capturing, viewing, editing and downloading video and/or audio recordings, but not including body worn cameras;
- (d) Devices that cannot record or transmit audio or video or be remotely accessed, such as image stabilizing binoculars or night vision goggles or thermal imaging cameras used for fire operations, search and rescue operations and missing person or probable cause searches;

(e) Manually-operated technological devices that are not designed and will not be used to surreptitiously collect surveillance data, such as two-way radios, email systems and city-issued cell phones;

(f) Municipal agency databases;

(g) Medical equipment used to diagnose, treat, or prevent disease or injury, including electrocardiogram machines.

(h) Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, prevent, and protect the City of Berkeley and its community members from potential cybersecurity events (e.g. reconnaissance or monitoring systems, intrusion, interference or attack on our systems); and cybersecurity capabilities, technologies and systems used by the City of Berkeley in cybersecurity monitoring and cyber-forensic based investigations and prosecutions of illegal activity;

(i) Stationary security cameras affixed to City property or facilities.

3) “Surveillance Technology Report” means an annual written report by the City Manager covering all of the City of Berkeley’s Surveillance Technologies that includes all of the following information with regard to each Surveillance Technology:

(a) **Description:** A description of all non-privileged and non-confidential information about use of the Surveillance Technology, including but not limited to the quantity of data gathered and sharing of data, if any, with outside entities. If sharing has occurred, the report shall include general, non-privileged and non-confidential information about categories of recipient entities and purposes for such sharing;

(b) **Complaints:** A summary of each complaint, if any, received by the City about the Surveillance Technology;

(c) **Audits and Violations:** The results of any non-privileged internal audits, any information about violations or potential violations of the Surveillance Use Policy, and any actions taken in response;

(d) **Effectiveness:** Information that helps the community assess whether the Surveillance Technology has been effective in achieving its identified outcomes;

(e) **Costs:** Total annual costs for the Surveillance Technology, including personnel and other ongoing costs.

4) “Surveillance Impact Report” means a publicly-released written report produced prior to acquisition of a Surveillance Technology that includes the following:

(a) **Description:** Information describing the Surveillance Technology and how it works, including product descriptions from manufacturers;

(b) **Purpose:** Information on the proposed purposes(s) for the Surveillance Technology;

(c) **Location:** The general location(s) it may be deployed and reasons for deployment;

(d) **Impact:** An assessment identifying any potential impact on civil liberties and civil rights including but not limited to potential disparate or adverse impacts on any communities or groups;

(e) **Mitigation:** Information regarding technical and procedural measures that can be implemented to appropriately safeguard the public from any impacts identified in subsection (d);

(f) **Data Types and Sources:** A list of the sources of data proposed to be collected, analyzed, or processed by the Surveillance Technology, including "open source" data;

(g) **Data Security:** Information about the steps that can be taken to ensure adequate security measures to safeguard the data collected or generated from unauthorized access or disclosure;

(h) **Fiscal Cost:** The fiscal costs for the Surveillance Technology, including initial purchase, personnel and other ongoing costs, including to the extent practicable costs associated with compliance with this and other reporting and oversight requirements, as well as any current or potential sources of funding;

(i) **Third Party Dependence and Access:** Whether use or maintenance of the technology will require data gathered by the technology to be handled or stored by a third-party vendor on an ongoing basis, and whether a third-party may have access to such data;

(j) **Alternatives:** A summary of potentially viable alternative methods (whether involving the use of a new technology or not) considered before deciding to use the proposed Surveillance Technology, including an overview of the costs and benefits associated with each potentially viable alternative; and,

(k) **Experience of Other Entities:** To the extent such information is available, a summary of the experience of other government entities with the proposed technology, including any unanticipated financial or community costs and benefits.

5) "Surveillance Use Policy" means a publicly-released and legally-enforceable policy for use of the Surveillance Technology that at a minimum specifies the following:

- (a) **Purpose:** The specific purpose(s) that the Surveillance Technology is intended to advance;
- (b) **Authorized Use:** The uses that are authorized, the rules and processes required prior to such use, and the uses that are prohibited;
- (c) **Data Collection:** Information collection that is allowed and prohibited. Where applicable, list any data sources the technology will rely upon, including “open source” data;
- (d) **Data Access:** A general description of the title and position of the employees and entities authorized to access or use the collected information, and the rules and processes required prior to access or use of the information;
- (e) **Data Protection:** A general description of the safeguards that protect information from unauthorized access, including encryption and access control mechanisms;
- (f) **Data Retention:** The time period, if any, for which information collected will be routinely retained, the process by which the information is regularly deleted after that period lapses, and the specific conditions that must be met to retain information beyond such period;
- (g) **Public Access:** How collected information may be accessed or used by members of the public;
- (h) **Training:** Training required for any employee authorized to use the Surveillance Technology or to access information collected;
- (i) **Auditing and Oversight:** Mechanisms to ensure that the Surveillance Use Policy is followed, technical measures to monitor for misuse, and the legally enforceable sanctions for intentional violations of the policy; and
- (j) **Maintenance:** The mechanisms and procedures to ensure maintenance of the security and integrity of the Surveillance Technology and collected information.

6) “Exigent Circumstances” means a City Entity’s good faith belief that an emergency involving danger of death or serious physical injury to any person, or imminent danger of significant property damage, requires use of the Surveillance Technology or the information it provides.

X.XX030 City Council Approval Requirement

1) A City Entity must obtain City Council approval, except in Exigent Circumstances, by placing an item on the Action Calendar at a duly noticed meeting of the City Council prior to any of the following:

- (a) Accepting state or federal funds for the purchase of, or in-kind or other donations of, Surveillance Technology;
- (b) Acquiring new Surveillance Technology, including but not limited to procuring such technology without the exchange of monies or consideration;
- (c) Using new Surveillance Technology, or using Surveillance Technology previously approved by the City Council for a purpose, or in a manner not previously approved by the City Council; or
- (d) Entering into an agreement with a non-City Entity to acquire, share or otherwise use Surveillance Technology or the information it provides.

2) A City Entity must submit for review a Surveillance Impact Report and obtain City Council approval of a Surveillance Use Policy prior to engaging in any of the activities described in Section (1) (a)-(d).

X.XX.040 Temporary Acquisition and Use of Surveillance Equipment

Notwithstanding the provisions of this Chapter, a City Entity may borrow, acquire and/or temporarily use Surveillance Technology in Exigent Circumstances without following the requirements in Sections (4) and (5). However, a City Entity that borrows, acquires or temporarily uses Surveillance Technology in Exigent Circumstances must:

- 1) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance;
- 2) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Surveillance Impact Report and Surveillance Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Sections (4) and (5); and
- 3) Include the Surveillance Technology in the City Manager’s next annual Surveillance Technology Report.

X.XX.050 Determination by City Council that Benefits Outweigh Costs and Concerns

The City Council shall only approve any action described in Section 4 or Section 5 of this Chapter after making a determination that the benefits to the community of the Surveillance Technology, used according to its Surveillance Use Policy, outweigh the costs; that the proposal will appropriately safeguard civil liberties and civil rights to the maximum extent possible while serving its intended purposes; and that, in the City Council’s judgment, no feasible alternative with similar utility and a lesser impact on civil rights or civil liberties could be implemented.

X.XX.060 Compliance for Existing Surveillance Technology

The City Manager shall submit to the Action Calendar for the first City Council meeting in November of 2018, a Surveillance Impact Report and a proposed Surveillance Use Policy for each Surveillance Technology possessed or used prior to the effective date of this ordinance.

X.XX.070 Oversight Following City Council Approval

The City Manager must submit to the Council Action Calendar a written Surveillance Technology Report, covering all of the City's Surveillance Technologies, annually at the first regular Council meeting in November. After review of the Surveillance Technology Report, Council may make modifications to Surveillance Use Policies or direct that the use of one or more Surveillance Technologies cease.

X.XX.080 Public Access to Surveillance Technology Contracts

To the extent permitted by law, the City shall continue to make available to the public all of its surveillance-related contracts, including related non-disclosure agreements, if any.

Section X.XX.090 Enforcement

This Chapter does not confer any rights upon any person or entity other than the City Council to cancel or suspend a contract. The Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Council by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If it is shown that the violation is the result of arbitrary or capricious action or conduct by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$7,500 if he or she is personally obligated to pay such fees.

X.XX.100 Whistleblower Protections

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016 and including any updates thereto, shall apply to employees reporting good faith suspicions of violations of this ordinance or of misconduct or misuse of any Surveillance Technology.

X.XX.110 Severability

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part,

section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.