



Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
AGENDA**

**Wednesday, September 21, 2016
7:00 P.M.**

South Berkeley Senior Center
2939 Ellis Street, Berkeley

- 1. CALL TO ORDER & ROLL CALL**
- 2. APPROVAL OF AGENDA**
- 3. PUBLIC COMMENT**
(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers. They may comment on items on the agenda or any matter within the PRC's jurisdiction at this time.)
- 4. APPROVAL OF MINUTES**
Regular Meeting of September 14, 2016
(To be delivered.)
- 5. CHAIR'S REPORT**
- 6. PRC OFFICER'S REPORT**
Status of complaints; October meeting schedule; other items.
- 7. CHIEF OF POLICE'S REPORT**
Crime, budget, staffing, training updates, and other items.
- 8. 2015 CRIME REPORT**
Presentation by Berkeley Police Department. Questions by Commissioners; discussion and possible action.
- 9. OLD BUSINESS (discussion & action)**
 - a. Review draft of response to City Manager's September 12, 2016 letter regarding the standard of proof used in BOI hearings.
(To be delivered.)
 - b. Appointment of commissioner and public members to the Subcommittee on Surveillance and Community Safety Ordinance.

- c. Consideration of recommendations from General Orders C-64, etc.
Subcommittee: i) Revised General Order C-64 (Crowd Management and Control); and ii) Commander's Guide to Crowd Management and Crowd Control.
(See materials attached to Sept. 14, 2016 agenda packet.)
- d. Policy regarding publication of communications from the public to the PRC.
From: PRC Officer
- e. Review of BPD marijuana enforcement report.
From: Commissioner Bernstein
(See materials attached to Sept. 14, 2016 agenda packet.)
- f. Outreach: consider ways to effectively reach target audience, including possible formation of subcommittee.
From: Commission
- g. Decide whether to accept policy complaint #2406; if accepted, decide how to proceed.
From: PRC Officer
(See materials attached to Sept. 14, 2016 agenda packet.)
- h. Commission's list of tasks and prioritization.
From: PRC Officer.

10. NEW BUSINESS (discussion & action)

- a. Evaluation and discussion of BPD's use and reliance on CalGang database in light of recent report from the state auditor.
From: Commissioner Bernstein
- b. BPD's role in prevention of underage drinking.
From: Commissioner Bernstein

11. SUBCOMMITTEE REPORTS AND RECOMMENDATIONS (discussion & action)

- a. General Orders C-64, etc. Subcommittee
Schedule next meeting date or consider dissolving.
- b. Fair & Impartial Policing Subcommittee
Update; schedule next meeting date.
- c. Mutual Aid Pacts Subcommittee
Update; schedule next meeting date.
- d. Media Credentialing Subcommittee
Update; schedule next meeting date.

12. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

Attached.

13. PUBLIC COMMENT

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers; they may comment on items on the agenda at this time.)

Closed Session

Pursuant to the Court's order in *Berkeley Police Association v. City of Berkeley, et al.*, Alameda County Superior Court Case No. 2002 057569, the PRC will recess into closed session to discuss and take action on the following matters:

14. **VOTE ON WHETHER TO CONSIDER A COMPLAINT AS FILED LATE AND, IF SO, WHETHER TO ACCEPT IT**
Complaint #2404
15. **INQUIRY TO CITY MANAGER REGARDING EXCUSING A SUBJECT OFFICER FROM APPEARING AT A BOI**
16. **REVIEW OF CALOCA DECISION**
Complaint #2380 (*Decision and brief to be distributed during closed session.*)

End of Closed Session

17. **ANNOUNCEMENT OF CLOSED SESSION VOTE**
18. **ADJOURNMENT**

Communications Disclaimer

Communications to the Police Review Commission, like all communications to Berkeley boards, commissions or committees, are public record and will become part of the City's electronic records, which are accessible through the City's website. Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to a City board, commission or committee, will become part of the public record. If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the PRC Secretary. If you do not want your contact information included in the public record, do not include that information in your communication. Please contact the PRC Secretary for further information.

Communication Access Information (A.R.1.12)

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at 981-6342 (V) or 981-6345 (TDD) at least three business days before the meeting date. Please refrain from wearing scented products to this meeting.

SB 343 Disclaimer

Any writings or documents provided to a majority of the Commission regarding any item on this agenda will be made available for public inspection at the Police Review Commission, located at 1947 Center Street, 1st floor, during regular business hours.

Contact the Police Review Commission at (510) 981-4950 or prc@cityofberkeley.info.

PRC REGULAR MEETING ATTACHMENTS

September 14, 2016

MINUTES

September 14, 2016 Regular Meeting

To be handed at meeting.

AGENDA-RELATED

Item 9.c – Draft: Recommendations to be included in the Commander’s Guide to Crowd Management & Crowd Control.	Page	7
Item 9.c – Memo from Osha Neumann, Esq. dated October 19, 2015 to the PRC re state law and existing mutual aid pacts.	Page	11
Item 9.h – PRC Priority List updated 9-15-16.	Page	13
Item 9.h – Prioritization of PRC requests to BPD updated 9-15-16.	Page	15
Item 9.h – PRC Subcommittee list updated 9-16-16.	Page	16
Item 10.a - Article from the San Francisco Chronicle dated August 11, 2016: State’s gang database fails to ensure privacy, report says.	Page	17

COMMUNICATIONS

None

KJL:mgm

Recommendations to be included in the Commander's Guide to Crowd Management & Crowd Control

Pre-Planned Events

If requesting mutual aid for 1st Amendment events, request that if possible, they not bring obviously armored vehicles or that if they do, that they be willing to keep them in the staging area until use required.

For large scale crowd management events, increase staffing of bicycle officers, motorcycle officers and parking enforcement officers, dispatchers and jailer positions.

Contact Crowd Leadership if possible

If DOC used, have IT and Public Works staff on hand
Ensure Tactical Channel is recorded
Tactical Dispatcher
If staffing allows, use social media to communicate with the crowd

Inventory munitions and ensure that sign in/out sheets are utilized

Conduct Briefing for all LE participants

Convey community concerns such as reasonable use of force, use of armored vehicles, use of chemical agents, to all personnel.
Review no baton strike areas on the human body.
Brief media policy.
If issued, outline use of body worn cameras.

Review rules of engagement with Less Lethal operators prior to deployment.

Consider deploying joint police and fire scout teams to manage small fires and scout medical calls.

The IC in charge when event ends has 72 hrs. to submit the AAR. If due to the length of the incident, i.e. multiple operational periods, the IC shall write a summary report. Use of less lethal and chemical munitions should be recorded in the after action report.

Spontaneous Events-Watch Commander is the IC

Use BPD forces to contact the crowd whenever possible.

Time permitting, review rules of engagement with Less Lethal operators

Utilize munitions sign in/out sheet

IC may command from field or have Squad Leader(s) designated as Field Commander

Broadcast initial objectives and update as the situation progresses

At the conclusion of the operation, have Squad Leaders submit use of force reports and munitions sign in/out sheets to the IC for the AAR.

The IC in charge when event ends has 72 hrs. to submit the AAR. If due to the length of the incident, i.e. multiple operational periods, the IC shall write a summary report.

Mission

The Mission of the Berkeley Police Department in crowd situations is to facilitate free expression, de-escalate violence, and resolve conflict peacefully with the overall goal of ensuring public safety and protecting First Amendment rights of free speech and assembly.

Communication

To enhance two-way communication and facilitate peaceful demonstrations, BPD will, whenever practical, communicate with crowd leadership before and during the event. BPD negotiators, crisis intervention trained officers, or others with a similar skill set should be considered for this role first.

Look for opportunities to give directions to the crowd. Directions should include acceptable and unacceptable behavior that can potentially lead to a dispersal order. Record and document these public addresses.

Directions may also include a medical admonishment describing what to do if exposed to gas ("Get to fresh air and flush the skin and eyes with water") as well as the location of a first aid station or eye wash station (in the event one is established). Social media can also be used to accomplish this goal.

Consider using the mini-PA on the Polaris Ranger to communicate with the crowd (i.e. directions, Dispersal Orders). Caution- Giving prolonged dispersal orders

Tactical Command

Tactical command decision making should be made in the field (responsibility for squad movements).

The Chief's intent via the IC will be captured in the Operations Plan and briefed. Based on the needs of an incident, the IC has the discretion to delegate overall tactical control of an incident to one or more field commanders. That person(s) will be responsible for communicating with the Operations Section Chief to coordinate squad taskings that will fulfill that intent.

Command should provide clear and specific taskings to Field Commanders. Field Commanders should make redeployment decisions proactively based on known situational awareness. (If task is accomplished or not needed by the time the Commander and his/her squad arrives, go 10-8. Look for work).

Opportunities for the police to deescalate from crowd control to crowd management tactics needs to be recognized and seized.

Deployment

Deploy resources at the beginning of an event in preventative crowd management roles designed to keep events peaceful. Examples Bikes monitoring from the front, sides and rear of crowd. Officers walking with crowd. Motors and PEOs to facilitate traffic control.

Maneuver

Have a contingent of officers to move with the crowd, so that violent elements in the crowd will see a continuous police presence.

Deploy squads with dedicated drivers who remain **in/with** the vehicles to increase squad mobility and facilitate vehicle security.

Media

Review pertinent parts of BPD General Order P-29 – Public/Media Relations during the briefings with officers, reminding them to attempt to identify members of the press in the crowd.

Social Media

When practical BPD will use social media proactively before and during the event to communicate with participants, clearly identifying all communications as coming from BPD.

Dispersal Orders

Issue fewer dispersal orders and record evidence that the crowd was able to hear the orders.

Give plain English explanations to make sure the message is understood. As dispersal orders are given over the loud speaker, social media will be used when practical to communicate more detailed information to the crowd.

If a crowd forms but their composition may have changed reissue dispersal orders before making arrests for failure to disperse per California Penal Code Section 409.

Skirmish Lines

Skirmish lines should be deployed only in situations where the use of force that may be necessary to enforce the line is warranted by the objective of deploying the line.

Have enough officers in place to support isolated arrests.

Officers or Squad Leaders on a skirmish line should not get into a debate or argument with crowd members but may answer reasonable questions.

CS Gas

Only to be used as a last resort when all other means have failed or are not possible.

If possible, give preparatory orders warning officers of the impending use of chemical agents over the radio prior to their use.

Prior to the planned deployment of CS Gas, medical aid should be on scene and available to respond to treat people who might be affected by CS Gas.

Have a Gas Plan for every volley of gas. The Commander's Gas Plan should include clear direction regarding the type of gas to be used, the quantity of gas to be used, and the intended location for release. For instance, two canisters of gas and two canisters of smoke released at the southwest corner of MLK and Addison. The commander may consider starting with one canister of gas and/or smoke to ascertain the wind direction and effect on the crowd. After each use of chemical agent and/or gas, the commander shall re-evaluate to determine if additional chemical agents and/or smoke are necessary. If he or she determines that additional chemical agents and/or smoke are needed, the commander should articulate a new Gas Plan.

If a determination is made that the use of hand thrown chemical agents is necessary, the preferred method of delivery is to roll the canister.

Arrests

When possible make targeted arrests of law breakers before they coopt event.

To: Berkeley Police Review Commission
From: Osha Neumann, Esq.
Date: October 19, 2015

I write in response to the PRC's recent conclusion that "state law and existing mutual aid pacts require each agency to follow its own policies re use of force....therefore the BPD cannot enforce its use-of-force policies on mutual aid responders."

At a minimum, the latter statement is incorrect. California Govt. Code § 8618 provides that the responsible local official in whose jurisdiction an incident requiring mutual aid has occurred shall remain in charge at such incident including the direction of personnel and equipment provided him through mutual aid.¹ See also the California Master Mutual Aid Agreement.²

Therefore, host agencies have not only the right, but also the responsibility to supervise the performance of invited agencies.

Moreover, if BPD requests mutual aid and its failure to adequately supervise and control the assisting agencies leads to injuries and violations of constitutional rights the City of Berkeley and its commanders may be held liable under federal law.³

It is also not clear that state law requires each agency to follow its own use of force policies in a mutual aid situation. The citation given for this claim refers not to state law but to a policy manual, the Law Enforcement Guide for Emergency Operations, under a section titled "Administrative Guidelines." The Guide shows no citation to state law.

The mandate that the host agency supervises the performance of invited agencies explicitly extends to the direction of personnel and equipment. This state law provides the basis for the instruction in the California Law Enforcement Mutual Aid Plan that the jurisdiction requesting mutual aid is responsible for among other things "advising responders what equipment they should bring."⁴

Finally, under the above-cited state law, the 1992 mandate passed by the Berkeley City Council is legally valid and should be considered governing in Berkeley's participation in mutual aid. It mandates that:

"The BPD take direct supervisory responsibility for all mutual aid units deployed to the maximum amount allowable by law...advise such units that they will be expected to comply with [BPD] regulations and policies," and that if there are conflicts with other agencies over policies which cannot be resolved, "BPD reserves the right to elect not to deploy those units affected....where the City of Berkeley has adopted more stringent standards, those will take precedence over county-wide standards within Berkeley."⁵

I urge the PRC and the City Council to uphold California and Berkeley law on mutual aid. BPD has a right and also a civic and moral responsibility to local residents, to ensure policing be conducted according to local community standards.

Sincerely yours,

Osha Neumann, Esq.

¹ <http://www.lawlink.com/research/Level2/50475>

² <http://www.caloes.ca.gov/PlanningPreparednessSite/Documents/CAMasterMutAidAgreement.pdf>

³ Pursuant to *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (See, e.g., *Jennings v. City of Miami*, 2009 U.S. Dist. LEXIS 5430, 2009 WL 413110 (S.D.Fla. 2009) [*Monell* claim stated based on City's adoption and implementation of mutual aid agreements for policing of demonstrations during FTAA meetings] and basic principles of supervisory liability. As the Ninth Circuit has held, a "defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). "The requisite causal connection can be established . . . by setting in motion a series of acts by others," ...or by "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury," (*Dubner v. City & Cnty. of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001).) "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." (*Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).)

⁴ "The agency requesting mutual aid is responsible for the following: 1. Identifying numbers and types of mutual aid resources requested. 2. Identifying specific missions for mutual aid responder tasking. 3. Advising responders what equipment they should bring. 4. Establishing an assembly area for responding resources. 5. Identifying communications channels compatible with command and control of field resources. 6. Designating a liaison officer to facilitate a coordinated assimilation of responding mutual aid resources. 7. Preparing a situation briefing including local maps for responders. 8. Providing logistical support such as food, lodging, rest intervals and equipment maintenance as appropriate, for mutual aid personnel."

<http://www.caloes.ca.gov/LawEnforcementSite/Documents/1Blue%20Book.pdf>

⁵ <http://www.berkeleyside.com/wp-content/uploads/2015/02/2003-09-09-Item-54-57.pdf>

PRC Priority List

Updated September 15, 2016

Top Priorities	Notes
Revision of General Orders, incl. C-64, U-2, M-2	Subcommittee recommendations to be considered by full Commission 9.21.16.
Body-worn camera policy	Following 7.19 Council Work Session, PRC and BPD met 9.14 to see if policy differences can be reconciled. Next meeting TBD.
Fair and Impartial Policing (includes policy review re race designation on traffic citations)	Subcommittee active.
Standard of proof in BOI hearings	On 9.14.16 designated commissioners to draft letter to Council.
City Council directive of 1.26.16 to work with BPD on recommendations from reports re response to Dec. 2014 protests.	Items not referred to General Orders or Media Credentialing Subcommittees to be agendized for 10.13.16 meeting.
Develop Ordinance on Surveillance and Community Safety	Subcommittee in formation.
Outreach – community awareness of who the PRC is and what it does	Agendized for 9.21.16 meeting.
Media credentialing policy	Subcommittee reactivated September 2016.

Pending items	
McKinley Ave. Staging – policy review	BPD to present revised G.O. U-4, Unusual Occurrences. (Per 4.13.16 meeting)
G.O. W-1: Right to Watch	Request to BPD 3.31.16 to adopt SFPD's G.O. 5.07
Investigation into BPD response on Dec. 7 & 8, 2014	1) Letter to Chief with inquiries sent 8.22.16; 2) 2 issues referred to G.O. C-64 etc. Subcommittee
Policy review re Smoking Control Ordinance	On 7.15.15, PRC authorized further action as memorialized in 8.7.15 letter from PRC Officer to Chief expressing concerns and making requests.
G.O. M-3: Monthly Management and Annual Reports	7.18.16 letter to CM and Chief re why reports not generated. CM on 8.1.16 said Chief to respond. 9.14.16 authorized request to Chief for his recommendations to M-3 in line with current IT and data tracking, for complying with reporting requirements to CM.

PRC Priority List

Updated September 15, 2016

Remaining items	
Commissioner training on law and police procedures	Tactical de-escalation training presented 8.10.16. Additional training?
BPD acquisition of non-military armored vehicle	To be agendaized.
Policy review of citations to bicyclists running red lights	(A. Bernstein would like to add "Idaho stop" issue.)
How to read CAD reports	PRC Officer item.
Achieving agreement with BPD regarding consultation on all new and changes to G.O.s	
BPD budget review	
BPD preparedness and capacity	Comm. Roberts' item.

Pending from staff	
Review of BOI procedures and underlying authority (Copley Press, PSOBRA, BPA v. COB, etc.)	Staff to prepare memo.
Obtain findings reports from other oversight agencies	Assigned 9.14.16.

Prioritization of PRC requests to BPD

Date/form of request	Request	Status/Notes
GROUP I		
1.26.16 Council action	Council directive to PRC and BPD to work on recommendations following review of December 6, 2014 response	Most are being handled in G.O. C-64 etc. Subcommittee
12.9.15 oral	Center for Policing Equity analysis of stop data – when?	As of Sept. 2016, still unknown
3.31.16 letter	Consider adopting SFPD G.O. 5.07, Rights of Onlookers, as the BPD's Right to Watch G.O.	9.14.16 Chief says on his desk.
7.18.16 letter	General Order M-3, BPD reports to City Manager et al.: 1) Urge reporting to occur; 2) Discuss at meeting with CM 8.1.16	2) Discussed with Chief/CM: Chief to reply. (per 9.14 PRC action, further request to Chief forthcoming)
GROUP II		
12.9.15 oral	Analysis of new beat plan – when?	At 12.9.15 meeting, Chief said would be another 4 – 6 months.
1.5.16 letter	3 new ordinances to “improve conditions on community sidewalks”: any plan to issue G.O., T&I Bulletin, or Captain's Instructions?	
4.13.16 meeting	Provide Revised G.O. U-4, Unusual Occurrences, for review.	
8.22.16 letter	Respond to questions regarding BPD response on Dec. 7-8, 2014	
GROUP III		
8.27.15 letter	Smoking Ordinance/dissemination of info to officers re new ordinances.	At 12.9.15 meeting, PRC did not include in top 10 priorities.
1.13.16 oral	Cost analysis to carry out recommendations in Dec. 2014 post-incident review?	

**POLICE REVIEW COMMISSION
SUBCOMMITTEES LIST
Updated 9-16-16**

Subcommittee	Commissioners	Chair	BPD Reps / Others
Body-worn & Dash Cameras Formed 12-9-15	Javier Lippman Roberts Yampolsky	Lippman	Lt. David Reece Sgt. Joseph Okies
General Orders on Crowd Control C-64, U-2, M-2 Formed 1-13-16	Bernstein Lippman Perezvelez	Bernstein	Capt. Dave Frankel Lt. Michael Durbin
Fair & Impartial Policing Formed 1-13-16	Javier Lippman Roberts Smith <i>Public members:</i> Christina Murphy Paul Kealoha-Blake Elliot Halpern	Lippman	Capt. Andy Greenwood
Media Credentialing Formed 1-13-16	Perezvelez Sherman Smith		
Mutual Aid Pacts Re-formed 7-13-16	Bernstein DaSilva Sherman		Capt. Andy Greenwood
Surveillance and Community Safety Ordinance Formation begun 9-14-16	Bernstein DaSilva TBD		

<http://www.sfchronicle.com/crime/article/Audit-Many-in-California-gang-database-listed-9137916.php>

State's gang database fails to ensure privacy, report says

By Vivian Ho

August 11, 2016 Updated: August 11, 2016 6:54pm

California's database of suspected gang members that is shared by police agencies around the state may violate privacy rights by including many people without proper justification, according to a report released by the state auditor that calls for stricter oversight.

The CalGang database, funded by the state Department of Justice, tracks roughly 150,000 alleged gang members and associates, 85 percent of whom are Latino or African American. But the system "does not ensure that user agencies collect and maintain criminal intelligence in a manner that preserves individuals' privacy rights," stated the report by Auditor Elaine Howle.

Because of the lack of oversight, four sample agencies examined by the auditor's office — which included the Sonoma County and Santa Clara County sheriff's departments — entered groups into the database that did not meet the CalGang criteria for inclusion, the report said.

Thirteen of 100 individuals reviewed were listed in the database as suspected gang members but lacked the proper criteria, the report said. Forty-two individuals in the database were supposedly younger than 1 year old at the time of entry.

In addition, the auditor found, more than 600 individuals in CalGang had "purge dates" — when they were to be removed — that extended beyond a five-year limit.

The database was created 20 years ago as a way for agencies in different jurisdictions to share information in a bid to stop gang activity. Agencies can add individuals to the database once they have "sufficient source documentation" showing they meet at least two gang membership criteria such as admitting gang membership, being affiliated with known gang members, having gang tattoos, frequenting gang areas and exhibiting gang clothing or behavior.

The system is meant to act solely as an investigative tool, and a person's inclusion in the database is not meant to be used in court or in employment.

But the audit found at least four court cases in which CalGang was cited as a source or a person's gang involvement, and three law enforcement agencies responded to a statewide survey admitting they used the database for employment or military-related screenings.

"These instances emphasize that inclusion in CalGang has the potential to seriously affect an individual's life," the report states. "Therefore, each entry must be accurate and appropriate."

The audit also uncovered problems with the treatment of juveniles, saying the Los Angeles and Santa Ana police departments — the other two agencies examined by the auditor — flouted the law by failing to notify many juveniles placed in CalGang and their parents so that they could contest their inclusion.

The auditor recommended that the Legislature designate the Department of Justice to take over CalGang, which is now operated under contract, and that the state develop and implement best practices. The report recommended that local agencies review both the gangs and suspected gang members they've entered into the database.

Santa Clara County Sheriff Laurie Smith responded to the report's findings by saying her office "agreed to a certain extent with the recommendations." She wrote in a letter that her office looks forward to working "to improve the CalGang Intelligence System and in turn safeguard the rights of those in the system."

Sonoma County Sheriff Steve Freitas disagreed strongly with the report's findings. His agency acts as a "node," which means it is responsible for the CalGang operations of 30 counties in Northern California.

In a letter included in the report, Freitas said he believed that his office "has met or exceeded the statutory guidelines for administering a model Criminal Intelligence System that is used nation-wide." He was critical of the auditors, noting they had never audited a database like this before.

But his office said Thursday that while it disagrees with some parts of the report, it looked forward to discussing the audit and agreed that the Department of Justice should take over the database.

Read the full report here.

*Vivian Ho is a San Francisco Chronicle staff writer. Email: vho@sfgchronicle.com
Twitter: @VivianHo*