

ORDINANCE NO. -N.S.

ADDING A NEW CHAPTER 2.100 TO THE BERKELEY MUNICIPAL CODE
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.100 is amended to read as follows:

Chapter 2.100
POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE

Sections:

- 2.100.010 Name of Ordinance**
- 2.100.020 Definitions**
- 2.100.030 Acquisition and Use of Controlled Equipment**
- 2.100.040 Reports on the Use of Controlled Equipment**
- 2.100.050 Enforcement**
- 2.100.060 Transparency**
- 2.100.070 Whistleblower Protections**
- 2.100.080 Severability**

2.100.010 Name of Ordinance.

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

2.100.020 Definitions

(A) "Controlled Equipment" includes, but is not limited to, all of the following:

(1) Vehicles that are built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) ~~Multi~~-purpose wheeled vehicles that are: built to operate both on-road and off- road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; or built or modified to use a breaching or entry apparatus as an attachment.

Commented [LK1]: KL edits.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

(3) Tracked vehicles that are built or modified to provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.

(4) Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.

(5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.

(6) Firearms of .50 caliber or greater.

(7) Ammunition of .50 caliber or greater.

(8) Specialized firearms and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code. Standard issue rifle, currently the Colt M4, is excluded from this policy.

Commented [NM2]: Refer to full Commission for discussion. If Colt M4 included, need to define "use."

(9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag," rubber bullet, or specialty impact munition (SIM) weapons, and equipment used to disperse chemical agents.

(10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.

(11) Explosives, pyrotechnics, such as "flashbang" grenades, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls."

(12) Batons 30 inches or longer in length, shields, -

(13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, water cannons, and the Long Range Acoustic Device (LRAD).

Commented [MOU3]: Keep for now, wait for confirmation of union approval of new policy

(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.

(14) Any other equipment as determined by a majority of the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

(C) "City Staff" means City personnel authorized by the City Manager or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.

Commented [LK4]: K.Lee edit.

(D) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

(1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.

(2) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve

Commented [LK5]: Subcomm: duplicates use policy.

(3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, , and rationale for selection over alternative methods..

(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

~~(8)~~

2.100.030 Controlled Equipment Use Policy Requirement

Controlled Equipment requires a publicly available use policy that identifies the purpose, any prohibited uses, training requirements, and any process required prior to use.

~~(9) Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment or a reference to applicable BPD training policy.~~

(E) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

Commented [NM6]: New Section numbering (Use policy requirement) 9/22/20

Commented [LK7]: Section incomplete.

Commented [LK8]: 9/29: See handout from John Lindsay-Poland

Commented [NM9]: Refer to full comm. – 9/22 potentially add "property damage"

2.100.040 Acquisition and Use of Controlled Equipment.

(A) Restrictions Prior to Submission and Approval

(1) The Berkeley Police Department shall submit to the Berkeley Police Review Commission (hereinafter "Police Review Commission"), or any successive agency, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy prior to engaging in any of the following:

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Collaborating with another law enforcement agency, such as commanding,

controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.

(e) Using any new or existing Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the governing body pursuant to this Ordinance

(f) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

(2) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Review Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.

(a) Notwithstanding the above, the Chair of the Police Review Commission, in consultation with the Vice Chair, may provide approval, in writing, for the Department to solicit funding for Controlled Equipment before submitting a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

(b) If funding is received, the Controlled Equipment shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Review Commission for review and approved by City Council, as required by this section

(3) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.

(B) Submission to Police Review Commission

(1) At least 15 days prior to any public meeting concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. Publishing to the Department's website shall satisfy the requirements of this subsection.

(2) The final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is available for use.

(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a meeting.

(C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter only if it determines all of the following:

Commented [LK10]: Comm. Mikiten: This may be impracticable. If there is an event today (a fire, violence) what would BPD do? Captain cautions us that other departments will not be able to convert to our tools and policies in an instant. Consider a policy statement that says BPD will use Mutual Aid in a way that best complies with Berkeley policy. BPD will attempt to handle the primary issues. But if there are 5 different locations, however, that will not be practicable.

Commented [LK11]: To discuss with full Commission. Tie to an "exigent circumstances" provision?

Commented [LK12]: Edits in (a) and (b) suggested by K. Lee.

Commented [LK13]: See comment on previous page re mutual aid.

Commented [LK14]: Edits suggested by K. Lee.

Commented [LK15]: Edits suggested by K. Lee

- (a) The Controlled Equipment is needed despite available alternatives.
- (b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- (c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(2) ~~If~~ the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, a recommendation for approval for the funding, acquisition, or use of Controlled Equipment by the Police Review Commission pursuant to this Ordinance shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

Commented [LK16]: Comm. Mikiten: Is this not a risk for ANY equipment? It's not like any particular tool is designed to deny civil liberties, yet just about anything could. Also, isn't functional law enforcement protective of our civil liberties?

(D) Police Review Commission Review Required Before City Council Consideration of Approval.

Commented [LK17]: K.Lee: Reword to something like, "PRC Submission to City Staff"

(1) ~~The~~ Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy

Commented [LK18]: Subcomm: Significant issue to discuss at full Commission – how involved should Council be?

(a) If the Police Review Commission proposes that the Controlled Equipment Use Policy be modified or rejected, it shall propose such modifications to City Staff. City Staff shall present such modifications or notice of rejection to City Council when seeking City Council approval pursuant to this Ordinance.

Commented [LK19]: K.Lee edit.

Commented [LK20]: The draft refers variously to "City Staff," "the Department," and the "Police Department." Seems like only one entity is being referred to, so should be consistent. (K. Lee)

(b) Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(E) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year.

(2) ~~A~~ Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council for immediate consideration. If City Council does not act on such a recommendation within four (4) City Council meetings from when the item is first scheduled, the City shall cease its use of the Controlled Equipment.

Commented [LK21]: For discussion with full Commission.

Commented [LK22]: What does "immediate consideration" mean, practically? Other edits suggested. (K.Lee)

(F) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. ~~If the Department fails to do so, it must cease use of such equipment.]~~The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this

Commented [LK23]: Bracketed language suggested by K.Lee, to replace rest of paragraph.

ordinance if it has not submitted the Use Policies and Impact Statements within the year

(2) 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 Review Commission shall consider this ranking in determining the order in which to perform its review. .

Commented [LK24]: Suggested edits by K.Lee

(G) City Council Approval Process

(1) After the Police Review Commission Review requirements have been met, City Staff seeking City Council approval shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.

Commented [LK25]: Section of significance for discussion by full Commission.

(2) The City Council shall approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy only after considering the recommendation of the Police Review Commission, and then determining that the City's interest in community safety outweighs the potential adverse effects of using Controlled Equipment.

Commented [LK26]: Suggested edits in (2) and (3) by K. Lee

(3) For approval of existing Controlled Equipment for which the Police Review Commission has failed to make a recommendation within the required ninety (90) days, if the City Council does not approve such item within four (4) City Council meetings from when the item is first scheduled, the City shall cease its use of the Controlled Equipment until such review and approval occurs.

2.100.050 Reports on the Use of Controlled Equipment.

(A) Annual Report on Controlled Equipment

(1) The Berkeley Police Department shall submit a report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use, for any Controlled Equipment not included in a Use of Force report. The report shall be provided no later than March 15th of each year, unless the Police Review Commission advises the Police Department that an alternate date is preferred. The Police Department shall also make each annual report required by this section publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used.

Commented [LK27]: Full Commission to discuss definition of "uses" that have to be tracked for Annual Report.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court

authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

(2) Within 60 days of the Police Department submitting an annual report pursuant to this section, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. After review and approval by the Police Review Commission, City Staff shall submit the annual report to City Council.

(C) Compliance & Revocation of Approval

(1) The Police Review Commission shall determine, based on the annual report, whether each type of Controlled Equipment identified in that report has complied with the standards for approval set forth in Section 3. If the Police Review Commission determines that any Controlled Equipment has not complied with those standards, it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations shall be forwarded to City Council in accordance with the approval process in Section 3.

2.100.060 Enforcement.

(A) Remedies for Violations of this Ordinance

(1) Any violation of this Ordinance, or of a Controlled Equipment 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 the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.

(2) Any person who has been subjected to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater).

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

(4) Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirements.

Commented [LK28]: Majority of subcommittee think this section should conform to language in the Surveillance Ordinance.

Commented [LK29]: Surveillance Ord. Subcommittee removed similar language from its proposed ordinance.

2.100.070 Transparency

Commented [LK30]: Subcommittee thinks this requires City Attorney review.

(A) Disclosure Requirements

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

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

2.100.080 Whistleblower Protections.

Commented [LK31]: Replace with language from Surveillance Ord. referencing City Whistleblower Policy.(see below)

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016, and including any updates or replacements thereto, shall apply.

Commented [LK32]: Verbatim from Surveillance Technology Ordinance, B.M.C. Sec. 2.99.100. See the Policy at https://www.cityofberkeley.info/uploadedFiles/Human_Resources/Level_3_-_General/WhistleblowerPolicyMemo.pdf

2.100.090-Severability

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently 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 the Maudelle Shirek Building, 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.