



Kate Harrison
Councilmember District 4

03

REVISED AGENDA MATERIAL

Meeting Date: November 2, 2020

Item Number: 2

Item Description: **Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment**

Submitted by: Councilmember Harrison

Revisions

1. Accepted Police Review Commission edits;
2. Clarified that the LRAD is controlled equipment to the extent that it is used as an crowd dispersal tool;
3. Moved definition of Exigent Circumstances to the definitions section;
4. Clarified that the ordinance applies to the Police Review Commission or successive agency;
5. Clarified that BPD shall report on controlled equipment annually.

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 Controlled Equipment Use Policy Requirement

2.100.040 Acquisition and Use of Controlled Equipment

2.100.050 Reports on the Use of Controlled Equipment

2.100.060 Enforcement

2.100.070 Transparency

2.100.080 Whistleblower Protections

2.100.090 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.

(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, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.

(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.

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

(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) "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-

(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.

(D) "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.

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.

2.100.040 Acquisition and Use of Controlled Equipment.

(A) Restrictions Prior to Submission and Approval

(1) The Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before the Berkeley Police Review Commission ("Police Review Commission"), or any successive agency, -reviews and recommends, and the City Council approves, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy for that equipment in compliance with this section.

(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) Using any new Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the City Council pursuant to this Ordinance.

(e) 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.

(B) Submission to Police Review Commission

(1) At least 15 days prior to any public meeting to consider the adoption of any Controlled Equipment Use Policy or Controlled Equipment Impact Report, the Use Policy and Impact

report shall be published for public review.

(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:

(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, the Police Review Commission's recommendation for approval for the funding, acquisition, or use of the Controlled Equipment 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.

(D) Temporary Use in Exigent Circumstances

(1) Notwithstanding the provisions of this Chapter, the Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances without following the requirements in Section 2.100.040. However, if the Department does so, it must take all of the following actions:

(a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;

(b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment 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 Section 2.100.040; and

(c) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.

~~(2) "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.~~

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

(1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.

(2) The Police Review Commission shall present its recommendations to City Council.

(3) 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.

(F) 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. If City Council does not act on such a recommendation within four (4) City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment.

(G) 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.

(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. .

(H) City Council Approval Process

(1) After the Police Review Commission review requirements have been met, the Police Department 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.

(2) If the City Council does not approve such item within four (4) regular City Council meetings from when the item is first scheduled, the Police Department 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 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 Department that an alternate date is preferred. The Department shall also make each annual report 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. For the purposes of annual reports, "use" of equipment shall refer to deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, not to transfers of location or placement of equipment inside Department vehicles.

(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.

(B) Compliance or Revocation of Approval

(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission shall determine, based on the report, whether each piece of Controlled Equipment reported on has complied with the standards for approval set forth in Section 2.100.040.

(2) 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 2.100.040.

(3) After review by the Police Review Commission, the Police Department shall submit

the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.

2.100.060 Enforcement.

(A) Remedies for Violations of this Ordinance

This 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 Manager 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 the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action 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 \$15,000 if they are personally obligated to pay such fees.

2.100.070 Transparency

(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.

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.

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 2. 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.