

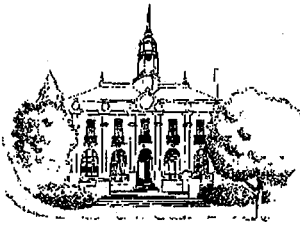
TO: Members of the PRC
From: Alison Bernstein
RE: Suggestions for ballot measure to amend current PRC enabling legislation
Date: June 8, 2016

The Berkeley PRC was created with the general purpose of providing for community participation in setting and reviewing police department policies, practices, and procedures and to provide a means for prompt, impartial, and fair investigation of complaints brought by individuals against the Berkeley Police Department.

In the interest of creating a more robust and effective avenue for citizen oversight of the police department, the members of the PRC suggest the following changes to the PRC ordinance, too be either approved by the council or submitted to the voters in November. We believe these proposed changes will greatly enhance the effectiveness of the PRC, and assure that we are able to fully able to provide meaningful oversight to BPD.

- 1) The PRC shall use the "preponderance of the evidence" as the standard of proof for all decisions
- 2) The current 120 day limit on the imposition of discipline shall be extended to one year, consistent with existing California law.
- 3) The PRC shall have full discretion to review complaints as to alleged officer misconduct from any person with personal knowledge of the alleged misconduct. Additionally, the PRC shall have the discretion to accept complaints from anonymous sources professing first hand knowledge of alleged police misconduct, so long as the complainant requests anonymity based upon a credible belief that the complainant will face prosecution or harassment. The determination of whether the request for anonymity is based upon a credible belief shall be made by the a 2/3 vote of the full commission, acting in closed session.
- 4) The PRC shall have full access to all records maintained by the BPD that the PRC staff believes are relevant to the investigation of the allegations of misconduct, including tape and video recordings. The members of the BOI shall have access to reports of relevant IA investigations, including past allegations of misconduct similar to the misconduct that is the subject of a PRC complaint, whether or not sustained, against a subject officer.
- 5) Upon a sustained finding of misconduct, the Board of Inquiry shall have the authority to suggest appropriate discipline to the Chief and/or City manager.
- 6) In addition to the training required of all Berkeley City Commissioners, all members of the PRC shall be required to complete training in the following areas: use of force; criminal procedure; fourth amendment; BPD general orders and standard operating procedures. This training shall include law, policy and best practices. The training shall be organized annually by the PRC officer, in consultation with the City attorney's office, the BPD and the BPA.





Kriss Worthington

Councilmember, City of Berkeley, District 7
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ACTION CALENDAR

June 14, 2016

To: Honorable Mayor and Members of the City Council
From: Councilmember Kriss Worthington
Subject: Ballot Measure to Increase Police Accountability

RECOMMENDATION

Refer to the City Manager and City Attorney to direct staff to develop language for a Measure to amend the City Charter to increase police accountability, to be placed on the November 8, 2016 ballot.

BACKGROUND

Police accountability reform is currently sweeping the nation as an answer to civil rights movements and community demands. The City of Berkeley recently created new regular reports; for example on January 26, 2015 the Police department began collecting data pursuant to General Order B-4, Fair and Impartial Policing Policy (issued December 31, 2014).

The attached proposed Charter Amendment has been reviewed by multiple attorneys and modified with suggestions from multiple elected officials to seek to codify best practices in contemporary Police reform.

The U.S. Department of Justice's Office of Community Oriented Policing Services, COPS, has completed an assessment of the best policies and practices for preventing, detecting and investigating misconduct. These reports serve as blueprints for reforms and build on the reform efforts already undertaken.

In 1973, a referendum in Berkeley established the first oversight agency in the U.S., the Police Review Commission (PRC), with independent authority to investigate complaints. Furthermore, Berkeley Police Chief Michael Meehan initiated communication with community organizations to gather input to create the Fair and Impartial Policing Policy. It is consistent with Berkeley's past leadership on this issue that we consider these updated reforms.

FINANCIAL IMPLICATIONS:

Staff time

ENVIRONMENTAL SUSTAINABILITY:

Consistent with Berkeley's Environmental Sustainability Goals and no negative impact.

CONTACT PERSON

Councilmember Kriss Worthington 510-981-7170

Viktor Petersson 510-981-7170

Attachment:

1. Proposed Charter Amendment creating the Oakland Police commission and the Community Police Review Agency, Measure X Section 604.

**PROPOSED CHARTER AMENDMENT CREATING THE OAKLAND
POLICE COMMISSION AND THE COMMUNITY POLICE REVIEW
AGENCY,
MEASURE X**

Section 604 –Oakland Police Commission

SECTION 604

(a) Creation and Role.

1. There is hereby established the Oakland Police Commission (hereinafter, Commission), which shall oversee the Oakland Police Department (hereinafter, Department) in order to ensure that its policies, practices, and customs conform to national standards of constitutional policing. The Commission shall have the functions and duties enumerated in this Section.
2. There is hereby established a Community Police Review Agency (hereinafter, Agency), which shall have the functions and duties enumerated in this Section.
3. Nothing herein shall prohibit the Chief of Police or a commanding officer from investigating the conduct of a Department sworn employee under his or her command, nor shall anything herein prohibit the Chief of Police from taking disciplinary or corrective action with respect to complaints investigated solely by the Department.
4. No later than two (2) years after the City Council has confirmed the first set of Commissioners and alternates, the City Auditor shall conduct a ~~performance and financial audits of the Commission and the Agency. Nothing herein shall limit the City Auditor's authority to conduct future performance audits of the Commission and the Agency.~~ The Commission shall choose an entity with appropriate experience to conduct a performance audit.

(b) Powers and Duties.

The powers and duties of the Commission are as follows:

1. Organize, reorganize and manage the Agency, including appointing, assigning, reassigning, disciplining and removing staff.
2. Conduct public hearings at least once a year on Department policies, rules, practices, customs, and General Orders.
3. Propose changes to all policies, procedures, customs, and General Orders of the Department which govern use of force, use of force review boards, profiling based on any of the protected characteristics identified by federal, state, or local law, ~~or First Amendment assemblies,~~ or matters arising from investigations conducted by the Agency or which are the subject of litigation to which the City and the Police Department are parties. All such proposed changes shall be submitted to the City Council for approval or rejection. If the City Council does not approve or reject the Commission's proposed changes within one hundred and twenty (120) days of the Commission's vote on the proposed changes, the changes will become final.
4. Approve or reject the Department's proposed changes to all policies, procedures, customs, and General Orders of the Department which govern use of force, use of force review boards, profiling

based on any of the protected characteristics identified by federal, state, or local law, or First Amendment assemblies. The Commission's decision regarding the Department's proposed changes shall be submitted to the City Council for rejection or approval. If the City Council does not approve or reject the Commission's decision within one hundred and twenty (120) days of the Commission's vote on the Department's proposed changes, the Commission's decision will become final.

5. Review and comment on all other policies, procedures, customs, and General Orders of the Department. All such comments shall be submitted to the Chief of Police ~~who shall provide a written response to the Commission. and may be provided to the public at the discretion of the Commission.~~ The Chief of Police shall respond to the Commission's comments within thirty days of receipt.

6. Review the Mayor's proposed budget to determine whether budgetary allocations for the Department are aligned with the Department's Commission's approved policies, procedures, and customs, and General Orders. The Commission shall conduct at least one public hearing on the Department budget per budget cycle and shall forward to the City Council any recommendations for change.

7. Require the Chief of Police to submit an annual report to the Commission regarding such matters as the Commission shall require.

8. Report at least once a year to the Mayor, the City Council, and to the public to the extent permissible by law, the information contained in the Chief's report in addition to such other matters as are relevant to the functions and duties of the Commission.

9. Acting separately or jointly with the Mayor, remove the Chief of Police by a vote of not less than five affirmative votes. Upon removal, by the Commission, by the Mayor, or by the Mayor and the Commission acting jointly, or upon the notice of vacancy of the position of Chief of Police, the Commission, with the assistance of the City Administrator, shall prepare and distribute a job announcement, and prepare a list of at least four candidates and transmit the names and relevant background materials to the Mayor. The Mayor shall appoint one person from this list, or reject the list in its entirety and request a new list from the Commission.

10. Send the Chairperson of the Commission or another Commissioner appointed by the Chairperson to serve as a non-voting member of any level 1 Oakland Police Force Review Board.

(c) Appointment, Terms, Vacancies, Removal.

1. The Commission shall consist of seven (7) regular members and ~~two (2)~~ three (3) alternate members, all of whom shall be Oakland residents. To the extent practicable, appointments shall be broadly representative of Oakland's diversity. The following shall not be eligible to serve as a Commissioner:

- a. current or former sworn police officer;
- b. current City employee;
- ~~e. former Department sworn employee; or~~
- d. c. current or former employee, official or representative of an employee association representing sworn police officers.

2. Within ninety (90) days of the enactment of this Section, the Mayor shall appoint three (3) Oakland residents as Commissioners, at least one of whom shall be a retired judge or lawyer with trial experience in criminal law or police misconduct, and one (1) Oakland resident as an alternate. Within two hundred and ten (210) days of the enactment of this Section, these appointees must be submitted to the Council and approved for confirmation. The Council shall approve or disapprove the appointment within forty five (45) days. The Mayor shall appoint an Oakland resident to fill any Commission vacancies that were previously filled by a Mayor's appointee. If the Mayor does not appoint a person within sixty (60) days of a vacancy in the Commission, such appointment shall be made pursuant to subsection (3)(a) below.

3. All other Commissioners and the other alternate shall be appointed as follows:

a. There is hereby established a nine (9) member Selection Panel. Within ninety (90) days of the enactment of this Section, each district City Council member shall appoint one (1) person, and the Mayor at large member shall appoint ~~one (1)~~ two (2) persons, to the Selection Panel. No current or former sworn Department employee, or officer of an employee organization representing sworn police officers ~~Department employee~~ is eligible to be a member of the Selection Panel. The Selection Panel, with the assistance of the City Administrator, will solicit applications from those willing to serve on the Commission. The Selection Panel will review the applications, and interview applicants to serve as members of the Commission.

b. Within one hundred and twenty days (120) of its formation, the Selection Panel shall submit a slate of four (4) regular members and ~~one (1)~~ two (2) alternate members to the City Council. If the City Council does not accept or reject the slate in its entirety within sixty (60) days, the four (4) regular members and one (1) alternate member shall be deemed appointed.

c. Each year the Selection Panel shall re-convene, as needed, to designate replacements for the five (5) Commissioner (four (4) regular members and one (1) alternate) vacancies initially filled by the Selection Panel and shall submit a slate of names of such designated persons to the City Council for acceptance or rejection. If the City Council does not accept or reject the entire slate within sixty (60) days, all designated replacements shall be deemed appointed.

d. Each year the Mayor and each Councilmember may replace her or his assigned person on the Selection Panel. Selection Panel members may serve up to five (5) years.

4. With the exception of the first group of Commissioners which shall serve staggered terms, the term for each Commissioner shall be three (3) years.

5. Commission members are limited to no more than two (2) consecutive terms, except that a Commissioner serving a term of no more than one (1) year shall be allowed to serve two (2) additional consecutive terms.

6. To effect a staggering of terms among the Commissioners, the duration of the first group of Commissioners shall be determined by the Selection Panel as follows: Three (3) regular members, including one (1) of the mayoral appointees, shall have an initial term of three (3) years; two (2) regular members, including one (1) of the mayoral appointees, shall have an initial term of two (2) years; two (2) regular members, including one (1) of the mayoral appointees, shall have an initial term of four (4) years. The alternate member appointed by the Selection Panel shall have an initial

term of two (2) years and the alternate member appointed by the Mayor shall have an initial term of three (3) years.

7. A vacancy on the Commission shall exist whenever a member dies, resigns, ceases to be a resident of the City, is convicted of a felony, or is removed.

8. For vacancies occurring for reasons other than the expiration of a regular member's term, the Commission shall select one of the alternates to replace the regular member for that regular member's remaining term of office.

9. Members of the Commission may be removed by a majority vote of the Commission only for conviction of a felony, substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office, absence from three consecutive regular Commission meetings or five regular meetings in a calendar year except on account of illness or when absent by permission.

(d) Meetings, Rules and Procedures

1. The Commission shall meet at least twice each month unless it determines that one meeting is sufficient in a particular month. The Commission shall notify the public of the time and place of the meeting and provide time for public comment at each meeting. The Commission shall meet at least twice each year in locations other than City Hall.

2. The Commission shall establish rules and procedures for the conduct and operations of its business. Such rules shall be made available to the public.

3. Five (5) members shall constitute a quorum. If a quorum is not established by the regular members in attendance, the Chairperson of the Commission may designate one or more alternate members to establish a quorum and cast votes.

4. The affirmative vote of four (4) members of the Commission shall be required for the adoption of any motion or recommendation regarding discipline of a police officer. Motions on all other matters may be approved by a majority of those Commission members present. To the extent permissible by state law, including rules regarding attorney-client privilege, the vote of each Commissioner regarding final decisions about discipline shall be made public.

(e) Budget and Staffing

1. The City shall allocate a sufficient budget for the Commission, including the Agency, to perform its functions and duties as set forth in this section, including budgeting at least one full-time-equivalent ~~Deputy City Attorney~~ attorney that is specifically charged with providing legal services to the Agency related to investigations, adjudications, and other police discipline matters. The attorney shall be chosen by the Commission.

2. Within sixty (60) days of the City Council's confirmation of the first group of Commissioners and alternates, the Oakland Citizens' Police Review Board (hereinafter Board) shall be disbanded and its pending business transferred to the Commission and to the Agency. The Executive Director of the Board shall become the Interim Director of the Agency, and all other staff will be transferred to the Agency.

3. After the effective date of this Charter section, the Commission shall identify special qualifications and experience that candidates for Agency staff positions must have. Candidates for future vacancies

shall be selectively certified in accordance with the Civil Service Personnel Manual, as may be amended from time to time, except that said selective certification shall not be subject to discretionary approval by the Personnel Director.

4. The staff of the Agency shall consist of no fewer than one line investigator for every one hundred (100) sworn officers in the Department, rounded up or down to the nearest one hundred (100). The number of investigators shall be determined at the beginning of each budget cycle based on the number of sworn officers employed by the Department the previous June 1. At least one investigator shall be a licensed attorney. The budget set-aside for such minimum staffing may be suspended for a fiscal year or two-year budget cycle upon a finding in the budget resolution that the City is facing an extreme fiscal necessity, as defined by City Council resolution.

5. ~~The City Administrator shall assign~~ Commission shall choose a staff member to act as liaison to the ~~Commission City Administrator and the Department~~ and to provide administrative support to the Commission.

6. Upon a vacancy, the Commission shall choose a new Director of the Agency. ~~shall be hired by the City Administrator from among two (2) or three (3) candidates submitted by the Commission.~~ By an affirmative vote of at least five (5) members, ~~or by an affirmative vote of four (4) members with the approval of the City Administrator,~~ the Commission may terminate the Director of the Agency. The Commission shall periodically conduct a performance review of the Agency Director.

7. Agency and Commission staff, with the exception of the Agency Director, shall be civil service employees in accordance with Article IX of the City Charter. Background checks shall be required for all Agency investigators that have been transferred from the Board and all subsequent investigator applicants before they are hired by the Agency.

8. No current or former sworn employee of the Department, or current official, employee or representative of an employee association representing sworn police officers, is eligible for any staff position in the Agency or the Commission.

9. The Agency Director shall be classified as a Department head.

10. The Department's Inspector General shall report to the Commission regarding any analysis of Department policies, procedures and general orders, and the results of any audit or review conducted by that office.

(f) Investigations

1. The Agency shall receive, review and prioritize all public complaints concerning the alleged misconduct or failure to act of all Department sworn employees, including complaints from Department non-sworn employees. The Agency shall not be required to investigate each public complaint it receives, but shall investigate all disciplinary level one public complaints including but not limited to those involving uses of force, profiling based on any of the protected characteristics identified by federal, state, or local law, and First Amendment assemblies. The Agency shall also investigate any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint, as directed by the Commission. The Agency shall conduct a timely and complete investigation into every incident in which a sworn officer of the Police Department discharges a firearm or activates a device that results in the physical injury or death of a

person, even if the discharge or activation is accidental. The Agency shall forward a copy of each complaint received to the Internal Affairs Division of the Oakland Police Department within one business day of receipt.

2. The Agency shall have the same access to all Department files and records, in addition to all files and records of other City departments and agencies, as the Department's Internal Affairs Division. The Department and other City departments and agencies shall make every reasonable effort to respond to the Agency's requests for files and records within ten (10) days.

3. The Agency shall make every reasonable effort to complete its investigations within one hundred and eighty (180) days of the filing of the complaint with the Agency. Within thirty (30) days of completion of the investigation, the Director of the Agency shall issue written findings and proposed discipline regarding the allegations stated in the complaint to the Commission and the Chief of Police.

4. To the extent allowed by law and after consultation with the Commission, the Agency shall forward information to other enforcement agencies, including but not limited to the Alameda County District Attorney, when such information establishes a reasonable basis for believing that a crime may have been committed by a sworn Department employee.

(g) Adjudication

1. If the Chief of Police agrees with the Agency's findings and proposed discipline, he or she shall send to the subject officer notification of findings and intent to impose discipline.

2. If the Chief of Police disagrees with the Agency's findings and/or proposed discipline, the Chief of Police shall prepare his or her own findings and/or proposed discipline, which shall be submitted to a Discipline Committee comprised of three Commissioners. The Agency's findings and proposed discipline shall also be submitted to the Discipline Committee which shall review both submissions and resolve any dispute between the Agency and the Chief of Police. Based solely on the record presented by the Agency and the Chief of Police, the Discipline Committee shall submit its final decision regarding the appropriate findings and proposed discipline to the Chief of Police who shall notify the subject officer. The Discipline Committee shall not have the authority to conduct its own investigation.

3. If the Chief of Police's findings and proposed discipline is provided to the Agency before the Agency's investigation is completed, the Agency may close its investigation to allow final discipline to proceed as proposed by the Chief. If the Agency chooses not to close its investigation, imposition of final discipline shall be delayed until the Agency's investigation is completed and the Agency makes its findings and recommendation for discipline. The Agency shall notify the Chief of its decision within five (5) business days of the Chief's notice of completion of his or her investigation.

4. After the findings and imposition of discipline have become final, the subject officer shall have the right to appeal the findings and imposition of discipline (hereinafter defined as suspension, fine, demotion or termination) to the full Commission. ~~All Department sworn employees shall also have the right to appeal any findings and discipline imposed by the Chief of Police, when an investigation has been conducted solely by the Department's Internal Affairs Division, to the Commission.~~ The Commission shall conduct an evidentiary hearing where the Agency, the Chief of Police, and the subject officer shall have the right to call witnesses and submit other evidence. ~~The Commission may delegate its authority to hold such a hearing to a hearing officer who shall be an attorney or retired judge with ten or more years of relevant experience. The Commission shall have the sole authority to choose the hearing officer. The hearing officer shall conduct the hearing and make a recommendation for final decision to the Commission.~~ At all times, the Commission shall make the final decision regarding the findings and level of discipline to be imposed with an affirmative vote of at least four members. The Commission's decision shall be final, subject only to other review as required by law.

5. Subsequent to the expiration of any adopted Memorandum of Understanding in effect at the time of the effective date of this section, discipline imposed under this section shall not be subject to arbitration notwithstanding any other Section of this Charter or terms of any agreement between the City and employee organization representing sworn officers.

Alternative:

Discipline imposed by the Commission or the Chief of Police shall be final, subject, however, to any other procedure required by this Charter or the terms of an agreement between the City and an employee organization representing sworn officers. In such other procedure, the City shall be represented by counsel chosen by the Commission.

6. The Commission shall have the same access to all Department files and records, in addition to all files and records of other City departments and agencies, as the Department's Internal Affairs Division. The Department and other City departments and agencies shall make every reasonable effort to respond to the Agency's requests for files and records within ten (10) days.

7. The Commission shall have the power to issue subpoenas to compel the appearance of witnesses, and the production of books, papers, records, and documents, and take testimony on any pending

matter. The Commission or the Agency may seek a contempt order as provided by the general law of the State for a person's failure or refusal to appear, testify, or produce subpoenaed documents.

8. The Commission may offer to the subject officer voluntary conciliation, mediation, referral to the Chief of Police for disposition without a hearing, or any other alternative dispute resolution method that the Commission deems appropriate. If the subject officer agrees to use an alternative dispute resolution method, the Chief of Police and the Agency Director jointly shall have full settlement authority. If no settlement is reached, the subject officer shall have the right to appeal the findings and imposition of discipline as described in subsection 4 above.

9. The one-year statute of limitations for investigating complaints shall be tolled as required by state law when the complainant is the subject of criminal prosecution.

(h) Enabling Legislation

The Commission may make recommendations to the City Council for enacting legislation or regulations that will further the goals and purposes of this section 604. The City Council may, on its own initiative, enact legislation or regulations that will further the goals and purposes of this section 604 after first submitting such legislation or regulations to the Commission for review and comment. The Commission shall have forty-five (45) days to submit its comments to the City Council, such time to be extended only by agreement of the City Council.

Lee, Katherine

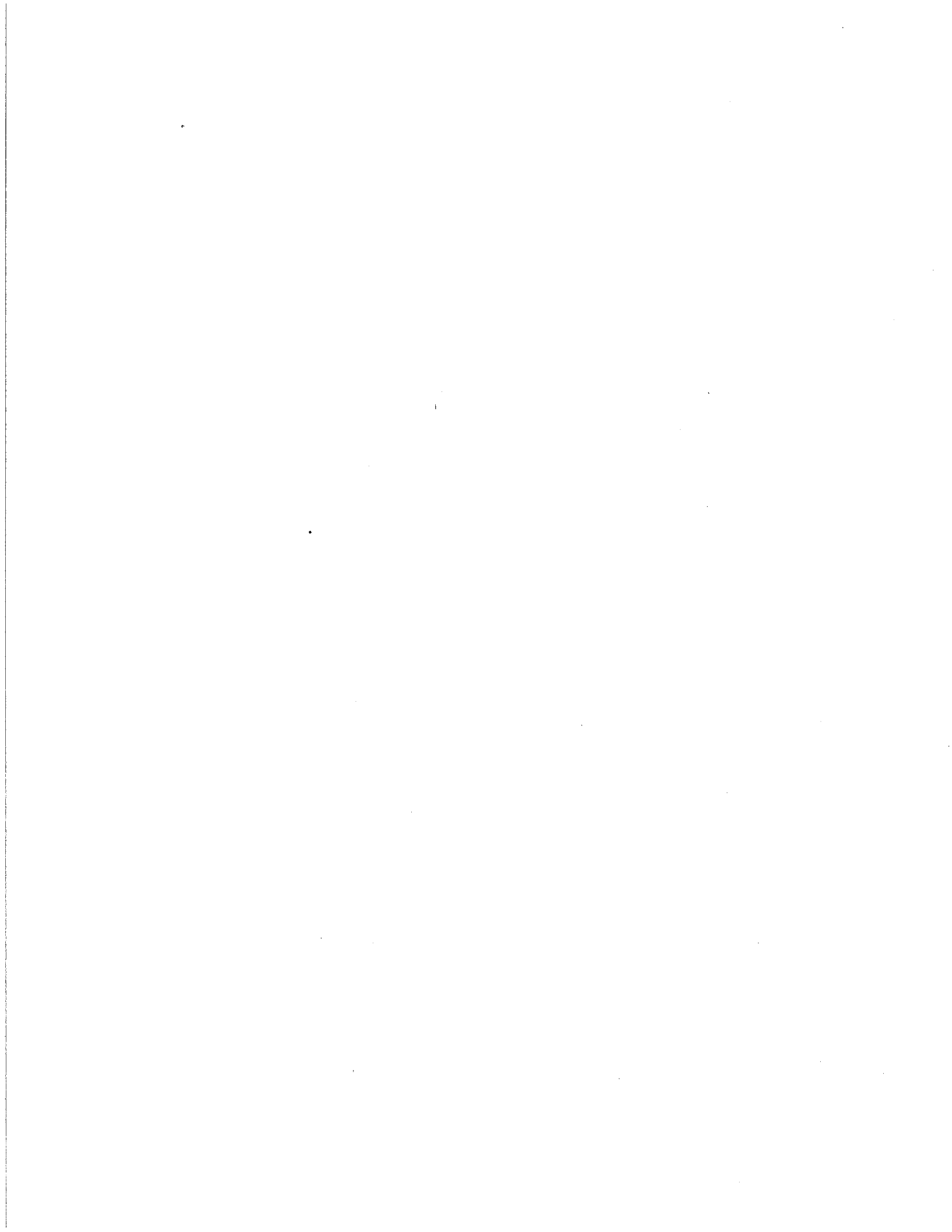
From: Ari Yampolsky <ari.yampolsky@gmail.com>
Sent: Thursday, June 02, 2016 10:37 AM
To: Lee, Katherine
Subject: Re: SFPD Body Camera policy

Follow Up Flag: Follow up
Flag Status: Completed

Categories: For Agenda

No problem. Thanks for shooting it out. I wanted to make sure others got the actual SF policy document, as well as to offer a friendly amendment to George's characterization of the SF policy compared to our proposal. (Feel free to send this to the Commissioners as well, if you think it's appropriate.)

We have proposed a somewhat broader no-pre-statement-review rule that applies to all use-of-force episodes, not just those involving officer-involved shootings, in-custody deaths, or criminal matters, as SF's policy does. Our thinking in doing so is two-fold. *First*, the same principle that necessitates capturing an officer's state of mind in a high-level use-of-force incident applies equally in a lower-level use-of-force scenario. That principle, specifically, is that an officer's unadulterated perspective on whether a suspect poses an immediate threat to the safety of officers or others, as well as whether the suspect is actively resisting or attempting to evade arrest by flight, bears directly on the reasonableness of the officer's conduct under the Fourth Amendment analysis spelled out in *Graham v. Connor*. Under that analysis, in order to avoid civil liability, an officer must prove his or her conduct was reasonable under the circumstances. Requiring a written report before the officer reviews the video footage of a use-of-force episode preserves the account of an officer's subjective perspective, which strengthens the credibility of what the officer perceived at the time he or she deployed force; this protects both officers and the department in potential civil litigation. *Second*, as a practical matter, we're talking about a very small number of incidents to which the rule would apply; Sgt. Okies estimated the entire department has 40-50 use-of-force incidents per year.



Proposed Berkeley Police Department General Order:

Body Worn Cameras

450.1 PURPOSE AND SCOPE

This policy provides guidelines for the use of portable ~~audio/video recording devices, or~~ Body Worn Cameras (BWC) by members of this department while in the performance of their duties. ~~This policy covers all recording systems whether body worn, hand held or otherwise.~~

This policy does not apply to lawful surreptitious audio/video recording, interception of communications for authorized investigative purposes. ~~[or to mobile audio/video recordings]~~ JO: original lexipol – mobile audio policies but important to include mobile video like in a vehicle.

450.2 POLICY

The Berkeley Police Department recognizes that video recording of contacts between Department personnel and the public provides an objective record of these events, and that the use of a recording system complements field personnel in the performance of their duties by providing a video record of enforcement and investigative field contacts, which can enhance criminal prosecutions, limit civil liability, increase transparency, and enhance professionalism in policing. A video recording of an event or contact also enables the delivery of timely, relevant, and appropriate training to maximize safety for both community members and BPD personnel and will improve the delivery of police services to the community.

While recordings obtained from video recorders provide an objective record of events, it is understood that video recordings do not necessarily capture all events, activities and information, or reflect the full experience of the individual member(s) in a given incident. ~~Moreover, the recordings, especially video, have limitations and may depict events differently than the events recalled by the involved member.~~ Specifically, it is understood that the recording device will capture information that may not have been heard and/ or observed by the involved member and that the involved member may see and hear information that may not be captured on video.¹ [Okies: difference bt. what brain perceives and what video records: officer not lying]

450.2a Confidentiality and Proper Use of Recordings.

Body Worn Video use is limited to enforcement and investigative activities involving members of the public. The recordings will capture video and audio evidence for use in criminal investigations, administrative reviews, and other proceedings protected by confidentiality laws and Department policy. ~~Officers shall comply with all applicable laws and policies regarding confidential information.~~ ~~Unauthorized-improper~~ use or release of BWC recordings may compromise ongoing criminal and administrative investigations or violate the privacy rights of those recorded and is prohibited.

~~Any unauthorized use or release of recordings or other violation of confidentiality laws or Department policies are considered serious misconduct and subject to disciplinary action.~~

450.2b Training Required.

Officers who are assigned BWC's must complete department-approved training in the proper use and maintenance of the devices before deploying to the field.

¹ One commissioner felt the last two sentences of this paragraph were unnecessary.

41 [As part of a continual improvement process, regular review should be conducted by BPD staff of the
42 training on this policy and the related use of BWC's under this policy. The department shall make an
43 annual report to the PRC regarding the outcome of this review.] ~~MOVE ELSEWHERE BPD shall develop a~~
44 ~~training curriculum that shall be reviewed by the PRC periodically.²~~

45

46 **450.3 MEMBER PRIVACY EXPECTATION**

47 All recordings made by members acting in their official capacity shall remain the property of the
48 Department. Members shall have no expectation of privacy or ownership interest in the content of
49 these recordings.

50

51 **450.4 MEMBER RESPONSIBILITIES**

52 Prior to going into service, each member who is assigned to wear a BWC will be responsible for making
53 sure that he or she is equipped with a portable recorder issued by the Department, and that the
54 recorder is in good working order. If the recorder is not in working order or malfunctions at any time,
55 the member shall promptly report the failure to his/her supervisor and obtain a functioning device as
56 soon as practicable. Uniformed members should wear the recorder in a conspicuous manner or
57 otherwise notify persons that they are being recorded, whenever possible. Come back to this.

58 Officers are not required to obtain consent to record from members of the public when the officer is
59 lawfully at the location where the recording takes place.

60 Upon the approval of the police chief or his or her designee, non-uniformed members may use an
61 approved portable recorder. Unless conducting a lawful recording in an authorized undercover capacity,
62 non-uniformed members should wear the recorder in a conspicuous manner when in use and notify
63 persons that they are being recorded, whenever possible.

64 When using a portable recorder, the assigned member shall record his or her name, BPD identification
65 number and the current date and time at the beginning and the end of the shift or other period of use,
66 regardless of whether any activity was recorded. This procedure is not required if the recording device
67 and related software captures the user's unique identification and the date and time of each recording.

68 Members are required to document the existence of a recording in any report or other official record of
69 the contact, including any instance where the recorder malfunctioned or the member deactivated the
70 recording. In the event activity outlined in section 450.5 is not captured in whole or in part the member
71 will need to document this and the reason the footage was not captured.

72 **450.4.1 SUPERVISOR RESPONSIBILITIES**

73

74 Supervisors shall take immediate physical custody of a BWC when the device may have captured an
75 incident involving a use of force, an officer-involved shooting or death or other serious incident, and
76 shall ensure the data is uploaded in a timely manner as prescribed by BPD policy. (Penal Code § 832.18).

77

² Question: Sgt. Okies asked if there are other training curricula that are shared with the PRC as required by policy.

Supervisors shall also review relevant BWC recordings prior to submitting any administrative reports.

450.5 ACTIVATION OF THE BWC

This policy is not intended to describe every possible situation in which the BWC should be used.

Members shall activate the recorder as required by this policy or at any time the member believes it would be appropriate or valuable to record an incident within the limits of privacy described herein.

The BWC shall be activated in any of the following situations:

(a) All enforcement and investigative contacts including stops and field interview (FI) situations.

(b) Traffic stops including, but not limited to, traffic violations, stranded motorist assistance and all crime interdiction stops.

(c) Self-initiated activity in which a member would normally notify the Communications Center.

(d) Probation or parole searches.

(e) Service of a search or arrest warrant.

(f) Any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.

(g) Transporting any detained or arrested person, with the member in close physical proximity to the civilian. Any time hands on. Return to this

(h) No member of the Department may surreptitiously record a contact with or conversation of any other member of this Department without the expressed knowledge and consent of all parties present, including the member whose acts or conversation are being recorded. Nothing in this Section is intended to interfere with an officer's right to openly record any interrogation pursuant to Government Code Section 3303(g).

(i) Members of the Department are expected to activate their body worn camera any time they reasonably believe that a recording of an on-duty contact with a member of the public may be of future benefit to the Department. 1. At no time should an officer jeopardize his/her safety or the safety of another in order to activate their body worn camera. 2. Members of the Department are expressly prohibited from utilizing Department recorders and recorded media for personal use. 3. Members of the Department will not make copies of any recordings for their personal use and are prohibited from using a recording device (such as a phone camera or secondary video camera) to record media from storage video files of the Body Camera unit. Nothing in this policy shall be construed as limiting an officer's right to carry and use a personal device such as a smart-phone, however officers shall not carry or use another mobile video recorder in addition to the City issued Body worn Camera without express approval of the Chief of Police

~~(h) As directed by the police chief or his/her designee.~~

450.5.1 ACTIVATION IN CROWD CONTROL SITUATIONS start here next time.

Forn

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174 During crowd control, protest or mass arrest incidents members shall use their BWC's consistent with
175 this policy, and when directed by the Incident Commander. The Incident Commander shall document
176 their orders in an appropriate report (e.g. Operations Plan or After Action Report) and provide the
177 orders to all personnel.

178
179 BPD General Order C-1, Intelligence Procedures for First Amendment Activities, prohibits intelligence
180 gathering on "political, religious, or social views or activities of individuals or groups, unless such views
181 or activities directly relate to criminal conduct," and applies to the use of BWC's and other recording
182 devices.

183
184 **450.5.2 DISCRETIONARY ACTIVATION**

185
186 Recording is permitted but not required under certain circumstances, including but not limited to the
187 following:³

- 188 1. Members taking a report when the information available to them indicates the suspect is not on
189 the scene.
- 190 2. During a preliminary investigation with a child abuse victim or a victim of a sexual assault.
- 191 3. Members meeting with a Confidential Informant.
- 192 4. Members on guard assignment on police, medical, psychiatric, jail or detention facility.
193 Members shall assess the circumstances (e.g., suspect's demeanor/actions, spontaneous
194 statements, etc.) of each guard assignment, on a continuing basis, to determine whether to
195 activate or de-activate their recorder.

196
197 Members are authorized to use the BWC's to record statements in lieu of taking a written statement.
198 Members shall advise or obtain consent from victims or witnesses when taking a recorded statement.
199 Members shall advise and obtain consent from child abuse or sexual assault victims or their guardians
200 before taking a recorded statement.

201
202 Members shall remain sensitive to the dignity of all individuals being recorded and exercise sound
203 discretion to respect privacy by discontinuing recording whenever it reasonably appears to the member
204 that such privacy may outweigh any legitimate law enforcement interest in recording. Requests by
205 members of the public to stop recording should be considered using this same criterion. Recording
206 should resume when privacy is no longer at issue unless the circumstances no longer fit the criteria for
207 recording.

208
209 Informal community interactions differ from "consensual encounters" in which officers make in an effort
210 to develop reasonable suspicion to detain or probable cause to arrest. To strengthen relationships
211 between police and citizens, officers may use discretion regarding the recording of informal, non-
212 enforcement related interactions with members of the community, but in no case will recordings be
213 made that are in conflict with the provisions of this policy.

214

³ NOTE: This list was adapted from the OPD policy. Sgt. Okies expressed the perspective that Lexipol's more general language, rather than the itemized list, better expressed the intent of the policy. Officers use discretion regularly and a general direction to use discretion would be more helpful.

262 At no time is a member expected to jeopardize his or her safety in order to activate a BWC or change
263 the recording media. However, the BWC should be activated in situations described above as soon as
264 practicable.

265
266 BODY WORN CAMERAS OPERATING PROCEDURES

267 Members of the Department that are assigned a BODY WORN CAMERA shall receive mobile video training prior
268 to deployment of the device in an operational setting. Prior to going into service each officer shall perform an
269 inspection TO ensure that his/her BODY WORN CAMERA is operational. If problems are encountered with any
270 component of the system, the BODY WORN CAMERA equipment will not be used. The officer to whom the
271 problematic equipment is assigned shall report the problem to their immediate supervisor upon becoming aware of
272 it. A spare BODY WORN CAMERA shall be issued to that officer through a supervisor prior to the officer going
273 into service. The officer and supervisor shall inform the BODY WORN CAMERA Technician via email of
274 problems that are occurring with the problem unit as well as what spare BODY WORN CAMERA was assigned to
275 the officer (number of BODY WORN CAMERA). The problematic BODY WORN CAMERA shall be routed to the
276 BODY WORN CAMERA Technician to diagnose and shall reassign a new unit to the affected employee.

277 (a) The officers shall report the loss or theft of a BODY WORN CAMERA to their immediate supervisor. The
278 officer shall prepare a memo to be routed via the chain of command to the Operations Deputy Chief documenting
279 the circumstances surrounding the loss or theft of the device. The BODY WORN CAMERA technician should be
280 informed via email from the immediate supervisor of the loss. A spare BODY WORN CAMERA shall be issued to
281 the officer through a supervisor prior to going back into service. The officer and supervisor shall inform the BODY
282 WORN CAMERA Technician via email of what spare was issued (number of BODY WORN CAMERA unit). The
283 BODY WORN CAMERA Technician shall assign a new unit to the officer as soon as possible after receiving
284 notification of the loss or theft of the camera.

285 (b) Once the BODY WORN CAMERA is activated pursuant to Section 450.5 of this policy, it shall remain on until
286 the event giving rise to the activation has reached a conclusion and/or the officer leaves the scene of the event,
287 whichever occurs first. When the officer reasonably believes the event giving rise to the activation is over, he/she
288 may deactivate the BODY WORN CAMERA from the recording mode. If the event giving rise to the activation
289 resumes following the officer's termination of the BODY WORN CAMERA recording the officer shall reactivate
290 their BODY WORN CAMERA.

291 (c) When the BODY WORN CAMERA is used in any incident investigation, or during a traffic stop, this fact will
292 be documented on any relevant citation and/or report prepared regarding the incident. Conversely, when the BODY
293 WORN CAMERA is not used in any incident investigation, or during a traffic stop, the reason for non-use will be
294 documented on any relevant citation and/or report prepared regarding the incident. Whenever the BODY WORN
295 CAMERA is activated pursuant to Section 450.5 of this policy, this fact will be documented on any relevant citation
296 and/or police report prepared regarding the event that gave rise to the activation. Conversely, whenever the BODY
297 WORN CAMERA is not activated as required by Section 450.5 of this policy, the reason for the lack of activation
298 will be documented on the relevant citation and/or police report prepared regarding the event that otherwise would
299 have given rise to activation. For the purposes of capturing the recording or lack of recording in the police report it
300 should be mentioned at the beginning of the narrative summary.

301 (d) Except in circumstances prohibited by statute, or as directed by the Chief of Police, or his or her designee, an
302 officer may have access to review his/her recordings when preparing written reports and/or statements relevant to
303 any incident, to help ensure accuracy and consistency of accounts.

304 (e) Department personnel shall not intentionally erase, alter, reuse, modify or tamper with audiovideo recordings,
305 nor shall they attempt to erase, alter, reuse, modify or tamper with audiovideo recordings.

306 (f) If the BODY WORN CAMERA is accidentally activated, the officer shall inform his or her immediate
307 supervisor requesting the recording be deleted. The request shall be sent via email and routed to the BODY WORN
308 CAMERA Administrator. Once the video has been reviewed by the supervisor and administrator and deemed to

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spac

309 have no evidentiary value the video will be categorized as "Testing/ Accidental" and retained for thirty (30) days prior
310 to deletion

311 (g) When an officer discovers that his/her BODY WORN CAMERA battery is becoming depleted (as evidenced by
312 a yellow indicator light and/or a sounding tone when recording), the officer shall immediately exchange the battery
313 for a charged replacement. If the officer will be delayed in exchanging the battery, or if the officer is unable to locate
314 a charged replacement, the officer shall notify a supervisor and the supervisor will locate a charged replacement for
315 the officer's use as soon as possible.

316

317 **450.5.3 SURREPTITIOUS USE OF THE PORTABLE RECORDER**

318

319 Members of the Department may surreptitiously record any conversation during the course of a criminal
320 investigation in which the member reasonably believes that such a recording will be lawful and
321 beneficial to the investigation.⁴

322

323 Members shall not surreptitiously record another department member without a court order unless
324 lawfully authorized by the Chief of Police or the authorized designee.

325

326

327 **450.5.4 CESSATION OF RECORDING**

328

329 Once activated, the BWC should remain on continuously until the member's direct participation in the
330 incident is complete or the situation no longer fits the criteria required herein for activation. Recording
331 may be stopped during significant periods of inactivity such as report writing or other breaks from direct
332 participation in the incident.

333

334 Members shall cease audio/video recording whenever necessary to ensure conversations are not
335 recorded between a person in custody and the person's attorney, religious advisor or physician, unless
336 there is explicit consent from all parties to the conversation.⁵

337

338 **450.6 PROHIBITED USE OF PORTABLE RECORDERS**

339 Members are prohibited from using department-issued portable recorders and recording media for
340 personal use and are prohibited from making personal copies of recordings created while on duty or
341 while acting in their official capacity.

342 Members are also prohibited from retaining recordings of activities or information obtained while on
343 duty. Members shall not duplicate or distribute such recordings, except for authorized legitimate
344 department business purposes. All such recordings shall be retained at the Department.

345 Members are prohibited from using personally owned-devices for video recording while on duty.⁶

⁴ Penal Code § 633

⁵ Penal Code § 636

⁶ Note: Sgt. Okies expressed concern about not allowing exceptions for personal devices if there is no other way to get the evidence. Other agencies allow such exceptions with watch commander approval.

388 Recordings shall not be used by any member for the purpose of embarrassment, intimidation or ridicule.

389

390 **450.7 PROCESSING AND HANDLING OF RECORDINGS**

391 Any time a member records any portion of a contact that the member reasonably believes constitutes
392 evidence in a criminal case, the member shall record the related case number and transfer the file in
393 accordance with current procedure for storing digital files and document the existence of the recording
394 in the related case report. Transfers must occur at the end of the member's shift, or any time the
395 storage capacity of the recorder is nearing its limit. In circumstances when the officer cannot complete
396 this task, the officer's supervisor shall immediately take custody of the portable recorder and be
397 responsible for uploading the data. Officers must properly categorize and tag video recordings any time
398 they are uploaded.

399 Any time a member reasonably believes a recorded contact may be beneficial in a non-criminal matter
400 (e.g., a hostile contact), the member should promptly notify a supervisor of the existence of the
401 recording and document the contact appropriately.

402 Members are prohibited from intentionally erasing, altering, reusing, modifying, or tampering with
403 audio video recordings.—Findings that a member intentionally or repeatedly destroyed or did not
404 capture required video recordings will result in disciplinary action.

405

406 **450.7.1 RETENTION REQUIREMENTS**

407 This policy requires that all video and audio recordings from BPD body cameras be retained for two
408 years and one month (twenty-five months), prior to being erased, deleted, destroyed, or recycled with
409 the following exceptions:

- 410 a) If evidence that may be relevant to a criminal prosecution is obtained from a recording made by
411 a body-worn camera under this section, BPD shall retain the recording in the same manner as is
412 required by law for other evidence that may be relevant to a criminal prosecution.
- 413 b) Recording caused by either testing or accidental activation may be deleted after 60 days.

414

415 (Insert?)

416 CATEGORIES AND RETENTION PERIODS

417

418 The Berkeley Police Department has twelve (12) categories to tag and retain our cases. Each one is listed below with
419 the current retention cycle. It should be noted that retention times can be extended at any time by a Supervisor,
420 Internal Affairs, Evidence Specialist, BPD System Administrator for evidence.com, or by the Chief of Police or
421 his/her designee. Categories can also be added if needed.

422

423 (a) 01) INFRACTION VIOLATIONS 2 YEARS

424 (b) 02) DETENTIONS 2 YEAR

425 (c) 03) SERVICE TO CITIZENS 1 YEAR

426 (d) 04) COLD REPORT 1 YEAR

427 (e) 05) ARREST (UNTIL MANUALLY DELETED)

428 (f) 06) OUTSIDE ASSIST 1 YEAR

429 (g) 07) CONSENSUAL CONTACTS 1 YEAR

⁷ California law section 832.18 gives basic retention requirements for video and audio recordings from body worn cameras used by police officers in the line of duty.

- 430 (h) 08) SICK OR INJURED PATRONS 3 YEARS
- 431 (i) 09) STATEMENTS (UNTIL MANUALLY DELETED)
- 432 (j) 10) USE OF FORCE (UNTIL MANUALLY DELETED)
- 433 (k) 11) UNATTENDED DEATH / HOMICIDE (UNTIL MANUALLY DELETED)
- 434 (l) 12) TESTING / ACCIDENTAL 30 DAYS

435
436 b)
437

438 **450.7.2 REVIEW OF RECORDINGS BY A MEMBER**

439 When preparing written reports, members should review their recordings as a resource, except as
440 stated in subsections A, B, and C below. However, members shall not retain personal copies of
441 recordings. Members shall not use the fact that a recording was made as a reason to write a less
442 detailed report.

443 A. Incidents that involve use of force.

444 A member involved in a use of force shall not review or receive an accounting of any related
445 body camera video footage prior to completing any required initial reports and statements
446 regarding the recorded event. An involved member will be given the opportunity to supplement
447 his or her statement in a separate document, a separate section of the report, or in a separate
448 version of the same document if the earlier document(s) can be easily accessed. In no case shall
449 a member alter a report made prior to reviewing the recording.⁸

450 B. Incidents that result in grave bodily injury.

- 451 1. In the event of an officer-involved incident that results in grave bodily injury, including an
452 officer-involved shooting or an in-custody death, the BWC of the involved member(s) shall be
453 taken from him or her and secured by a supervisor, commander, or appropriate investigator, as
454 necessary. Involved members are not to access or obtain their footage of the incident. It will be
455 the responsibility of the investigation team's supervisor to coordinate with the involved
456 member's supervisor to obtain footage of the incident.
- 457 2. Personnel uploading secured BWC video files shall not view the files unless authorized.
- 458 3. No member involved in the incident may view any video recordings prior to being interviewed
459 by the appropriate investigative unit and receiving command approval.
- 460 4. Once a member's report(s) has been submitted and approved and the member has been
461 interviewed by the appropriate investigator, the involved member will have an opportunity to
462 review the recordings prior to the conclusion of the interview process and to provide additional
463 information to supplement his or her statement in a separate document or separate section of
464 the report. In no case shall a member alter a report made prior to reviewing the recording.

465 C. Access by a Member under investigation

- 466 1. Criminal - Personnel who are the subject of a criminal investigation may not view any
467 audio/video recordings related to the incident except upon approval, as specified below, by the
468 lead investigator or IAB.

⁸ Note: Sgt. Okies advocated that prohibition of review prior to writing the initial police report should be limited to officer-involved shootings, in-custody death, and use of force consistent with what some agencies refer to as Level 1 or categorical use of force. This perspective mirrors policies reviewed by the subcommittee including Los Angeles, Oakland, BART and Richmond.

One commissioner supported also applying the rule in Schedule A to arrests.

469 2. Administrative - In instances where a complaint has been filed and administrative
470 investigations are undertaken and video recordings of the incident exist, the initial interview of
471 the member shall occur before the member has reviewed the recordings. An involved officer will
472 have an opportunity to review recordings after the initial statement has been taken, and he or
473 she can be re-interviewed if either the officer or the investigators believe it necessary.

474 3. Subject or witness personnel wanting to view any of the audio/video recordings related to the
475 incident shall make a request to do so, in writing or via email, to the IAD Commander, as
476 appropriate.

477 4. The IAD Commander receiving the above request shall notify the member, in writing or via
478 email, of the approval or denial to view the recordings. The IAD Commander shall document the
479 approval or denial in the case file notes/log or include a copy of the approval or denial
480 correspondence in the case file. Approval to view the audio/video recordings may be made by
481 the IAD Commander as long as he or she has determined that allowing the recordings to be
482 viewed will not be detrimental to the investigation.

483 D. Investigatory Review

484 Supervisors are authorized to review relevant recordings any time they are investigating alleged
485 misconduct or reports of meritorious conduct or whenever such recordings would be beneficial
486 in reviewing the member's performance.

487 Recorded files may also be reviewed

488 (a) Upon approval by a supervisor, by any member of the Department who is participating in an
489 official investigation, such as a personnel complaint, administrative investigation or criminal
490 investigation.

491 (b) Pursuant to lawful process or by court or District Attorney personnel who are otherwise
492 authorized to review evidence in a related case.

493 Personnel assigned to investigatory units are authorized to view any BWC video file associated
494 to their active investigations, unless otherwise prohibited by policy.

495 Investigators conducting criminal or internal investigations shall:

496 a. Advise the coordinator to restrict public disclosure of the BWC file in criminal or
497 internal investigations, as necessary.

498 b. Review the file to determine whether the BWC file is of evidentiary value and process
499 it in accordance with established protocols.

500 c. Notify the coordinator to remove the access restriction when the criminal/internal
501 investigation is closed.

502 E. Recorded files may also be reviewed by training staff regarding incidents that may serve as a learning
503 or teaching tool.

504

505 450.8 RELEASE OF RECORDINGS

506 Recorded files will be released:

507 (a) To the Police Review Commission in conjunction with the PRC's investigation of a civilian complaint.

508 (b) In compliance with a public records request, as permitted under General Order R-23 (RELEASE OF
509 PUBLIC RECORDS AND INFORMATION), R-23 does not authorize release of documents that would
510 constitute an unwarranted invasion of privacy. Circumstances where this might arise in video include
511 footage taken inside a home, a medical facility, the scene of a medical emergency, or where an
512 individual recorded has a "reasonable expectation of privacy." However, all subjects of any footage or
513 their next of kin may authorize its release unless prevented by other city policy, law or the courts.

514 (c) To media personnel or the general public with permission of the Chief of Police or authorized
515 designee, subject to privacy protections indicated in this policy.

516 All recordings should be reviewed by the Custodian of Records prior to public release (see the Records
517 Maintenance and Release Policy).

518 BPD may share video footage with law enforcement, national security, military, or other government
519 agencies outside of Berkeley, when there is reasonable suspicion that criminal activity has occurred or is
520 about to occur.⁹

521

522 **450.9 COORDINATOR**

523 The Chief of Police or the authorized designee shall appoint a member of the Department to coordinate
524 the use and maintenance of portable audio/video recording devices and the storage of recordings,
525 including (Penal Code § 832.18):

526 (a) Establishing a system for uploading, storing and security of recordings.

527 (b) Designating persons responsible for uploading recorded data.

528 (c) Establishing a maintenance system to ensure availability of operable portable audio/video recording
529 devices.

530 (d) Establishing a system for tagging and categorizing data according to the type of incident captured.

531 (e) Establishing a system to prevent tampering, deleting and copying recordings and ensure chain of
532 custody integrity.

533 (f) Working with counsel to ensure an appropriate retention schedule is being applied to recordings and
534 associated documentation.

⁹ Refer to General order N-17 "Suspicious Activity Reporting": "The standard by which the determination as to whether information may be used to create a SAR is made in circumstances involving a named or identified individual or group. It means that there exists a "reasonable suspicion" based on the analysis of legally obtained information that the subject of the information is or may be involved in definable criminal conduct and/or activity that supports, encourages, or otherwise aids definable criminal conduct. For the purposes of this order, infraction violations will not be considered sufficient to establish a criminal predicate. The underlying offense must amount to a misdemeanor or felony.... Non-violent civil disobedience is specifically exempted from SARs reporting, and such activities shall not be reported as SARs.... Race, ethnicity, national origin, or religious affiliation should not be considered as factors that create suspicion (although these factors may be used as specific suspect descriptions)." http://www.ci.berkeley.ca.us/uploadedFiles/Police/Level_3_-_General/GO%20N-17_18Sept12.pdf

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537

538 **450.10 SURVEILLANCE**

539

540 The use of facial recognition and other biometric technologies in conjunction with body camera images
541 is prohibited until a BPD policy is adopted addressing the uses of such technologies.

542

543

544 MOBILE VIDEO RECORDERS The Department assigned Body Camera shall be the only mobile video recorder
545 allowed for Department employees while on-duty. Any other mobile video recorder shall only be used with the
546 expressed permission of the Chief of Police.

547

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