

Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
REVISED AGENDA**

**Wednesday, March 22, 2017
7:00 P.M.**

North Berkeley Senior Center
1901 Hearst Avenue, Berkeley

1. CALL TO ORDER & ROLL CALL

2. APPROVAL OF AGENDA

3. PUBLIC COMMENT

(Speakers are generally allotted up to three minutes, but may be allotted less time if there are many speakers. They may comment on items on the agenda or any matter within the PRC's jurisdiction at this time.)

4. APPROVAL OF MINUTES

Regular Meeting of February 22, 2017
Regular Meeting of March 8, 2017

5. CHAIR'S REPORT

6. PRC OFFICER'S REPORT

Status of complaints; other items.

7. CHIEF OF POLICE'S REPORT

Crime, budget, staffing, training updates, and other items.

8. SUBCOMMITTEE REPORTS (discussion & action)

Report of activities and meeting scheduling for all Subcommittees, and additional discussion and action as noted for specific Subcommittees:

a. Fair & Impartial Policing Subcommittee

Renew Subcommittee. Next meeting March 27, 2017, 6:00 – 8:00 p.m.

b. Media Credentialing Subcommittee

Renew Subcommittee.

- c. Surveillance and Community Safety Ordinance Subcommittee
- d. General Orders C-64, etc. Subcommittee
Renew Subcommittee.
- e. Outreach Subcommittee
 - i. Present 5-prong outreach plan.
 - ii. Approve Subcommittee arranging for presentations to community groups.
- f. Homeless Encampment Subcommittee

Recommendation that the Commission write a letter to the City Manager asking for the legal basis for the confiscation of property due to a concern that police may have become involved or are complicit in illegally confiscating property; and requesting clarification of the Police Department's role in supporting the Public Works Department's seizure of property.

9. 2016 CRIME REPORT

Presentation by Berkeley Police Department.

10. OLD BUSINESS (discussion & action)

- a. How to proceed on Policy Complaint #2406, regarding searches of persons and vehicles based on smell of marijuana, or consider closure of complaint.
From: PRC Officer
(See materials attached to March 8, 2017 packet.)
- b. Review and prioritization of questions to submit to Berkeley Police Department regarding its budget.
From: Commission
(See materials attached to March 8, 2017 packet.)
- c. Continue deciding how to conduct policy review of General Order W-1, Public Recording of Law Enforcement Activity (Right to Watch), to ensure that police are not violating First Amendment protections established by case law.
From: Commissioner Prichett
- d. Next steps in policy review initiated on February 22, 2017, of BPD's establishment of a perimeter around homeless encampments when enforcement actions to dismantle them is being taken, and whether the perimeters violated General Order W-1; and if a violation is found, how the policy should be revised.
From: Commission

11. NEW BUSINESS (discussion & action)

- a. Review City Attorney's opinion regarding disclosure of informal complaints to the Police Review Commission, and consider procedures for handling informal complaints, as suggested by City Attorney, including possible amendment to PRC Regulations.
From: Commissioner Bernstein

- b. Whether to open a review of the Police Department's policy or procedures for determining when a school should be advised to shelter in place.
From: Commissioner Prichett
- c. Prepare annual Commission Work Plan, as directed by City Council.
From: City Clerk

12. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

Attached.

13. PUBLIC COMMENT

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

14. ADJOURNMENT

Communications Disclaimer

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



Communication Access Information (A.R.1.12)

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

SB 343 Disclaimer

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

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

PRC REGULAR MEETING ATTACHMENTS

March 22, 2017

MINUTES

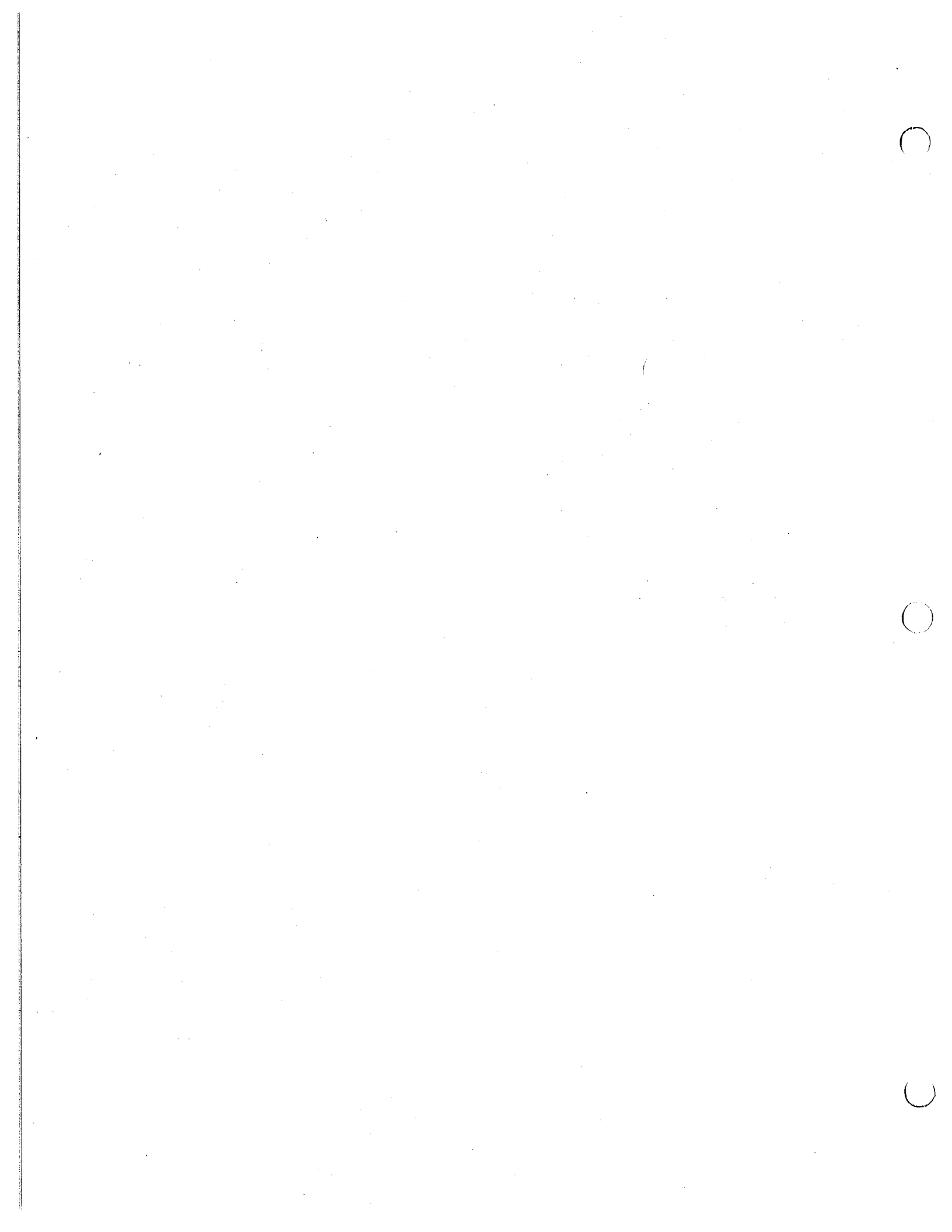
February 22, 2017 <i>Regular Meeting Minutes</i>	Page 7
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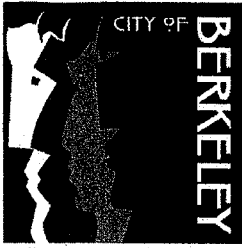
AGENDA-RELATED

Item 9 – Worksession item dated March 14, 2017 from City Manager to the Mayor and Councilmembers: Crime Report – 2016.	Page 17
Item 10.c – BPD General Order W-1: Public Recording of Law Enforcement Activity (issued 11-10-16).	Page 27
Item 10.c – Article from Ft. Worth Star-Telegram—Appeals court: First Amendment gives public right to video police (2-26-17).	Page 31
Item 10.c – Article from The Public Servant re Updating eavesdropping: ACLU v. Alvarez and potential legislation (Oct. 2012).	Page 35
Item 10.c – Article from ACLU.org re Simon Glik Broke No Law When He Used His Cell Phone to Record Police Officers' Use of Force Against Another Man on Boston Common (8-29-11).	Page 41
Item 11.a – Memo dated February 15, 2017, from City Attorney to PRC Officer: Disclosure of Informal Complaints to the Police Review Commission.	Page 45
Item 11.c – Memo from the City Clerk dated March 3, 2017 to Commission Secretaries re Commission Work Plans – Council Item from 2016.	Page 51

COMMUNICATION(S)

- Email dated 3-7-17 from PRC Chair re public records ruling by California Supreme Court. Page 59
- Emails exchange between a citizen and PRC Officer re March 4, 2017 Protests. Page 61
- Letter dated March 13, 2017 from the PRC Chair to the Berkeley City Council re PRC Endorsement of Resolution Opposing Religious and Ethnic Registries, Participation in Federal Immigration Ban, and Restricting City Resources to Support Such Registries and Bans. Page 63





Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
MINUTES**

(revised, unapproved)

**Wednesday, February 22, 2017
7:00 P.M.**

North Berkeley Senior Center
1901 Hearst Avenue, Berkeley

1. CALL TO ORDER & ROLL CALL BY CHAIR BERNSTEIN AT 7:20 P.M.

Present: Commissioner Alison Bernstein (Chair)
Commissioner Kimberly DaSilva (Vice Chair) (arrived 7:55 p.m.)
Commissioner George Lippman
Commissioner George Perezvelez
Commissioner Andrea Prichett (arrived 7:27 p.m.)
Commissioner Terry Roberts
Commissioner Bulmaro Vicente
Commissioner Ari Yampolsky

Absent: None

PRC Staff: Katherine J. Lee, PRC Officer

BPD Staff: Chief Andy Greenwood, Sgt. Benjamin Cardoza

2. APPROVAL OF AGENDA

The agenda was approved by general consent.

3. PUBLIC COMMENT

There was 1 speaker.

4. APPROVAL OF MINUTES

a. Motion to approve *Special Meeting Minutes of February 1, 2017*

Moved/Seconded (Perezvelez/Bernstein) **Motion Carried**

Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Vicente, and Yampolsky.

Noes: None

Abstain: Roberts

Absent: None

- b. **Motion to approve *Regular Meeting Minutes of February 8, 2017 as corrected to remove Commissioner Perezvelez from the Commissioners listed "present."***

Moved/Seconded (Roberts/Perezvelez) **Motion Carried**

Ayes: Bernstein, DaSilva, Perezvelez, Prichett, Roberts, Vicente, and Yampolsky.

Noes: None

Abstain: Lippman

Absent: None

5. CHAIR'S REPORT

The Chair reported that she reached out to BPA and Copwatch re a reserved time for them to comment at the end of public comment. BPA agreeable, if they have something to say. Copwatch as well.

6. PRC OFFICER'S REPORT

-- No new complaints filed since last meeting; haven't heard back from policy complainant.

-- The mediation in Complaint #2410 was completed, so the complaint is now closed.

-- Commission's approved motion at the Feb. 22 meeting to have all subcommittees produce notes of each meeting did not include a change to the standing rules, although agendized as such. Proposed addition to standing rules approved.

7. CHIEF OF POLICE'S REPORT

-- Settlement of lawsuit v. City re police actions on Dec. 6, 2014, was approved by Council: City paying \$125K to 7 plaintiffs and their attorneys; agreed on language to be incorporated into G.O.s and Commander's Guide; BPD commits to full implementation (not pilot) of body-worn camera program, Have adjusted budget figures for FY 18; pending Council approval, which will probably occur.

-- Currently 172 officers including 19 in training.

Questions:

-- Will BWC video be kept In-house on own server or under contract with someone to house on their server? Considering using cloud server and City's IT staff.

-- Schedule for procuring BWCs? Moving forward, and need to follow City procurement rules; can't give dates when unknown, but can update periodically.

-- Did we buy a \$250K boat? We applied for a grant to purchase one and didn't get it.

-- What is protocol for activating a lockdown of a school for police activity, like the one on Feb. 10? Responsibility of Watch Commander or the supervisor to notify school, as schools are concerned when significant police activity nearby. Don't know the school's or district's communications protocol.

8. SUBCOMMITTEE REPORTS (discussion & action)

Report of activities and meeting scheduling for the following Subcommittees:

- a. Fair & Impartial Policing Subcommittee – next meeting Mon., Feb. 27, 6:00 p.m.
- b. Media Credentialing Subcommittee -- in process of scheduling.
- c. Surveillance and Community Safety Ordinance Subcommittee – Disaster & Fire Safety Commission considering Ordinance at its meeting tonight.
- d. General Orders C-64, etc. Subcommittee – now that have settlement, will start meeting again.
- e. Outreach Subcommittee – next meeting Weds., March 1, 5:45 p.m.
- f. Homeless Encampment Subcommittee – next meeting Weds., March 1, 7:00 p.m.

9. OLD BUSINESS (discussion & action)

- a. Mutual Aid Pacts: Consider whether to approve agreement with Northern California Regional Intelligence Center (NCRIC), following report back from BPD as to whether information from NCRIC is retrieved for use in BPD investigations.
After discussion, item postponed to next meeting, to which representatives from ACLU and NCRIC will be invited.
- b. Consider language that the PRC Officer and Chief of Police negotiate with BPD regarding these aspects of Body-Worn Camera policy: Use of personal recording devices; Release of recordings to the PRC.
(Item postponed to the next meeting.)
- c. Request that the BPD release to the PRC the following data that BPD sent to the Center for Policing Equity: 1) use of force data; 2) any stop data information beyond what is published on the City's Open Data Portal; 3) climate survey questions and answers.
(Discussion; no action.)
- d. Decide process for policy review of General Order W-1, Public Recording of Law Enforcement Activity (Right to Watch), to evaluate the current policy and its implementation. Process may include establishment of subcommittee or consideration by full Commission. Begin review, if by full Commission.

Motion to open a policy review of whether the BPD's conduct in establishing a large perimeter around homeless encampments, when participating in enforcement actions to dismantle them, violated General Order W-1; and if so, how should the policy be revised.

Moved/Seconded (DaSilva/Yampolsky) **Motion Carried**

Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Roberts, Vicente, and Yampolsky.

Noes: None

Abstain: None

Absent: None

- e. Continue discussion of process for providing PRC review of Lexipol policies.
(Item postponed to the next meeting.)

10. NEW BUSINESS (discussion & action)

- a. Commendations of BPD personnel
 - i. Amend standing rules to formalize practice of considering commendations.
(Item postponed to the next meeting in which commendations are considered.)
 - ii. Consider commendations for the period June through December 2017.

By general consent, the Commissioners singled out the following officers and other BPD staff for special recognition; and asked the PRC Officer to write a letter to the Chief informing him of such.

Sgt. K. Smith	Ofc. Cerletti	Ofc. K. White
Vilma Garcia	Ofc. McDougall (twice)	Ofc. Warren
Ofc. Burcham	Ofc. J. Smith (twice)	Ofc. Nabozny
Ofc. Tu (twice)	Ofc. Mathis	Ofc. Coats
Ofc. Murray (3 times)	Ofc. Andersen	Ofc. Bartalini
Ofc. Li (twice)	Ofc. J. Jones (2x)	Lolita Cueva
Ofc. Dozier (twice)	Ofc. Flores	PEO S. Davis
Ofc. S. Johnson	Of. Valle	Sgt. Friedman
Ofc. G. Brown	Ofc. De Bruin (twice)	Sgt. Jung
Lt./Capt. Louis (twice)	Ofc. Hom	Sgt. Melero
Lt. D. Reece	Ofc. Nash	Sgt. Rittenhouse
Sgt. Durbin	Ofc. Breaux (twice)	Sgt. D. Lindenau
Sgt. Okies	Ofc. Scott	Sgt. C. Lindenau (twice)
Sgt. Fomby	Ofc. Haney	Sgt. Hong
Sgt. Frankel	Ofc. Loelinger	Sgt. B. Wilson
Sgt. Ross	PSD Lockhart	Ofc. Salas
Sgt. Stines	PSD Houston	Ofc. Kacelek
Sgt. Cummings	PSD Saechao	Ofc. Ledoux
Sgt. K. Reece	PSD Calhoun	Ofc. Castle
Ofc. Tillberg	PSD Parker	Ofc. Kishiyama
Ofc. Yu (twice)	PSD S. Smith	Ofc. Lathrop
Ofc. Radey	PSD Netz	Ofc. Hammonds
Ofc. Kleppe	PSD Salem	Ofc. Shannon
Ofc. Castle (twice)	Ofc. Muniz	Ofc. Bonaventure
Ofc. Valle	Ofc. Diaz	Ofc. Muratovic
Ofc. Rodrigues	Ofc. Gibbs	Ofc. S. Martinez
Ofc. Bejarano	Ofc. Collier	Ofc. Waite
Ofc. Hunt	Ofc. Driscoll	Ofc. Perkins
Ofc. Bold	Ofc. Coria	Ofc. Driscoll
Ofc. Neff	Ofc. Hogan	
	Ofc. P. Lee (twice)	
	Ofc. Grant (twice)	

- b. Consider closure of Policy Complaint #2377, regarding BPD awareness of change to non-smoking ordinance.
(Item postponed to the next meeting.)
- c. Report of research into Policy Complaint #2406, regarding searches of persons and vehicles based on smell of marijuana.
(Item postponed to the next meeting.)

11. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

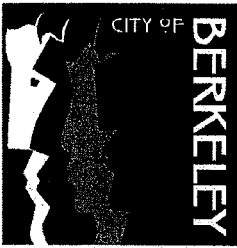
Attached.

12. PUBLIC COMMENT

There were no speakers.

13. ADJOURNMENT

By general consent, the meeting was adjourned at 10:03 p.m.



Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
MINUTES
(unapproved)**

**Wednesday, March 8, 2017
7:00 P.M.**

North Berkeley Senior Center
1901 Hearst Avenue, Berkeley

1. CALL TO ORDER & ROLL CALL BY CHAIR BERNSTEIN AT 7:05 P.M.

Present: Commissioner Alison Bernstein (Chair)
Commissioner Kimberly DaSilva (Vice Chair)
Commissioner George Lippman
Commissioner George Perezvelez
Commissioner Andrea Prichett
Commissioner Terry Roberts
Commissioner Bulmaro Vicente
Commissioner Ari Yampolsky

Absent: None

PRC Staff: Katherine J. Lee, PRC Officer

BPD Staff: Chief Andrew Greenwood, Sgt. Benjamin Cardoza

2. APPROVAL OF AGENDA

By general consent, the Commission approved the agenda as written except for moving Item #9.a. to after approval of the minutes, and considering Item #10.a. when the speakers for that item arrive.

3. PUBLIC COMMENT

There were 3 speakers.

4. APPROVAL OF MINUTES

(Heard following Item #10.a.; this item postponed to the next meeting.)

5. CHAIR'S REPORT

Chair reminded Commissioners that items they wish to distribute to the full Commission should be sent through the PRC Officer.

6. PRC OFFICER'S REPORT

-- On March 14, Chief's crime report will be presented to Council. At March 22 PRC meeting, he can present abbreviated version and leave more time for questions.

-- PRC Officer will be giving remarks at SEEDS (mediation organization) reception tomorrow night.

-- The PRC office received 3 emails regarding police action on March 4.

7. CHIEF OF POLICE'S REPORT

-- Major planning effort to prepare for March 4 protests. On day of, took measured approach. 10 arrests. No injuries other than involved parties. No property damage.

-- After tomorrow's academy graduation for 4 people, will have 12 officers in field training and 7 in academy. Have hired a lateral.

Questions:

-- How many officers on March 4? Around 80. What strategies can be used to nip anarchists in the bud? Each incident has to be evaluated on its own set of characteristics. Helpful to have large, non-confrontational police presence before things start happening.

-- Could officers have been positioned between the two sides? Difficult, because then committing those resources for the duration.

8. SUBCOMMITTEE REPORTS (discussion & action)

Report of activities and meeting scheduling for the following Subcommittees:

a. Fair & Impartial Policing Subcommittee – Continuing to meet; looking forward to report from CPE.

b. Media Credentialing Subcommittee – First meeting scheduled for 6:30 p.m. March 22nd.

c. Surveillance and Community Safety Ordinance Subcommittee – Still on hiatus pending action by the Disaster and Fire Safety Commission.

d. General Orders C-64, etc. Subcommittee – Will be scheduling meeting.

e. Outreach Subcommittee – Met and produced a 5-prong plan: community presentations; collaborate with other groups; presence at community events; work on website and other outreach materials; hold Commission meetings in different locations.

f. Homeless Encampment Subcommittee – Will ask PRC to ask City Manager for legal basis for confiscation of property, to better understand role of BPD. Request

PRC Officer to ask BPD for its video of Gilman Street clearing. Next meeting March 22, 6:00 p.m.

9. OLD BUSINESS (discussion & action)

- a. Mutual Aid Pacts: Consider whether to approve agreement with NCRIC, following report back from BPD as to the nature and extent of BPD's reliance on NCRIC's ALPR database in investigations, and how and in what way the loss of this database would impact the mission of BPD; presentations from representatives of the ACLU and NCRIC.

(Heard following Item #2.)

Motion that the Commission inform the City Council that we approve the MOU with NCRIC based on our understanding that the only information we put into NCRIC are the Suspicious Activity Reports, which are drafted and submitted pursuant to General Order N-17, and, based on the recognition that the Department has been vigilant in the last few years in following G.O. N-17; and, based on our understanding that the license plate reader database maintained by NCRIC is useful to the Department; and, based on an agreement with Department that we will, within the next 90 days, come up with a system for the PRC to receive an audit as to when and how often the NCRIC database is accessed and the cases for which it is accessed (by description not name), and come up with a protocol for other access of information received from NCRIC, that would include an audit component.

Moved/Seconded (Bernstein/Roberts) Motion Carried

Ayes: Bernstein, DaSilva, Perezvelez, Roberts, and Yampolsky.

Noes: Lippman, Prichett, Vicente Abstain: None Absent: None

- b. Consider language that the PRC Officer and Chief of Police negotiate with BPD regarding these aspects of Body-Worn Camera policy: Use of personal recording devices; Release of recordings to the PRC.

(Heard following Item #8; this item postponed to the next meeting.)

- c. Continue discussion of process for providing PRC review of Lexipol policies.
(Discussion; no action.)

- d. Consider closure of Policy Complaint #2377, regarding BPD awareness of change to non-smoking ordinance.

(Heard following Item #10.c.)

Motion to close the policy complaint

Moved/Seconded (Perezvelez/Roberts) Motion Carried

Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Roberts, Vicente, and Yampolsky.

Noes: None

Abstain: None

Absent: None

- e. Report of research into Policy Complaint #2406, regarding searches of persons and vehicles based on smell of marijuana.
(*Heard following Item #10.b.; this item postponed to the next meeting.*)

10. NEW BUSINESS (discussion & action)

- a. Review changes to crowd control/crowd management policies (General Orders C-64 and U-2 and Commanders' Guide) resulting from recent lawsuit settlement; presentation by plaintiffs' attorneys.
(*Heard following Item #9.a.*)

Jim Chanin and Rachel Lederman, plaintiffs' attorneys in lawsuit regarding police actions on December 6, 2014, presented changes to General Orders C-64 and U-2 agreed to in settlement, and additional revisions they recommend. Matters referred to General Orders C-64, etc. Subcommittee.

- b. Assessment of Berkeley Police Department budget, including review of expenditures during FY 2016 and 2017, understanding of process and timeline for FY 2018 & 2019, how priorities are established, and other questions.
(*Heard following Item #9.d. Discussed and to be continued at the next meeting.*)

- c. Endorsement of a resolution to be proposed by Councilmember Davila and Mayor Arreguin opposing religious and ethnic registries, participation in the federal executive order of an immigration ban, and restricting the use of city resources to support such registries and bans.
(*Heard following Item #9.c.*)

Motion to endorse a resolution to be proposed by Councilmember Davila and Mayor Arreguin opposing religious and ethnic registries, participation in the federal executive order of an immigration ban, and restricting the use of city resources to support such registries and bans.

Moved/Seconded (Perezvelez/Bernstein) **Motion Carried**

Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Roberts, Vicente, and Yampolsky.

Noes: None

Abstain: None

Absent: None

11. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

(*Heard following Item #9.e.*)

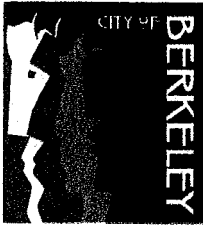
Comm. Perezvelez announced that on Thursday, March 16, 7 – 9 p.m., Senate leader Kevin de Leon will be speaking on the California Values Act, preventing the use of local law enforcement from aiding federal immigration efforts, at JFK University, 100 Elmwood Way, Pleasant Hill. Free.

12. PUBLIC COMMENT

There was one speaker.

13. ADJOURNMENT

By general consent, the meeting was adjourned at 10:05 p.m.



Office of the City Manager

WORKSESSION
March 14, 2017

To: Honorable Mayor and Members of the City Council
From: *DWR* Dee Williams-Ridley, City Manager
Submitted by: Andrew Greenwood, Interim Chief of Police
Subject: Crime Report - 2016

INTRODUCTION

At the request of City Council, the City Manager provides regular reports on crime in Berkeley and strategies undertaken by the Berkeley Police Department to safeguard our community. This report includes 2016 Part One crime information, as well as recent organizational developments and changes initiated within the Berkeley Police Department in the latter part of 2016.

CURRENT SITUATION AND ITS EFFECTS

In 2016, total Part One crime in Berkeley decreased by 7% overall. A considerable decrease of 543 fewer Part One Property Crimes offset an increase of 91 more Part One Violent Crimes, resulting in the overall 7% decrease in Part One crimes. Part One Property Crimes decreased by 9.1% (543 crimes). Part One Violent Crime increased by 17.9% (91 crimes).

Decreases in Part One Property Crimes were seen in both Residential and Commercial Burglary, Larceny (Grand Theft, Petty Theft and Auto Burglary) and Auto Theft. Increases were seen in Rape, Robbery, and Aggravated Assault.

Homicides

There were two homicides in Berkeley during 2016. An arrest has been made in one of the two cases and the suspect has been charged by the District Attorney's Office. The second case is under active investigation.

Robberies

Robberies increased 9.4%, from 331 in 2015 to 362 this year. This was reflected in part by an increase in pedestrian robberies in the north campus area. Also affecting robberies was a significant commercial robbery series.

Aggravated Assaults

Aggravated Assaults increased 34.8% in 2016, with 182 reports, compared to 135 in 2015. This increase includes a number of shootings, as well as a higher number of aggravated assaults occurring in the downtown and south campus areas, and which frequently involved alcohol or drug abuse by victim and/or suspect and frequently involved acquaintances.

Rape

Reported rapes increased 29.27% in 2016, with 53 reports as compared to 41 in 2015. 79% of the reported rapes involved an acquaintance of some type, either recently introduced, or previously known to the victim. Of the nine reported sexual assaults by strangers, five were part of a sexual assault series in the South Campus and three others resulted in arrests or identification of the suspects. Investigators closed a cold case investigation of a 2008 rape series with the arrest in 2016 of the suspect in that series.

Burglary, Larceny and Auto Theft

Burglaries decreased by 26.3% as compared to 2015. Broken down by residential and commercial burglaries the decreases were 21.7% and 37% respectively. A factor in the reduction of commercial burglaries was the arrest of a prolific career burglar from Oakland who was targeting Berkeley and Emeryville. Larcenies were down by 4.6%, and there were sixty six fewer Auto Thefts, a 9.3% decrease from 2015.

Arson

Reported arsons were identical to last year with 20 cases in each year. Of the twenty cases, two involved a subject who had a previous history of arson as well as mental health issues. Ten of the cases reported this year were trashcan or dumpster fires.

Data

Data on serious crime is collected annually by the Federal Bureau of Investigation (FBI) from over 17,000 law enforcement agencies representing over 90% of the U. S. population. The FBI's primary objective in the Uniform Crime Report (UCR) is to generate a reliable set of crime statistics for use in law enforcement administration, operation, and management in the United States. The UCR tracks the following crimes:

Violent Crimes

Murder
Rape
Robbery
Aggravated Assault

Property Crimes

Burglary
Larceny (petty and grand theft, auto burglary)
Auto Theft
Arson*

**Arson is a UCR crime tracked separately from violent and property crime. It is included in the accompanying graphs.*

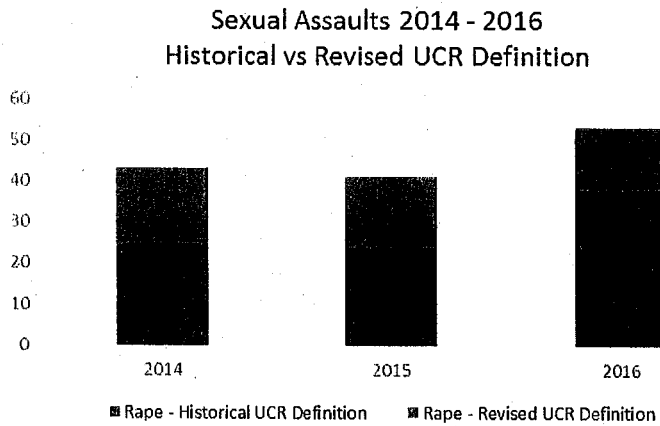
The UCR data provides the Berkeley Police Department the ability to analyze national and local crime trends, determine the effectiveness of response to crime, and conduct future planning and potential resource allocation. The FBI UCR handbook discourages using UCR statistics to compare crime rates of one jurisdiction to another because of the complex variables affecting crime and crime reporting practices.

Change in Uniform Crime Report Definition of Rape

In prior Crime Reports, the Berkeley Police Department reported Rape cases based on the 1927 Uniform Crime Report historical definition which excluded several sexual assault offenses, and further excluded reporting where victims were male. The United States Department of Justice has revised and expanded the Federal Bureau of Investigation’s UCR definition of rape to include other sexual assault offenses, regardless of victim gender.

As of January 2015, BPD transitioned to reporting sexual assaults according to the revised UCR definition in this and future Council Crime Reports. The chart below shows how the change in reporting affected the statistics.

We are presenting data for 2014-2016, in order to show how the reporting was impacted by the revised definition. Regardless of UCR classification, the Berkeley Police Department thoroughly investigates *all* sexual assault crimes.



	2014	2015	2016
Rape - Historical UCR Definition	25	24	38
Rape - Revised UCR Definition	18	17	15
Total	43	41	53

BPD Strategies and Organizational Changes

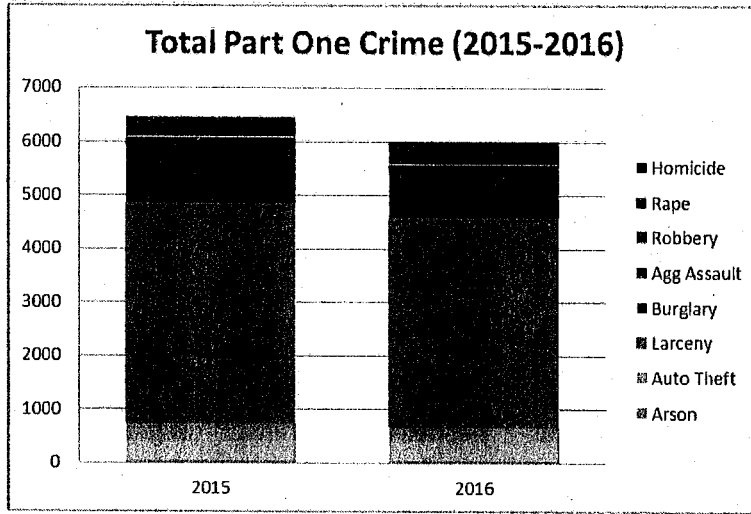
For 2016, the Berkeley Police Department's goal was to reduce the level of Part One Crime experienced in 2015 and previous years. The Department continued to implement strategies focused on reducing crime, community engagement and, in the 4th quarter of 2016, initiated a number of organizational changes, including:

- Developing a Mission, Vision, and Values Statement from which our organization can operate;
- Re-organizing Departmental Divisions to more effectively distribute workload and responsibility;
- Preparation to move to 16 Beat structure, accomplished in January 2017;
- Sustained focus on prioritizing staffing and hiring to fill vacancies;
- Ongoing intra-department communication serves to coordinate and focus police resources on current crime trends, recent incidents and chronic offenders.
- BPD collaborating with the Berkeley Unified School District to support the first year of the Law and Social Justice classes for Berkeley High School, with the goal of preparing students for possible careers in criminal justice, potentially with the Berkeley Police Department.
- Utilizing the Nixle alert and notification service to inform the community about crime prevention strategies, police incidents (e.g. missing persons at risk) and road closures caused by traffic accidents.
- Developing and implement a social media strategy using Twitter, NextDoor, direct emails, et al.
- Providing state-certified De-Escalation Training classes to officers. This course focuses on tactics using time and distance to resolve incidents as safely as possible for all involved. This complements our Department-wide CIT and other trainings, to provide officers training and tools to increase safety and minimize harms for all involved.
- Sending personnel to attend California Department of Justice training to develop a BPD-specific Principled Policing training class, anticipated to occur later in 2017.
- Adding another full-time sexual assault investigator to the Special Victims Unit.

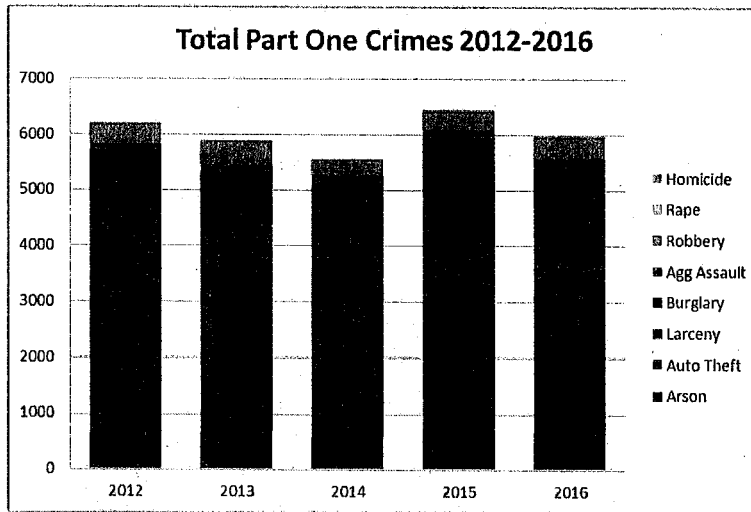
Attached to this report are the new Berkeley Police Department Mission, Vision, and Values statement; the recently adopted 16 Beat Patrol configuration, the Area Coordinator districts; as well as annual totals of UCR data for Part One Violent and Property Crimes for 2015 and 2016 in Berkeley, as well as five-year trends in Part One Violent Crimes and Part One Property Crimes.

Graphs below include:

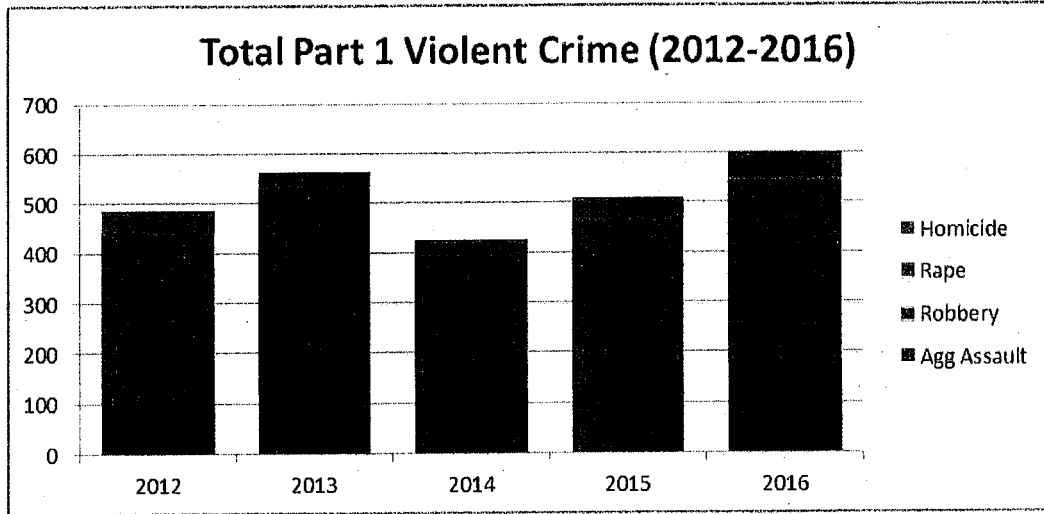
- UCR Part One Violent and Property Crime, two year trend
- UCR Part One Violent and Property Crime, five year trend
- UCR Part One Violent Crime, five year trend
- UCR Part One Property Crime, five year trend



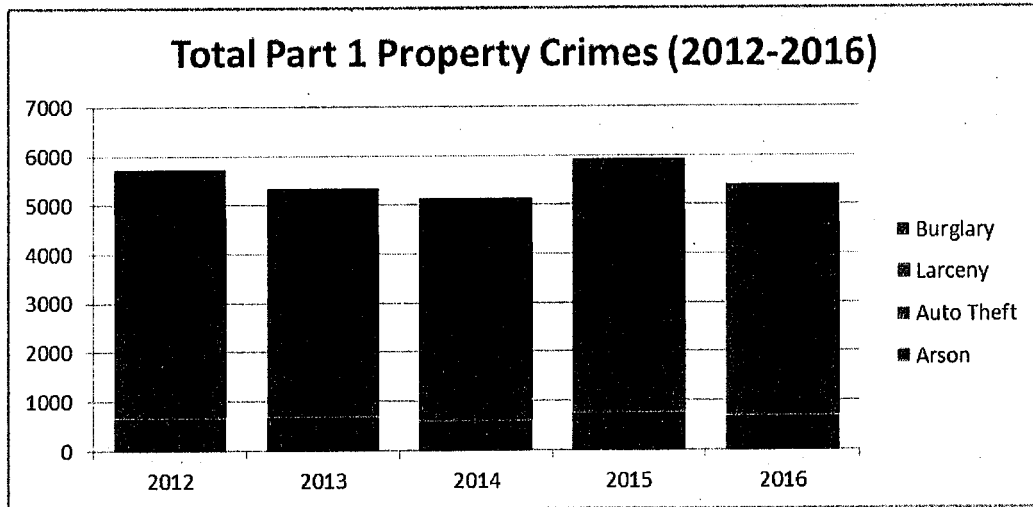
	Homicide	Rape	Robbery	Agg Assault	Burglary	Larceny	Auto Theft	Arson
2015	1	41	331	135	1089	4118	713	20
2016	2	53	362	182	803	3927	647	20



	Homicide	Rape	Robbery	Agg Assault	Burglary	Larceny	Auto Theft	Arson
2012	5	39	334	108	967	4102	639	15
2013	4	29	409	122	978	3664	668	16
2014	3	25	265	132	934	3624	556	16
2015	1	41	331	135	1089	4118	713	20
2016	2	53	362	182	803	3927	647	20



	Homicide	Rape	Robbery	Agg Assault
2012	5	39	334	108
2013	4	29	409	122
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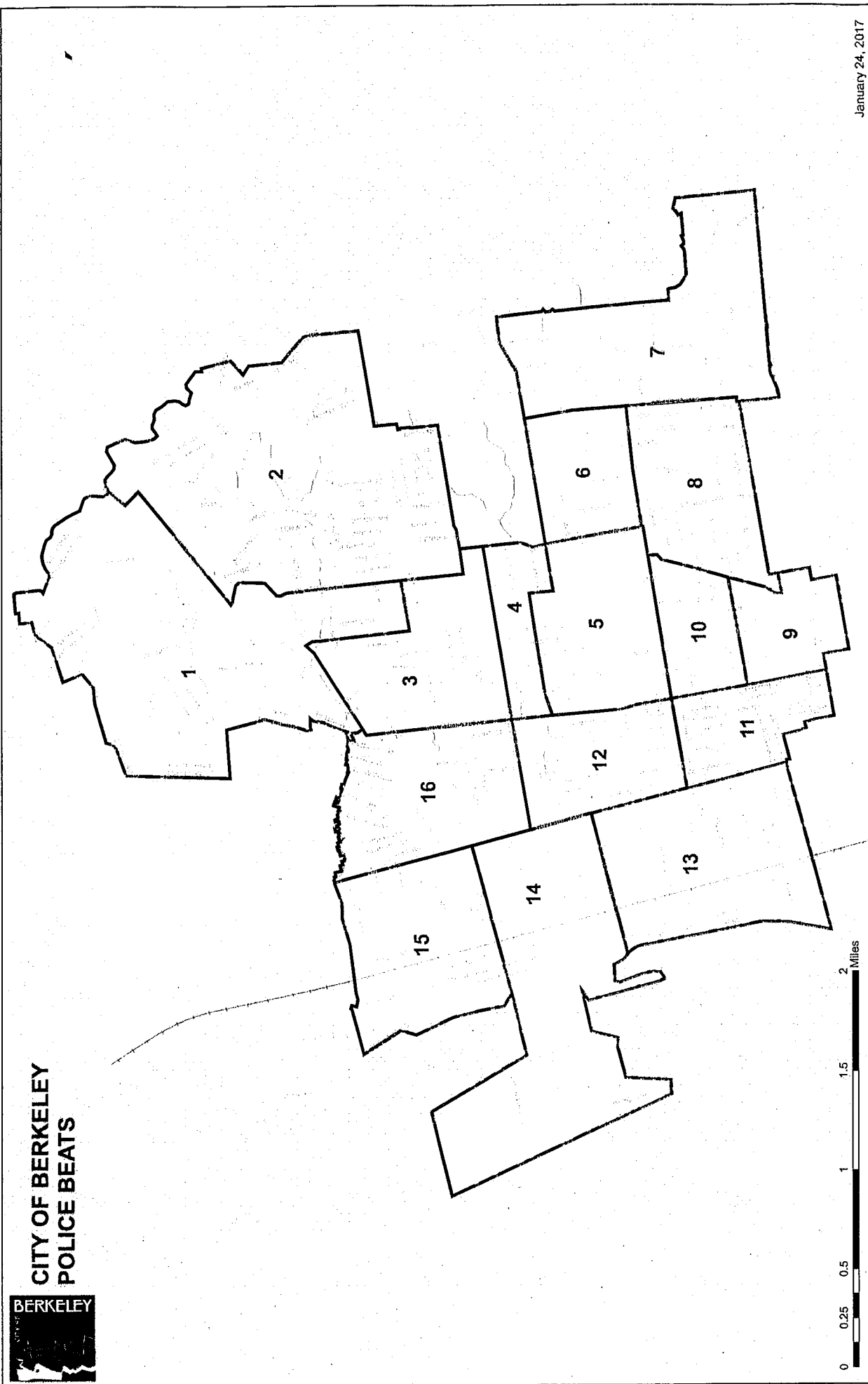


	Burglary	Larceny	Auto Theft	Arson
2012	967	4102	639	15
2013	978	3664	668	16
2014	940	3622	559	16
2015	1089	4118	713	20
2016	803	3927	647	20

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental opportunities or effects associated with the subject of this report.

cc: Andrew Greenwood, Int. Chief of Police



**Berkeley Police Department
Mission – Vision - Values**

Mission

United in service, our mission is to safeguard our diverse community through proactive law enforcement and problem solving, treating all people with dignity and respect.

Vision

The Berkeley Police Department will be a team of leaders at every level. We will foster strong relationships with our community, inspiring trust through our service, building on our historic tradition of progressive policing, and dedicated to the safety of all.

Values

Service is our calling.

As members of this community, the Berkeley Police Department team is committed to proactive law enforcement and problem solving, holding these as our core values:

Integrity: We are ethical, fair, and trustworthy in all we do.

Safety: We strive to keep our community and each other safe.

Respect: We fulfill our duties with dignity, compassion, and empathy.

Diversity: We value the strength of a diverse workplace and community. We endeavor to reflect the community we serve, promoting inclusion and fairness.

Professionalism: We commit to organizational excellence through progressive training, positive attitude, and superior performance.



BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 10, 2016

GENERAL ORDER W-1

SUBJECT: PUBLIC RECORDING OF LAW ENFORCEMENT ACTIVITY

PURPOSE AND SCOPE

- 1- This policy provides guidelines for handling situations in which members of the public photograph or audio/video record law enforcement actions and other public activities that involve members of this department. In addition, this policy provides guidelines for situations where the recordings may be evidence.

POLICY

- 2- The Berkeley Police Department recognizes the right of persons to lawfully record members of this department who are performing their official duties. Members of this department will not prohibit or intentionally interfere with such lawful recordings. Any recordings that are deemed to be evidence of a crime or relevant to an investigation will only be collected or seized lawfully.
- 3- Officers should exercise restraint and should not resort to highly discretionary arrests for offenses such as interference, failure to comply or disorderly conduct as a means of preventing someone from exercising the right to record members performing their official duties.

RECORDING LAW ENFORCEMENT ACTIVITY

- 4- Members of the public who wish to observe and / or record law enforcement activities are limited only in certain aspects.
 - (a) Recordings may be made from any public place or any private property where the individual has the legal right to be present (Penal Code § 69; Penal Code § 148).
 - (b) Beyond the act of photographing or recording, individuals may not interfere with the law enforcement activity. Examples of interference include, but are not limited to:
 1. Tampering with a witness or suspect.
 2. Inciting others to violate the law.
 3. Being so close to the activity as to present a clear safety hazard to the officers.
 4. Being so close to the activity as to interfere with an officer's effective communication with a suspect or witness.
 - (c) The individual may not present an undue safety risk to the officers, him/herself or others.

BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 10, 2016

GENERAL ORDER W-1

OFFICER RESPONSE

- 5- Officers should promptly request that a supervisor respond to the scene whenever it appears that anyone recording activities may be interfering with an investigation or it is believed that the recording may be evidence. If practicable, officers should wait for the supervisor to arrive before taking enforcement action or seizing any cameras or recording media.
- 6- Whenever practicable, officers or supervisors should give clear and concise warnings to individuals who are conducting themselves in a manner that would cause their recording or behavior to be unlawful. Accompanying the warnings should be clear directions on what an individual can do to be compliant; directions should be specific enough to allow compliance. For example, rather than directing an individual to clear the area, an officer could advise the person that he/she may continue observing and recording from the sidewalk across the street.
- 7- If an arrest or other significant enforcement activity is taken as the result of a recording that interferes with law enforcement activity, officers shall document in a report the nature and extent of the interference or other unlawful behavior and the warnings that were issued.

SUPERVISOR RESPONSIBILITIES

- 8- A supervisor should respond to the scene when requested or any time the circumstances indicate a likelihood of interference or other unlawful behavior. The supervisor should review the situation with the officer and:
 - (a) Request any additional assistance as needed to ensure a safe environment.
 - (b) Take a lead role in communicating with individuals who are observing or recording regarding any appropriate limitations on their location or behavior. When practical, the encounter should be recorded.
 - (c) When practicable, allow adequate time for individuals to respond to requests for a change of location or behavior.
 - (d) Ensure that any enforcement, seizure or other actions are consistent with this policy and constitutional and state law.
 - (e) Explain alternatives for individuals who wish to express concern about the conduct of Department members, such as how and where to file a complaint.

SEIZING RECORDINGS AS EVIDENCE

- 9- Officers should not seize recording devices or media unless (42 USC § 2000aa):
 - (a) There is probable cause to believe the person recording has committed or is committing a crime to which the recording relates, and the recording is reasonably

BERKELEY POLICE DEPARTMENT

DATE ISSUED: November 10, 2016

GENERAL ORDER W-1

necessary for prosecution of the person.

1. Absent exigency or consent, a warrant should be sought before seizing or viewing such recordings. Reasonable steps may be taken to prevent erasure of the recording.
- (b) There is reason to believe that the immediate seizure of such recordings is necessary to prevent serious bodily injury or death of any person.
- (c) The person consents.
1. To ensure that the consent is voluntary, the request should not be made in a threatening or coercive manner.
 2. If the original recording is provided, a copy of the recording should be provided to the recording party, if practicable. The recording party should be permitted to be present while the copy is being made, if feasible. Another way to obtain the evidence is to transmit a copy of the recording from a device to a department-owned device.

FORT WORTH

FEBRUARY 26, 2017 3:48 PM

Appeals court: First Amendment gives public right to video police

Take a quick look at Phillip Turner's police videos and the word "testy" comes to mind.

A 27-year-old part-time college student, Turner has been conducting self-described "First Amendment Audits" over the past few years by shooting videos outside police stations across the state. His work often leads to tense verbal exchanges with officers who clearly don't like what he's doing.



Phillip Turner's 2015 encounter with Fort Worth police outside an east-side police substation is having a far-reaching impact after the federal 5th Circuit Court of Appeals this month used Turner's case to clear up any question that videotaping or filming police activities is protected by the First Amendment. Courtesy photo

A 2015 encounter with Fort Worth police outside an east-side police substation, however, is having a far-reaching impact after the federal 5th Circuit Court of Appeals earlier this month used Turner's case to clear up any question that videotaping or filming police activities is protected by the First Amendment.

The ruling comes at a time when police activities have been under close scrutiny, with videos like the one taken in the Jacqueline Craig case in Fort Worth going viral and turning a nationwide spotlight on police conduct. Fort Worth police officer William Martin was suspended for 10 days after cellphone video showed Martin's questionable behavior while arresting Craig and her two daughters.

"Filming the police contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy," Justice Jacques Wiener wrote. "Protecting the right to film the police promotes First Amendment principles."

In a video posted after the 5th Circuit decision was announced Feb. 16, Turner said he "couldn't stop smiling" when he heard the news. "I can say that I'm very, very proud we were able to accomplish this. ... The news was like sweet music to my ears," Turner said on the video.

An Austin attorney praised the 5th Circuit's ruling, saying it was nice to see the conservative New Orleans appellate court join other "freedom-loving court circuits" in the United States in protecting this activity, adding that officers who are acting appropriately have nothing to fear.

“Being a public servant like a police officer means being held accountable, as uncomfortable as that may be at times. What better way to base accountability on the truth than having a video recording?” said Bill Aleshire, an attorney who focuses on government transparency and accountability. “With the cops wearing body cams and citizens doing their own recording, the evidence of what happened is right there to relive.”

Ken East, an attorney representing one of the officers involved in the case, declined to comment. But in a brief filed with the 5th Circuit, he describes Turner as someone who “spends much of his time trying to entrap police officers” into detaining him, resulting in litigation where he can seek financial gain.

East also stated in his appellate brief that at the time of the incident in Fort Worth, there was not a “general right to photograph or video record police and the topic continues to be highly disputed nationwide, with many courts, even in the past two years, repeatedly finding the absence of clearly established law on the topic.”

He also noted that in June 2015 Dallas police headquarters was attacked by someone with high-caliber weapons and pipe bombs driving an armored vehicle. Four days before Turner was detained, a gunman ambushed, shot and killed a Harris County sheriff’s deputy who was putting gas in his patrol car.

‘The Battousai’

Turner, a computer science major at Austin Community College, started collecting video of police activities after he said a Cedar Park police officer blocked his view when filming a DUI arrest several years ago. He filed a complaint and during an investigation learned that there wasn’t an established right to film the police.

Armed with his understanding of the law, Turner — also known as “The Battousai,” a reference to an assassin in a Japanese anime series — has since posted a series of videos on his website where he challenges police officers and police department policies on videotaping of their activities.

Turner has made videos in Arlington, Austin, Dallas, San Antonio and other cities with mixed results. Often police officers come out and ask Turner what he is doing and ask for his identification. Turner will say very little, but will tell them he is shooting pictures and refuses to ID himself. Sometimes Turner walks away; other times he is detained.

“The quickest way to test their policy is to take a photo of the police department, of the building and police cars,” Turner said in an interview. “There is nothing wrong with it, and the officers know there is nothing wrong with it. I’m not antagonizing. I’m not yelling and provoking them to come over.”

In September 2015, Turner decided to conduct one of his “First Amendment Audits” outside the police station at 1100 Nashville Ave. on Fort Worth’s east side. Turner stood across the street on the sidewalk and began videotaping. He was dressed in basketball shorts, a T-shirt, a hat and tennis shoes.

After a few minutes, Turner was approached by officers Grinalds and Dyess, who asked him what he was doing and said they like to know “who’s surrounding our complexes,” according to court records. They asked for his identification. Turner refused to cooperate and asked what would happen to him. The officers responded: “We’ll cross that bridge when we come to it.”

After repeatedly being told by Grinalds and Dyess that he was forcing their hand, Turner’s video camera was taken away, and he was handcuffed and placed in the back of a squad car. “This is what happens when you don’t ID yourself,” Grinalds is quoted in court records as saying.

Turner stayed in the squad car until the officers’ supervisor, Lt. Driver, arrived. After Driver discussed the situation with Grinalds and Dyess, Turner was released and his video camera returned. Turner never produced any identification, but was warned that he would be arrested if he trespassed on city property, court records state.

First Amendment principles

In 2015, Turner filed a federal civil-rights lawsuit against the police officers, claiming that they violated his First Amendment rights and that he was wrongfully detained.

In February 2016, U.S. District Judge John McBryde dismissed the case, giving the officers the qualified immunity that insulates a government official from legal action when they believe that the actions they are taking are lawful. He also said that the courts had not fully addressed and protected Turner’s First Amendment right to videotape the police.

McBryde said there is nothing in case law to suggest that police officers are constitutionally prohibited from taking reasonable steps to identify someone videotaping their place of work. “In this day and age, the risk to public officials, particularly police officers, is such that a police officer could reasonably believe that he had a right to require [Turner] to identify himself,” McBryde wrote.

But the 5th Circuit, which hears appeals of cases from Texas, Louisiana and Mississippi courts, agreed and disagreed with McBryde. In a 2-1 decision, it cleared Grinalds, Dyess and Driver of any First Amendment violations because it was unclear at the time — despite other appellate-court rulings — if individuals could videotape police officers at work.

The 5th Circuit wanted it to be clear in its future cases that it, too, now considered such activity to be protected, saying that “a First Amendment right to record the police does exist, subject only to reasonable time, place and manner restrictions,” Wiener wrote in an opinion joined by Justice Stephen Higginson.

The court sent the case back to McBryde to examine Turner’s claims that he was unlawfully arrested by Grinalds and Dyess. The court cleared Driver on that point, determining he acted appropriately. In her dissent,

Justice Edith Clements said Turner's First Amendment rights were not violated and that the officers acted reasonably in detaining Turner.

Turner's attorney Kervyn Altaffer called the 5th Circuit's ruling a significant one in a complicated area of the law.

"I think any time one of the federal court of appeals says that something is protected by the Constitution, that is important for all people," Altaffer said. "I definitely think they [the police] overstepped. ... This is supposed to be a free country."

Houston attorney Philip Hilder, a former federal prosecutor and a member of the city of Houston Police Oversight Board, said the court ruling "underscores and reiterates that citizens have the right to video police officers as long as the filming isn't unreasonable and doesn't affect police operations.

"The significance, of course, is that with the advent of the smartphone over the last few years, everybody now has the ability to video and you have a population carrying with them a camera that you didn't have as recently as 10 years ago."

STAFF WRITER RYAN OSBORNE CONTRIBUTED TO THIS REPORT.

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Read more here: <http://www.star-telegram.com/news/local/community/fort-worth/article135125164.html#storylink=cpy>

THE PUBLIC SERVANT

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Updating eavesdropping: ACLU v. Alvarez and potential legislation

By

Jordan M. Kielian

and

David J. Silverman

Introduction

Prior to the Seventh Circuit's opinion in *ACLU v. Alvarez*,¹ Illinois' eavesdropping statute prohibited all audio recordings of any oral communication absent consent of all the parties. Violation of the statute constituted a class 4 felony. If one of the communicating parties was a law enforcement officer, the charge was upgraded to a class 1 felony punishable with a possible prison sentence of four to fifteen years. In *Alvarez*, the Seventh Circuit ruled that the law was likely unconstitutional and directed the district court to issue a preliminary injunction barring prosecutors from enforcing the statute against people who openly record police officers performing their duties in public. The opinion only tackled a part of the issue surrounding Illinois' eavesdropping statute and even raised new questions about the portion it aimed to resolve. The unresolved issues will have to be addressed by future opinions or legislation.

Background

The Illinois General Assembly first enacted the eavesdropping law in 1961.² The statute made it a crime to use an eavesdropping device to hear or record any oral communication without "the consent of any party thereto." In 1976, the legislature amended the statute to require the consent of all parties to the communication.³ In 1986, the Illinois Supreme Court ruled that the eavesdropping law only protected communications that involved an "expectation of privacy."⁴ Thus, neither party needed to give consent if the conversing parties did not have an expectation of privacy. In 1994, the Illinois Supreme Court clarified that no expectation of privacy existed if one of the parties to the conversation was the recording party.⁵ This allowed a person to secretly record a conversation so long as they were a participant. Following these two decisions, the Illinois General Assembly amended and strengthened the statute by making it applicable to any oral communication "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."⁶ This amendment pushed back against the Illinois Supreme Court decisions that effectively narrowed the statute. Now, it was clear that all parties needed to give consent before any recording could take place.

In contrast to the recording restrictions the statute places upon the general public, police are allowed to record a variety of situations as part of their law enforcement duties.⁷ For example, the Seventh Circuit noted that police have the discretion to record an array of encounters loosely classified as "enforcement stops" without the consent of the other parties involved. Enforcement stops include "traffic stops," "motorist assists," "pedestrian stops," and "requests for identification." Secret recordings and interceptions for police investigations are covered by other subsections of the statute.⁸

ACLU v. Alvarez arose from the ACLU's request for declaratory judgment and injunctive relief against Cook County from enforcing the eavesdropping statute. This preenforcement action rested on a narrow issue: whether Illinois prosecutors could enforce the eavesdropping statute against people who openly record police officers performing their official duties in public. The district court initially dismissed the suit because the plaintiff did not sufficiently allege a threat of prosecution, and thus did not have standing to pursue the preenforcement action.⁹ After the ACLU cured that defect in an amended complaint, the court again dismissed the suit, this time with prejudice, because the ACLU did not allege a cognizable First Amendment injury, as nothing in the First Amendment protects the "right to audio record." The ACLU appealed the ruling to the United States Court of Appeals for the Seventh Circuit.

Analysis

On appeal, the Seventh Circuit discredited the State's argument that audio recordings are wholly unprotected by the First Amendment. The Seventh Circuit found that audio and audiovisual recordings are used to preserve and disseminate ideas and information, and therefore enable speech and implicate First Amendment rights. The Seventh Circuit concluded that the district court's dismissal of the ACLU's suit was based on an incomplete and incorrect reading of precedent.¹⁰ In *Potts v. City of Lafayette*,¹¹ the Seventh Circuit did not, as the district court asserted, state a categorical principle that recordings are not protected under the First Amendment. Rather, *Potts* stated that the right to gather information can be limited under certain circumstances, but the limiting regulation must be appropriate under the "time, place, or manner" standard.¹²

The ACLU challenged its right to openly record—not to secretly record. The Seventh Circuit stressed the distinction between the two circumstances: "At the risk of repeating ourselves, this case has nothing to do with private conversations or surreptitious interceptions."¹³ The problem with Illinois' statute is its expansive scope. It does not simply outlaw secret recordings, but "sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private."¹⁴ The blanket eavesdropping rule infringes on basic speech and press freedoms, and the First Amendment limits the extent to which the statute may restrict recordings of public speech. The Court explained: "Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny."¹⁵

The constitutional analysis consisted of weighing the public's interest in the recordings against the State's interest in their prohibition. Because the ACLU wished to record public officials carrying out their duties in public places, the ACLU had strong First Amendment interests.¹⁶ While there was some discussion of whether the statute should be analyzed under strict or intermediate scrutiny, the Seventh Circuit sided with the lesser burden.¹⁷ To pass the required intermediate level of scrutiny, the government would have to show that its regulation was (1) content neutral; (2) justified by an important public interest; and (3) not a greater burden on the right than is necessary to serve the government's interest.¹⁸ The majority found that the State likely met the first requirement, but failed the latter two.¹⁹

The Court did not accept the State's privacy interest rationale and reasoned that even if the interest was acceptable, the means was not. While the Court agreed that conversational privacy is an important governmental interest, it rejected the privacy rationale because police officers speaking audibly in public places do not have any "reasonable expectation of privacy."²⁰ Further, even if the State fulfilled the second requirement, the third requirement is not met because the statute is unreasonably broad for the aim: "by making it a crime to audio record *any* conversation, even those that are *not* in fact private—the State has severed the link between the eavesdropping statute's means and its end."²¹ The law is unacceptable because the legislature made no attempt to tailor the

law to specifically serve its goal of protecting personal privacy. Instead, it bans all recordings of oral communications regardless of whether any privacy interests are implicated.

The Seventh Circuit reasoned that to ban the open recording of non-private public activities by police officers does not serve the government's privacy interests. Thus, under these circumstances, the eavesdropping statute is likely unconstitutional and the preliminary injunction should be granted. The Court left unresolved the issue of secret recordings. In a footnote, the Court noted that the First Amendment may also protect secret recordings, but the scrutiny analysis regarding those recordings would implicate stronger privacy interests.²² In addressing concerns regarding effective law enforcement, the Court noted that police could still control a scene and deliver moving orders to bystanders based on public safety and legitimate law enforcement needs. Thus, while the Court's decision withdrew the authority of police to preclude recording, it noted the remaining remedies police may use to control a public situation.

In his dissent, Judge Posner framed the issue differently than the majority, focusing on the privacy of civilians rather than police. Regarding secret recordings, he seemed receptive to the right of a civilian to secretly record a police officer: "Maybe [the statute is] too strict in forbidding nonconsensual recording even when done in defense of self or others, as when the participant in a conversation records it in order to create credible evidence of blackmail, threats, other forms of extortion, or other unlawful activity."²³ But when a civilian's right to privacy is implicated, Judge Posner was more reluctant to allow recordings: "Police may have no right to privacy in carrying out official duties in public. But the civilians they interact with do."²⁴ Whether the civilian is a suspect, witness, or victim, Judge Posner argued that allowing recordings of interaction with police will undermine the civilian's privacy and also undermine effective law enforcement by police.²⁵

Judge Posner also raised questions regarding "open" recordings. In a smart phone society, nearly everyone can record a public interaction and it is not altogether obvious what constitutes an "open" recording, because a cell phone can be "hidden in plain view."²⁶ Civilians wishing to keep private their conversations with police may not know that they are being recorded. The fact that police will be wary of cell phone recorders "will increase security concerns by distracting police."²⁷ Posner ultimately reasoned that people's right to nonconsensually record police interactions in a public place is outweighed by the civilian's privacy interests and the interests of effective law enforcement. Furthermore, Posner's dissent on the issue of "open" recordings raises questions about the ease to which the majority's decision can be applied to future situations involving public recordings.

Potential Legislation

Alvarez's narrow holding altered the law yet did not resolve all of the controversial issues. Proposed amendments to the eavesdropping statute worked their way through the General Assembly but ultimately failed to pass both houses. The proposed amendment that passed the House carved out an exception to the eavesdropping law for conversations involving police officers in public places while defining public place:

(q) A person who is not a law enforcement officer nor acting at the direction of a law enforcement officer may record the conversation of a law enforcement officer who is performing a public duty in a public place and any other person who is having a conversation with that law enforcement officer if the conversation is at a volume audible to the unassisted ear of the person who is making the recording. For purposes of this subsection (q), "public place" means any place to which the public has access and includes, but is not limited to, streets, sidewalks, parks, and highways (including inside motor vehicles), and the common areas of public and private facilities and buildings.²⁸

Notably, the proposed amendment did not refer to open or secret recording—just recording. Thus, the statute appears to have addressed the issue that the *Alvarez* majority left unresolved—the issue of secret recordings. Under this proposal, any type of recording would seem acceptable under the new statute so long as one of the parties was a police officer and the conversation was audible in a public place. Judge Posner’s concerns of what qualifies as a secret or open recording in public would no longer be an issue. Further, because this amendment defined public place, the statute provided guidance and would have expanded the boundaries of the law. For example, because “public place” included the inside of a motor vehicle on a highway, it appears that the legislature was specifically allowing citizens to record their interactions with police during traffic stops.

The amendment also included a provision which would call for the prosecution of anyone who intentionally altered the recording of a police officer:

If a recorded conversation authorized under subsection (q) of Section 14-3 of the Criminal Code of 1961 is used by the complainant as part of the evidence of misconduct against the officer and is found to have been intentionally altered by or at the direction of the complainant to inaccurately reflect the incident at issue, it must be presented to the appropriate State’s Attorney for a determination of prosecution.²⁹

This legislation, while passing the House, stalled in the Senate because some legislators were still unsatisfied with the amendments and wanted to see police officers have even more discretion with their own recordings. Consequently, the General Assembly was unable to reach an agreement on the statute and resolve the controversies. So, while statutory change is in order, disagreement over the appropriate change has hindered the process. It is possible that future opinions will answer some of the questions that the General Assembly failed to resolve. It is also possible that the General Assembly will pass legislation that will help guide courts in deciding the murkier issues.

Conclusion

ACLU v. Alvarez changed the landscape of the eavesdropping law in Illinois. Prosecutors can no longer enforce the law against people who openly record police officers performing their duties in public. The Seventh Circuit’s ruling did not resolve the issue of secret recordings, and the dissent cast skepticism over the distinction between open and secret recordings. The General Assembly tried but ultimately failed to amend the statute. The final outcome of this legal issue remains undecided, and it is unclear whether clarifications will come by way of judicial opinions or legislative amendments. It is further difficult to predict whether the scope of the law’s exceptions will extend from police officers to other public officials. While the statute’s future is uncertain, prosecutors will undoubtedly have to apply it differently than in the past. ■

This article is reprinted from the August 2012 issue of the ISBA’s Local Government Law newsletter.

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David J. Silverman is with the firm of Mahoney, Silverman & Cross, LLC.

1. *ACLU v. Alvarez*, 2012 U.S. App. LEXIS 9303 (7th Cir. May 8, 2012).

2. *Id.* at 4.
3. *Id.* at 5.
4. *People v. Beardsley*, 115 Ill. 2d 47 (Ill. 1986).
5. *People v. Herrington*, 163 Ill. 2d 507 (Ill. 1994).
6. *Alvarez*, 2012 U.S. App. LEXIS at 6.
7. *Id.* at 7.
8. *Id.*
9. *Id.* at 9.
10. *Id.* at 17.
11. 121 F.3d 1106 (7th Cir. 1997).
12. *Alvarez*, 2012 U.S. App. LEXIS at 18-19.
13. *Id.* at 63.
14. *Id.* at 29.
15. *Id.* at 45.
16. *Id.* at 36.
17. *Id.* at 56.
18. *Id.* at 58.
19. *Id.* at 59.
20. *Id.* at 60.
21. *Id.* at 62.
22. *Id.* at FN 13.
23. *Id.* at 70.
24. *Id.* at 82.
25. *Id.* at 87.
26. *Id.* at 84.
27. *Id.*
28. TITLE: CRIM CD-TAMPERING PUBLIC RCD, 2011 Illinois Senate Bill No. 1808, Illinois Ninety-Seventh General Assembly - First Regular Session.
29. *Id.*

From:

<https://www.isba.org/committees/governmentlawyers/newsletter/2012/10/updatingeavesdroppingacluvalvarezan>

From: <https://www.aclu.org/news/appeals-court-unanimously-affirms-right-videotape-police>

August 29, 2011

Simon Glik Broke No Law When He Used His Cell Phone to Record Police Officers' Use of Force Against Another Man on Boston Common

FOR IMMEDIATE RELEASE

CONTACT: (212) 549-2666; media@aclu.org

BOSTON -- The U.S. Court of Appeals for the First Circuit ruled unanimously late Friday that Simon Glik had a right to videotape police in action on Boston Common. Mr. Glik sued three police officers and the City of Boston for violating his civil rights after police arrested him and charged him with illegal wiretapping, aiding the escape of a prisoner, and disturbing the peace--all for merely holding up his cell phone and openly recording Boston police officers who were punching another man on Boston Common in October 2007. As a defense, the police argued the law was not clear, but the Court decisively rejected their claim of immunity from being sued.

"This is a resounding victory for the First Amendment right to openly record police officers carrying out their duties in a public place," said Sarah Wunsch, ACLU of Massachusetts staff attorney. "It will be influential around the country in other cases where people have been arrested for videotaping the conduct of the police," said Wunsch.

"Police officers must be trained to respect the right of people to openly record their actions in public," said David Milton, a Boston attorney representing Mr. Glik for the ACLU in the civil rights suit. "Simon did what we hope any engaged citizen would do, which was documenting what he thought looked like an improper use of force, and his action in no way interfered with the police."

"This case is significant not only for members of the public who use cell phone cameras to document police conduct. It is equally important for members of the media, since reporters and the public have the same right of access to information," said attorney Milton. The court noted that changes in technology have made it hard to draw a line between a private citizen and a journalist. This ruling applies to recording of all public officials. The Court noted the particular importance of recording police officers because they have "substantial discretion that may be misused to deprive individuals of their liberties."

Massachusetts wiretap statute (Ch. 272, Sec. 99) prohibits willful interception--in secret--of any oral communication, without having obtained the prior authorization of those taking part. However, the statute does not require "consent," it only requires that the recording not be secret. Since Mr. Glik was openly recording the police by holding up his cell phone, there was no reason to believe he was violating the statute. The police therefore also violated Glik's Fourth Amendment right to not be arrested without probable cause, as well as his First Amendment right to observe and gather information about what the police were doing in a public place.

At the time of his arrest, Simon Glik was a lawyer who had finished a clerkship with the Probate Court. He was looking for a permanent job as an attorney. Instead, for four months, he became a criminal defendant facing a felony charge.

During the incident, Mr. Glik stood about ten feet away from the officers while they were making an arrest. He did not interfere. Mr. Glik did not speak to the police officers nor did they speak to him until the suspect was in handcuffs. The police officers were identified later as John Cunniffe, Peter J. Savalis, and Jerome Hall-Brewster. They are defendants in the civil rights case along with the City of Boston, which the suit argues is responsible for inadequately training, supervising, and disciplining officers who arrest people under the wiretap statute for openly recording the police carrying out their duties in public.

Shortly after Mr. Glik's arrest, the Suffolk County District Attorney's office dropped the "aiding the escape of a prisoner" charge but pursued the wiretap charge (a felony) and disturbing the peace. After a judge of the Boston Municipal Court threw out those charges, the ACLU of Massachusetts brought a civil rights suit on Mr. Glik's behalf, charging that the police officers and the City had violated his rights.

All of the police officers asked the U.S. District Court to throw out the case against them on the grounds of "qualified immunity", which protects government officials from the burdens of a lawsuit only if the allegations of the complaint do not show a constitutional violation, or, if they do constitute a violation of a constitutional right, the right was not clearly established, and a reasonable police officer would not have known about it.

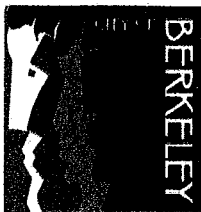
In June 2010, U.S. District Court Judge William Young denied the police officers' request to have the case against them dismissed, stating that the law is clearly established that the First Amendment protects Simon Glik's conduct, and refused to grant them qualified immunity from suit.

The police officers appealed that ruling to the U.S. Court of Appeals, which heard oral arguments on June 8, 2011. The claims against the City of Boston for failing to train and supervise police officers about the right of Americans to observe and openly record the conduct of the police in public is not subject to qualified immunity and have continued in U.S. District Court.

David Milton of the Boston firm Law Offices of Howard Friedman is the cooperating attorney for the ACLU of Massachusetts and argued for Simon Glik, asking the First Circuit to affirm Judge Young's ruling. He, his colleague Howard Friedman, and ACLU of Massachusetts staff attorney Sarah Wunsch have been representing Mr. Glik on the civil rights lawsuit.

For more details, including video of the arrest witnessed by Mr. Glik, see: <http://aclum.org/glik>





Office of the City Attorney

Date: February 15, 2017
To: Katherine J. Lee, PRC Officer
From: Zach Cowan, City Attorney
By: Kristy van Herick, Assistant City Attorney *KVA*
Re: Disclosure of Informal Complaints to the Police Review Commission

Background

An email from a member of the public, raising specific concerns about the conduct of a named City of Berkeley peace officer, was included in the Police Review Commission (PRC) public agenda packet as a communication. This office informally advised that such emails are confidential and must not be included as communications in the agenda packet. On behalf of the PRC, you have requested a written opinion.

Issue

May the Police Review Commission receive and review informal email complaints identifying specific officers in the public agenda packet?

Conclusion

No. Any citizen complaint against an officer, even one that is not received on the official PRC complaint form, must be treated confidentially under Penal Code Sections 832.5, 832.7 and 832.8 and *Berkeley Police Assn v. City of Berkeley* (2008) 167 Cal.App.4th 385. Moreover, accepting and distributing informal email complaints is inconsistent with the PRC's own regulations.

Discussion

Peace officer personnel records are confidential pursuant to the California Penal Code. Penal Code section 832.7(a), provides, in relevant part, that:

"[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not

be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.”

Penal Code Section 832.8 defines “personnel record” to include complaints:

“As used in Section 832.7, “personnel records” means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

- (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- (b) Medical history.
- (c) Election of employee benefits.
- (d) Employee advancement, appraisal, or discipline.
- (e) **Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.**
- (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”

Additionally, Section 832.5 specifies the process for reviewing and considering complaints against officers, including, in relevant part:

- “(b) Complaints and any reports or findings relating to these complaints shall be retained for a period of at least five years. **All complaints retained pursuant to this subdivision may be maintained either in the peace or custodial officer's general personnel file or in a separate file designated by the department or agency as provided by department or agency policy, in accordance with all applicable requirements of law.** However, prior to any official determination regarding promotion, transfer, or disciplinary action by an officer's employing department or agency, the complaints described by subdivision (c) shall be removed from the officer's general personnel file and placed in separate file designated by the department or agency, in accordance with all applicable requirements of law.
- (c) Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, separate files that **shall be deemed personnel records for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the Evidence Code....”**

Read together, these statutes require “that records pertaining to citizen complaints against officers be kept for at least five years” and that citizen complaints are “confidential and shall not be disclosed in any criminal or civil proceeding” except in accordance with the special discovery procedure set forth in Evidence Code section 1043. (*Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 391–92.) Moreover, the Public Records Act exempts citizen complaints against peace officers from disclosure. (Govt Code § 6254(c), (f) and (k).)

A review of case law provides a fairly broad interpretation of what falls within the scope of a citizen complaint. “[S]ection 832.7 does not make it a necessary condition for confidentiality to apply that the officer whose records are sought be involved in a disciplinary proceeding. It is sufficient that he or she be **the subject of a citizen complaint** without regard to whether disciplinary action is also involved.” (*Berkeley Police Ass'n*, supra, at p. 401.) How the record is processed or stored (i.e., in the official personnel file vs in an agenda packet) does not dictate whether it is a personnel record. As the California Supreme Court noted, “[w]e consider it unlikely the Legislature intended to render documents confidential based on their location, *rather than their content*.” (*Commission On Peace Officer Standards And Training [CPOST] v. Superior Court* (2007) 42 Cal.4th 278, 291.)

“As construed in *Copley Press* and *CPOST*, however, the statutes in issue were aimed primarily at protecting the confidentiality of records pertaining to citizen complaints against police officers, and the Legislature did not intend to allow local jurisdictions to **circumvent that protection either deliberately or inadvertently by the manner in which they assigned responsibility** for the investigation of such complaints.” (*Berkeley Police Ass'n*, supra, at p. 405.) It seems a logical extension of the court’s analysis that the form in which the complaint is presented (email vs. complaint form) should not result in a circumvention of the officer’s privacy rights.

Therefore, to determine whether an “informal email complaint” is considered part of a confidential “personnel record” of a peace officer, one must consider the content of the document, and err on the side of considering it to be a “citizen complaint” with the associated confidentiality protections. An email sent to the PRC or PRC staff from a member of the public that identifies an officer (or officers) by name, badge number, or other identifying features and alleges any act of misconduct pertaining to the manner in which he or she performs his or her duties certainly falls within the category of a citizen complaint and should be handled as a confidential document.

Currently, the PRC *Regulations for Handling Complaints Against Members of the Police Department*, effective March 28, 2016 (PRC Regulations) do not include a process for receiving and handling complaints received in an informal email. The PRC Regulations “govern the receipt and processing of complaints submitted to the Police Review Commission.” (PRC Reg. Section I.A.) Section II.A.1 specifies that “complaints and policy complaints **must be filed on a form** provided by the PRC, and except as provided in section 3 [*unavailability of complainant*], **signed by the complainant**.” The PRC Regulations further provide that within 20 business days of the date that a timely filed complaint is received by the PRC office, the PRC staff shall issue to the officer both the Notice of Allegations and a copy of the complaint. (PRC Regulations, III.B.1 and 2.)

The PRC staff shall maintain a central register of all complaints filed, and shall maintain the complaints in the PRC Office. (PRC Regulations, III.B.2.)

The consistent processing of complaints under the PRC Regulations helps to ensure compliance with privacy laws and the Police Officer Bill of Rights Act (POBRA). Peace officers have a right to read and sign (or refuse to sign) any comment adverse to their interests that is maintained in either their personnel file or any other file used for personnel purposes. (See Government Code sections 3305 and 3306.) In *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, the court determined that a complaint that was received and retained in a separate location, but was rejected for processing, nevertheless triggered notice obligations under POBRA. So it would not be a legally compliant alternative to allow for email complaints to be reviewed by the PRC or PRC staff without sharing the complaint with the subject peace officer.

The PRC Regulations and complaint form were carefully crafted to be consistent with the Police Officer Bill of Rights and California statutes and case law. The complaint form collects the types of information needed by staff to investigate the allegations. The certification, while not under "penalty of perjury", requires the complainant to certify that to the best of his or her knowledge, the statements made on the complaint are true. By signing the complaint form, the complainant also acknowledges that testimony before a Board of Inquiry will be given under oath. The Complaint form is promptly shared with the officer.

In considering the handling of informal email complaints, it is also critically important that citizens are not discouraged from raising complaints. "The Legislature, through the adoption of section 832.5, has indicated its desire that complaints filed with a law enforcement agency are to be encouraged. (*Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 82.)" (79 Ops.Cal.Atty.Gen. 163, 1996 WL 426537, p. 1.) Moreover, both the federal Constitution (U.S. Const., 1st Amend.) and state Constitution (Cal. Const., art. I, § 3) protect the right of the people to petition government for the redress of grievances.

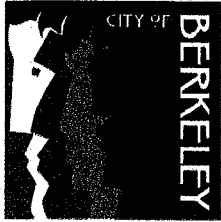
In an effort to balance these important interests, there are a few approaches the PRC can take moving forward. A couple of suggestions are included as follows:

- (1) The PRC website could be updated to include a clear notice about communications to the PRC, explaining that emails that contain complaints about specific officers will be handled through the confidential complaint process and will not be treated as general communications to the PRC and will not be included in the public packet or listed as a communication on the agenda. The PRC staff can then follow up with the citizen regarding the process for initiating a complaint. General emails addressed to the PRC that do not directly or indirectly identify an officer or officers will be processed as communications, shared in the public packet, and considered a public document under the Public Records Act. (For example, an email discussing the status of police and public relations in California, making local policy suggestions, or making announcements of a general nature would not fall within the personnel record restrictions.)

Memo to Katherine Lee, PRC Officer
February 15, 2017
Page 5 Re: Informal Complaints

- (2) The PRC could update its Regulations to include a protocol for receiving and handling informal email complaints. This would allow the PRC staff to process the email complaint, share it with the officer, and either investigate it or seek to administratively close the matter depending on whether the complainant chooses to participate in the process set forth in the Regulations.

cc: Dee Williams-Ridley, City Manager
Jovan Grogan, Deputy City Manager
Mark Numainville, City Clerk
Opn. Index: II.A.1; II.E.1; II.F.6; II.I.2; II.G.8.a.



City Clerk Department

March 3, 2017

To: Commission Secretaries
From: Mark Numainville, City Clerk
Subject: Commission Work Plans – Council Item from 2016

This is a reminder regarding the requirement for annual commission work plans.

In 2016 the City Council approved an item that directs Berkeley Commissions, with the exception of the Board of Library Trustees, the Zoning Adjustments Board, and the Design Review Committee, to submit a workplan to the City Council at the beginning of each fiscal year.

Some commissions currently produce a workplan on a regular or semi-regular basis. This is a best practice that aligns with the direction given in the Commissioners' Manual. For more information, please see the attached agenda item and the relevant excerpt from Chapter V. Section A. of the Manual.

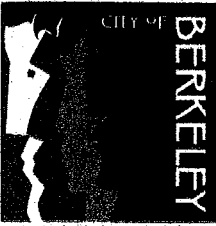
Please agendize this topic for discussion by the commission and inform the members that they must take all steps needed to meet this direction. As stated in the Commissioners' Manual, it is the responsibility of the commission members, not staff, to draft the content of reports to Council. This responsibility includes drafting the content of the work plan. This task cannot be delegated to the commission secretary or other city staff.

Please contact me directly if you have any questions.

Enc.

cc: Department Heads





Lori Droste, District 8
Susan Wengraf, District 6

CONSENT CALENDAR
July 19, 2016

TO: Honorable Mayor and City Council

FROM: Councilmembers Lori Droste, Susan Wengraf,
Linda Maio, and Kriss Worthington

SUBJECT: Commission Work Plans

RECOMMENDATION

Commissions—with the exception of the Board of Library Trustees, Design Review Committee, and the Zoning Adjustments Board—will submit a work plan detailing its goals and objectives for the year. Plans will be submitted at the start of the fiscal year, annually.

FINANCIAL IMPLICATIONS

Although additional staff time will be needed to assist commissions in drafting work plans, staff time will be reduced overall if misaligned commission referrals are reduced. In addition, if boards and commissions do not direct city staff to perform research, gather information, or otherwise engage in activities involving projects or matters that are not aligned with the City's Strategic Plan, staff will be able to make more efficient use of their time.

BACKGROUND

The City of Berkeley is in the process of introducing its first strategic plan. To ensure that Berkeley's commissions are in alignment with the overall mission of the City, commissions should submit annual work plans. Each work plan should contain the following information:

1. Commission mission statement
2. What are the commission's goals? In order to achieve these objectives, please specify:
 - a. Resources
 - i. What specific resources are needed and available to achieve desired change? (i.e. staff time, \$, time, materials, equipment)
 - b. Program activities
 - i. What will the commission do with its resources?
 - ii. Processes, tools, events, technology, actions that are employed to bring about the intended objectives.

c. Output(s)

- i. What will be the direct results of commission activities?
- ii. How much will be done? (i.e. Number of forums/meetings held, # of participants reached, etc.)

d. Outcomes

- i. The specific changes desired/achieved in the short-term (1-3 years) and long-term (4-6 years)

Outcomes should be measurable, action-oriented, and realistic (W. K Kellogg Foundation, 2004).

ENVIRONMENTAL SUSTAINABILITY

Not applicable

CONTACT PERSON

Lori Droste, City Councilmember District 8, 510-981-7180
Susan Wengraf, City Councilmember District 6, 510-981-7160

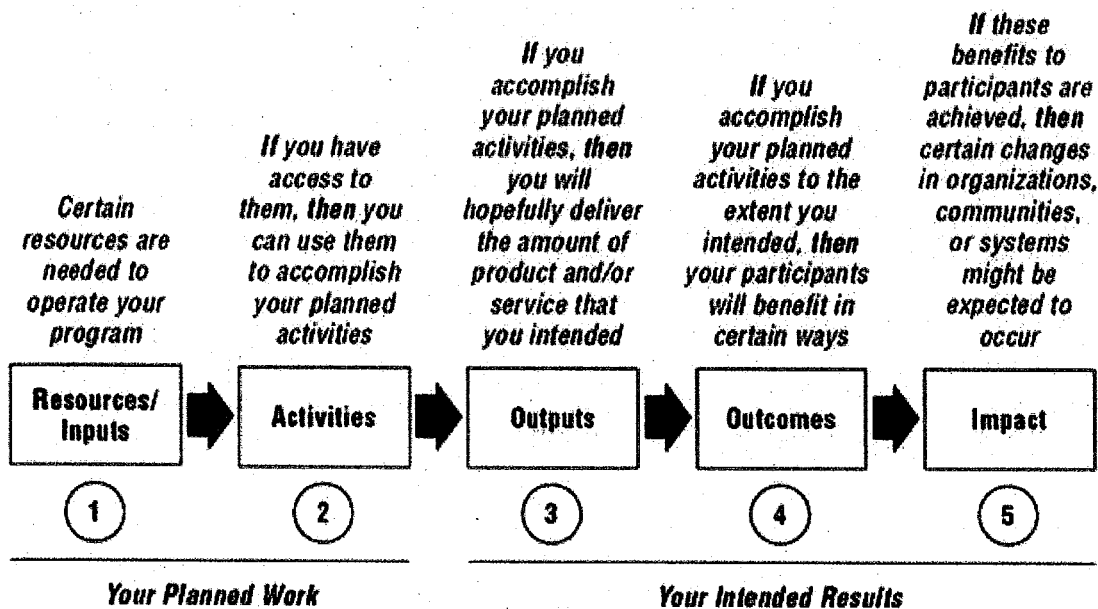
Attachments:

1: Logic Model Summary (W.K. Kellogg Foundation)

Logic Model Summary

A logic model brings program concepts and dreams to life. It lets stakeholders try an idea on for size and apply theories to a model or picture of how the program would function.

The program logic model is defined as a picture of how your organization does its work – the theory and assumptions underlying the program. A program logic model links outcomes (both short- and long-term) with program activities/processes and the theoretical assumptions/principles of the program.



The Basic Logic Model components shown above are defined below. These components illustrate the connection between your planned work and your intended results.

They are depicted numerically by steps 1 through 5.

YOUR PLANNED WORK describes what resources you think you need to implement your program and what you intend to do.

1. Resources include the human, financial, organizational, and community resources a program has available to direct toward doing the work. Sometimes this component is referred to as Inputs.

2. Program Activities are what the program does with the resources. Activities are the processes, tools, events, technology, and actions that are an intentional part of the program implementation. These interventions are used to bring about the intended program changes or results.

YOUR INTENDED RESULTS include all of the program's desired results (outputs, outcomes, and impact).

3. Outputs are the direct products of program activities and may include types, levels and targets of services to be delivered by the program.

4. Outcomes are the specific changes in program participants' behavior, knowledge, skills, status and level of functioning. Short-term outcomes should be attainable within 1 to 3 years, while longer-term outcomes should be achievable within a 4 to 6 year timeframe. The logical progression from short-term to long-term outcomes should be reflected in impact occurring within about 7 to 10 years.

5. Impact is the fundamental intended or unintended change occurring in organizations, communities or systems as a result of program activities within 7 to 10 years. In the current model of WKKF (W.K. Kellogg Foundation) grantmaking and evaluation, impact often occurs after the conclusion of project funding.

Compiled from:
W.K. Kellogg Foundation. "Logic Model Development Guide." (2004)

CHAPTER V. COMMISSION PROCEDURES

A. WORK PROGRAM

1) Development of a Work Program

Many commissions find it effective to establish a yearly work program or statement of goals. A work program is a planning document that specifies how and when the objectives (outcomes) which the commission expects to accomplish during the fiscal year will be achieved. Goal statements explain the nature and scope of the work to be performed and the time needed to accomplish the goal. The nature of the duties of specific commissions may determine which method is most suitable.

Designing yearly work programs or goal statements may be done in conjunction with the development of the relevant departmental work plan so that the department and commission's work will complement each other throughout the year.

When developing a workplan Commissions should take special care to ensure that they remain within their subject area purview and the constraints of their enabling legislation.

B. MEETING PROCEDURES

1) Establishment of Meeting Rules

Each commission may establish additional rules and limit debate. It is the responsibility of the chairperson to control the debate among commissioners so that everyone has a chance to speak before others speak for a second time, and to expedite the business at hand. To this end, commissions may establish rules to limit debate.

2) Processing of Motions

When a motion is made and seconded, it should be stated by the maker of the motion and read by the Chair prior to debate. If the motion is adopted, the maker's written version of the motion, if any, should be given to the secretary for reference in preparation of Council reports and/or the minutes. A motion may not be withdrawn by the mover without the consent of the member seconding it. After discussion has ended and immediately prior to the vote, the secretary clearly states the full motion (with any amendments). If a roll call vote is used, the secretary then calls the roll (always calling the names in the same order). After all commissioners have voted, the secretary announces the vote totals and whether or not the motion passes.

Lee, Katherine

From: Lee, Katherine
Sent: Tuesday, March 07, 2017 5:21 PM
To: Lee, Katherine
Subject: FW: Public records ruling by Calif. Supreme Court

Dear Commissioners,

I am forwarding from Commissioner Bernstein an article about a recent state Supreme Court decision, as well as the text of the decision. The gist: Texts and emails sent by public employees on their personal devices or accounts are a matter of public record if they deal with official business.

-Kathy

Katherine J. Lee
Police Review Commission Officer
City of Berkeley
510.981.4960

From: Alison Bernstein [mailto:alibernstein@gmail.com]
Sent: Friday, March 03, 2017 11:14 AM
To: Lee, Katherine <KLee@cityofberkeley.info>
Subject: Public records ruling by CSC

I think we all already knew this, but you may want to share out to the commission

<http://www.latimes.com/local/lanow/la-me-ln-public-officials-email-20170302-story.html>.

Here is the opinion:

<http://www.courts.ca.gov/opinions/documents/S218066.PDF>

AB



Lee, Katherine

From: Lee, Katherine
Sent: Wednesday, March 08, 2017 2:37 PM
To: 'Banuelo@yahoo.com'
Cc: Norris, Byron
Subject: FW: Unacceptable! Unprofessional!
Attachments: March 4 Demonstration Memo 030617.pdf

Dear Ms. Banuelos,

Thank you for writing to express your concerns about the actions of the Berkeley Police Department during the March 4th protests. Your email will be forwarded to the members of the Police Review Commission.

If you are interested in initiating an investigation into the Berkeley police's response on March 4th, you may do so on our policy complaint form, available from this page:
http://www.cityofberkeley.info/Police_Review_Commission/Home/Policy_Complaints.aspx

You might be interested in reading the report of the Berkeley Chief of Police about the incidents that day, which I have attached.

Finally, be advised that the University of California, Berkeley, is a separate entity with its own police force (over whom this agency has no jurisdiction). The March 4th protests occurred on City property, and not on campus, and I do not believe that University police were involved.

Sincerely,

Katherine J. Lee
City of Berkeley
Police Review Commission Officer
1947 Center Street, 1st Floor
Berkeley, CA 94704

510.981.4960
KLee@cityofberkeley.info

-----Original Message-----

From: PRC (Police Review Commission)
Sent: Wednesday, March 08, 2017 8:29 AM
To: Lee, Katherine <KLee@cityofberkeley.info>
Cc: Norris, Byron <BNorris@cityofberkeley.info>
Subject: FW: Unacceptable! Unprofessional!

-----Original Message-----

From: Amy Banuelos [mailto:banuelo@yahoo.com]

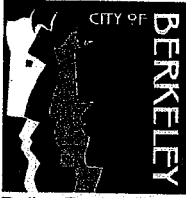
Sent: Wednesday, March 08, 2017 2:05 AM

To: PRC (Police Review Commission) <prcmailbox@cityofberkeley.info>

Subject: Unacceptable! Unprofessional!

It was absolutely appalling to see the Berkeley Police Department just stand there like statues while many Trump supporters were being assaulted and beaten by groups of anarchist anti-Trump terrorists. The freedom of speech was not protected for citizens of the United States who were Trump supporters. America demands to know who told these police officers to stand down. We want a full investigation. I expect there is going to be a lot of law suits against Berkeley University, City of Berkeley, and the Berkeley Police Department. Good luck getting out of this mess. I will also contact our President so University of Berkeley gets defunded for Federal Student Aid!!

Have a good day!
Amy Bañuelos



Police Review Commission (PRC)

March 13, 2017

Berkeley City Council
Civic Center Building
2180 Milvia Street
Berkeley, CA 94704

Re: PRC Endorsement of Resolution Opposing Religious and Ethnic Registries, Participation in Federal Immigration Ban, and Restricting City Resources to Support Such Registries and Bans

Dear Mayor and Members of the City Council,

At the request of Commissioner Andrea Prichett, the Police Review Commission considered whether to support a resolution proposed by Councilmember Cheryl Davila and Mayor Jesse Arreguin, and which will be before you at your March 14, 2017 meeting. The resolution will disallow the use of City of Berkeley resources to create or maintain registries or databases, or in support of an immigration ban of individuals on the basis of religious affiliation, kinship, belief or practice; national origin; or ethnicity.

At its March 8, 2017 meeting, the PRC voted to:

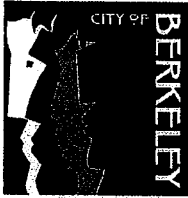
Endorse a resolution to be proposed by Councilmember Davila and Mayor Arreguin opposing religious and ethnic registries, participation in the federal executive order of an immigration ban, and restricting the use of city resources to support such registries and bans.

Moved/Seconded (Perezvelez/Bernstein) **Motion Carried.** Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Roberts, Vicente, and Yampolsky. Noes: None. Abstain: None. Absent: None.

Sincerely,

Alison Bernstein, Chair
Police Review Commission





Police Review Commission (PRC)

March 13, 2017

Berkeley City Council
Civic Center Building
2180 Milvia Street
Berkeley, CA 94704

Re: PRC's recommendations to the City Council regarding 2017 Agreements with Other Law Enforcement Agencies, Police Departments, and Private Security Organizations

Dear Mayor and Members of the City Council,

Each year, the Police Review Commission forms a Mutual Aid Pacts Subcommittee, which is tasked with reviewing the year's annual compendium of the Berkeley Police Department's agreements with other law enforcement agencies, police departments, and private security organizations. Working with representatives from BPD, the subcommittee reviews all new agreements, and any existing agreements that any member of the subcommittee wishes to address. The Subcommittee's recommendations are then presented to the full Commission for consideration.

This year, the Mutual Aid Pacts Subcommittee made recommendations on the four new or revised agreements only.

New or revised agreements

The PRC passed the following motion on January 11, 2017:

Accept the recommendation of the Mutual Aid Pacts Subcommittee to approve the new or revised agreements with: Alameda County DA's Office – Victim/Witness Assistance Division to serve victims of elder abuse; Hayward Police Department and other agencies for Avoid the 21 DUI Program; Bay Area Women Against Rape (BAWAR) to serve survivors of sexual assault; and BNSF Railway for consent to enter property to enforce grade crossing and trespassing laws.

Moved/Seconded (Bernstein/Prichett) - **Motion Carried.** Ayes: Bernstein, DaSilva, Lippman, Perezvelez, Prichett, Roberts, and Yampolsky. Noes: None. Abstain: Vicente. Absent: None

Agreement with the Dept. of Homeland Security, Urban Area Security Initiative (UASI) program

As in past years, the full Commission had a robust debate about the problematic aspects of the UASI program, such as the perceived militarization of local policing, versus the advantages of this relationship, which include significant amounts of officer training. At its January 25, 2017 meeting, the PRC ultimately voted to:

- 1) Support the Berkeley Police Department's continued participation in UASI programs, with a more robust requirement for the BPD to report back to the PRC after each UASI-sponsored training; such report is to include, but not be limited to, an accounting of all the money with BPD gets from UASI for equipment and training, and all the costs to BPD associated with BPD's participation in training, including the Urban Shield exercise;**
- 2) Request the inclusion of a PRC member in all UASI-sponsored training; and**
- 3) Request that the BPD inform the PRC when the BPD becomes aware of when the next Urban Shield exercise will take place.**

Moved/Seconded (DaSilva/Bernstein) – **Motion Carried.** Ayes: Bernstein, DaSilva, Perezvelez, Roberts, and Yampolsky. Noes: Lippman, Vicente. Abstain: Prichett. Absent: None.

Agreement with the Northern California Regional Intelligence Center (NCRIC)

The City's relationship with NCRIC is likewise a subject of ongoing concern. The Mutual Aid Pacts Subcommittee did not make a recommendation to the full Commission, but did report that the single Suspicious Activity Report submitted to NCRIC last year was appropriate in that it met the requirements of General Order N-17: there was predicate criminal activity and the SAR was not based on speech alone.

Interim Chief Greenwood informed the Commission that the only NCRIC database the police department accesses is license plate reader data, and that officers regularly use that database as an investigatory resource; occasionally, other information from NCRIC is obtained by telephone. At its March 8, 2017 meeting, the PRC heard from a staff attorney from the ACLU Northern California, who urged the Commission to weigh the privacy and civil liberties concerns implicated by data-sharing through NCRIC against its benefits. (A NCRIC representative was invited, but was unable to attend.)

At its March 8, 2017 meeting, the PRC voted to:

Mayor and Members of the City Council
PRC's recommendations to the City Council regarding the 2017 Agreements with Other Law
Enforcement Agencies, etc.
March 13, 2017
Page 2

Inform the Council that: we approve the MOU with NCRIC based on our understanding that the only information we put into NCRIC are the Suspicious Activity Reports, which are drafted and submitted pursuant to General Order N-17; and, based on the recognition that the Department has been vigilant in the last few years in following G.O. N-17; and, based on our understanding that the license plate reader database maintained by NCRIC is useful to the Department; and, based on an agreement with Department that we will, within the next 90 days, come up with a system for the PRC to receive an audit as to when and how often the NCRIC database is accessed and the cases for which it is accessed (by description not name), and come up with a protocol for other access of information received from NCRIC, that would include an audit component.

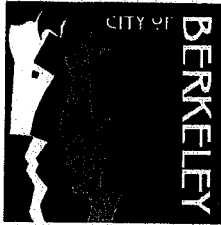
Moved/Seconded (Bernstein/Roberts) - **Motion Carried.** Ayes: Bernstein, DaSilva, Perezvelez, Roberts, and Yampolsky. Noes: Lippman, Prichett, Vicente. Abstain: None. Absent: None.

Sincerely,



Alison Bernstein, Chair
Police Review Commission





Office of the City Manager

March 13, 2017

Alison Bernstein
Chairperson
Police Review Commission
1947 Center Street, 1st Floor
Berkeley, CA 94704

Subject: Selection of a permanent Chief of Police

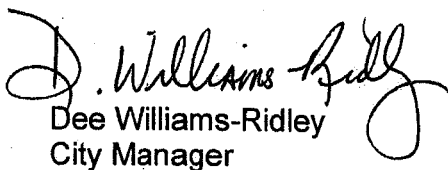
Dear Ms. Bernstein:

Thank you for your letter regarding the selection of a permanent police chief for the City of Berkeley. After careful consideration, I have decided to forgo a national search and will be appointing Interim Police Chief, Andrew Greenwood, to the permanent position as soon as administratively possible. Over the last six months, Interim Chief Greenwood has demonstrated exceptional leadership to the community and the entire Berkeley Police Department. I am confident in his abilities to lead this dynamic police department during national and local unrest as well as his commitment and dedication as a public servant to Berkeley for over 20 years.

My recommendation to appoint Interim Chief Greenwood will be brought before the City Council for affirmation as required by the City Charter, Article VII, Section 28 b.

Thank you again for your interest.

Sincerely,


Dee Williams-Ridley
City Manager

cc: Katherine J. Lee, Police Review Commission Officer
Jovan Grogan, Deputy City Manager
Andrew Greenwood, Interim Police Chief



BERKELEY POLICE DEPARTMENT

DATE ISSUED: March 9, 2017

GENERAL ORDER C-64

SUBJECT: FIRST AMENDMENT ASSEMBLIES

PURPOSE

- 1 - The purpose of this Order is to provide policy and procedural guidance to Berkeley Police Department personnel involved in the planning, response, and/or deployment of police personnel for crowd situations.

Mission Statement

- 2 - The mission of the Berkeley Police Department in crowd situations is to **facilitate free expression, de-escalate violence, and resolve conflict peacefully** with the overall goal of ensuring public safety and protecting First Amendment rights of free speech and assembly.
 - (a) Appropriate action will be determined by the Incident Commander in the field, and will be based on the behavior of the people in the crowd.
 - (b) Police action shall be reasonable, intended to prevent lawlessness or restore order, and may include responses ranging from no police action to full crowd control tactics.

POLICY

- 3 - In the event a crowd situation is determined to be a peaceful protest or demonstration, wherein participants are exercising their rights to free speech in a lawful manner, the policy of the Berkeley Police Department shall be to facilitate the event to the extent possible.
- 4 - **The department shall make it a priority to establish lines of communication with the demonstrators both before and during the crowd situation. The department shall consider social media as one means of communication.**
- 5 - In the event that a crowd situation is unlawful, and lack of immediate police action to may lead to the escalation of criminal behavior and violence, the Berkeley Police Department will take steps to restore order.
 - (a) Steps to restore order may include monitoring with minimal police presence, a strong police presence, selective arrest of those committing crimes, or a dispersal order.
 - (b) **Prior to issuing a dispersal order, BPD shall make efforts to safely arrest those committing crimes while preserving the rights of citizens to demonstrate.**
 - (c) **Opportunities to de-escalate from crowd control to crowd management tactics should be continually evaluated by considering**

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all available resources and deploying them flexibly.

Use of Force

- 6 - Employees who employ force in a crowd control situation shall do so in conformance with policy set forth in General Order U-2.
- (a) Pain compliance techniques (e.g., gum nerve, buckle nerve pressure, etc.), impact weapons, and chemical agents should not be used on persons participating in a crowd situation who are committing an unlawful act with passive resistance (e.g., sitting or lying down to block a doorway) solely to effectuate a custodial arrest.
 - (1) Verbal commands to stand followed by control holds (e.g. wrist lock, twist lock, etc.) with reasonable pressure may be utilized to attempt to require an arrestee who is sitting or lying down to stand up to effectuate a custodial arrest.
 - (2) If an arrestee who is sitting or lying down continues to refuse to stand up in response to verbal commands followed by pressure applied from a control hold, the officer should use drag, carry, or roll techniques to effectuate the custodial arrest.
 - (3) Once an arrestee is standing in a self-supporting manner, the officer may counter an arrestee's lapse into passive resistance (e.g., attempting to fall or sit down) with control holds that would likely prevent such a movement.
 - (b) Officers attempting to move a crowd or individual should not strike anyone who is unable to move back for reasons out of their control (i.e., physical disability, crowd surge, being pinned against a fixed object, etc.)
 - (c) Sworn officers should employ particular applications of force (e.g., a specific baton strike, such as a "rake" or "jab") as may be directed by their chain of command, when its use is intended to accomplish a desired crowd control objective.
 - (1) **Officers shall not intentionally strike a person with any baton to the head, neck, throat, kidneys, spine or groin except when the person's conduct is creating an immediate threat of serious bodily injury or death to an officer or any other person.**
 - (2) **Officers on a skirmish line shall not use batons to collectively push a crowd in a particular direction prior to dispersal orders being given unless exigent circumstances exist. This requirement does not apply to officers on a skirmish line who are using force in compliance with Graham v. Conner.**

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- (d) Officers are not precluded from using authorized force, as appropriate, to address the actions of a particular person(s).
 - (e) **Less-lethal munitions shall only be fired at a specific target and officers shall be mindful of the increased risk of hitting an unintended target due to unexpected movement of members of the crowd. Officers may never use less-lethal munitions indiscriminately against a crowd or group of people.**
- 7 - **Personnel deployments during demonstrations should include clear and specific objectives.**
 - 8 - In squad or team movement, the type and scope of force used shall be at the discretion of the Incident Commander, Field Commander, Squad or Team Leader.
 - 9 - Less-than-lethal munitions, chemical agents (excluding OC spray), and/or smoke shall only be deployed in crowd situations as outlined in General Order U-2. **For planned events, inventories shall be conducted before and at the conclusion of the incident. Outside agency inventories shall also be tracked.**
 - 10 - **The Field Commander shall determine the type and quantity of chemical agents to be used. After use of chemical agent, the Field Commander shall re-evaluate the scene to determine if additional chemical agents are needed.**

Use of Vehicles

- 11 - **BPD shall enhance mobility and flexibility by using police vehicles such as trained bicycle officers and motorcycle officers, in addition to foot patrols, to maintain peaceful crowd management. Parking Enforcement Officers will only be used for traffic control purposes.**
- 12 - Specialized police vehicles (e.g., police motorcycles, off-road motorcycles, parking enforcement vehicles, mobile command vehicles, etc.) may be used in crowd situations at the discretion of the Incident Commander.
 - (a) Specialized police vehicles shall not be used to contact demonstrators for the purpose of physically pushing people back or forcibly dispersing them from an area.
 - (b) Specialized police vehicles may be in a MFF line with other marked vehicles as a visual deterrent.

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DEFINITIONS

- 13 - Control Hold: Any Department approved hold, designed to allow an officer to control the movement of a subject (e.g., twist lock, rear wrist lock, finger lock, etc.).
- 14 - Counter Demonstration: An assembly of persons in conflict with a different demonstration at the same location.
- 15 - Crowd Control: **Law enforcement response to a pre-planned event or spontaneous event, activity or occurrence that has become unlawful or violent and may require arrests and/or the dispersal of the crowd. These strategies include but are not limited to skirmish lines, mobile field force techniques, targeted and mass arrests and the use of force generally.**
- 16 - Crowd Management: **Strategies and tactics employed before, during and after a gathering for the purpose of maintaining the event's lawful activities. These strategies include, but are not limited to: communication with leaders before and during the event, police presence and event participation, blocking traffic to facilitate a march, and bicycle officers monitoring the crowd.**
- 17 - Demonstration: A public assembly of persons to exhibit thoughts, ideas, or opinion.
- 18 - Incident Commander: A sworn officer, usually a lieutenant or captain, responsible for all personnel assigned to an event.
- (a) During the initial stages of a spontaneous event, the Incident Commander will be the highest ranking or senior officer available to take charge, until relieved of responsibilities by a higher ranking officer.
- 19 - Mobile Field Force (MFF): A statewide tactical concept that utilizes groups of trained officers with standard marked police vehicles and equipment, who have the capability to respond to crowd events that are highly mobile or that break up and quickly reform in other locations.
- 20 - Non-Permitted Event: Any demonstration, whether spontaneous or planned, wherein organizers have not obtained permits or licenses that are lawfully required under the circumstances.
- 21 - Operations Commander: A sworn officer, usually a lieutenant or sergeant, responsible for the movement and actions of a platoon, squad, or other identified group of officers at the scene of an event.
- 22 - Pain Compliance Technique: Any technique designed to inflict pain for the purpose of motivating a person to comply with verbal commands (e.g., buckle

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nerve, gum nerve, sternum rub).

- 23 - Passive Resistance: When an individual does not follow the lawful verbal commands of a police officer, but does not physically resist in any way (i.e., a person who goes completely limp, sits down and refuses to stand or walk, or who may stand with arms at their sides without attempting to strike at or physically resist officers.)
- (a) Persons who lock arms, use lockdown devices, or physically resist officers in any other way are not considered "passive".
- 24 - Permitted Event: Any demonstration or event wherein organizers have obtained all applicable permits or licenses.
- 25 - Platoon: Any group of officers, usually 36 or more in number, organized into 3 or more squads. Each platoon will have a commander, usually a lieutenant, who is responsible for the actions of the platoon in the field.
- 26 - Protected First Amendment Activity: Various forms of expression including, but not limited to, speech, assembly, marching, holding signs, street theater, distribution of literature, or displaying banners.
- (a) Freedom of speech and assembly are rights protected by the First Amendment of the United States Constitution, and Article 1 Sections 2 & 3 of the California Constitution subject to reasonable time, place and manner regulations, such as, compliance with lawful permit requirements and traffic regulations (ref. paragraph 34 of this Order).
- 27 - Riot: Any group of two or more people, acting together, who use force, violence, or the threat of force or violence, to disturb the public peace. (ref. Penal Code §405)
- 28 - Riot Gear: Police equipment visible to the public and generally associated with crowd control, such as, helmets, batons, flex-cuffs, special uniforms, specialized vehicles, etc.
- 29 - Spontaneous Event: Any unplanned event that develops, usually as a result of some catalyst, such as sporting events, parties, concerts, court rulings, festivals, major political events, major news events, or any combination thereof.
- 30 - Squad: A group of sworn officers, usually 12 in number, with an identified squad leader responsible for the actions of the squad.
- 31 - Squad Leader: A sworn officer, usually a sergeant, responsible for the movement and actions of a squad.
- 32 - Team: A group of four sworn officers within a squad, inclusive of an identified

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leader responsible for the actions of the team.

- 33 - Team Leader: A sworn officer, sometimes a sergeant, responsible for the movement and actions of a team of officers within a squad.
- 34 - Time, Place, or Manner Restrictions: Reasonable restrictions on protected activity imposed by law (e.g., an applicable permit) intended to serve a specific governmental interest (e.g., public safety), with regard to the time, location, or manner in which protected activity is to be conducted.
- 35 - Unlawful assembly: Two or more persons, assembled together to commit an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner. (ref. PC §407)
 - (a) The prohibition in PC §407 against persons in an assembly doing a lawful act in a violent, boisterous or tumultuous manner is limited only to situations where the conduct poses a clear and present danger of imminent violence. (ref. *In re Brown* (1973) 9 Cal. 3d 612, 623)

PROCEDURE

Planned Events

- 36 - At such time as a special event or crowd situation comes to the attention of police department personnel, the Patrol Division Captain or Patrol Watch Commander shall be notified, and forwarded all information regarding the event.
- 37 - The Incident Command System (**ICS**) shall be used for managing all crowd situations. **ICS** should include the appointment of an Incident Commander, and be structured to sufficiently distribute responsibilities allowing for all necessary tasks to be accomplished with a manageable span of control.
- 38 - The Incident Commander shall, whenever possible, establish a liaison with the group or groups involved, and other potential stakeholders.
 - (a) Stakeholders may include event organizers, business owners or their employees, or private residents that may be affected by an event.
 - (1) Stakeholder involvement is critical to the overall success of managing any crowd event, but may be especially helpful during planned demonstrations where civil disobedience is expected.
 - (2) If a leader or cooperative event organizer is not identified, the Incident Commander shall ensure that attempts to communicate with the group and establish a liaison will continue to the extent reasonable.

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- 39 - Once assigned to a preplanned event, the Incident Commander shall make an initial assessment of the personnel needed to appropriately manage the event based on the information available at the time.
- (a) Initial assessment may include on-duty personnel in the Patrol Division and other divisions within the department.
 - (b) If available on-duty personnel will not be sufficient to manage an event, consideration should be given to calling in off duty personnel and requesting mutual aid resources from surrounding police agencies. (ref. paragraphs 67-71 of this Order)
- 40 - Once sufficient details of the event are known to accurately estimate the scope of response, and required personnel are identified, the Incident Commander shall work with Division Commanders to secure their participation.
- 41 - Once all personnel required to work the event are identified and committed to an event, the Incident Commander shall ensure a written Operations Plan is completed, time and circumstances permitting.
- (a) An Operations Plan shall contain sufficient detail to allow an uninvolved party who reads it to understand the nature of the event, department policy involved, planned response, and the department resources dedicated to it. (ref. General Order P-23)
 - (b) **The Operations Plan shall include specific guidelines and priorities to consider when making deployment decisions and shall reflect the department's commitment to crowd management.**
 - (c) Upon approval by the Patrol Captain and signed by the Chief of Police, the original Operations Plan shall be routed to the Bureau of Internal Controls in the Office of the Chief, and copies distributed to all appropriate personnel.

Spontaneous Events

- 42 - Sworn officers shall respond to a reported spontaneous crowd situation to assess immediate hazards to public safety.
- 43 - The ranking sworn officer, or senior officer, shall assume the role and responsibilities of Incident Commander, and take the following immediate actions:
- (a) Broadcast the type of event, if known, and estimated number of participants.
 - (b) Report known or imminent public safety hazards.

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- (c) Request sufficient on-duty personnel resources to address life-threatening public safety emergencies.
- 44 - The on-duty Patrol Division Watch Commander, or if absent or unavailable, the senior Patrol Division Sergeant, shall respond to the event scene and take the following actions:
- (a) Assume the role and responsibilities of Incident Commander.
 - (b) Assess the potential risks to public safety.
 - (c) Assess whether or not a static event has the potential to go mobile, either on foot in the form of a march, or in vehicles.
 - (d) Assess the number of officers and type of equipment required to maintain order and their manner of response.
 - (e) Assess the potential need for outside resources:
 - (1) On-duty personnel from other police agencies.
 - (2) Fire Department personnel and resources.
 - (3) Media relations personnel.
 - (f) Identify and broadcast the location of the Incident Command Post, operational staging areas, and routes to and from.
- 45 - The Incident Commander should consider the following factors when making decisions regarding the police response:
- (a) The number of people involved in the event and their behavior.
 - (b) The level of vehicular traffic.
 - (c) The level of disruption to those not involved in, but impacted by the event.
 - (d) The overall level of risk to both participants and the general public who may be inadvertently caught up in the event.
 - (e) The personnel and equipment available for the task.
- 46 - The Incident Commander may use on-duty personnel from other Divisions or units to assist in the police response to a spontaneous event.
- 47 - The Incident Commander shall direct necessary on-duty personnel to a static event and make response assignments as required, which may include, but are not limited to:

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- (a) Assign personnel to monitor the event only.
 - (b) Use personnel to maintain order at the event and/or divert uninvolved, **affected** traffic away from the area.
- 48 - If the event is mobile, the Incident Commander should consider response actions appropriate to manage or control the behavior and activities of the crowd, options including, but not limited to:
- (a) Let the group proceed with no police presence.
 - (b) Assign officers to facilitate the mobile event by providing traffic control.
 - (c) Attempt to direct the path of the mobile event by denying access to certain roadways.
 - (d) Allow the mobile event to proceed, but deny access to certain locations that would create a public safety hazard, such as, roadways to bridge approaches and roadways in busy commercial districts.
 - (e) Declare the event an unlawful assembly if circumstances qualify, and allow the group to disperse, make arrests, or use force to disperse the group for the purpose of restoring public order.
- 49 - There is no required order of response; the Incident Commander shall be responsible for continually **assessing** the event and adjusting the response strategies and tactics accordingly. **Opportunities to de-escalate from crowd control to crowd management tactics should be continually evaluated by considering all available resources and deploying them flexibly.**
- 50 - The Incident Commander shall remain responsible for the police response to a planned or spontaneous crowd event until relieved by a higher ranking officer, or the position is relinquished **to** another officer who officially assumes the responsibility.
- (a) Any change of command shall be broadcast on the radio frequency used to manage the police response.

General Event Procedures

- 51 - Employees dispatched or pre-assigned to a crowd situation shall be in a department-approved uniform appropriate for their assignment.
- (a) Employees shall ensure their name and badge number are visible upon their uniform, and badge number is visible on their helmet, if worn.
- 52 - Officers dispatched or pre-assigned to a crowd situation shall have immediately available relevant department-issued safety equipment, (i.e., helmet, chemical

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- agent mask, etc.).
- 53 - Specialized weapons and equipment (i.e., patrol rifles, less-than-lethal munition launchers, chemical agent masks, etc.) shall be deployed at the discretion of the Incident Commander. **The Incident Commander shall be responsible for assuring that there is an inventory of less-lethal munitions, CS gas, and/or smoke prior to deployment, including any outside agencies assisting BPD. Absent exigent circumstances, such less-lethal munitions, CS gas and smoke shall not be deployed prior to determination of an accurate inventory.**
- 54 - The Incident Commander shall ensure personnel receive an operational briefing, whether in person or via radio, prior to their deployment.
- (a) Information communicated in an operational briefing shall include, at minimum:
- (1) The nature of the event.
 - (2) The mission and operational goal(s) of the department.
 - (3) The chain of command managing the event.
 - (4) The individual's assignment and any special equipment he/she may require to accomplish it.
 - (5) When possible, the identity and appearance of all undercover personnel involved in the police response.
 - (i) Undercover personnel should be present at operational briefings for planned events.
- 55 - Undercover personnel shall adhere to laws and policies governing information gathering by law enforcement.
- 56 - Verbal requests or commands should be used before and when advancing on a crowd.
- (a) Commands should be simple and stated clearly, giving members of the crowd an opportunity to comply before force is used. (Examples: "Step back!" or "Move onto the sidewalk!")
- 57 - **Employees in a crowd situation shall conduct themselves in a professional and courteous manner, answering questions when appropriate.**
- 58 - When practical, as part of an implemented crowd control plan, police personnel should attempt to identify and separate from the crowd individuals who are violating the law.

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- (a) Efforts to take an offender into custody in a crowd situation should strive to minimize the risk to uninvolved persons, to the extent reasonably possible.
- 59 - In conformance with procedures set forth in General Order V-10, visual recording devices should be used to document the activities of police personnel and the people involved in a crowd situation.
- (a) Activities that should be documented via visual recording device include, but are not limited to:
 - (1) Criminal activity (misdemeanor or felony);
 - (2) Violation of a Permit condition, City Ordinance, or traffic violation.
 - (3) Use of force by officers.
 - (4) Arrests by officers.
 - (5) Any person who, by words or action, is inciting violence.
 - (6) Dispersal orders issued by police.
- 60 - Employees shall adhere to information release and media liaison protocols set forth in General Orders R-23 and P-29, respectively.
- (a) The Incident Commander shall ensure legitimate "credentialed" members of the media are provided access to areas available to them by law.
 - (b) A person who claims to be a member of the media, but who does not possess a bona fide media credential, has no special privilege and shall be treated like any other citizen with regard to event area access.

Dispersal Orders

- 61 - The Incident Commander at any crowd situation shall make the determination as to when or if a crowd, whose behavior poses a clear and present danger of imminent violence, will be declared an unlawful assembly.
- 62 - Unless otherwise directed or required, the following dispersal order text shall be used by Berkeley Police Department personnel in crowd control situations:
- (a) "I am (*rank*) (*name*) with the Berkeley Police Department. I hereby declare this to be an unlawful assembly, and in the name of the people of the State of California, command all those assembled at (*location*) to leave the area immediately. If you do not leave, you are in violation of section 409 of the California Penal Code, and may be arrested or subject to other police action. Other police action may include the use of less lethal **projectiles, baton strikes, or use of tear gas**, which may pose a risk of

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serious injury. The following routes of dispersal are available: *(state options available)* You have *(state time expectation)* to leave the area."

- 63 - Except when exigent circumstances exist and doing so would place officers or the public at risk, a dispersal order shall be issued prior to forcibly dispersing a crowd.
- 64 - The Incident Commander, or his/her designee, shall issue a dispersal order:
- (a) As close to the crowd as practical;
 - (b) In a manner clearly audible to persons in the crowd;
 - (1) Use sound amplification systems when necessary;
 - (2) When practical, shall record the dispersal order to establish that the orders were audible to the crowd.**
 - (3) When practical, employ officers stationed around the perimeter of the crowd to ensure the dispersal order is clearly audible.
 - (c) In more than one language **if possible**, depending on the needs of the crowd.

Additional dispersal orders may be given following a reasonable period of time to allow for crowd dispersal. (Ongoing dispersal orders should be avoided.)

- 65 - **If after a dispersal order is given, a crowd is discovered in a different location, the new location should be evaluated to determine if it is an ongoing unlawful assembly.**

Mass Arrests

- 66 - When considering the arrest of multiple people at a crowd control event, the Incident Commander should evaluate preparedness of the following operational elements:
- (a) Resource Availability: Sufficient personnel should be available to maintain order, accomplish intended arrests and subsequent processing, and maintain control of the arrestees through a booking process, if necessary.
 - (b) In-Field Arrest Processing: Equipment and logistics should be available to facilitate in-field processing of mass arrests.
 - (c) Transportation: In the event arrestees are not released in-field on citation, vehicles should be available to facilitate necessary transportation to a custodial facility.

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- (d) Booking/Jail Capacity: The custodial facility to which arrestees are transported should have the capacity to receive and maintain custody of persons not released on citation.
- (e) Documentation: Arresting personnel must ensure arrestees are identified and photographed, arrests are effectively documented, and associated paperwork is properly directed for administrative processing.

Mutual Aid

- 67 - An official request for mutual aid resources shall adhere to procedures set forth in General Order M-2.
 - (a) Emergency requests for immediate assistance may be made directly to local agencies.
- 68 - The Chief of Police or his/her designee shall contact the liaison from the Alameda County Sheriff's Department to coordinate a plan for mutual aid resources and response.
 - (a) This plan should include the number of officers potentially needed, any special equipment requested, and an expected response time if called out.
 - (b) **Absent exigent circumstances, responding mutual aid personnel shall be briefed prior to deployment and should be given clear and specific objectives.**
- 69 - In preparation for mutual aid forces, the Incident Commander shall ensure that liaison officers from BPD are assigned to work with the outside agency to assist with response routes into the staging area, parking vehicles, checking in with the staging area supervisor, communications, and response to event location.
- 70 - MFF organization should be employed when integrating mutual aid personnel into local crowd event response, or when responding to another jurisdiction as a mutual aid unit.
 - (a) Personnel should be formed into squads or teams that are easily integrated into squads and platoons.
- 71 - When responding to another jurisdiction as a mutual aid unit, personnel will have with them enough vehicles and equipment to allow the deployed team or squad to patrol a designated area, use less-than-lethal munitions or authorized chemical agents, if necessary, and have enough food and water to last for a reasonable operational period until relieved.

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Post-Event

- 72 - At the conclusion of an event the Incident Commander shall ensure that an After Action Report is prepared **within 72 hours**.
- (a) An After Action Report shall document arrests, injuries, property damage, personnel costs, **inventories of less lethal munitions, CS gas and smoke** and **an overall** critique of the police preparation and response.
 - (b) An After Action Report should include information in sufficient detail to help others prepare for the event if it, or a similar event, should occur in the future.

Training

- 73 - When possible, training in crowd management and crowd control shall be incorporated into general departmental in-service training.
- 74 - When possible prior to a major pre-planned event, update training should be provided to all assigned officers.

References: *In re Brown* (1973) 9 Cal. 3d 612, 623
Penal Code §§405, 407, 409 and 830.10
General Orders C-1, C-10, M-2, P-23, P-29, R-23, U-2, V-10 and X-1
Police Regulations 225, 226, 249 and 250

BERKELEY POLICE DEPARTMENT

DATE ISSUED: March 9, 2017

GENERAL ORDER U-2

SUBJECT: USE OF FORCE

PURPOSE

- 1 - The purpose of this General Order is to provide Departmental standards on the reporting and use of force. This General Order supersedes all other Orders, Regulations, and training information to the extent that they are inconsistent with this Order.

POLICY

- 2 - Police officers may use reasonable force to (1) make an arrest, (2) prevent an escape of a suspect, (3) overcome resistance, or (4) maintain order.
 - (a) Under the Fourth Amendment of the United States Constitution, an officer can use reasonable force when doing so is reasonable under the totality of the circumstances as they appear through the eyes of the officer. Circumstances to be considered include the immediacy and severity of a threat to the safety of the officer or others, the severity of the crime involved, and whether a suspect is fleeing or resisting.
- 3 - In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what Departmentally authorized force techniques or weapons will bring the situation under control in a reasonable manner.
 - (a) The Department uses a "use of force continuum" that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The "spoked wheel" is one visual concept of the various options that an officer should consider in a threatening situation.
 - (b) The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate to the threat.

DEFINITIONS

- 4 - Lethal Force: Any use of force that creates a substantial risk of causing death or serious bodily injury.
- 5 - Less-Than-Lethal Force: Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options.
 - (a) Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles

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designed to cause physiological effects consistent with blunt force impact.

- 6 - Non-Lethal Force: Any use of force other than lethal force or less-than-lethal force.
- 7 - Officer (or) Police Officer: Any sworn peace officer.
- 8 - Authorized Employee: Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.
- 9 - Employee: Any non-sworn employee of the Berkeley Police Department, including those deemed "authorized employees."
- 10 - Deploy:
 - (a) With respect to less-than-lethal munitions, removal of a launcher, projectile or other device from its storage container for the purpose of operational use.
 - (b) With respect to chemical agents and smoke, removal of a canister or delivery device from its storage container for the purpose of operational use.
- 11 - Use:
 - (a) With respect to less-than-lethal munitions, to discharge a less-than-lethal munition.
 - (b) With respect to chemical agents and smoke, to discharge the contents of a canister or delivery device.

PROCEDURES

Use of Lethal Force

- 12 - Officers shall not discharge firearms or use other lethal force in connection with police duty, except in the following circumstances:
 - (a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.
 - (b) To apprehend a suspected fleeing felon:
 - (1) When necessary to prevent escape, and
 - (2) When the officer has probable cause to believe that the suspected

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fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and

- (3) Where feasible, some warning has been given.
- (c) During other police duty:
 - (1) In supervised Department training sessions at an approved range, or other site.
 - (2) To destroy an animal that represents a threat to public safety, or as a humanitarian measure where the animal is seriously injured. If possible, supervisory approval should be obtained prior to using lethal force to destroy an animal.

Use of Vehicles

- 13 - Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except in the following circumstances:
 - (a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.
 - (b) To apprehend a suspected fleeing felon:
 - (1) When necessary to prevent escape, and
 - (2) When the officer has probable cause to believe that the suspected fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and
 - (3) Where feasible, some warning has been given.

Deployment and Use of Less-Than-Lethal Force

- 14 - Less-than-lethal munitions shall only be deployed and used by trained officers authorized by the Chief of Police.
- 15 - Except during authorized training programs, less-than-lethal force shall be deployed only at the direction of a sergeant or command officer, or the Incident Commander in a crowd situation.
- 16 - Less-than-lethal force shall only be used in the following situations, and, where feasible, after some warning has been given:

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- (a) When an act of violence is occurring, or is about to occur;
 - (b) To overcome the resistance of a physically combative person, or to gain compliance from a non-compliant person reasonably believed to be armed;
 - (c) To deter a person who is reasonably believed to be armed and is threatening to harm him-/herself, another person, or an officer; or,
 - (d) To resolve a potentially violent incident not otherwise described above, when deemed reasonable by the authorizing sergeant or commander.
- 17 - When practical, approval for the deployment and use of less-than-lethal force will be obtained from the Patrol Division Watch Commander. If there is no Watch Commander on duty, deployment authorization will be requested from the Duty Command Officer (DCO).
- (a) Prior to deployment, efforts should be made to ensure an appropriate medical response is available.
 - (b) In the event exigent circumstances preclude prior command approval, the supervisor authorizing less-than-lethal force deployment shall notify the Watch Commander, or in his/her absence the DCO, as soon as practical.
- 18 - In crowd situations, less-than-lethal force and/or chemical agents shall not be used without the prior approval of the Chief of Police, or his/her designee, unless exigent circumstances prevent the request from being made and the delay would likely risk injury to citizens or police personnel (e.g., rocks, bottles, or other projectiles are being thrown and immediate crowd dispersal is necessary).
- (a) In the event immediate use is necessary, notification to the Chief of Police, or his/her designee, should be made as soon as possible after the deployment.
 - (b) **In the event a use of force as described in Section 23 of this Order occurs during an unusual occurrence as described in General Order U-4, the officer shall prepare a supplemental report as soon as practical following the incident.**
 - (c) **Each officer shall include in the report, to the extent possible, specific information regarding each use of force, e.g., the reason for the use of force, location, description of the individual(s) upon whom force was used, type of force used, etc.**

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Use of Non-Lethal Force

- 19 - When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use reasonable approved non-lethal force techniques and weapons in the following circumstances:
- (a) To protect themselves or another person from physical injury;
 - (b) To restrain or subdue a resistant individual; or
 - (c) To bring an unlawful situation safely and effectively under control.

Prohibited Uses of Force

- 20 - The following uses of force are prohibited:
- (a) Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., dated February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."
 - (1) The term bar-arm refers to a variety of techniques. As defined in the City Council Resolution, "bar-arm hold" refers to *any* use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.
 - (b) Oleoresin Capsicum (pepper spray) for use as a crowd control technique is prohibited. On September 16, 1997, the City Council passed a policy recommendation that says, in part, "no pepper spray will be used for crowd control by the Berkeley Police Department."
 - (c) Deployment of less-than-lethal munitions from a shotgun is prohibited.

Provision of Medical Attention

- 21 - When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall ensure that the subject receives appropriate medical care. (See also General Order A-17).

Unauthorized Use of Force / Intervention and Reporting

- 22 - When an officer or employee witnesses any other officer or employee of this Department, or of any other law enforcement agency, use force that he or she

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believes is unauthorized, he or she shall do the following:

- (a) If the witness employee is a sworn officer, he or she shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, if appropriate, physical intervention.
 - (1) A sworn officer's failure to act may potentially expose him/her to criminal charges and/or civil liability.
- (b) Any officer or employee who observes a potentially unauthorized use of force shall make an oral report to an on-duty sergeant or a command officer at the first opportunity.

Use of Force / Reporting Requirements

- 23 - Any officer or employee who uses force shall, as soon as practical, make an oral report to an on-duty sergeant or command officer in the following four situations:
 - (a) When an officer discharges a firearm (intentional or unintentional) while on duty, except during a supervised training session.
 - (b) When an officer discharges a firearm while off-duty pursuant to his or her authority as a law enforcement officer.
 - (c) When an officer or employee uses force that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
 - (d) When an officer or employee uses a non-lethal *weapon* (e.g., Oleoresin Capsicum or baton) on a person, whether or not an injury is sustained
- 24 - The officer or employee must also complete a police or incident report in any of the above four situations.
- 25 - Whenever an officer or employee uses Oleoresin Capsicum (pepper spray), he or she must also complete a "Use of Pepper Spray Report" form. (See Training and Information Bulletin #216 for detailed instructions in completing this form).

Use of Force / Supervisor Responsibilities

- 26 - A sergeant shall immediately be assigned and shall respond to the scene in the following four situations:
 - (a) When an officer discharges a firearm (intentional or unintentional) while on duty, except during a supervised training session.
 - (b) When an officer discharges a firearm while off-duty pursuant to his or her

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authority as a law enforcement officer.

- (c) When an officer or employee uses force (including, but not limited to, a non-lethal weapon) that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
 - (d) When an officer or employee reports a use of force by another officer or employee of the Department, or of any other law enforcement agency, that he or she believes is unauthorized.
- 27 - A supervisor shall complete a Use of Force Report in any of the above four situations.
- (a) A supervisor shall complete a Use of Force Report whenever an officer or employee uses a non-lethal weapon on a person, even if no injury results.
 - (b) The supervisor shall attach copies of all police reports relating to the incident to the Use of Force Report. (See Use of Force Report form at the end of this General Order)
- 28 - The supervisor who completes the Use of Force Report shall route the Use of Force Report (with attached police reports) and/or Use of Pepper Spray Report forms to the Division Captain through the chain of command.

Use of Force / Administrative Review

- 29 - The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings.
- (a) The Chief of Police may convene a Review Board (as outlined in General Order R-3) instead of utilizing Division Captain Review.
- 30 - The Chief of Police will make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.
- 31 - Any determination concerning the propriety of force used will be based on facts and the information available to the officer at the time the force was employed, and not upon information gained after the fact.
- 32 - All Use of Force Reports will be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; and/or, 3) require revision or additional training.

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- 33 - Use of Force Reports will be held in file for five (5) years and then purged, unless needed for additional administrative action.

SPECIAL PROCEDURES / DEATHS AND SERIOUS BODILY INJURY

- 34 - In addition to the above, the Departmental response to incidents in which an officer uses force that results in death or a serious bodily injury shall be as follows:

- (a) The officer shall be placed on administrative leave as outlined in Police Regulation 325: " ... If any person is seriously injured or killed as a result of an officer's actions, including the discharging of a firearm, such officer shall be placed on administrative leave for a period of time, as determined by the Chief of Police, depending upon the circumstances of the situation. The officer(s) shall not return to regular duties until he/she meets with a mental health professional."
- (b) The Department shall conduct both an administrative and criminal investigation of the incident as outlined in General Order P-12 (Police-Involved Shootings and Fatal or Serious Injury Incidents); and a Review Board shall be convened as described in General Order R-3.

References: *Tennessee v. Garner* (1986) 471 U.S. 1
Graham v. Connor (1989) 490 U.S. 386
Doerle v. Rutherford (9th Cir. 2001) 272 F.3d 1272
California Penal Code §§196, 197, 835, 835(a), 836, 836.5, and 843
General Orders A-17, C-16, C-64, F-2, P-12, P-26, R-3 and U-4
Police Regulations 202, 318, 321, 322, 323, 324, 325 and 332
Training and Information Bulletin 216
Lethal and Non-Lethal Force Manual
Uniform and Equipment Manual
City of Berkeley Council Resolution No. 52,605 – N.S. (2/14/85),
"Prohibiting use of 'chokehold' for law enforcement
purposes in the City of Berkeley"
National Tactical Officers Association, General Policy Statement
for Less-Than-Lethal Impact Projectiles (11/22/2002)

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EXEMPLAR

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USE OF FORCE REPORT

This report is to be completed by an on-duty supervisor per General Order U-2 if:
(1) Use of any force results in injury or death to a person; (2) Non-lethal weapons
(OC/baton) or less-than-lethal munitions are used on a person; or (3) An officer
discharges a firearm intentionally or unintentionally on duty (other than during
training), or off-duty while acting in the capacity of a police officer.

Date: _____

To: Chief of Police via Chain of Command

From: _____

Subject: USE OF FORCE REVIEW

Refer to Case Number(s): _____

Date / Time of Incident: _____

Location of Incident: _____

Nature of Incident: _____

Officer(s)/Employee(s) Involved: _____

Type of Force used: Physical Baton O.C.
 Firearm Less-than-lethal Other

Was Officer or Police Employee injured? Yes No

If yes, nature of injuries: _____

Medical treatment required: BFD Response - Yes No

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Was a citizen(s) injured during this incident? Yes No

If "yes," nature of injuries: _____

Medical treatment required: BFD Response - Yes No

Investigator(s) and Identification Technician who responded, if any:

Were photographs taken? Yes No

Summary of actions of Officer(s) involved: _____

Supervisor's Comments:

Division Captain Recommendation:

Chief of Police (Signature)

Findings: Within Policy
 Referred for Administrative
Action/Investigation

(Date)
