

Police Review Commission (PRC)

**POLICE REVIEW COMMISSION
REGULAR MEETING
AGENDA**

**Wednesday, April 26, 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 March 22, 2017
Regular Meeting of April 12, 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
 - b. Surveillance and Community Safety Ordinance Subcommittee
 - c. General Orders C-64, etc. Subcommittee

d. Outreach Subcommittee

Staffing for the Summer of Love 50th Anniversary event, Saturday, April 29, noon – 5:00 pm., Telegraph Ave. from Bancroft to Dwight. (PRC table between Haste & Dwight.)

e. Homeless Encampment Subcommittee

Approve follow-up letter to the City Manager and Council asking her/them to identify who is responsible for confiscating personal property from homeless encampments, and requesting that they establish a clear procedure for accounting for and returning property. *(To be delivered.)*

9. OLD BUSINESS (DISCUSSION & ACTION)

a. Proposed Body-Worn Camera policy:

i) Approve change to section 450.5.4 (Cessation of Recording) of PRC proposed policy, to provide that, once the BWC is activated, it “shall” (not “should”) remain on continuously until the incident is complete, etc.

From: PRC Officer

ii) Approve change to section 450.8 (Release of Recordings), subsection (a), to add that the PRC Officer or Investigator will have access to video from the PRC office, for purposes of conducting their investigation, including using the video in interviewing complainants, subject officers, and witnesses.

From: PRC Officer

iii) Approve final proposed Body-Worn Camera policy and transmit to the City Manager and the City Council.

From: Commission

b. Amending PRC Regulations for Handling Complaints Against Members of the Police Department.

i) Review draft language regarding Challenge of BOI Commissioner (Section VI.C.)

From: Commissioner Perezvelez

ii) Review draft language regarding Summary Disposition (Section VII.C.3.)

From: Commissioner Bernstein

c. Review City Attorney’s opinion classifying communications complaining about specific officer conduct as “informal complaints” and prohibiting their disclosure to the full Police Review Commission, and consider procedures for handling “informal complaints,” as suggested by City Attorney, including possible amendment to PRC Regulations.

From: Commissioner Bernstein

d. Policy review of General Order W-1, Public Recording of Law Enforcement Activity (Right to Watch): consider draft of new policy.

From: Commissioner Prichett

- e. Next steps in policy review initiated on February 22, 2017, assessing whether BPD's establishment of a perimeter around homeless encampments during enforcement actions violates General Order W-1; and if a violation is found, how the policy should be revised.
From: Commission
- f. Prepare annual Commission Work Plan, as directed by City Council.
From: City Clerk
- g. Amendment of Standing Rules to provide a mechanism whereby Commissioners can view motions in writing before voting.
From: Commission

10. NEW BUSINESS (discussion & action)

- a. Discussion and potential action regarding failure of BPD to communicate with the PRC about planned police training using blank firing ammunition within city limits and that result in road closures.
From: Commissioner Perezvelez
- b. Policy Complaint #2415: Decide whether to open a policy review, and if so, how to proceed.

11. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

Attached.

12. 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.)

13. ADJOURNMENT

PRC REGULAR MEETING ATTACHMENTS

April 26, 2017

MINUTES

March 22, 2017 <i>Regular Meeting Minutes</i>	Page 7
April 12, 2017 <i>Regular Meeting Minutes</i>	Page 11

AGENDA-RELATED

Item 8.e – SFPD Department Bulletin A, 12-085, dated 4-19-12: Operation Outreach Protocol for Processing Homeless Property – “Bag & Tag.”	Page 17
Item 8.e – 311 SF, Dept of Public Works BSES 30012 – Homeless – Property.	Page 19
Item 8.e – Lavan v. City of Los Angeles – trial digest.	Page 21
Item 8.e – Lavan v. City of Los Angeles 693 F.3d 1022 (2012) Ninth Circuit Court of Appeals case.	Page 23
Item 9.a – Memo dated April 19, 2017, from the PRC Officer to the Police Review Commission re History of Development of a Body-Worn Camera Policy.	Page 41
Item 9.a – Annotated Comparison of BPD and PRC Draft Policies for Portable Audio/Video Recorders / Body-worn Cameras (with two new changes), 4-19-17.	Page 43
Item 9.b.a – PRC Recommended Policy for Berkeley Police Department Use of Body Worn Cameras (Proposed General Order).	Page 59
Item 9.b.i – Draft revised Regulation Section VI.C (Commissioner Challenge) from Commissioner Perezvelez.	Page 67
Item 9.b.i – Draft revised Regulation Section VI.C (Commissioner Challenge) from Commissioner Bernstein.	Page 69
Item 9.b.ii - Draft revised Regulation Section VII.C.3 (Summary Disposition) from Commissioner Bernstein.	Page 71
Item 9.c – Memo dated February 15, 2017, from the City Attorney to the PRC Officer re Disclosure of Informal Complaints to the Police Review Commission.	Page 73

Item 9.d – Proposal to Revise BPD General Order W-01: The Right to Watch. Page 79

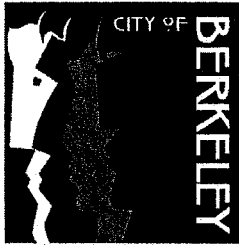
Item 9.f – Memo dated March 3, 2017, from City Clerk to the Commission Secretaries re Commission Work Plans – Council Item from 2016. Page 81

Item 10.a – Nixle alert: BPD Training in North Berkeley 4-20-17. Page 87

Item 10.b – PRC Policy Complaint #2415. Page 89

COMMUNICATION(S)

- Memo dated April 18, 2017, from the City Manager to the Honorable Mayor and Members of the City Council re April 15, 2017 Demonstration. Page 91



Police Review Commission (PRC)

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

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

North Berkeley Senior Center
1901 Hearst Avenue, Berkeley

1. CALL TO ORDER & ROLL CALL BY CHAIR BERNSTEIN AT 7:07 P.M.

Present: Commissioner Alison Bernstein (Chair)
Commissioner George Lippman
Commissioner George Perezvelez
Commissioner Andrea Prichett
Commissioner Terry Roberts

Absent: Commissioners Kimberly DaSilva, Bulmaro Vicente, and Ari Yampolsky

PRC Staff: Katherine J. Lee, PRC Officer

BPD Staff: Chief Andy Greenwood, Sgt. Rashawn Cummings, Sgt. Sean Ross

2. APPROVAL OF AGENDA

By general consent, the agenda was approved as written, except for the combining of Items #7 (Chief's report) and #9 (Crime report).

3. PUBLIC COMMENT

There was 1 speaker.

4. APPROVAL OF MINUTES

Motion to approve Regular Meeting Minutes of February 22, 2017

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

Ayes: Bernstein, Lippman, Perezvelez, Prichett, and Roberts.

Noes: None Abstain: None Absent: DaSilva, Vicente, Yampolsky

Motion to approve Regular Meeting Minutes of March 8, 2017

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

Ayes: Bernstein, Lippman, Perezvelez, and Roberts

Noes: None Abstain: Prichett Absent: DaSilva, Vicente, Yampolsky

5. CHAIR'S REPORT

The Commission needs to amend its Regulations regarding the process to challenge a BOI commissioner and for summary dismissals.

6. PRC OFFICER'S REPORT

-- Next meeting in three weeks, April 12.

-- No new complaints filed since January 25. A Caloca hearing has been set for April 20. A BOI was held on March 16.

-- PRC Officer and Investigator attended SEEDS celebration on March 9. PRC Officer spoke about how mediation is used during our complaint process.

-- Body-worn camera language on two items PRC Officer to discuss with Chief will be on the April 12 agenda.

-- PRC Officer Met with the consultant hired by BART to conduct a review of its Independent Police Auditor's office.

-- Interim's chief's appointment as permanent chief will be on the Council's public agenda soon.

-- South Berkeley Senior Center will not be ready for use again before mid-May.

7. CHIEF OF POLICE'S REPORT

(Heard with Item #9.)

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

Report given. Next meeting March 27, 2017, 6:00 – 8:00 p.m.

Motion to renew the Fair & Impartial Policing Subcommittee.

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

Ayes: Bernstein, Lippman, Perezvelez, Prichett, and Roberts.

Noes: None Abstain: None Absent: DaSilva, Vicente, Yampolsky

b. Media Credentialing Subcommittee

(Renewal of Subcommittee postponed to the next meeting.)

c. Surveillance and Community Safety Ordinance Subcommittee

Awaiting action of Disaster & Fire Safety Commission.

d. General Orders C-64, etc. Subcommittee

Motion to renew the General Orders C-64, etc. Subcommittee.

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

Ayes: Bernstein, Lippman, Perezvelez, Prichett, and Roberts.

Noes: None
Yampolsky

Abstain: None

Absent: DaSilva, Vicente,

e. Outreach Subcommittee

i. Outreach plan was explained.

ii. Approve Subcommittee arranging for presentations to community groups.

Motion to approve of the Outreach Subcommittee making presentations to community groups if and when they are able to.

Moved/Seconded (Bernstein/Perezvelez)

And that any members of the PRC may make these presentations.

Friendly amendment Roberts, accepted by Bernstein and Perezvelez

Motion, as amended, **Carried**

Ayes: Bernstein, Lippman, Perezvelez, Prichett, and Roberts.

Noes: None Abstain: None Absent: DaSilva, Vicente.

Yampolsky

f. Homeless Encampment Subcommittee

Report given. Two recommendations will be agendized for the next meeting, to replace the recommendation that appeared on this week's agenda.

9. 2016 CRIME REPORT

Presentation by Berkeley Police Department.

(Combined with Item #7 and heard following Item #6.)

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.

Motion to close policy complaint #2406.

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

Ayes: Bernstein, Perezvelez, and Roberts.

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

b. Review and prioritization of questions to submit to Berkeley Police Department regarding its budget.

Following discussion, questions to be presented to Chief after relationship to specific line items is identified to PRC Officer; to be agendized for first meeting in May.

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.
(Item postponed to the next meeting.)

- 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.
(Item postponed to the next meeting.)

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.
(Item postponed to the next meeting.)
- 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.
(Item postponed to the next meeting.)
- c. Prepare annual Commission Work Plan, as directed by City Council.
(Item postponed to the next meeting.)

12. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATIONS

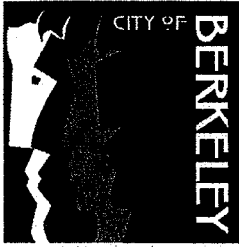
Attached.

13. PUBLIC COMMENT

There was 1 speaker.

14. ADJOURNMENT

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



Police Review Commission (PRC)

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

**Wednesday, April 12, 2017
7:00 P.M.**

North Berkeley Senior Center
1901 Hearst Avenue, Berkeley

1. CALL TO ORDER & ROLL CALL BY CHAIR BERNSTEIN AT 7:15 P.M.

Present: Commissioner Alison Bernstein (Chair)
Commissioner Kimberly DaSilva (Vice Chair)
Commissioner George Lippman
Commissioner George Perezvelez (left 9:20 p.m.)
Commissioner Andrea Prichett
Commissioner Terry Roberts
Commissioner Bulmaro Vicente
Commissioner Ari Yampolsky

Absent: None

PRC Staff: Katherine J. Lee, PRC Officer

BPD Staff: Capt. Dave Reese, Sgt. Ben Cardoza

2. APPROVAL OF AGENDA

By general consent, the agenda was approved as written, except that Item #11.b. will be heard after all Subcommittee items (#9).

3. PUBLIC COMMENT

There were no speakers.

4. APPROVAL OF MINUTES

Motion to approve Regular Meeting Minutes of March 22, 2017
Postponed to confirm accuracy of vote on Item #10.a.

5. CHAIR'S REPORT

The Chair noted that Councilmembers Harrison and Davila are sponsoring forum on militarization of the police in Berkeley on April 17; coordination with PRC in the

future may be a good idea.

6. PRC OFFICER'S REPORT

-- George Lippman was re-designated as Councilmember Harrison's appointee.

-- 2 commissioners must complete Ethics training.

-- Reminder that at the May 24 meeting, Dr. Goff of CPE is scheduled to do a presentation on their analysis of BPD stop data. Chief has committed to releasing the report in early May.

-- One new complaint filed last week; may also be policy complaint.

Questions:

-- Status of budget questions? First meeting in May.

-- Further response from our letter to City Manager re process of hiring Chief? No.

7. CHIEF OF POLICE'S REPORT

No report.

Questions:

-- Several questions about gangs in Berkeley. Capt. Reece suggested a presentation from Sgt. Delaluna might be helpful.

-- Plans for April 15 demonstrations for April 15? All officers being called in, and mutual aid is on call. Do try to de-escalate but also try not to insert selves in melee. Can't do anything about masks until a crime is committed. Will any new surveillance technology will be used? No; BPD will use handheld video cameras in plain view. Most of video from the last protest came from civilian attendees.

-- Data on shoulder-tap program (underage people buying alcohol)? Don't have data; program targets adults who buy for underage drinkers; not conducted on frat row. Part of program with ABC that includes inspections of liquor sellers. True that many sexual assaults occur due to alcohol consumption? They go hand-in-hand; they have done education to student groups on that.

-- Familiar with incident involving UCPD dispatchers and BPD called for response? No.

8. ELECTION OF COMMISSION VICE-CHAIRPERSON (discussion & action)

Motion to nominate Kim DaSilva for PRC Vice-Chairperson

(Perezvelez/Bernstein)

Motion to nominate George Lippman for PRC Vice-Chairperson

(Prichett/Vicente) Commissioner Lippman **declined** the nomination.

Motion to elect Kim DaSilva Vice-Chairperson carried by acclamation

9. 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

b. Media Credentialing Subcommittee
(*Heard following Item #9.f.*)

Motion to dissolve the Media Credentialing Subcommittee, and place re-establishing this subcommittee on the agenda for the first meeting in June.

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

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

Noes: Prichett

Abstain: None

Absent: None

c. Surveillance and Community Safety Ordinance Subcommittee

Met before this meeting. Continuing review of draft Ordinance which just came back from Disaster & Fire Safety Commission, who didn't take a position, but sent to Council w/ recommendation that CM assess costs and burden of implementation. Next meeting April 27 at 5:30 p.m.

d. General Orders C-64, etc. Subcommittee

Meeting to be scheduled.

e. Outreach Subcommittee

Motion to approve the PRC's participation in the Summer of Love, Juneteenth, Solano Stroll and National Night Out events.

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

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

Noes: None

Abstain: None

Absent: None

f. Homeless Encampment Subcommittee

Met March 22. Will be agendaizing three items for Commission consideration at its next meeting relating to taking, storing, and return of personal property. Next meeting tentatively set for April 27 at 7:00 p.m.

10. OLD BUSINESS (discussion & action)

a. Consider language that the PRC Officer and Chief of Police negotiate regarding these aspects of Body-Worn Camera policy: Use of personal recording devices; Release of recordings to the PRC.
(*Heard following Item #11.b.*)

Motion to accept 450.8 (f) review of recordings as reflected on p. 27 of packet (p. 5 of BPD's draft policy), as modified by changing the reference

to "Board of Review" to "Board of Inquiry," and the two references to PRC Investigator to "PRC Officer and/or Investigator."

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

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

Noes: None

Abstain: None

Absent: None

Motion to approve the entirety of the paragraph in red type on p. 26 of the packet (p. 4 of BPD's draft policy), section 450.6, regarding the use of personal recording devices.

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

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

Noes: None

Abstain: Vicente

Absent: None

By general consent, asked PRC Officer to get clarification and report back on other changed language (shown in red) on BPD draft policy, and agreed to agendize the PRC's proposed policy for the next meeting, to send to Council.

- b. Determine scope of policy review of General Order W-1, Public Recording of Law Enforcement Activity (Right to Watch), addressing whether current BPD policies and practices violate First Amendment protections afforded those viewing police conduct, as recognized in the case law.

Motion to have Commissioner Prichett prepare a draft Right to Watch policy that will be returned to the Commission for consideration.

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

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

Noes: None

Abstain: None

Absent: Perezvelez

- c. Next steps in policy review initiated on February 22, 2017, assessing whether BPD's establishment of a perimeter around homeless encampments during enforcement actions violates General Order W-1; and if a violation is found, how the policy should be revised.
(Item postponed to the next meeting.)
- d. Review City Attorney's opinion classifying communications complaining about specific officer conduct as "informal complaints" and prohibiting their disclosure to the full Police Review Commission, and consider procedures for handling "informal complaints," as suggested by City Attorney, including possible amendment to PRC Regulations.
(Item postponed to the next meeting.)
- e. 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.
(Item postponed to the next meeting.)

- f. Prepare annual Commission Work Plan, as directed by City Council.
(Item postponed to the next meeting.)

11. NEW BUSINESS (discussion & action)

- a. Amendment of Standing Rules to provide a mechanism whereby Commissioners can view motions in writing before voting.
(Item postponed to the next meeting.)
- b. Establish subcommittee or other process for amending PRC Regulations for Handling Complaints Against Members of the Police Department on the subjects of: 1) Challenge of BOI Commissioner (Section VI.C.) and 2) Summary Disposition (Section VII.C.3.)
(Heard following Item #9.b.)

By general consent, Commission agreed that Commissioner Perezvelez will draft proposed language on commissioner challenges, and Commissioner Bernstein will draft proposed language on summary disposition, to be placed on the next meeting agenda for the Commission's consideration.

12. ANNOUNCEMENTS, ATTACHMENTS & COMMUNICATION

13. PUBLIC COMMENT

There was 1 speaker.

Closed Session

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

14. REPORT OF PRC OFFICER

Complaint #2412 – Status of Report of Investigation.

Report given.

End of Closed Session

15. REPORT OF ACTION TAKEN IN CLOSED SESSION

No reportable action was taken.

16. ADJOURNMENT

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



A
12-085
04/19/12

**OPERATION OUTREACH PROTOCOL FOR PROCESSING
HOMELESS PROPERTY-"BAG & TAG"**

On December 1, 2004, the Department established the Operation Outreach Program. The goal of Operation Outreach is to utilize a community policing approach with regard to homeless individuals. While enforcing the law, an officer's mission is also to determine the places most frequented by the homeless, provide strict attention to those areas, contact homeless persons, and determine their needs. Officers should work collaboratively with the Outreach Officer in their districts and appropriate City agencies to provide needed services.

Officers are encouraged to use SFPD's established relationships with the Human Services Agency and the Department of Health, e.g., the City's Homeless Outreach Team, to refer individuals to services such as housing, drug and mental illness treatment, and intensive case management.

Officers routinely contact homeless individuals and their property. At times, a homeless person's property may be deemed "infectious" due to presence of potential biohazards such as fecal material, needles, etc. As such, this potentially infectious material should not be brought into a station to avoid unnecessary exposure to other officers.

Officers encountering homeless individuals subject to arrest and in possession of property should follow Department of Public Works (DPW) bag and tag procedures denoted in the protocol below.

**PROCEDURES FOR PROCESSING PROPERTY
BELONGING TO HOMELESS INDIVIDUALS**

Officers who find a large amount property on the street and cannot find the individual responsible for the property or who arrest an individual with an impractical amount of property should do the following:

- Contact the Department of Public Works at 695-2134
- DPW will respond and assess the material for environmental health issues
- DPW will then take charge of the property and provide plastic bags for the personal items
- DPW will then tag those items to log the property
 - a. Date
 - b. Time
 - c. Location
 - d. Name of DPW employce and officer(s)

e. Name of arrestee if applicable.

Officers taking property from an individual shall refer to DGO 6.15 section IIIA (1) and issue the individual a property receipt (SFPD 315) in duplicate. If no one claims ownership of the property then officers do not have to issue a property receipt.

Officers should also review Department Bulletin 10-233, RIGHTS OF THE HOMELESS.

Department of Public Works Policy

Only personal property is collected for storage at the DPW Maintenance Yard

- a. Items of value are stored in the Homeless Cage 1
- b. Items soiled with urine or fecal matter are destroyed
- c. No furniture is stored
- d. Food items will be bagged and stored for no more than five (5) days
- e. Property held for 90 days (120 days if hauled in by SFPD).

Useful Telephone Numbers:

Mayor's Department of Health Homeless Outreach Team (H.O.T. Team):

- 203-6643 or 203 9963

See P. 52
GREGORY P. SUHR
Chief of Police



Dept of Public Works BSES 30012 - Homeless - Property

Homeless Belongings – Storage, Missing

- Where can I store my belongings temporarily?
- My belongings are missing, how can I find them?
- What becomes of abandoned and picked up shopping carts?
- Where is the DPW Storage Yard Located?
- How do I get to the DPW Storage Yard?

Is there a place to store my personal belongings?

The "Homeless Storage Facility", located at 350 Jones Street, San Francisco, 94103 provides free storage service for shoes and clothing only. It's recommended that you call the facility first to understand the terms and conditions of the facility. Their phone number is (415) 921-1978

Providence Foundation Shelter

<http://www.providencefoundationsf.org/index-3.html>

If you have a reserved bed at a Shelter you may bring some personal belongings with you. When making a reservation through a Shelter Reservation Center for a shelter bed, be sure to ask what the terms and conditions are for bringing personal belongings to a shelter.

NOTE: Shopping carts and other non-clothing items cannot be stored at the facility.

How to Make a Shelter Reservation

My personal belongings are missing

It's possible that items left unattended on public or private property may have been picked up the Department of Public Works (DPW) and taken to a storage yard. After 90 days, unclaimed items are disposed of.

Items picked up by the DPW are bagged and tagged. DPW will not bag wet or moldy clothing, wet or moldy bedrolls or food items (or anything else with health concerns). Those items are disposed of right of way. The tag on the bagged items includes:

- Date and time of the pickup

<https://sf311.org/dept-public-works-bses-30012-homeless-property#location>

- Location of the pickup
- Name of the owner (if known)
- Brief description of the contents
- SFPD badge number (if SFPD was involved)

Bags are taken to the DPW storage yard at Marin & Kansas streets where the tagged information is logged and the bags are stored. If a shopping cart was picked up as well, it will be given to a cart retrieval company for return to the retailer. The owner of the bagged items has 90 days to reclaim their items, the cart cannot be reclaimed.

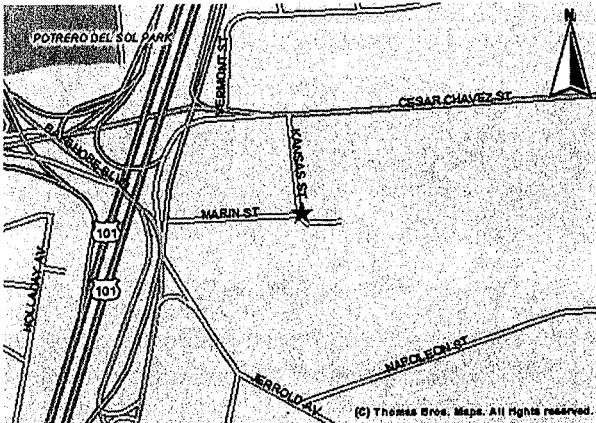
To reclaim items:

The Storage Yard is open Tuesday through Saturday 9am to 3pm. There is a guard at the gate that will help people locate their items. Before going to the yard be prepared to provide the following information. Without this information, the DPW employees may not be able to help you.

- Date and time of the pickup
- Location of the pickup
- Description of the items
- SFPD badge number (if one was provided)

Location of the DPW Storage Yard (intersection of Kansas and Marin). Open Tuesday through Saturday 9am to 3pm. Ask the guard at the gate for assistance.

KANSAS ST:MARIN ST, San Francisco



Directions to the DPW Storage Yard

Call 3-1-1 and provide the Customer Service Representative with the address of your current location and that you need bus information to the intersection of Marin and Kansas streets. The intersection is close to the Cesar Chavez exit off of Highway 101.

49 Trials Digest 19th 12, 2016 WL 7118671 (C.D.Cal.) (Verdict and Settlement Summary)

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United States District Court, C.D. California.

Lavan v. City of Los Angeles

TOPIC:

Synopsis: City of Los Angeles allegedly seized and destroyed homeless people's personal property

Case Type: Civil Rights & Constitutional Law; Fifth Amendment Takings; Civil Rights & Constitutional Law; Search & Seizure; Civil Rights & Constitutional Law; Section 1983; Personal Property; Conversion; Intentional Torts; Other; Class Action

DOCKET NUMBER: 2:11CV02874

STATE: California

COUNTY: Not Applicable

Related Court Documents:

Plaintiffs' complaint: 2011 WL 1294707

Plaintiffs' amended complaint: 2016 WL 6094701

Plaintiffs' motion for partial summary judgment: 2014 WL 12571323

Plaintiffs' memorandum in support of motion for partial summary judgment: 2014 WL 12571321

Defendant's opposition to plaintiffs' motion for partial summary judgment: 2014 WL 12571323

[Ninth Circuit decision: 693 F.3d 1022](#)

Verdict/Judgment Date: June 14, 2016

JUDGE: Philip S. Gutierrez

ATTORNEYS:

Plaintiff: Carol A. Sobel, Law Office of Carol A. Sobel, Santa Monica, CA; John P. Given, Law Office of Carol A. Sobel, Santa Monica, CA

Defendant: Michael N. Feuer, Office of the City Attorney, Los Angeles, CA; Thomas H. Peters, Office of the City Attorney, Los Angeles, CA; Cory M. Brente, Office of the City Attorney, Los Angeles, CA; Surekha A. Pessis, Office of the City Attorney, Los Angeles, CA; James P. Clark, Office of the City Attorney, Los Angeles, CA; Amy Field, Office of the City Attorney, Los Angeles, CA; Wendy C. Shapero, Office of the City Attorney, Los Angeles, CA

SUMMARY:

Verdict/Judgment: Settlement

Verdict/Judgment Amount: \$822,000

Range Amount: \$500,000 - 999,999

\$500,000 to Structured Assignments, Inc. for periodic payments benefiting plaintiffs

\$322,000 to plaintiffs' attorneys

The case was settled at a settlement conference conducted by Magistrate Judge Carla Woehrl.

Trial Type: Settlement

FACTS/CONTENTIONS:

According to court records: Tony Lavan, Caterius Smith, Willie Vassie, Ernest Seymore, Lamoen Hall, Shamal Ballantine, Byron Reese and Reginald Wilson said they were homeless individuals living on the streets of the Skid Row area of Los Angeles.

During February and March 2011, plaintiffs said police officers and public works employees of defendant City of Los Angeles seized their property from the streets when they stepped away to attend to personal matters. Defendant's employees allegedly used a skip loader to crush and destroy plaintiffs' property. Plaintiffs claimed the property they lost included EDARS, shopping carts, a bicycle, medications, personal papers and identification documents, clothing and hygiene products, cell phones, sleeping bags and blankets.

Plaintiffs contended defendant failed to provide them with adequate notice that their property would be seized and destroyed, threatened them with arrest if they attempted to retrieve it, and neglected to provide them with pre- or post-deprivation procedures to reclaim it.

Plaintiffs brought a class action on behalf of approximately 3,000 homeless individuals living in the Skid Row area of Los Angeles. Plaintiffs' amended complaint asserted claims for (1) unreasonable property seizure in violation of the Fourth Amendment and Art. 1, Sec. 13, California Constitution, (2) due process violations under the Fifth and Fourteenth Amendments and Art. I, Sec. 7, California Constitution, (3) interference by threat, intimidation or coercion in violation of Cal. Civ. Code Sec. 52.1, (4) failure to protect and preserve their personal property as required by Cal. Civ. Code Sec. 2080, and (5) conversion.

Defendant claimed that Los Angeles Municipal Code Sec. 56.11, which prohibited persons from leaving merchandise, baggage or any article of personal property on any parkway or sidewalk, authorized seizure of plaintiffs' property. According to defendant, the Skid Row area had signs posted to advise plaintiffs of the provisions of Los Angeles Municipal Code Sec. 56.11.

Defendant also argued that on one of the occasions it seized property in March 2011, at least 20 shopping carts were found in the street, in parking lanes and blocking the sidewalk, forcing pedestrians to walk in the street to pass them. Defendant claimed after it emptied those carts and began loading property into the skip loader, one of its employees watched to ensure that no personal property was thrown away.

The court entered a preliminary injunction, June 23, 2011, prohibiting defendant from seizing personal property in Skid Row unless (1) there was an objectively reasonable belief that it is abandoned, (2) there was an immediate threat to public health or safety, or (3) the property was evidence of a crime. The court's injunction also required defendant to provide a notice advising where it kept any confiscated property and how owners could reclaim it.

CLAIMED DAMAGES:

Not reported.

SETTLEMENT DISCUSSIONS:

Not reported.

COMMENTS:

According to court records: The complaint was filed April 5, 2011. Defendant filed an interlocutory appeal from the trial court's order granting the preliminary injunction, and the Ninth Circuit heard the appeal, Feb. 8, 2012. The Ninth Circuit affirmed the trial court's order granting the preliminary judgment, Sept. 5, 2012.

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta State v. Tegland, Or.App., February 11, 2015

693 F.3d 1022

United States Court of Appeals,
Ninth Circuit.

Tony LAVAN; Caterius Smith; Willie Vassie;
Ernest Seymore; Lamoen Hall; Shamal Ballantine;
Byron Reese; Reginald Wilson,
Plaintiffs--Appellees,

v.

CITY OF LOS ANGELES, Defendant--Appellant.

No. 11-56253.

Argued and Submitted Feb. 8, 2012.

Filed Sept. 5, 2012.

Synopsis

Background: Homeless individuals brought putative civil rights class action against city, alleging that city, through its police department and bureau of street services, confiscated and destroyed their personal possessions in violation of their Fourth and Fourteenth Amendment rights. Individuals sought preliminary injunction enjoining city's purported unconstitutional practices. The United States District Court for the Central District of California, Philip S. Gutierrez, J., 797 F.Supp.2d 1005, granted injunction, and city appealed.

[Holding:] The Court of Appeals, Wardlaw, Circuit Judge, held that it was within district court's discretion to find likelihood of success on homeless individuals' due process claim against city.

Affirmed.

Callahan, Circuit Judge, filed a dissenting opinion.

West Headnotes (11)

^[1] **Federal Courts**

⚡ Preliminary injunction; temporary restraining

order

A preliminary injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.

Cases that cite this headnote

^[2] **Federal Courts**

⚡ Preliminary injunction; temporary restraining order

In reviewing the grant of a preliminary injunction under the abuse of discretion standard, the Court of Appeals does not review the underlying merits of the case.

1 Cases that cite this headnote

^[3] **Searches and Seizures**

⚡ Persons, Places and Things Protected

By seizing and destroying homeless individuals' unabandoned legal papers, shelters, and personal effects, city meaningfully interfered with individuals' possessory interests in that property under Fourth Amendment, even if property was left on sidewalks in violation of municipal ordinance. U.S.C.A. Const.Amend. 4.

19 Cases that cite this headnote

^[4] **Searches and Seizures**

⚡ What Constitutes Search or Seizure

Under the Fourth Amendment, a "search" occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable. U.S.C.A. Const.Amend. 4.

14 Cases that cite this headnote

^[5] **Searches and Seizures**
⊕What Constitutes Search or Seizure

Under the Fourth Amendment, a “seizure” of property occurs when there is some meaningful interference with an individual’s possessory interests in that property. U.S.C.A. Const.Amend. 4.

22 Cases that cite this headnote

^[6] **Constitutional Law**
⊕Protections Provided and Deprivations Prohibited in General

Any significant taking of property by the state is within the purview of the Due Process Clause. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

^[7] **Constitutional Law**
⊕Procedural due process in general

Application of the prohibition against a taking of property requires the familiar two-stage analysis; first the court must ask whether the asserted individual interests are encompassed within the Fourteenth Amendment’s protection of life, liberty or property, and if protected interests are implicated, the court then must decide what procedures constitute due process of law. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

^[8] **Civil Rights**
⊕Property and housing

Homeless individuals maintained protected

interest in unabandoned personal property left temporarily unattended in public area, as required for preliminary injunction prohibiting city from seizing and destroying homeless individuals’ unabandoned personal property located in public area. U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

^[9] **Constitutional Law**
⊕Notice and Hearing

The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

^[10] **Constitutional Law**
⊕Destruction of property
Municipal Corporations
⊕Use of sidewalk

Homeless individuals’ unabandoned possessions, which were temporarily left on public sidewalks, were “property” within the meaning of the Fourteenth Amendment, and thus city was required to comport with the requirements of Fourteenth Amendment’s due process clause if it wished to take and destroy possessions. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

^[11] **Civil Rights**
⊕Property and housing

It was within district court’s discretion to find likelihood of success on homeless individuals’ Fourteenth Amendment claim that city’s seizure and destruction of their unabandoned personal

property located in public area violated their procedural due process rights, thus supporting issuance of preliminary injunction enjoining city's purported unconstitutional practices, where city admitted that it failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to area's homeless population. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

Attorneys and Law Firms

*1023 Carmen A. Trutanich, City Attorney, and Amy Jo Field, Deputy City Attorney, Los Angeles, CA, for the defendant-appellant.

Carol A. Sobel, Law Office of Carol A. Sobel, Santa Monica, CA, for the plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California, Philip S. Gutierrez, District Judge, Presiding. D.C. No. 2:11-cv-02874-PSG-AJW.

Before: STEPHEN REINHARDT, KIM McLANE WARDLAW, and CONSUELO M. CALLAHAN, Circuit Judges.

Opinion by Judge WARDLAW; Dissent by Judge CALLAHAN.

OPINION

WARDLAW, Circuit Judge:

Appellees, nine homeless individuals living in the "Skid Row" district of Los Angeles, charge that the City of Los Angeles *1024 (the "City") violated their Fourth and Fourteenth Amendment rights by seizing and immediately destroying their unabandoned personal possessions, temporarily left on public sidewalks while Appellees attended to necessary tasks such as eating, showering, and

using restrooms. Finding a strong likelihood of success on the merits of these claims, the district court enjoined the City from confiscating and summarily destroying unabandoned property in Skid Row. The narrow injunction bars the City from:

1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

Lavan v. City of Los Angeles, 797 F.Supp.2d 1005, 1020 (C.D.Cal.2011).

The district court expanded upon the great leeway the City retains to protect public health and safety, noting: "The City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction ... merely prevent[s the City] from *unlawfully* seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard." *Id.* at 1019.

In this appeal, the City does not challenge the scope of the injunction, nor does it ask us to modify its terms; instead, the City argues only that the district court applied the wrong legal standard in evaluating Appellees' claims.¹ We conclude that the Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.

I. FACTS AND PROCEDURAL BACKGROUND

The facts underlying this appeal are largely undisputed.² Appellees are homeless persons living on the streets of the Skid Row district of Los Angeles. Skid Row's inhabitants include the highest concentration of homeless persons in the City of Los Angeles; this concentration has only increased in recent years.³ See Los Angeles Homeless Services Authority, 2011 Greater Los Angeles Homeless Count Report, available at <http://www.lahsa.org/docs/2011-Homeless-Count/HC11-Detailed-Geography-Report-FINAL.PDF>. Appellees occupy the sidewalks of Skid Row pursuant to a settlement agreement we approved in 2007. See *Jones v. City of *1025 Los Angeles*, 444 F.3d 1118 (9th Cir.2006), vacated due to

settlement, 505 F.3d 1006 (9th Cir.2007). The settlement agreement limits the City's ability to arrest homeless persons for sleeping, sitting, or standing on public streets until the City constructs 1250 units of permanent supportive housing for the chronically homeless, at least 50 percent of which must be located within Skid Row or greater downtown Los Angeles. See Settlement Agreement, *Jones v. City of Los Angeles*, No. 03-CV-01142 (C.D.Cal. Sept. 15, 2008).

Like many of Skid Row's homeless residents, Appellees stored their personal possessions—including personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets—in mobile containers provided to homeless persons by social service organizations. Appellees Tony Lavan, Caterius Smith, Willie Vassie, Shamal Ballantine, and Reginald Wilson packed their possessions in EDAR mobile shelters.⁴ Appellees Ernest Seymore, Lamoen Hall, and Byron Reese kept their possessions in distinctive carts provided by the "Hippie Kitchen," a soup kitchen run by the Los Angeles Catholic Worker.⁵

On separate occasions between February 6, 2011 and March 17, 2011, Appellees stepped away from their personal property, leaving it on the sidewalks, to perform necessary tasks such as showering, eating, using restrooms, or attending court. Appellees had not abandoned their property, but City employees nonetheless seized and summarily destroyed Appellees' EDARs and carts, thereby permanently depriving Appellees of possessions ranging from personal identification documents and family memorabilia to portable electronics, blankets, and shelters. See *Lavan*, 797 F.Supp.2d at 1013-14. The City did not have a good-faith belief that Appellees' possessions were abandoned when it destroyed them. Indeed, on a number of the occasions when the City seized Appellees' possessions, Appellees and other persons were present, explained to City employees that the property was not abandoned, and implored the City not to destroy it. *Id.* at 1013. Although "the City was in fact notified that the property belonged to Lamoen Hall and others, ... when attempts to retrieve the property were made, the City took it and destroyed it nevertheless." *Id.* at 1014.

The City does not deny that it has a policy and practice of seizing and destroying homeless persons' unabandoned possessions. Nor is the practice new: The City was previously enjoined from engaging in the precise conduct at issue in this appeal. See *Justin v. City of Los Angeles*, No. 00-CV-12352, 2000 WL 1808426, at *13 (C.D.Cal. Dec. 5, 2000) (granting a temporary restraining order barring the City from, among other things, "[c]onfiscating

*1026 the personal property of the homeless when it has not been abandoned and destroying it without notice"). The City maintains, however, that its seizure and disposal of items is authorized pursuant to its enforcement of Los Angeles Municipal Code ("LAMC") § 56.11, a local ordinance that provides that "[n]o person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk."

On April 5, 2011, Appellees sued the City under 42 U.S.C. § 1983, claiming that the City's practice of summarily confiscating and destroying the unabandoned possessions of homeless persons living on Skid Row violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. On April 18, 2011, Appellees filed an ex parte application for a temporary restraining order (the "TRO"), seeking an injunction preventing the City from seizing and destroying Appellees' possessions without notice.

On April 22, 2011, the district court granted Appellees' application for the TRO, concluding that "Plaintiffs have sufficiently established a likelihood of success on the merits for, at the least, their Fourth Amendment and Fourteenth Amendment claims against the City," that the City's conduct, unless enjoined, would irreparably injure Plaintiffs, and that the TRO served the public interest, as it allowed the City to "lawfully seize and detain property, as opposed to unlawfully seizing and immediately destroying property." *Lavan v. City of Los Angeles*, No. 11-CV-2874, 2011 WL 1533070, at *5-6 (C.D.Cal. Apr. 22, 2011). The district court fashioned an order encompassing all unabandoned property on Skid Row, reasoning that "it would likely be impossible for the City to determine whose property is being confiscated—i.e. whether it is one of the named Plaintiffs or another homeless person." *Id.* at *4. The terms of the TRO bar the City from:

1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

Id. at *7. The City is also "directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner." *Id.*

On June 23, 2011, the district court issued a preliminary injunction (the “Injunction”) on the same terms as the TRO. After weighing the evidence before it, the district court found that the Appellees had “clearly shown that they will likely succeed in establishing that the City seized and destroyed property that it knew was not abandoned,” 797 F.Supp.2d at 1014–1015, and held that Appellees had shown a strong likelihood of success on the merits of their claims that the City violated their Fourth Amendment and Fourteenth Amendment rights, *id.* at 1016, 1019. Explaining that Appellees “have a legitimate expectation of privacy in their property,” the district court further held that “[t]he property of the homeless is entitled to Fourth Amendment protection.” *Id.* at 1011, 1016. The district court also concluded that Appellees “personal possessions, perhaps representing everything they own, must be considered ‘property’ for purposes of [Fourteenth Amendment] due process analysis.” *Id.* at 1016. Because Appellees had shown a strong likelihood of success on their claims that the seizure and destruction of their property *1027 was neither reasonable under the Fourth Amendment nor comported with procedural due process, the district court enjoined the City from continuing to engage in its practice of summarily destroying Appellees’ unattended personal belongings.

The district court made clear that under the terms of the injunction, “[t]he City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash.” *Id.* at 1019. It emphasized that “issuance of the injunction ... merely prevent[s the City] from unlawfully seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard.” *Id.* This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

[1] [2] We have jurisdiction over the district court’s entry of a preliminary injunction under 28 U.S.C. § 1292(a)(1), and review the grant of a preliminary injunction for an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir.2003) (en banc) (per curiam). “A preliminary ‘injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.’ ” *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir.1995) (quoting *Sports Form, Inc. v. United Press Int’l*, 686 F.2d 750, 752 (9th Cir.1982)). In reviewing the grant of a preliminary injunction, “we do not review the underlying merits of the case.” *Id.*

III. DISCUSSION

The City’s only argument on appeal is that its seizure and destruction of Appellees’ unabandoned property implicates neither the Fourth nor the Fourteenth Amendment. Therefore, the City claims, the district court relied on erroneous legal premises in finding a likelihood of success on the merits. Because the unabandoned property of homeless persons is not beyond the reach of the protections enshrined in the Fourth and Fourteenth Amendments, we affirm the district court.

A. The Fourth Amendment’s Protection Against Unreasonable Seizures

[3] The City argues that the Fourth Amendment does not protect Appellees from the summary seizure and destruction of their unabandoned personal property. It bases its entire theory on its view that Appellees have no legitimate expectation of privacy in property left unattended on a public sidewalk in violation of LAMC § 56.11. Relying on Justice Harlan’s concurrence in *Katz v. United States*, the City asserts that the Fourth Amendment protects only persons who have both a subjectively and an objectively reasonable expectation of privacy in their property. 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring). As the Supreme Court has recently made very clear in *United States v. Jones*, 565 U.S. —, 132 S.Ct. 945, 950, 181 L.Ed.2d 911 (2012), however, the City’s view entirely misapprehends the appropriate Fourth Amendment inquiry, as well as the fundamental nature of the interests it protects. The reasonableness of Appellees’ expectation of privacy is irrelevant as to the question before us: whether the Fourth Amendment protects Appellees’ unabandoned property from unreasonable seizures.

[4] [5] The Fourth Amendment “protects two types of expectations, one involving ‘searches,’ the other ‘seizures.’ A ‘search’ occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable. A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Appellees need not show a *1028 reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against seizures of their unabandoned property. Although the district court determined that Appellees had a reasonable expectation of privacy in their EDARs and carts, we need not decide that

question because the constitutional standard is whether there was “some meaningful interference” with Plaintiffs’ possessory interest in the property.⁶

To the extent that Justice Harlan’s *Katz* concurrence generated the mistaken impression that the Fourth Amendment protects only privacy interests, the Supreme Court has clarified that the Fourth Amendment protects possessory and liberty interests even when privacy rights are not implicated. *Soldal v. Cook County*, 506 U.S. 56, 63–64 & n. 8, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). As the Court explained, while *Katz* and its progeny may have shifted the emphasis in Fourth Amendment law from property to privacy, “[t]here was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the Fourth Amendment.” *Id.* at 64, 113 S.Ct. 538. Indeed, even in the *search* context, where privacy is the principal protected interest, the Supreme Court has recently reiterated that a reasonable expectation of privacy is not required for Fourth Amendment protections to apply because “Fourth Amendment rights do not rise or fall with the *Katz* formulation.” *Jones*, 565 U.S. at —, 132 S.Ct. at 950.

Following *Soldal*, we recognized that a reasonable expectation of privacy is not required to trigger Fourth Amendment protection against seizures. In *Miranda v. City of Cornelius*, 429 F.3d 858, 862 n. 2 (9th Cir.2005), for example, the plaintiffs admitted that they had no reasonable expectation of privacy in their parked car, but they nevertheless challenged the city’s impoundment of the vehicle as an unreasonable seizure. We held that the seizure was subject to the Fourth Amendment’s reasonableness standard because “[t]he Fourth Amendment protects against unreasonable interferences in property interests *1029 regardless of whether there is an invasion of privacy.” *Id.* at 862 (citing *Soldal*). Other circuits are in accord. *See United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir.1998) (“The Supreme Court recently made clear that the protection afforded by the Fourth Amendment extends to an individual’s possessory interests in property, even if his expectation of privacy in that property has been completely extinguished.”) (citing *Soldal*); *Lenz v. Winburn*, 51 F.3d 1540, 1550 n. 10 (11th Cir.1995) (“It is true that a possessory interest is all that is needed for the Fourth Amendment’s reasonableness requirement to apply to a *seizure*.”) (citing *Soldal*); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir.1994) (“[O]ur finding that Bonds had no reasonable expectation of privacy in the house at 4174 Dunn Avenue does not affect our conclusion that Bonds has standing to challenge the seizure of her property.”).

Thus the dissent’s nearly exclusive focus on the *Katz*

“reasonable expectation of privacy” standard is misguided. We need not make any conclusion as to expectations of privacy because that is not the standard applicable to a “seizure” analysis. Moreover, as Justice Scalia made abundantly clear in *Jones*, even in the “search” context, the *Katz* test “did not narrow the Fourth Amendment’s scope,” *Jones*, 565 U.S. at —, 132 S.Ct. at 951, but was “added to, not substituted for, the common-law trespassory test.” *Id.* at —, 132 S.Ct. at 952 (emphasis in original). Therefore, even if we were to analyze the reasonableness of the City’s *search* of Plaintiffs’ belongings, we would still apply the Fourth Amendment’s requirement that the search be reasonable—irrespective of any privacy interest—because the City searched Plaintiffs’ “persons, houses, papers, [or] effects,” *id.* at 950. *See U.S. v. Duenas*, 691 F.3d 1070, 1080–81 (9th Cir.2012) (explaining the relationship between the *Katz* “expectation of privacy” test and the traditional scope of the Fourth Amendment).⁷

Even if we were to assume, as the City maintains, that Appellees violated LAMC § 56.11 by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of Appellees’ property remains subject to the Fourth Amendment’s reasonableness requirement. Violation of a City ordinance does not vitiate the Fourth Amendment’s protection of one’s property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.⁸

*1030 Indeed, the Supreme Court has recognized protected possessory interests even in contraband: In *United States v. Jacobsen*, for example, the Court found that the government’s testing of illegal cocaine (which resulted in the destruction of a portion of the cocaine) was a “seizure” that “affect[ed] respondents’ possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one.” 466 U.S. at 124–125, 104 S.Ct. 1652. Moreover, the Fourth Amendment protected the cocaine from unreasonable seizures despite the lack of any reasonable expectation of privacy in concealing the contraband nature of the powder. *See id.* at 123, 104 S.Ct. 1652 (“Congress has decided ... to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine ... compromises no legitimate privacy interest.”).

Here, by seizing and destroying Appellees’ unabandoned legal papers, shelters, and personal effects, the City

meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement. Although the district court based its holding on a finding that Appellees had a reasonable expectation of privacy in their seized personal effects—a finding that is unnecessary to the proper analysis in this case—it correctly held that the Fourth Amendment's protections extend to Appellees' unabandoned property. The court therefore applied the proper legal standard for determining whether Appellees had shown a likelihood of success on the merits: "The question then becomes whether the City, in seizing [Appellees'] property, acted reasonably under the Fourth Amendment." *Lavan*, 797 F.Supp.2d at 1013. Thus, the district court properly subjected the City's actions to the Fourth Amendment's reasonableness requirement, even if the City was acting to enforce the prohibitions in LAMC § 56.11. *See Miranda v. City of Cornelius*, 429 F.3d at 864 ("We begin with the premise, apparently not recognized by the Defendants, that the decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment....").

The district court properly balanced the invasion of Appellees' possessory interests in their personal belongings against the City's reasons for taking the property to conclude that Appellees demonstrated a strong likelihood of success on the merits of their claim that by collecting and destroying Appellees' property on the spot, the City acted unreasonably in violation of the Fourth Amendment. The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable. *See Jacobsen*, 466 U.S. at 124–125, 104 S.Ct. 1652 ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.' "); *see also San Jose Charter of Hells Angels Motorcycle Club v. San Jose*, 402 F.3d 962, 975 (9th Cir.2005) ("The destruction of property by state officials *1031 poses as much of a threat, if not more, to people's right to be secure in their effects as does the physical taking of them.") (internal quotation marks and citations omitted).

The City does not—and almost certainly could not—argue that its summary destruction of Appellees' family photographs, identification papers, portable electronics, and other property was reasonable under the

Fourth Amendment; it has instead staked this appeal on the argument that the Fourth Amendment simply does not apply to the challenged seizures. We reject the City's invitation to impose this unprecedented limit on the Fourth Amendment's guarantees.

B. The Fourteenth Amendment's Due Process Requirement

¹⁶¹ ¹⁷¹ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "Any significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). "Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" *Ingraham v. Wright*, 430 U.S. 651, 672, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

Let us be clear about the property interest at stake in this appeal: The district court did not recognize, and we do not now address, the existence of a constitutionally-protected property right to leave possessions unattended on public sidewalks. Instead, the district court correctly recognized that this case concerns the most basic of property interests encompassed by the due process clause: Appellees' interest in the continued ownership of their personal possessions.

The City argues that the district court erred in holding that Appellees' "personal possessions, perhaps representing everything they own, must be considered 'property' for purposes of ... due process analysis," *Lavan*, 797 F.Supp.2d at 1016. The City maintains that "no constitutionally protected property interest is implicated by the City's purported conduct" because "there is no law establishing an individual's constitutionally protected property interest in unattended personal property left illegally on the public sidewalk." Therefore, the City contends, no process is required before the City permanently deprives Appellees of their unattended possessions.

¹⁸¹ To determine whether Appellees have a protected property interest in the continued ownership of their unattended possessions, we look to "existing rules or understandings that stem from an independent source such as state law-rules or understandings." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33

L.Ed.2d 548 (1972), While “[t]he Court has ... made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money,” this appeal concerns only the core property interest that derives from actual ownership of chattels. *Id.* at 571–572, 92 S.Ct. 2701. California law recognizes the right of ownership of personal property, a right that is held by “[a]ny person, whether citizen or alien.” Cal. Civ.Code §§ 655, 663, 671. It is undisputed that Appellees owned their possessions and had not abandoned them; therefore, Appellees maintained a protected interest in their personal property. *Cf. Nevada Dept. of Corr. v. Greene*, 648 F.3d 1014, 1019 (9th Cir.2011) (“Nevada recognizes *1032 ‘personal property,’ which includes ‘money, goods, [and] chattels.’ See Nev.Rev.Stat. §§ 10.045, 10.065. As Downs’s typewriter constituted a chattel, Downs had a property interest in it.”).

¹⁹¹ As we have repeatedly made clear, “[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.” *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir.2008). This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart. The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. As the district court recognized, the logic of the City’s suggestion would also allow it to seize and destroy cars parked in no-parking zones left momentarily unattended.

Even if Appellees had violated a city ordinance, their previously-recognized property interest is not thereby eliminated. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (“[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.”). Even if the City had seized Appellees’ possessions in accordance with the Fourth Amendment, which it did not, due process requires law enforcement “to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.” *City of West Covina v. Perkins*, 525 U.S. 234, 240, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999). And even if LAMC § 56.11 provided for forfeiture of property, which it does not, the City is required to provide procedural protections before permanently depriving Appellees of their possessions. See *Greene*, 648 F.3d at 1019 (“An agency ... violates the Due

Process Clause of the Fourteenth Amendment when it prescribes and enforces forfeitures of property ‘[w]ithout underlying [statutory] authority and competent procedural protections.’”) (quoting *Vance v. Barrett*, 345 F.3d 1083, 1090 (9th Cir.2003)).

¹⁹¹ Because homeless persons’ unabandoned possessions are “property” within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment’s due process clause if it wishes to take and destroy them. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (“Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.”). The City admits that it failed to provide any notice or opportunity to be heard for Tony Lavan and other Appellees before it seized and destroyed their property. The City’s decision to forego any process before permanently depriving Appellees of protected property interests is especially troubling given the vulnerability of Skid Row’s homeless residents: “For many of us, the loss of our personal effects may pose a minor inconvenience. However, ... the loss can be devastating for the homeless.” *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1559 (S.D.Fla.1992). The City does not argue, nor could it, that the district court erred in holding that the City’s “practice of on-the-spot destruction of seized property... presents an enormous risk of erroneous deprivation, which could likely be mitigated by certain safeguards such as adequate notice and a *1033 meaningful opportunity to be heard.” *Lavan*, 797 F.Supp.2d at 1017–18.

¹⁹¹ We reject the City’s suggestion that we create an exception to the requirements of due process for the belongings of homeless persons. The district court did not abuse its discretion when it found a likelihood of success on Appellees’ Fourteenth Amendment claims, as the City admits it failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to Skid Row’s homeless population.

IV. CONCLUSION

This appeal does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise fulfill their obligations to maintain public health and safety. In fact, this court would urge Los Angeles to do more to resolve that problem and

to fulfill that obligation. Nor does this appeal concern any purported right to use public sidewalks as personal storage facilities. The City has instead asked us to declare that the unattended property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society. Because even the most basic reading of our Constitution prohibits such a result, the City's appeal is **DENIED**.

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent. I disagree that Plaintiffs are likely to succeed on the merits of their claims that the City of Los Angeles (the "City") violated their protected interests under the Fourth Amendment and under the due process clause of the Fourteenth Amendment. The pivotal question under both Amendments is not whether Plaintiffs had a property interest in the items seized—they may very well have had such an interest—but whether that interest is one that society would recognize as reasonably worthy of protection where the personal property is left unattended on public sidewalks. Because under the due process standard, society does not recognize a property interest in unattended personal property left on public sidewalks, the City's health and safety concerns allow it to seize and dispose of such property.

In this case, Plaintiffs left their personal property unattended on the sidewalks. They did so despite the numerous 10593 signs blanketing Skid Row that specifically warned that personal property found on the sidewalks in violation of the Los Angeles Municipal Code section 56.11 (the "Ordinance" or "LAMC § 56.11") would be seized and disposed of during scheduled clean-ups. The majority impermissibly stretches our Fourth Amendment jurisprudence to find that Plaintiffs had a protected interest in their unattended personal property. In addition, because Plaintiffs have not demonstrated a protected property interest, I would reverse the district court's ruling that Plaintiffs established a likelihood of success on the merits of their claim under the Fourteenth Amendment.

I. Background

In order to combat the problem created by excessive accumulation of unattended personal property on the

public sidewalks of the area in downtown Los Angeles commonly known as "Skid Row," the City conducts regular and scheduled street cleaning in accordance with the Ordinance. The Ordinance provides that: "No person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk." LAMC § 56.11. Pursuant to the Ordinance, the City posted approximately *1034 73 signs throughout the Skid Row area warning that street cleaning would be conducted Monday through Friday between 8:00 a.m. and 11:00 a.m. and that any unattended property left at the location in violation of the Ordinance would be disposed of at the time of clean-up. These signs advised:

Please take notice that Los Angeles Municipal Code section 56.11 prohibits leaving any merchandise, baggage or personal property on a public sidewalk. The City of Los Angeles has a regular clean-up of this area scheduled for Monday through Friday between 8:00 and 11:00 am. Any property left at or near this location at the time of this clean-up is subject to disposal by the City of Los Angeles.

In expressly providing notice about when the street cleaning will take place, the City allows Skid Row residents to prepare ahead of time for the cleaning by making sure that their personal property is either removed from the sidewalks or is attended. Additionally, there is a warehouse in Skid Row open to the public during regular business hours, which is sponsored by the Business Improvement District in the Central Division. This warehouse provides a location for people to store their personal property free of charge.

During the scheduled street clean-ups, the City workers and police escorts make an effort to remove only items that appear to have been abandoned, such as items that have remained in the same location for several days or items that pose a health and safety hazard, including rotting food, human fecal matter, and drug paraphernalia. Despite these efforts by the City to balance health and safety concerns with private property concerns, Plaintiffs allege that the City removed and immediately destroyed personal property that was not permanently abandoned but was temporarily left unattended. Plaintiffs claim that because they are homeless, they have no option but to leave their personal property unattended on public sidewalks during the regularly scheduled clean-ups in order to get food, shower, use the bathroom, obtain medical care and other private and government services,

and go to work.¹ However, Plaintiffs do not explain why they cannot make use of the free public storage warehouse or make arrangements *1035 for their property to be attended during the brief three-hour windows of scheduled clean-ups.

On April 5, 2011, Plaintiffs filed their class action complaint against the City under 42 U.S.C. § 1983, alleging violations of their Fourth and Fourteenth Amendment rights. On Plaintiffs' request, the district court then issued a temporary restraining order (the "TRO") and ordered the City to show cause as to why a preliminary and/or permanent injunction should not issue. On June 23, 2012, the district court issued the preliminary injunction. In issuing the injunction, the court made factual findings that the City was removing and disposing of not only "abandoned" property but also personal property that was "unattended but not abandoned." The district court found that Plaintiffs were likely to succeed on the merits of their Fourth and Fourteenth Amendment claims and enjoined the City from:

1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

The court also directed the City to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner.

On July 25, 2011, the City timely appealed the district court's order granting the preliminary injunction.

II. Analysis

On appeal, the City does not challenge the district court's factual finding that it removes and disposes of personal property left unattended, but not abandoned, on the City sidewalks during its scheduled street cleanings. Although the majority focuses on the finding that the property was not abandoned, the fundamental issue is whether Plaintiffs relinquished their privacy and property interests by leaving their personal property unattended on public sidewalks in violation of the Ordinance and in spite of the

warning signs.

A. Standard of Review

We review a district court's decision granting a preliminary injunction for abuse of discretion. *Bay Area Addiction & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir.1999). "In issuing a preliminary injunction, a district court abuses its discretion by basing its decision on either an erroneous legal standard or clearly erroneous factual findings." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir.1999). "A district court's decision is based on an erroneous legal standard if: (1) the court did not employ the appropriate legal standards that govern the issuance of a preliminary injunction; or (2) in applying the appropriate legal standards, the court misapprehends the law with respect to the underlying issues in the litigation." *Id.* (citing *Sports Form Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir.1982)).

B. Plaintiffs Lacked an Objectively Reasonable Expectation of Privacy in Their Unattended Personal Property under the Fourth Amendment.

"To invoke Fourth Amendment protection, Plaintiffs must have both a subjective and an objectively reasonable expectation of privacy." *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (1967). Under *Katz*, it is not sufficient to have a property interest. There must also be an objectively reasonable *1036 expectation of privacy in that property interest. *Id.* In order to determine whether an expectation of privacy is reasonable, "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

No circuit court has expanded the right to be free from unreasonable searches and seizures to a right to leave unattended personal property on public land in violation of a law prohibiting that conduct. The few cases that have addressed similar issues lead to the conclusion that Plaintiffs lacked an objective expectation of privacy that society recognizes as reasonable. These cases have consistently held that a person who unlawfully takes up temporary residence on public property without a permit or permission lacks an objectively reasonable expectation of privacy. *See, e.g., Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir.1994) ("The Constitution does not

confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands."); *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir.1986) (reasoning that a trespasser living in a cave on federally-owned land did not have an objectively reasonable expectation of privacy); *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11–12 (1st Cir.1975) (concluding that squatters who unlawfully camped on public land did not have an objectively reasonable expectation of privacy for Fourth Amendment purposes). Further, we have similarly concluded that a trespasser on private state property did not have an objectively reasonable expectation of privacy. *Zimmerman v. Bishop Estate*, 25 F.3d 784, 787–88 (9th Cir.1994).

Plaintiffs attempt to distinguish these cases by reasoning that they are not squatters or trespassers as they have a right to occupy the public sidewalks. Plaintiffs do have a right to use the public sidewalks, but this does not mean that they may leave personal property unattended on the sidewalk, particularly where the Ordinance prohibits it and multiple signs expressly warn the public that unattended personal property "is subject to disposal by the City of Los Angeles."³ The issue is not whether Plaintiffs illegally occupied the sidewalks; they did not. However, like the plaintiffs in *Amezquita*, *Zimmerman*, and *Ruckman*, Plaintiffs violated the law. They left their personal property unattended on the City's sidewalks, in clear violation of the City's Ordinance prohibiting that conduct. *Amezquita*, *Zimmerman*, and *Ruckman* stand for the proposition that the unlawfulness of the plaintiffs' conduct negates the objective reasonableness of their expectation of privacy. In other words, by leaving their property unattended in violation of the City's Ordinance and in the face of express notice that their property would be removed during the scheduled clean-ups, Plaintiffs forfeited any privacy interest that society recognizes as objectively reasonable.

*1037 Despite this ample case law, the majority finds that Plaintiffs did not need to have a reasonable expectation of privacy. See Maj. Op. at 1028–29. In the majority's view, the problem with framing the Fourth Amendment question around whether the claimant had a "reasonable expectation of privacy" is that the Supreme Court, in *Soldal v. Cook County*, 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), clarified that *Katz* did not "snuff[] out the previously recognized protection for property under the Fourth Amendment." Maj. Op. at 1028. The majority asserts that *Katz* and its progeny were meant to expand the Fourth Amendment analysis to include consideration of privacy rights, in addition to property rights. *Id.* at 1028–29.

Soldal does not support Plaintiffs' professed expectation of privacy because Plaintiffs took actions that are, at a minimum, inconsistent with our society's reasonable expectations of privacy. In *Soldal*, the plaintiff's mobile home was seized while it was parked on mobile home park property, but because there was not yet a judicial order of eviction, it was parked there legally. *Soldal*, 506 U.S. at 60, 67–68, 113 S.Ct. 538. Thus, as a matter of law, the plaintiff there had yet to take any action that might relinquish his reasonable expectations of privacy. *Id.* However, here, Plaintiffs chose to leave their property unattended on public sidewalks despite being warned that their property would be seized during the limited hours of regularly scheduled street-cleanings. *Soldal* concerned the seizure of personal property that was *legally* parked in a mobile home area; whereas here, Plaintiffs left their property unattended in violation of the Ordinance prohibiting them from doing just that. In doing so, their expectation of privacy diminished below the level of privacy that society recognizes as reasonable.⁴

The importance of determining whether Plaintiffs had an expectation of privacy that society recognizes as reasonable was recently reaffirmed by the Supreme Court in *United States v. Jones*: "We have embodied that preservation of past rights in our very definition of 'reasonable expectation of privacy' which we have said to be an expectation 'that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" — U.S. —, 132 S.Ct. 945, 951, 181 L.Ed.2d 911 (2012) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)). In other words, the Supreme Court confirmed that the question whether a property-owner's professed expectation of privacy is reasonable is closely related to the question whether the expectation is one that society is willing to recognize as reasonable. See *id.*

The Supreme Court clarified in *Jones* that while individuals have a protected property interest in their personal property, the interest still must be "recognized and permitted by society." See *Jones*, 132 S.Ct. at 949–52. The interests recognized by society as valid do not include *unattended* personal items left on public property in violation of the law. The majority is concerned that if a "[v]iolation of a City ordinance [] vitiate[s] the Fourth Amendment's protection of one's property," then "the government could seize and destroy any illegally parked car or unlawfully unattended *1038 dog without implicating the Fourth Amendment." Maj. Op. at 1029. The more apt comparison is leaving an unattended bag in the airport terminal or a train station, where travelers are warned that such unattended personal

property may be immediately seized and destroyed.⁶ In the hypothetical of an illegally parked vehicle, there is no warning that the vehicle, in addition to being ticketed and towed, will be destroyed. Here, just as in the airport hypothetical, the City has a legitimate interest in immediately destroying personal property left on the streets rather than storing it for health and safety reasons.⁷ Unfortunately, in light of the incidents of domestic terrorism, the City must be concerned with potential dangers arising from a cart, box, bag, or other container left unattended in a public place as they could easily contain bombs, weapons, or bio-hazards.⁸

Accordingly, following *Jones*, this case turns on society's notions of expectations of privacy. *Cf. Jones*, 132 S.Ct. at 951. Common sense and societal expectations suggest that when people leave their personal items unattended in a public place, they understand that they run the risk of their belongings being searched, seized, disturbed, stolen, or thrown away. In other words, their expectation of privacy in that property is not one that "society [is] willing to recognize ... as reasonable." *Ciraolo*, 476 U.S. at 211, 106 S.Ct. 1809. Thus, even if Plaintiffs maintained a subjective *1039 expectation of privacy in their property despite having left it unattended on the public sidewalk, the risks to society are too great to recognize the expectation as reasonable. Accordingly, because the district court misapprehended the law, its ruling should be vacated.

C. Plaintiffs Did Not Have a Property Interest in their Unattended Personal Property Under the Fourteenth Amendment.

The Supreme Court has set forth a two-part test for analyzing a due process claim: "We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" *Ingraham v. Wright*, 430 U.S. 651, 672, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). I agree with the City that "because no constitutionally protected property interest is implicated by the City's purported conduct, the district court should never have addressed the second step of the due process analysis."

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33

L.Ed.2d 548 (1972). In this way, the first step of the due process inquiry is very similar to the second inquiry of the Fourth Amendment test. The City does not dispute that Plaintiffs had a protected property interest in the personal property itself. The question is whether the Plaintiffs' actions in leaving their personal property unattended in a public place altered their property interest to one that society does not accept as reasonable. While this is a novel question of law, we are not wholly without guidance on this question.

Much like the objective reasonableness analysis under the Fourth Amendment inquiry, protected property interests under the due process inquiry "are defined by existing rules or understandings" of our society, and "unilateral expectation[s]" are insufficient to create a protected interest. *See Bd. of Regents*, 408 U.S. at 577, 92 S.Ct. 2701. There is thus an objective element to the standard. However, the majority has not identified "an existing rule or law creating or defining this protected property interest." *See id.* The Eleventh Circuit has held that there is no "constitutional right to store one's personal belongings on public lands" regardless of subjective expectations. *Church*, 30 F.3d at 1345. Similarly, in this case, there do not appear to be any "existing rules or understandings" that provide Plaintiffs with an objectively protected interest that allows them to leave their belongings unattended on public sidewalks, even if temporarily.

California Penal Code section 647c provides that cities have the power to "regulate conduct upon a street, sidewalk, or other place or in a place open to the public." Although this law is not definitive, it does suggest that California's "existing rules or understandings" weigh in favor of the City. *See Bd. of Regents*, 408 U.S. at 577, 92 S.Ct. 2701. This is particularly the case where, as here, the preliminary injunction effectively prevents the City from carrying out its normal function of cleaning its sidewalks without risking legal liability. The courts should be reluctant to find a protected property interest where, as here, the result has far-sweeping implications for cities across the country, including their basic responsibility for public health and safety. This is precisely why the Supreme Court has cautioned that *1040 "the range of interests protected by procedural due process is not infinite," and has instructed the lower courts to focus on whether the property interest in question is recognized by "existing rules or understandings." *Bd. of Regents*, 408 U.S. at 570–71, 577, 92 S.Ct. 2701. Also, Plaintiffs' claim that they maintain a property interest in personal property left unattended on public sidewalks is undercut by the fact that any citizen walking by the property could disturb or remove it.

Ultimately, Plaintiffs have not met their burden of citing any “existing rules or understandings” beyond their own “unilateral expectation[s]” to support their claim that they had a protected property interest in their unattended personal items. *Cf. Bd. of Regents*, 408 U.S. at 577, 92 S.Ct. 2701. Thus, under *Board of Regents*, they have not demonstrated a protected property interest warranting the second step in the due process analysis. *Cf. Ingraham*, 430 U.S. at 672, 97 S.Ct. 1401. Because Plaintiffs’ claim fails at the first step of the due process inquiry, I would reverse the district court’s ruling that Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment claim.⁹

have relinquished their objectively reasonable expectation of privacy in the property. Moreover, under both the second inquiry under *Katz* and the first step of the Fourteenth Amendment analysis, Plaintiffs’ actions in leaving their personal property unattended in a public place reduced their interest in that property to one not within our existing societal rules and understandings. Whatever privacy or property interest Plaintiffs may have had in the property lost social recognition when the property was left unattended on the public sidewalks. Moreover, because Plaintiffs lack a protected property interest in their unattended personal items, I would not reach the second step of the due process analysis. Because society does not recognize Plaintiffs’ alleged privacy and property interests as reasonable, I dissent.

III. Conclusion

The majority has “misapprehend[ed] the law with respect to the underlying issues in the litigation.”¹⁰ *Cf. Walczak*, 198 F.3d at 730. The Fourth Amendment does not protect unattended personal property left on public sidewalks because the owners, by leaving their property unattended,

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Footnotes

- 1 Public critics of the district court’s ruling have mischaracterized both the breadth of the district court’s order and the substance of the City’s appeal. See, e.g., Carol Schatz, “Enabling homelessness on L.A.’s skid row,” *L.A. Times*, April 9, 2012; Estela Lopez, “Skid row: Hoarding trash on sidewalks isn’t a right,” *L.A. Times*, Feb. 28, 2012, available at <http://opinion.latimes.com/opinionla/2012/02/skid-row-trash-sidewalks-blowback.html>. The injunction does not require the City to allow hazardous debris to remain on Skid Row, nor does the City quibble with the contours of the order. Rather, the City seeks a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left momentarily unattended in violation of a municipal ordinance.
- 2 While the City disputed many facts before the district court, it “do[es] not challenge the district court’s factual findings” in this appeal.
- 3 A more comprehensive description of the circumstances surrounding the lives of homeless persons living on Skid Row is set forth in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1121–23 (9th Cir.2006), vacated due to settlement, 505 F.3d 1006 (9th Cir.2007).
- 4 EDARs are small, collapsible mobile shelters provided to homeless persons by Everyone Deserves a Roof, a nonprofit organization. EDARs are intended to address the chronic shortage of housing faced by homeless persons in Los Angeles. Former Los Angeles City Mayor Richard Riordan spent the night of Saturday, November 6, 2010 in an EDAR on Skid Row to demonstrate how the shelters could be used by the homeless population residing there. See <http://losangeles.cbslocal.com/2010/11/06/richard-riordan-volunteers-to-spend-night-with-homeless/>.
- 5 The Los Angeles Catholic Worker is a lay organization founded in 1970 to aid the poor and homeless of Skid Row. The organization operates a soup kitchen and hospitality house for the homeless, and provides meals, blankets, raincoats, and carts to homeless persons. See generally Jeff Dietrich, “Homeless enablers—and proud of it,” *L.A. Times*, April 16, 2012, available at <http://www.latimes.com/news/opinion/opinion-la/la-ol-homeless-skidrow-blowback-20120413,0,2199450.story>.
- 6 Although the question is not before us, we note that Appellees’ expectation of privacy in their unabandoned shelters and effects may well have been reasonable. When determining whether an expectation of privacy is reasonable, “we

must keep in mind that the test of legitimacy is ... whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. 207, 212, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (quotation omitted). In *Silverman v. United States*, the Court explained the "very core" of the Fourth Amendment:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

365 U.S. 505, 511 n. 4, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) (quoting *United States v. On Lee*, 193 F.2d 306, 315–16 (2d Cir.1951) (Frank, J., dissenting)). As our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless of Skid Row than their EDARs, it is in keeping with the Fourth Amendment's "very core" for the same society to recognize as reasonable homeless persons' expectation that their EDARs are not beyond the reach of the Fourth Amendment. See generally *State v. Mooney*, 218 Conn. 85, 588 A.2d 145, 161 (1991) ("The interior of [the homeless defendant's duffel bag and cardboard box] represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize its assertion as reasonable under the circumstances of this case.").

7 The assumption that the *Katz* privacy analysis applies in the seizure context, and that it is a standard that must be met in every Fourth Amendment search or seizure case, permeates the dissent's reasoning. See, for example, Section IIB of the dissent. Because the Supreme Court soundly rejected that assumption in *Jones*, the dissent's reasoning, which essentially echoes the City's, is, at best, highly questionable.

8 The dissent's analogy between the factual scenario presented by this case and that of a government official's seizure of a traveler's unattended bag in an airport terminal or train station is inapt. The City has not challenged the district court's clearly correct conclusion that the City's immediate destruction of Plaintiffs' unabandoned property was unreasonable. Even if the City had raised this issue on appeal, however, the dissent's suggestion that the government has the same interest in destroying EDARs and homeless persons' family photographs and identification papers found on public sidewalks as it does in destroying suspicious unattended luggage discovered in transportation hubs fails to recognize the unique nature of the security risks that exist at airports and train stations. The Fourth Amendment remains applicable at such transportation hubs; the nature of the security risks there (and, similarly, at border crossings) gives the government broader leeway in the reasonableness standard. As far as we are aware, Skid Row has never been the target of a terrorist attack, and the City makes no argument that the property it destroyed was suspicious or threatening. And, in any event, the very injunction that the City is challenging in this appeal expressly allows the City to act *immediately* to remove and destroy threats to public health or safety.

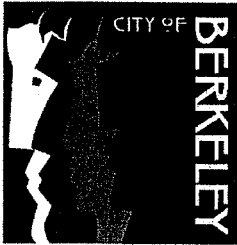
1 Although I sympathize with the plight of the homeless and believe that this is a problem that we must address as a society, a § 1983 action is not the proper vehicle for addressing this problem. The majority opinion focuses on the interests of the homeless in Skid Row who leave their property unattended and does not acknowledge the interests of the other people in Skid Row—homeless or otherwise—who must navigate a veritable maze of biohazards and trash as they go about their daily business. Certainly, the City is charged with protecting the health and safety of individuals who comply with the law but are forced to live in the unsanitary and unsafe conditions created by other residents. Those conditions include human waste, dead animals, and weapons. For example, during a recent clean-up, the City removed "278 hypodermic needles, 94 syringes, 60 razor blades, 10 knives, 11 items of drug paraphernalia," and "[t]wo 5-gallon buckets of feces." See Alexandra Zavis, "Nearly 5 tons of trash collected in L.A. skid row sweep," *L.A. Times*, July 9, 2012, available at <http://latimesblogs.latimes.com/lanow/2012/07/tons-of-trash-collected-in-la-skid-row-sweep.html>. Although the City does not challenge the district court's rulings on the balance of hardships and advancement of the public interest under *Winter*, because of the City's duty to maintain clean and safe sidewalks, I would find that these factors weigh in the City's favor. See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20–21, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (concluding that the public interest, as advanced by the Navy, in conducting training exercises with active sonar in realistic conditions outweighed the interest in preventing possible injury to an unknown number of marine mammals).

2 Plaintiffs, by leaving their personal property on the sidewalks unattended, raise doubts as to whether they "manifested a subjective expectation of privacy" under the first step of the *Katz* test. However, the City does not dispute the district court's finding that Plaintiffs had a subjective expectation of privacy in their personal property. Thus, I focus on the second step of the *Katz* test.

3 Plaintiffs assert that in several instances, the City seized personal belongings packed neatly in carts and despite the protests of persons on the scene. Perhaps the City erred in determining that the property was unattended, and

accordingly may face some liability, but this does not mean that the City may not seize and immediately dispose of materials it reasonably determines to be unattended.

- 4 If the City, in searching unattended personal property on its sidewalks, discovered illegal drugs or other evidence of criminal activity, the owner of the property would not likely succeed in a motion to have the evidence suppressed in a criminal prosecution. *Cf. California v. Greenwood*, 486 U.S. 35, 40, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (holding that there was no reasonable expectation of privacy in the contents of plastic garbage bags left on or at the side of a public street).
- 5 The majority does not really argue that a City may not seize an illegally parked car or an unlawfully unattended dog. Thus, it would appear that the majority's real concern is not with the constitutionality of the City's seizure of the unattended personal property but with the disposal of the property. Indeed, the district court's injunction allows the City to continue to seize property where it has "an objectively reasonable belief that it is abandoned." But it is difficult for the City to determine whether personal items are unattended or abandoned. Furthermore, legitimate concerns for public safety and health require that the City search and remove unattended property on its public sidewalks. I would hold that the fact that a cart is apparently unattended on a public sidewalk where warning signs are prominently displayed allows the City to search and seize the property.
- 6 Much like the cases involving unattended baggage in train stations and airports, the City has an interest in removing carts, bags, and other containers from its sidewalks that may conceal bombs, weapons, biohazards, or drugs. See, e.g., *United States v. Gault*, 92 F.3d 990, 992 (10th Cir.1996) (reasoning that the defendant's "expectation was not objectively reasonable" where he "left his bag unattended, with no one there to watch it or to protect it from being kicked or lifted").
- 7 The City states that the "accumulation of things presents significant health and safety problems" and bio-hazardous materials "draw rats and breeds disease." Plaintiffs do not dispute this fact. While the majority notes that Plaintiffs' carts might have contained personal identification documents, medications, cell phones, and other important personal items (See Maj. Op. at 1024–25), these items—when they exist—are often commingled with soiled clothing, dead animals, drug paraphernalia, and other hazardous materials, which pose health and safety problems. It is unduly burdensome on the City workers to have to separate out the potential health and safety hazards from the non-hazardous items. Additionally, the majority seems to suggest that the City may not even open bags or containers to determine whether they contain hazardous materials.
- 8 The majority brushes off the City's concerns, reasoning that allowing the City to dispose of unattended personal items on its sidewalks would mean that "the government could seize and destroy any illegally parked car." Maj. Op. at 1029–30, n.8. However, the same health and safety concerns necessitating the immediate destruction of unattended personal property on the sidewalks do not arise with an illegally parked car. Additionally, society still recognizes an ongoing property interest in an illegally parked car that it does not recognize in unattended personal items left on public sidewalks. Thus, the majority's example is a straw man.
- 9 I would find that Plaintiffs have not demonstrated a property interest subject to Fourteenth Amendment protection. However, even if there were such an interest, the breadth of the district court's order requiring the City to leave notices every time property is seized and to store the property for 90 days is troublesome. First, as property that is seized is unattended on a public sidewalk, it is not clear how the City can leave notices. The direction to do so comes close to being an order to litter. Second, there is no explanation for why the City is compelled to store the property for 90 days rather than a week or some other length of time. These provisions appear to be burdensome to the City and unnecessary to the injunction's goal of preserving personal property for the owners to collect within a reasonable time.
- 10 Were this case remanded, the district court would have to also carefully consider the balance of hardships and advancement of the public interest under *Winter*, 555 U.S. at 20–21, 129 S.Ct. 365.



Police Review Commission (PRC)

April 19, 2017

To: Police Review Commission
From: Katherine J. Lee, PRC Officer
Re: History of Development of a Body-Worn Camera Policy

This will provide some background on the development of a body-worn camera (BWC) policy for the Berkeley Police Department, to inform newer Commissioners and serve as a refresher for longer-serving Commissioners.

- Feb. 12, 2015 City Council referral to the PRC develop a plan to implement the use of dash cameras and body-worn cameras for the BPD.
- Aug. 25, 2015 City Manager memo to Council explaining reasons for delay (PRC spending most of 2015 investigating the BPD response to the December 2014 protests).
- Jan. 7, 2016 First meeting of PRC's Body-Worn & Dash Cameras Subcommittee: Comms. Lippman (Chair), Javier, Roberts, Yampolsky. Sgt. Okies present for BPD.
- Jan. – May 11, 2016 BWC Subcommittee meets about twice monthly, with Sgt. Okies usually in attendance.
- May 25, 2016 BWC Subcommittee presents recommended policy to PRC for approval. Discussion commences.
- June 8, 2016 Discussion on recommended policy continues and draft policy, as modified, is approved for transmittal to Council.
- July 19, 2016 Council Work Session on Body-Worn and Dash Cameras. PRC and BPD each submit a report attaching their desired policies. Comms. Perezvelez and Roberts, and PRC Officer present on behalf of PRC; Chief Meehan, Sgt. Okies, and Sgt. Fomby on behalf of BPD. In addition to discussing policy differences, BPD presents its suggested plan for implementation (pilot project with 20 cameras) and funding and additional staff time required.

- July 27, 2016 PRC empowers a subset of the Commission to meet with Chief and other BPD reps to discuss: 1) recording of interrogations; 2) use of personal recording devices; 3) release to PRC of video related to investigations; and 4) officer review of video before writing reports involving use of force.
- Sept. 14, 2016 Comms. Perezvelez & Roberts and PRC Officer meet with Chief Meehan, Lt. Montgomery, Lt. D. Reece, and Sgt. Okies.
- Dec. 6, 2016 Comm. Yampolsky & Roberts and PRC Officer meet with Chief Greenwood, Lt. D. Reece, and Sgt. Okies.
- Dec. 13, 2016 Memo from Comms. Roberts & Yampolsky to the PRC reporting on the Sept. 14 and Dec. 6 meeting.
- Dec. 14, 2016 Report on the meetings with BPD agendized; postponed.
- Jan. 11, 2017 Report on the meetings with BPD agendized; postponed.
- Jan. 25, 2017 Report on the meetings with BPD given. PRC adopted proposed language on recordings of Interrogations; when officers may review video, and mandatory v. discretionary activation of cameras; and directed PRC Officer work with Chief to work out compromise language on use of personal recording devices and release of recordings to PRC, to be brought back for Commission consideration.
- Feb. 8, Feb. 22, March 8, 2017 Consideration of compromise language agendized, but language not yet ready.
- April 12, 2017 PRC approves, with revisions, proposed compromise language. PRC Officer to get clarification about BPD versions of its policy.
- April 26, 2017 *Full policy to be returned to PRC for final approval and transmittal to City Council.*

**ANNOTATED COMPARISON OF BPD AND PRC DRAFT POLICIES FOR
PORTABLE AUDIO/VIDEO RECORDERS / BODY-WORN CAMERAS
(with two new changes)
By PRC Officer 4-19-2017**

BPD draft policy title: Portable Audio/Video Recorders

**PRC: Recommended Policy for Berkeley Police Department Use of Body Worn
Cameras**

BPD 450.1 PURPOSE AND SCOPE

This policy provides guidelines for the use of portable audio/video recording devices by members of this department while in the performance of their duties. Portable audio/video recording devices include all recording systems whether body-worn, hand held or integrated into portable equipment.

This policy does not apply to lawful surreptitious audio/video recording, interception of communications for authorized investigative purposes or to mobile audio/video recordings (see the Investigation and Prosecution and Mobile Audio/Video policies).

PRC 450.1 PURPOSE AND SCOPE

This policy provides guidelines for the use of portable Body Worn Cameras (BWC) by members of this department while in the performance of their duties.

This policy does not apply to lawful surreptitious audio/video recording, interception of communications for authorized investigative purposes.

BPD language is broader, and includes all portable audio/video recording devices, while PRC applies only to body-worn cameras (with some exceptions).

BPD 450.2 POLICY

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

While recordings obtained from video recorders provide an objective record of events, it is understood that video recordings do not necessarily reflect the experience or state of mind of the individual member(s) in a given incident. Moreover, the recordings, especially video, have limitations and may depict events differently than the events recalled by the involved member. Specifically, it is understood

that the recording device will capture information that may not have been heard and/ or observed by the involved member and that the involved member may see and hear information that may not be captured on video.

PRC 450.2 POLICY

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

While recordings obtained from video recorders provide an objective record of events, it is understood that video recordings do not necessarily capture all events, activities and information, or reflect the full experience of the individual member(s) in a given incident. Specifically, it is understood that the recording device will capture information that may not have been heard and/ or observed by the involved member and that the involved member may see and hear information that may not be captured on video.

1st paragraph: PRC language includes as benefits of video recording "increase transparency and enhance professionalism in policing," which are absent from BPD policy.
2nd paragraph: Slight difference in first sentences.

PRC 450.2a Confidentiality and Proper Use of Recordings.

Body Worn Video use is limited to enforcement and investigative activities involving members of the public. The recordings will capture video and audio evidence for use in criminal investigations, administrative reviews, and other proceedings protected by confidentiality laws and Department policy. Improper use or release of BWC recordings may compromise ongoing criminal and administrative investigations or violate the privacy rights of those recorded and is prohibited.

No comparable language in BPD policy.

BPD 450.3 MEMBER PRIVACY EXPECTATION

All recordings made by members acting in their official capacity shall remain the property of the Department regardless of whether those recordings were made with department-issued or personally owned recorders. Members shall have no expectation of privacy or ownership interest in the content of these recordings.

PRC 450.3 MEMBER PRIVACY EXPECTATION

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

BPD policy refers to department-issued or personal owned recorders, as its policy covers the latter, while the PRC's does not.

BPD 450.3A TRAINING

Members of the department who are assigned Body Worn Cameras must complete department training in the proper use and maintenance of the devices before deploying them in the field.

PRC 450.2b Training Required.

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

As part of a continual improvement process, regular review should be conducted by BPD staff of the training on this policy and the related use of BWC's under this policy. The department shall make an annual report to the PRC regarding the outcome of this review

First sentence of both policies almost identical. PRC's policy includes language encouraging regular review of the training and the use of BWC's, with an annual report to the PRC.

BPD 450.4 MEMBER RESPONSIBILITIES

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

Officers are not required to obtain consent from members of the public when the officer is lawfully in the area where the recording takes place. For example an officer who lawfully enters a business or residence shall record any enforcement or investigative activity, as set forth in this policy, and is not required to obtain consent from members of the public who may also be present. In addition, officers are not required to play back recordings to allow members of the public to review the video footage.

Any member assigned to a non-uniformed position may carry an approved portable recorder at any time the member believes that such a device may be useful. Unless conducting a lawful recording in an authorized undercover capacity, non-uniformed members should wear the recorder in a conspicuous manner when in use or otherwise notify persons that they are being recorded, whenever possible.

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

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

Members are required to download video footage prior to the end of their shift. If the member is unable to do so the supervisor will perform this function.

PRC 450.4 MEMBER RESPONSIBILITIES

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

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

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

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

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

1st paragraph: Substantially similar.

2nd paragraph: BPD adds an example of when public consent to recording not needed, and adds that officers are not required to play back recorded video for the public.

3rd paragraph: Re non-uniformed officers' use, PRC requires Chief or designee approval, while BPD allows officer to carry, if he/she deems useful.

4th paragraph: Identical.

5th paragraph: Substantially similar.

6th paragraph: Requirement to download video at the end of each shift appears in BPD policy only.

BPD 450.4.1 SUPERVISOR RESPONSIBILITIES

Supervisors should take custody of a portable audio/video recording device as soon as practicable when the device may have captured an incident involving an officer-involved shooting or in-custody death, or and ensure the data is downloaded (Penal Code § 832.18).

Supervisors shall review relevant body worn camera recordings prior to submitting any administrative reports.

PRC 450.4.1 SUPERVISOR RESPONSIBILITIES

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

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

PRC policy is mandatory, while BPD's is discretionary, and differences in when supervisor should or must take custody of the recording device mirrors differences in 450.7.2, Review of Recordings By a Member).

Last sentences substantially similar.

BPD 450.5 ACTIVATION OF THE PORTABLE RECORDER

This policy is not intended to describe every possible situation in which the portable recorder should be used, although there are many situations where its use is appropriate. Members should activate the recorder any time the member believes it would be appropriate or valuable to record an incident.

The portable recorder should be activated in any of the following situations:

- (a) All enforcement and investigative contacts including stops and field interview (FI) situations
- (b) Traffic stops including, but not limited to, traffic violations, stranded motorist assistance and all crime interdiction stops
- (c) Self-initiated activity in which a member would normally notify the Communications Center
- (d) Probation or parole searches
- (e) Service of a search or arrest warrant
- (f) Custodial Interviews
- (g) Any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.

(h) During crowd control, protest, or mass arrest incidents, members shall use their BWC's consistent with this policy, and when directed by the Incident Commander. The Incident Commander shall document their orders in an appropriate report.

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

Informal community interactions differ from "consensual encounters" in which officers make in an effort to develop reasonable suspicion to detain or probable cause to arrest. To strengthen relationships between police and citizens, officers may use discretion regarding the recording of informal, non-enforcement related interactions with members of the community.

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

PRC 450.5 ACTIVATION OF THE BWC

This policy is not intended to describe every possible situation in which the BWC should be used. Members shall activate the recorder as required by this policy or at any time the member believes it would be appropriate or valuable to record an incident within the limits of privacy described herein.

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

- (a) All enforcement and investigative contacts including stops and field interview (FI) situations.
- (b) Interrogations.
- (c) Traffic stops including, but not limited to, traffic violations, stranded motorist assistance and all crime interdiction stops.
- (d) Self-initiated activity in which a member would normally notify the Communications Center.
- (e) Probation or parole searches.
- (f) Service of a search or arrest warrant.
- (g) Any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.
- (h) Transporting any detained or arrested person, any time the member expects to have physical contact with that person.

Members shall remain sensitive to the dignity of all individuals being recorded and exercise sound discretion to respect privacy by discontinuing recording whenever it reasonably appears to the member that such privacy may outweigh any legitimate law enforcement interest in recording. Requests by

members of the public to stop recording should be considered using this same criterion. Recording should resume when privacy is no longer at issue unless the circumstances no longer fit the criteria for recording.

Informal community interactions differ from “consensual encounters” in which officers make an effort to develop reasonable suspicion to detain or probable cause to arrest. To strengthen relationships between police and citizens, officers may use discretion regarding the recording of informal, non-enforcement related interactions with members of the community.

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

Significant difference between the policies is that per BPD, members “should” activate the recording device in specified situations (activation discretionary), while per PRC, members “shall” (activation mandatory).

Re specified situations, PRC includes “(b) Interrogations,” while BPD includes “(f) custodial interviews” only. PRC also includes (h), transporting detainees or arrestees, whenever physical contact is expected; no comparable BPD language.

Re activation during crowd control, protest, or mass arrest, BPD includes above, while PRC places in separate section, below.

Last three paragraphs identical, except for BPD reference to “portable recorder” and PRC to “BWC.”

PRC 450.5.1 ACTIVATION IN CROWD CONTROL SITUATIONS

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

The limitations outlined in General Order C-1, governing intelligence-gathering procedures for First Amendment activities, apply to the use of BWCs and other recording devices.

BPD addresses in 450.5 (h), which is identical to PRC’s except that PRC adds examples of appropriate report, and PRC’s reference to G.O. C-1 is not in BPD policy.

BPD 450.5.1 SURREPTITIOUS USE OF THE PORTABLE RECORDER

Members of the Department may surreptitiously record any conversation during the course of a criminal investigation in which the member reasonably believes that such a recording will be lawful and beneficial to the investigation (Penal Code § 633).

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

PRC 450.5.3 SURREPTITIOUS USE OF THE PORTABLE RECORDER

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

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

Policies identical except for BPD reference to Penal Code.

BPD 450.5.2 CESSATION OF RECORDING

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

Members shall cease audio recording whenever necessary to ensure conversations are not recorded between a person in custody and the person's attorney, religious advisor or physician, unless there is explicit consent from all parties to the conversation (Penal Code § 636).

PRC 450.5.4 CESSATION OF RECORDING

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

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

First paragraphs were identical, except for BPD reference to portable recorder and PRC to BWC. **New proposed change for discussion 4-26-17: "Once activated, the BWC shall [not should] remain on continuously . . ."**
In 2nd paragraph, PRC references video in addition to audio recording of conversations.

BPD 450.6 PROHIBITED USE OF PORTABLE RECORDERS

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

Members are also prohibited from retaining recordings of activities or information obtained while on-duty, whether the recording was created with department-issued or personally owned recorders.

Members shall not duplicate or distribute such recordings, except for authorized legitimate department business purposes. All such recordings shall be retained at the Department.

Members shall utilize their department-issued body worn camera as specified in this policy. Members may additionally use personally owned recorders (e.g. cell phone) to document contacts in addition to the departmentally issued body worn camera, or in lieu of the departmentally issued BWC, where the issued device fails and/or is not functioning (e.g. malfunction, broken or battery dead). Regardless, if a member is using a department-issued body worn camera, and/or another recording device, members shall comply with the provisions of this policy, including retention and release requirements. In every event where members use any recording device aside from the department-issued body worn camera, the member shall document and explain the use in their police report (e.g. the body worn camera failed and evidence needed to be captured at that moment in time).

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

PRC 450.6 PROHIBITED USE OF PORTABLE RECORDERS

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

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

~~The department assigned BWC shall be the only mobile video recorder allowed for department employees while on duty. Any other mobile video recorders shall be used only with the express permission of the Chief of Police.~~

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

1st paragraph: Identical.

2nd paragraph: Identical, except BPD policy clarifies it applies to department-issued or personally owned recorders.

3rd paragraph: PRC policy originally prohibited use of any video recording device other than the BWC without express permission of Chief. At 4-12-17 meeting PRC agreed to compromise language proposed by BPD, above.

4th paragraph: Identical.

BPD 450.7 RETENTION OF RECORDINGS

Any time a member records any portion of a contact that the member reasonably believes constitutes evidence in a criminal case, the member shall record the related case number and transfer the file in accordance with current procedure for storing digital files and document the existence of the recording in the related case report. Transfers should occur at the end of the member's shift, or any time the storage capacity is nearing its limit. In circumstances when the officer cannot complete this task, the officer's supervisor shall immediately take custody of the portable recorder and be responsible for

downloading the data. Officers must properly categorize and tag video recordings any time they are downloaded.

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

Members are prohibited from intentionally erasing, altering, reusing, modifying, or tampering with audio or video recordings.

PRC 450.7 PROCESSING AND HANDLING OF RECORDINGS

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

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

Members are prohibited from intentionally erasing, altering, reusing, modifying, or tampering with audio video recordings

1st paragraph: Re procedures for preserving recordings for evidence in a criminal case, PRC says transfer "must" occur at shift's end or when storage capacity nearing limit, while BPD says "should." PRC says "uploading" while BPD says "downloading" to refer to the same thing (transfer from recording device to storage).
Last two paragraphs identical.

BPD 450.7.1 RETENTION REQUIREMENTS

All recordings shall be retained for a minimum of 60 days. Incidents involving consensual contacts, aid to citizens and cold reports will be retained for one year. Recordings of incidents involving the use of force by a police officer, detentions, arrests, or recordings relevant to a formal or informal complaint shall be retained for a minimum of two years. Any recordings relating to court cases and personnel complaints that are being adjudicated will be manually deleted at the same time other evidence associated with the case is purged and be done in line with the department's evidence retention policy.

PRC 450.7.1 RETENTION REQUIREMENTS

- a) All recordings shall be retained for a minimum of 60 days. Incidents involving consensual contacts, aid to citizens and cold reports will be retained for one year. Recordings of incidents involving use of force by a police officer, detentions, arrests, or recordings relevant to a formal or

informal complaint shall be retained for a minimum of two years and one month. Any recordings relating to court cases and personnel complaints that are being adjudicated will be manually deleted at the same time other evidence associated with the case is purged in line with the department's evidence retention policy.

- b) Recording caused by either testing or accidental activation may be deleted after 60 days.

PRC's paragraph a) is almost identical to BPD's only paragraph.
BPD does not have language comparable to PRC's paragraph b).

BPD 450.8 REVIEW OF RECORDINGS

When preparing written reports, members should review their recordings as a resource. However, members shall not retain personal copies of recordings. Members should not use the fact that a recording was made as a reason to write a less detailed report.

In the event of an officer-involved shooting or in-custody death, officers shall provide an initial interview before they review any audio or video recordings of the incident. An involved officer will have an opportunity to review recordings after the initial statement has been taken, and he or she can be re-interviewed if either the officer or members of the investigating team believe it is necessary.

Supervisors are authorized to review relevant recordings any time they are investigating alleged misconduct or reports of meritorious conduct.

Recorded files may also be reviewed:

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

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

- (c) By media personnel with permission of the Chief of Police or the authorized designee.

- (d) In compliance with a public records request, if permitted, and in accordance with the Records Maintenance and Release Policy.

- (e) By training staff regarding incidents which may serve as a learning or teaching tool.

- (f) By Police Review Commission Officer and/or Investigators and Board of Inquiry Members investigating a specific complaint where body worn camera footage is available. For purposes of the investigation, ~~video review should take place at the police department, and will be conducted by an Internal Affairs Sergeant, or other designee as directed by the Chief of Police~~ video will be made available to the PRC Officer and/or Investigator for their use and to facilitate pre-hearing viewing by BOI Commissioners. For purposes of the Board of ~~Review Inquiry~~, where video review is deemed necessary by the PRC Officer and/or Investigator, or by commission members, the Department shall facilitate such viewing, at the meeting site for the Board of Inquiry, and which will be conducted by an Internal Affairs

Sergeant, or other designee as directed by the Chief of Police. No one shall be allowed to make a copy of the video, or to otherwise record the video being shown, except as noted in other provisions of this policy. The department retains custody and control of the recordings, and content of the video will be subject to the confidentiality requirements of the Police Officer Bill of Rights (POBAR).

All recordings should be reviewed by the Custodian of Records prior to public release (see the Records Maintenance and Release Policy). Recordings that unreasonably violate a person's privacy or sense of dignity should not be publicly released unless disclosure is required by law or order of the court.

PRC 450.7.2 REVIEW OF RECORDINGS BY A MEMBER

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

A. Incidents that involve use of force.

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

B. Incidents that result in grave bodily injury.

1. In the event of an officer-involved incident that results in grave bodily injury, including an officer-involved shooting or an in-custody death, the BWC of the involved member(s) shall be taken from him or her and secured by a supervisor, commander, or appropriate investigator, as necessary. Involved members are not to access or obtain their footage of the incident. It will be the responsibility of the investigation team's supervisor to coordinate with the involved member's supervisor to obtain footage of the incident.

2. Personnel uploading secured BWC video files shall not view the files unless authorized.

3. No member involved in the incident may view any video recordings prior to being interviewed by the appropriate investigative unit and receiving command approval.

4. Once a member's report(s) has been submitted and approved and the member has been interviewed by the appropriate investigator, the involved member will have an opportunity to review the recordings prior to the conclusion of the interview process and to provide additional information to supplement his or her statement in a separate document or separate section of the report. In no case shall a member alter a report made prior to reviewing the recording.

C. Investigatory Review

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

Recorded files may also be reviewed:

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

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

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

Investigators conducting criminal or internal investigations shall:

1. Advise the coordinator to restrict public disclosure of the BWC file in criminal or internal investigations, as necessary.
2. Review the file to determine whether the BWC file is of evidentiary value and process it in accordance with established protocols.
3. Notify the coordinator to remove the access restriction when the criminal/internal investigation is closed.

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

Important difference between the two policies regarding when officers may review video before writing a report: BPD allows viewing in all cases except officer-involved shootings and in-custody deaths. PRC allows viewing in all cases except where reportable use of force or grave bodily injury occurs, and spells out separate procedures for those situations.

Release to PRC: Compromise language agreed to by PRC, with revisions shown (p. 11), at 4-12-17 meeting. New proposed language for discussion 4-26-17.

Other differences: BPD covers release in response to a PRA or to media in this section, which PRC covers in its sec. 450.8 below.

PRC 450.8 RELEASE OF RECORDINGS

Recorded files will be released:

~~(a) To the Police Review Commission in conjunction with the PRC's investigation of a civilian complaint. See BPD 450.8(f) (pp. 11-12) and annotation immediately above.~~

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

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

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

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

BPD covers these topics in its sec. 450.7.2.

See prior annotation regarding release to PRC.

Release under the PRA (in BPD sec. 450.8): Similar; both refer to G.O. R-23, except that PRC adds precautionary language that R-23 does not authorize release that would constitute an unwarranted invasion of privacy. BPD includes privacy language in different paragraph.

Release to media personnel (in BPD sec. 450.8): Similar; both under authorization of Chief or designee, except PRC adds release to general public and conditioned on privacy protections in policy. Both state that Custodian of records should review before public release.

PRC language re sharing with law enforcement and other agencies outside Berkeley has no

BPD 450.9 COORDINATOR

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

- (a) Establishing a system for downloading, storing and security of recordings.
- (b) Designating persons responsible for downloading recorded data.
- (c) Establishing a maintenance system to ensure availability of operable portable audio/video recording devices.
- (d) Establishing a system for tagging and categorizing data according to the type of incident captured.
- (e) Establishing a system to prevent tampering, deleting and copying recordings and ensure chain of custody integrity.
- (f) Working with counsel to ensure an appropriate retention schedule is being applied to recordings and associated documentation.
- (g) Maintaining logs of access and deletions of recordings.

PRC 450.9 COORDINATOR

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

- (a) Establishing a system for uploading, storing and security of recordings, including for video recordings made using personally-owned recording devices .
- (b) Designating persons responsible for uploading recorded data.
- (c) Establishing a maintenance system to ensure availability of operable portable audio/video recording devices.
- (d) Establishing a system for tagging and categorizing data according to the type of incident captured.

- (e) Establishing a system to prevent tampering, deleting and copying recordings and ensure chain of custody integrity.
- (f) Working with counsel to ensure an appropriate retention schedule is being applied to recordings and associated documentation.
- (g) Maintaining logs of access and deletions of recordings.

Identical, except:

Use of "uploading" v. "downloading" and

(a) PRC adds video made with personally-owned recording devices.

PRC 450.10 SURVEILLANCE

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

No comparable BPD language.

[end]

**PRC Recommended Policy for Berkeley Police Department Use of Body Worn Cameras
(Proposed General Order)**

4-26-2017

450.1 PURPOSE AND SCOPE

This policy provides guidelines for the use of portable Body Worn Cameras (BWC) by members of this department while in the performance of their duties.

This policy does not apply to lawful surreptitious audio/video recording, interception of communications for authorized investigative purposes.

450.2 POLICY

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

While recordings obtained from video recorders provide an objective record of events, it is understood that video recordings do not necessarily capture all events, activities and information, or reflect the full experience of the individual member(s) in a given incident. Specifically, it is understood that the recording device will capture information that may not have been heard and/or observed by the involved member and that the involved member may see and hear information that may not be captured on video.

450.2a Confidentiality and Proper Use of Recordings.

Body Worn Video use is limited to enforcement and investigative activities involving members of the public. The recordings will capture video and audio evidence for use in criminal investigations, administrative reviews, and other proceedings protected by confidentiality laws and Department policy. Improper use or release of BWC recordings may compromise ongoing criminal and administrative investigations or violate the privacy rights of those recorded and is prohibited.

450.2b Training Required.

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

As part of a continual improvement process, regular review should be conducted by BPD staff of the training on this policy and the related use of BWC's under this policy. The department shall make an annual report to the PRC regarding the outcome of this review

450.3 MEMBER PRIVACY EXPECTATION

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

450.4 MEMBER RESPONSIBILITIES

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

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

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

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

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

450.4.1 SUPERVISOR RESPONSIBILITIES

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

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

450.5 ACTIVATION OF THE BWC

This policy is not intended to describe every possible situation in which the BWC should be used. Members shall activate the recorder as required by this policy or at any time the member believes it would be appropriate or valuable to record an incident within the limits of privacy described herein.

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

- (a) All enforcement and investigative contacts including stops and field interview (FI) situations.
- (b) Interrogations.
- (c) Traffic stops including, but not limited to, traffic violations, stranded motorist assistance and all crime interdiction stops.
- (d) Self-initiated activity in which a member would normally notify the Communications Center.
- (e) Probation or parole searches.
- (f) Service of a search or arrest warrant.
- (g) Any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.
- (h) Transporting any detained or arrested person, any time the member expects to have physical contact with that person.

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

Informal community interactions differ from "consensual encounters" in which officers make an effort to develop reasonable suspicion to detain or probable cause to arrest. To strengthen relationships between police and citizens, officers may use discretion regarding the recording of informal, non-enforcement related interactions with members of the community.

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

450.5.1 ACTIVATION IN CROWD CONTROL SITUATIONS

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

The limitations outlined in General Order C-1, governing intelligence-gathering procedures for First Amendment activities, apply to the use of BWCs and other recording devices.

450.5.3 SURREPTITIOUS USE OF THE PORTABLE RECORDER

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

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

450.5.4 CESSATION OF RECORDING

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

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

450.6 PROHIBITED USE OF PORTABLE RECORDERS

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

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

~~The department assigned BWC shall be the only mobile video recorder allowed for department employees while on duty. Any other mobile video recorders shall be used only with the express permission of the Chief of Police.~~

Members shall utilize their department-issued body worn camera as specified in this policy. Members may additionally use personally owned recorders (e.g. cell phone) to document contacts in addition to the departmentally issued body worn camera, or in lieu of the

departmentally issued BWC, where the issued device fails and/or is not functioning (e.g. malfunction, broken or battery dead). Regardless, if a member is using a department-issued body worn camera, and/or another recording device, members shall comply with the provisions of this policy, including retention and release requirements. In every event where members use any recording device aside from the department-issued body worn camera, the member shall document and explain the use in their police report (e.g. the body worn camera failed and evidence needed to be captured at that moment in time).

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

450.7 PROCESSING AND HANDLING OF RECORDINGS

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

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

Members are prohibited from intentionally erasing, altering, reusing, modifying, or tampering with audio video recordings

450.7.1 RETENTION REQUIREMENTS

- a) All recordings shall be retained for a minimum of 60 days. Incidents involving consensual contacts, aid to citizens and cold reports will be retained for one year. Recordings of incidents involving use of force by a police officer, detentions, arrests, or recordings relevant to a formal or informal complaint shall be retained for a minimum of two years and one month. Any recordings relating to court cases and personnel complaints that are being adjudicated will be manually deleted at the same time other evidence associated with the case is purged in line with the department's evidence retention policy.
- b) Recording caused by either testing or accidental activation may be deleted after 60 days.

450.7.2 REVIEW OF RECORDINGS BY A MEMBER

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

A. Incidents that involve use of force.

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

B. Incidents that result in grave bodily injury.

1. In the event of an officer-involved incident that results in grave bodily injury, including an officer-involved shooting or an in-custody death, the BWC of the involved member(s) shall be taken from him or her and secured by a supervisor, commander, or appropriate investigator, as necessary. Involved members are not to access or obtain their footage of the incident. It will be the responsibility of the investigation team's supervisor to coordinate with the involved member's supervisor to obtain footage of the incident.

2. Personnel uploading secured BWC video files shall not view the files unless authorized.

3. No member involved in the incident may view any video recordings prior to being interviewed by the appropriate investigative unit and receiving command approval.

4. Once a member's report(s) has been submitted and approved and the member has been interviewed by the appropriate investigator, the involved member will have an opportunity to review the recordings prior to the conclusion of the interview process and to provide additional information to supplement his or her statement in a separate document or separate section of the report. In no case shall a member alter a report made prior to reviewing the recording.

C. Investigatory Review

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

Recorded files may also be reviewed:

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

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

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

Investigators conducting criminal or internal investigations shall:

1. Advise the coordinator to restrict public disclosure of the BWC file in criminal or internal investigations, as necessary.
2. Review the file to determine whether the BWC file is of evidentiary value and process it in accordance with established protocols.
3. Notify the coordinator to remove the access restriction when the criminal/internal investigation is closed.

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

450.8 RELEASE OF RECORDINGS

Recorded files will be released:

(a) To the Police Review Commission in conjunction with the PRC's investigation of a civilian complaint. To the Police Review Commission Officer and/or Investigators and Board of Inquiry Members investigating a specific complaint where body worn camera footage is available. For purposes of the investigation, video will be made available to the PRC Officer and/or Investigator for their use and to facilitate pre-hearing viewing by BOI Commissioners. For purposes of the Board of Inquiry, where video review is deemed necessary by the PRC Officer and/or Investigator, or by commission members, the Department shall facilitate such viewing, at the meeting site for the Board of Inquiry, and which will be conducted by an Internal Affairs Sergeant, or other designee as directed by the Chief of Police. No one shall be allowed to make a copy of the video, or to otherwise record the video being shown, except as noted in other provisions of this policy. The department retains custody and control of the recordings, and content of the video will be subject to the confidentiality requirements of the Police Officer Bill of Rights (POBAR).

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

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

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

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

450.9 COORDINATOR

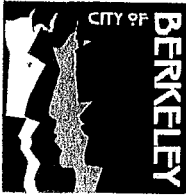
The Chief of Police or the authorized designee shall appoint a member of the Department to coordinate the use and maintenance of portable audio/video recording devices and the storage of recordings, including (Penal Code § 832.18):

- (a) Establishing a system for uploading, storing and security of recordings, including for video recordings made using personally-owned recording devices .
- (b) Designating persons responsible for uploading recorded data.
- (c) Establishing a maintenance system to ensure availability of operable portable audio/video recording devices.
- (d) Establishing a system for tagging and categorizing data according to the type of incident captured.
- (e) Establishing a system to prevent tampering, deleting and copying recordings and ensure chain of custody integrity.
- (f) Working with counsel to ensure an appropriate retention schedule is being applied to recordings and associated documentation.
- (g) Maintaining logs of access and deletions of recordings.

450.10 SURVEILLANCE

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

Agenda item 9. b. i)
PRC 4-26-17 meeting
from Perezvclerz



Police Review Commission (PRC)

C. Challenge of BOI Commissioner

1. Basis for Challenge

A Commissioner who has a personal interest, or the appearance thereof, in the outcome of a hearing shall not sit on the Board. Personal interest in the outcome of a hearing does not include political or social affiliations. Examples of personal bias include, but are not limited to: a) a familial relationship or close friendship with the complainant or subject officer; b) witnessing events material to the inquiry; c) a financial interest in the outcome of the inquiry; d) a bias for or against the complainant or subject officer e) making statements about the complainant, subject officer and or allegations outside of the hearing and deliberation process.

2. Procedure

a. Within 7 calendar days from the date of mailing of the Board of Inquiry hearing packet, which includes the names of the Commissioners constituting that Board, the complainant or the subject officer(s) may file a written challenge for cause to any Commissioner. Such challenge must specify the nature of the conflict of interest.

b. The PRC Officer or his/her designee shall contact the challenged Commissioner within 1 calendar day (24 hours) after receipt of the challenge.

c. If the Commissioner agrees, the PRC Officer or his/her designee shall ask another Commissioner to serve.

d. If the Commissioner does not agree that the challenge is for good cause, PRC Officer or his/her designee shall convene a special meeting to hear the challenge to the commissioner. In order for the challenge and removal petition of the commissioner to be granted, both commissioners must agree that the challenge is for good cause using the clear and convincing standard. If the challenge is granted the PRC or his/her designee shall inform the challenged Commissioner and ask another to serve. If there is not an unanimous agreement by the two other sitting commissioners, the challenged commissioner will be allowed to serve.

e. All materials pertinent to the challenge shall be submitted no later than 5 calendar days to the PRC officer and board commissioners before the special meeting to hear the challenge is convened. Both the challenged commissioner and the subject officer's representative or complainant will be able to read the argument and counterargument to the challenge and be given the opportunity to respond in writing 2 days before the hearing is convened.

f. All parties will be allowed the opportunity to present arguments, witness testimony and answer questions as part of the hearing process.

g. If a challenge to a Commissioner is rejected, and the Commissioner serves, the written challenge and the Commissioner's written response shall be part of the record of the complaint.

3. Replacement of Commissioners Any Commissioner who is unable to serve for any reason shall be replaced by another Commissioner, except in cases involving a death, at which time the full commission will sit as a board.

4. A challenge to a commissioner that is granted at the request of the subject officer shall toll any BPD disciplinary time period.

Agenda Item 9. b. ii)
PRC 4.26.17 meeting
Tom Bernstein

C. Challenge of BOI Commissioner

1. Basis for Challenge: A Commissioner who has a personal interest, ~~or the appearance thereof,~~ in the outcome of a hearing shall not sit on the Board. Political or social attitudes or beliefs are not personal interests as construed by this section, and shall not serve as the basis for a challenge. Personal interest in the outcome of a hearing does not include political or social attitudes or beliefs. Examples of personal bias-interest that may serve as the basis for a challenge include, but are not limited to:

- a) a familial relationship or close friendship with the complainant or subject officer;
- b) witnessing events material to the inquiry;
- c) a financial interest in the outcome of the inquiry;
- d) a bias for or against the complainant or subject officer.

2. Procedure

a. Within 7 calendar days from the date of mailing of the Board of Inquiry hearing packet, which includes the names of the Commissioners constituting that Board, the complainant or the subject officer(s) may file a written challenge for cause to any Commissioner. Such challenge must specify the nature of the conflict of interest.

b. The PRC Officer or his/her designee shall contact the challenged Commissioner as soon as possible after receipt of the challenge.

c. If the Commissioner agrees, PRC Officer or his/her designee shall ask another Commissioner to serve.

d. If the Commissioner does not agree that the challenge is for good cause, the BOI will be convened within three days to hold a hearing on the issue of the challenge to the BOI commissioner. Both the party alleging the challenge and the challenged commissioner will be provided an opportunity at this hearing to present evidence and argument before the remaining two commissioners. Evidence shall be taken at this hearing in accordance with the provisions outlined in section VII E below. After evidence and argument have been received, the remaining two commissioners will deliberate in closed session to determine whether the movant has established by a preponderance of the evidence that the challenged commissioner has a personal interest in the outcome of the hearing. If PRC Officer or his/her designee shall poll the other members of the Board and, if both agree that the challenge is for good cause, the PRC officer shall inform the challenged Commissioner and ask another to serve.

e. If a challenge to a Commissioner is rejected, and the Commissioner serves, the written challenge and the Commissioner's written response shall be part of the record of the complaint.

Agenda item 9.b.ii)
PRC 4.26.17 meeting
from Bernstein

3. Summary Disposition

a. Summary Dismissal

After reviewing the Hearing Packet, the BOI may summarily dismiss any or all of the allegations that it finds clearly without merit, by unanimous vote. Such a motion by be brought, on the recommendation of the PRC Officer or Investigator, its own motion, or that of the subject officer. Parties to the complaint shall be notified of the motion for summary dismissal, and may appear to argue for or against summary disposition. The motion for summary dismissal shall only be granted if the BOI finds that even if every fact alleged by the complainant were true, the allegations still could not be proven by clear and convincing evidence.

b. Summary Affirmation

After reviewing the Hearing Packet, the BOI may summarily sustain any or all of the allegations that it finds clearly meritorious, by unanimous vote, on the recommendation of the PRC Officer or Investigator, or its own motion. The subject officer shall be notified of the summary affirmation, and may appear to object to the summary affirmation, which shall not occur over the subject officer's objection. The motion for summary affirmation shall only be granted if the BOI finds that even if every fact alleged by the subject officer were true, the allegation would be proven by clear and convincing evidence.



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.

THE RIGHT TO WATCH

PROPOSAL TO REVISE: GENERAL ORDER W-01

In recent years, the U.S. Supreme Court has ruled that , “the First Amendment protects a program of advancing police accountability by openly audio recording public actions of on-duty police officers without their consent.” The purpose of this General Order is to adopt policies and procedures regarding a citizen’s right to observe, photograph or video record officers during the course of the officers’ public duties that reflect these clarifications.

POLICY

It shall be the policy of the Berkeley Police Department to place the least possible restriction on public observation, photographing or video recording of police officers’ performance of their duties, while ensuring the safety of the public and the officers. The “least possible restriction” means that the officer’s mindset should be to only limit observation if necessary for law enforcement purposes. In terms of witnessing, this order is a time, place and manner restriction on speech.

It is Departmental policy that any restriction an officer imposes on public observation of police officer conduct should be narrowly tailored to meet legitimate law enforcement purposes.

In all instances, it is expected that officers will conduct themselves in a professional manner, exercising good judgment and treating all persons courteously. Officers should restrict the practice of requesting that onlookers withdraw only to those instances where a potential threat to safety is involved.

PROCEDURES

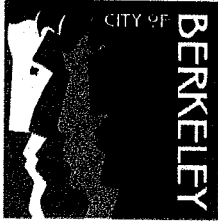
It is the policy of this Department that persons not involved in an incident be allowed to remain **in the immediate vicinity** to witness stops, detentions and arrests of suspects occurring in public areas, except under the following circumstances:

1. When the safety of the officer or the suspect is jeopardized.
2. When persons interfere or violate law.
3. When persons threaten by words or action, or attempt to incite others to violate the law.

Citizens also have the right to communicate with the detained person, provided, however:

1. that the observer does not interfere physically or verbally with the investigation being conducted by the officer. Penal Code Section 148 prohibits delaying or obstructing any peace officer engaged in the duties of his/her office.

2. that the observer's actions or communications do not jeopardize the safety of the officer conducting the inquiry nor the safety of the person who is the subject of the officer's attention. An officer may instruct an observer to maintain a safe distance from the scene, with the understanding that what constitutes a "safe" distance may vary depending on the circumstances.
3. If the conditions at the scene are peaceful and sufficiently quiet, and the officer has stabilized the situation, persons shall be allowed to approach close enough to overhear the conversation between the suspect and the officer, except when:
 - i. **The suspect** objects to persons overhearing the conversation.
 - ii. There is a specific and articulable need for confidential conversation for the purpose of police interrogation.



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.

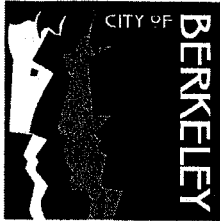
Please agendaize this topic for discussion by the commission and inform the members that they must take all steps needed to meet this direction. As stated in the Commissioners' Manual, it is the responsibility of the commission members, not staff, to draft the content of reports to Council. This responsibility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

] not
true
for
PRC

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

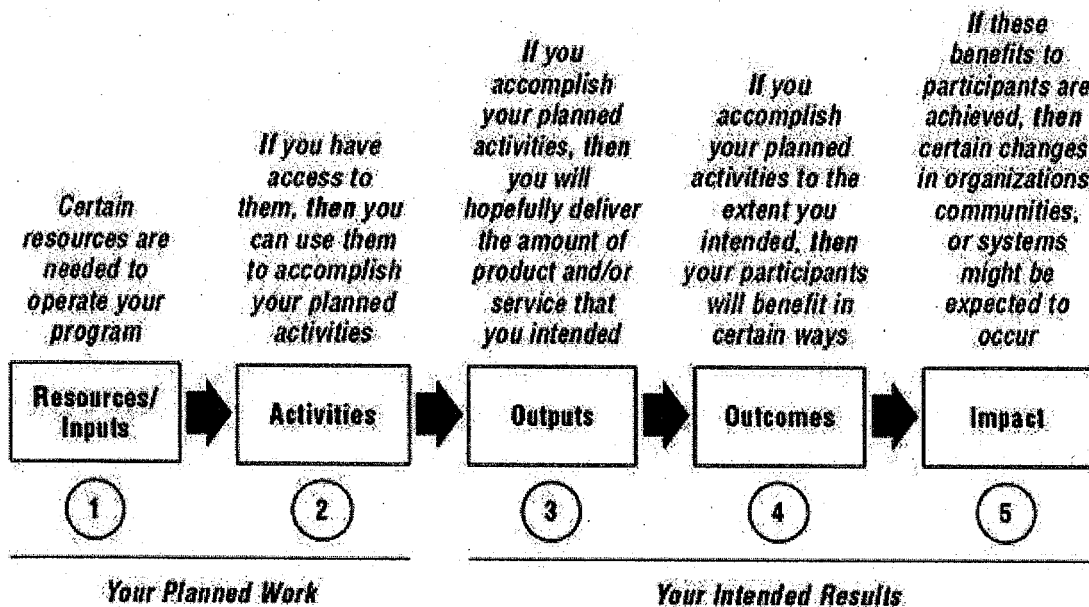
Attachments:

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)

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Berkeley Police Department

Wednesday April 19th, 2017 :: 04:41 p.m. PDT

 Forward

3

Advisory **Berkeley PD Training In North Berkeley**

On April 20, 2017 between 1:00 and 3:00pm, members of the Berkeley Police Department's Operations Division will be conducting training on the 2400 block of Le Conte Avenue. During the training, blank training rounds will used. The community should not be alarmed by the sound of simulated gunfire or the presence of numerous police cars and ambulances.

Traffic on Scenic Avenue (South of Virginia Street and North of Ridge Road) will be closed to through traffic between 12:45pm and 3:30pm.

Questions regarding the training may be directed to Sergeant Fomby at (510) 981-5821.

Address/Location
Berkeley Police Department
2100 Martin Luther King Junior Way
Berkeley, CA 94704

Contact
Emergency: 9-1-1
Non-emergencies: 510-981-5900

More Messages

[See more messages from Berkeley, California »](#)

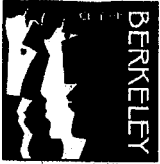
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Enter a town, zip code or address

For help, reply **HELP** to 888777. To cancel, reply **STOP** to 888777. No charge but Message & Data rates may apply. Message frequency varies. More info at [nixle.com](#). AT&T, T-Mobile®, Sprint, Verizon Wireless and most other carriers are supported. Contact customer support at [support@nixle.com](#)

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POLICY COMPLAINT FORM

Police Review Commission (PRC)
 1947 Center Street, 1st Floor, Berkeley, CA 94704
 Website: www.ci.berkeley.ca.us/prc/
 E-mail: prc@ci.berkeley.ca.us
 Phone: (510) 981-4950 TDD: (510) 981-6903 Fax: (510) 981-4955

Date Received:

4-4-17

PRC CASE #

2415

1

Name of Complainant: GOTTSCHALK KARLA
Last First Middle

Mailing Address: 520 Frederick St 13 SF CA 94117
Street City State Zip

Primary Phone: 808 238-4287 Alt Phone: ()

E-mail address: counsel@unseen.is

Occupation: Trustee Gender: NONE Age: 67
But I have a sex

Ethnicity: Asian Black/African-American Caucasian
 Latino/Hispanic Multiethnic: Other:

2

Identify the Berkeley Police Department (BPD) policy or practice you consider to be improper or would like the Commission to review.

TARGETING INDIVIDUALS BY LOOK — AGE taken for poor, race, Gender, Sex, CLOTHING and other physically observable look not necessarily even behavior but which puts an individual in the victim position for violation of civil rights without legal justification and under color of Law

3

Location of Incident (if applicable) Parking across from closed business

Date & Time of Incident (if applicable) See IA17-0014

Provide a factual description of the incident that forms the basis of your complaint. Be specific and include what transpired, and how the incident ended.

IN IA17-0014

4

What changes to BPD policy, practice, or procedure do you propose?

To STOP TARGETING OF INDIVIDUALS BY the way they look and the abuse of discretion under color of law by making up facts and or laws - not misquoting - knowingly in order to violate CIVIL RIGHTS of people who are not the officers color, age, sex, orientation, gender or any other non-legal reasons

5

Use this space for any additional information you wish to provide about your complaint. (Or, attach relevant documentation you believe will be useful to the Commission in evaluating your complaint.)

I expect to file suit after notice of intent to sue if I cannot get these unlawful policies, procedures or lack of discipline and cover-ups of unlawful acts of abuse of discretion under color of law by Berkeley Police Officers

6

CERTIFICATION

I hereby certify that, to the best of my knowledge, the statements made on this complaint are true.

Karla Gathchalh
Signature of Complainant

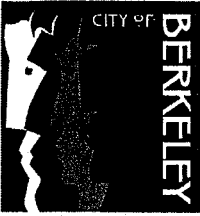
8/31/17
Date

7

How did you hear about Berkeley's Police Review Commission?

- Internet
- Publication: _____
- Referral: _____
- Other: _____

Eileen Luna, a colleague in the Bar of California's former PRC investigator.



Office of the City Manager

April 18, 2017

To: Honorable Mayor and
Members of the City Council

From: *DK* Dee Williams-Ridley, City Manager

Subject: April 15, 2017 Demonstration

Please see the attached report from Police Chief Andrew Greenwood regarding the demonstration that took place in Civic Center Park last Saturday, April 15, 2017. If you have any questions, please contact me.

Thank you.

Attachment

cc: Department Directors
Timothy Burroughs, Assistant to the City Manager
Tasha Tervalon, Assistant to the City Manager
Matthai Chakko, Assistant to the City Manager / Public Information Officer

April 17, 2017

To: D. Williams-Ridley, City Manager

From: A. Greenwood, Chief of Police

Re: **INFORMATION FOR MAYOR, COUNCIL AND COMMUNITY; APRIL 15 DEMONSTRATION**

On Saturday, April 15, 2017, a demonstration took place in and around Civic Center Park, and for a period on Center St., and at the intersection of Center/Shattuck Ave. I wanted to provide additional information to share with our elected officials and our community.

This non-permitted event attracted several hundred demonstrators and counter-demonstrators. Demonstrators arrived early in Civic Center Park. Part of the City's preparation included a one-day administrative regulation designed to allow for the peaceful expression of free speech. Those regulations prohibited anything that could be used as a weapon inside the park and mandated restrictions on entry and exit. These rules allowed the City to configure the park with temporary fencing to support separation of the demonstrators and counter-demonstrators. Controlled access points were created and staffed by police as resources allowed.

We found that once again, large elements of the factions arrived in the area armed and prepared to fight. The park strategy helped police to confiscate dozens of weapons, including sticks, wooden dowels, poles, a stun gun, mace, knives, bear spray, an axe handle, and pepper spray. Over the course of the morning and afternoon, groups engaged with each other, taunting and occasionally assaulting one another. Late in the afternoon, crowds moved up Center St., where there were some assaults between opposing demonstrators, and traffic was blocked, the crowds ultimately dispersed after a targeted arrest, which was followed with police peacefully clearing people from the street to the sidewalks without any use of force. Our strategy focused on people committing criminal actions, and numerous arrests were made. The conflicts resulted in considerable media coverage and attention, though, at this time, we're not aware of any vandalism to downtown businesses or injuries to anyone not connected to the events. Outside of the area of Civic Center Park, impacts on the community were minimal, as downtown crowds came for movies, theater and other events, as on any given Saturday.

There were twenty arrests. That included two people who BPD had identified as being part of March 4 violence and were identified and arrested from within the crowd. Berkeley Fire and Police responded to eleven injuries, of which seven were transported. As experienced on March 4, not all injured victims wished to cooperate with criminal investigations.

In addition to arrests made on Saturday, we are conducting several follow-on investigations, focused on identifying and apprehending suspects who committed violence and vandalism

At least eight officers were injured, including several reporting hearing loss due to illegal explosives thrown at them, exposure to pepper spray and a knee injury. Investigations into several felonious assaults is focusing on identifying and apprehending the suspects in these cases.

Planning prior to the event was extensive, and informed by our experience from the March 4 demonstration. Staffing was increased significantly. In preparing for the event, Police and City officials met with and/or communicated with various stakeholders. These included BUSD officials, the Downtown Business Association, the Ecology Center Farmer's Market, and others. This pre-event communication strategy provided stakeholders with information upon which to base their own decisions with regards to preparing for the 15th. We provided information to the community through Nixle, Nextdoor, and Twitter, before, during and after the event.

Coordination within various City of Berkeley Departments was extensive, and collaboration amongst departments (e.g. Berkeley Fire Department, Public Works, Parks, the City Attorney's office, the City Manager's Office) was again a key element in our City's work to manage this event.

As mentioned earlier, the City used a number of measures to work to support freedom of speech, while reducing opportunities for violent contact. The one-day Administrative rule allowed officers to control access points to the park and prohibit people from bringing in items which could be used as weapons. Fencing was used to delineate areas for each faction. Arrests were made on several occasions. When possible, we also video-recorded assaults to gather evidence in criminal investigations to allow us to identify and arrest suspects. This strategy has yielded additional arrest warrants and arrests.

Pre-event outreach with event organizers allows us to adequately prepare for events, provide guidance on how to have a safe event, always with a goal of protecting and facilitating free speech, while keeping our community safe. These pre-event discussions drive our planning processes, and inform our messaging to the community.

In this case, organizers did *not* participate in planning efforts generally associated with safely-run Special Events. While there was respectful communication involving the organizer and two groups of supporters, this was not a substitute for participating in the Special Events planning process. This falls far short of the discussions which normally occur as part of the Special Events planning process, where plans for adequate security, first aid, and contingencies are routinely developed and mutually agreed upon.

On April 15, groups initially remained separated in the park. At one point, about three dozen "antifa" entered the park over fencing, ultimately confronting demonstrators, and escalating violence, with fights and assaults breaking out. At one point, a person sprayed a large amount of chemical irritant, possibly pepper-spray, which exposed crowd members and police officers to the irritant. I authorized a request for mutual aid through the Alameda County Mutual Aid Coordinator, who had been advised of the event well in advance. The Oakland Police

Department responded to the County coordinator's request. OPD provided us with vital support, including providing security for City Hall, around which much of the confrontations were taking place.

The groups migrated around the park and onto the surrounding streets. During the course of the event, we saw crowds on Allston Way, Milvia and Center, and on Center up to just east of Shattuck. A number of assaults between demonstrators occurred in this immediate area, and demonstrators also blocked traffic in the intersections through their presence. Ultimately, the crowd, reduced in size, moved to the sidewalks after a targeted arrest, and a line of officers directed people back to the sidewalk. Traffic was opened up, and there were no further incidents of violence.

Our responsibility in this situation is to act with deliberation, and keen awareness of context, of what actions we're taking and why, and of what effect or reaction our actions may generate. We are rightly expected to not get swept into the volatility of the crowd. This is in keeping with the values of our community, and the best-informed practices of Law Enforcement across the country, in a time where community trust in our actions is absolutely essential.

Again, there were multiple assaults, all between elements of the crowd. People on both "sides" actively sought confrontations with those with opposing views. While our messaging to peaceful observers and media members asked that people separate themselves from those committing violence, crowds of onlookers and video recorders were suffused throughout the event, frequently placing themselves in very close proximity to those who were fighting. This phenomenon again made managing the event considerably more complex for our Department.

A fight within a volatile crowd is not a simple matter in which to intervene. Intervening on intermixed groups of armed participants fighting or eager to fight presents challenges. Intervention requires a major commitment of resources, a significant use of force, and carries with it the strong likelihood of harming those who are not committing a crime.

In the midst of these dynamics, our officers are held fully accountable for the legal, reasonable, and judicious use of force, while bringing about the least harm possible.

With these factors in mind, and instead of unnecessarily exacerbating the problem, we arrested individuals when conditions best favored the safety of all involved. Berkeley Police worked to identify those committing violence, even when suspects' actions amidst the cover of a crowd did not allow immediate apprehension.

During the course of this event, BPD made twice as many arrests as on March 4, and it's likely we will end up arresting more individuals through our investigations.

The primary vandalism which occurred impacted the Center Street Parking Lot construction site, which was broken, and the Berkeley High Community Theater exterior wall on Allston Way, was vandalized with anarchist symbols and graffiti, and a large glued-on poster.

A note on Mutual Aid: We requested Mutual Aid after our resources were essentially completely deployed. Mutual Aid requests are made to the Alameda County Mutual Aid coordinator, who then notifies agencies to request personnel. Any response to a call for assistance can take considerable time to arrive, be briefed, and be deployed—generally at least an hour. The Oakland Police Department responded, with approx. 180 personnel, including squads of officers, motorcycle officers, supervisors and commanders. Community members may have seen the convoy of OPD responders, as they responded en masse. OPD support allowed us to focus on targeted arrest activity, while ensuring that, for example, City Hall was secured.

It's important to note that no *uninvolved* community members were injured, and there were no reports of violence or vandalism outside of the Center St. area.

Substantial criminal investigations are continuing. A website has been established for those who wish to upload photos or videos: <http://bit.ly/berkvideo>.

We anticipate releasing photographs of currently unidentified suspects to the public in the next few days. We will be seeking the public's assistance in identifying additional suspects.

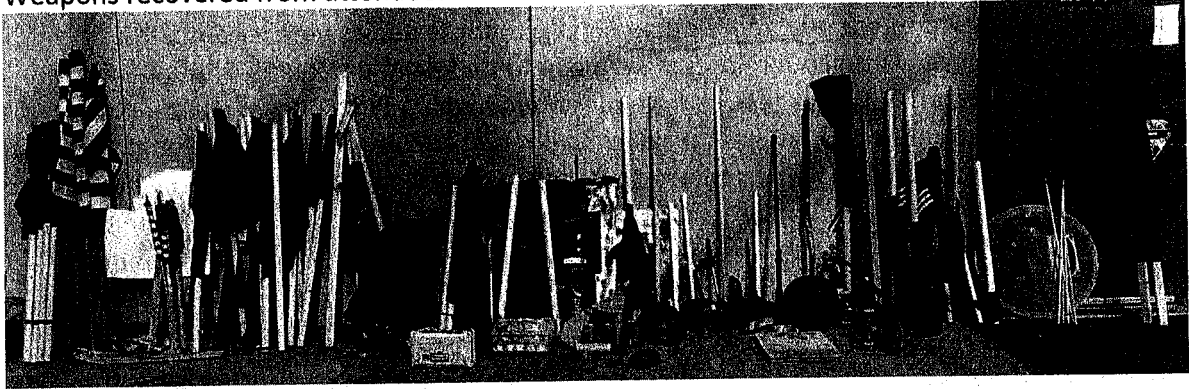
If constituents ask about reporting a crime related to the riot, please have them do so by calling 510-981-5900.

The photos below are attached for your information.

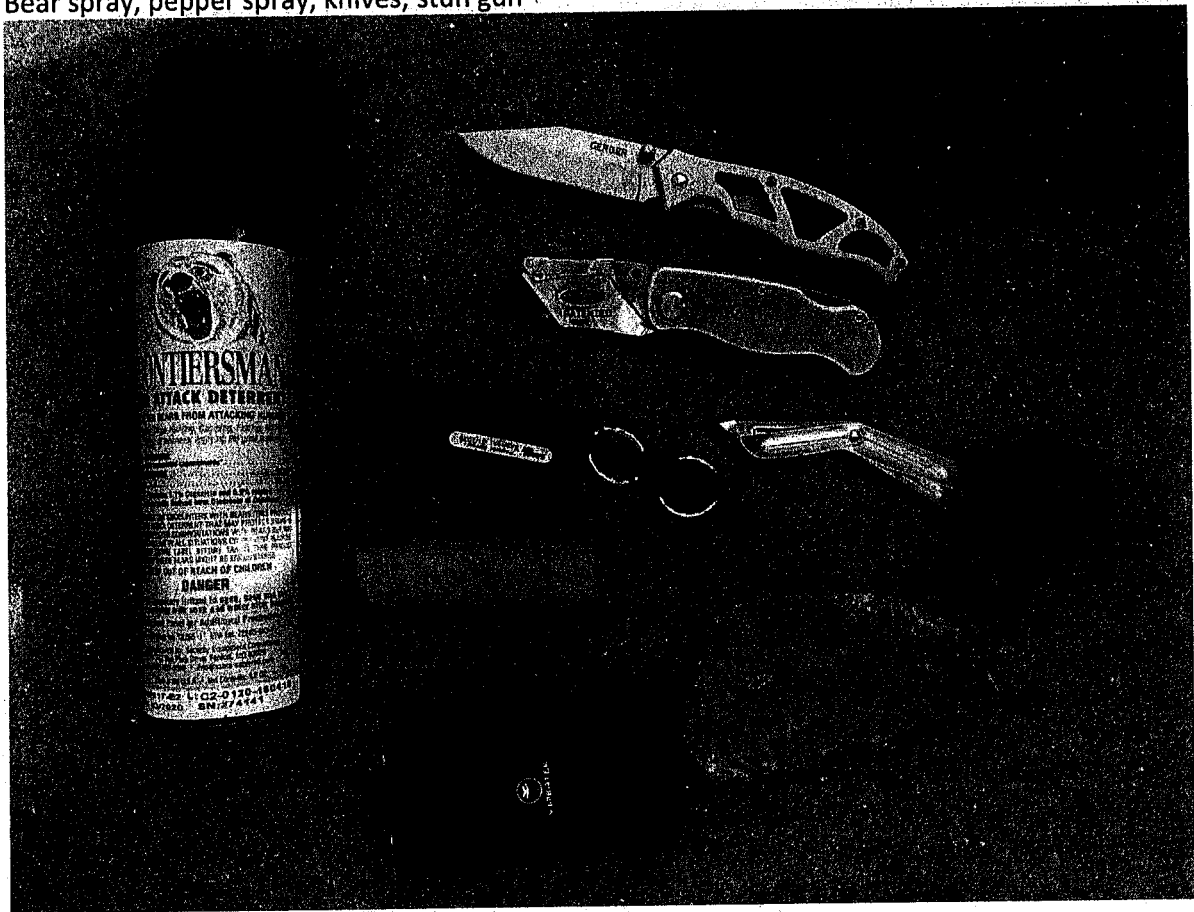


Explosive thrown at BPD officers detonates.

Weapons recovered from attendees



Bear spray, pepper spray, knives, stun gun



Functioning stungun

