



Kate Harrison  
Councilmember District 4

## **REVISED AGENDA MATERIAL for Supplemental Packet 2**

**Meeting Date:** April 27, 2021

**Item Number:** 32

**Item Description:** Police Equipment and Community Safety Ordinance

**Submitted by:** Councilmember Harrison

The item has been amended to:

- Clarify the definition of “Deployed” following consultation with the Berkeley Police Department and City Attorney’s office. The new definition of deployed specifically includes officers affecting some response during a Special Response Team deployment;
- Clarify in the transmittal that the enforcement provisions of the ordinance parallel the Surveillance Ordinance and the applicability of the ordinance during operations to secure an area.



Kate Harrison  
Councilmember District 4

ACTION CALENDAR

April 27, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmembers Harrison, Bartlett and Taplin

Subject: Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

RECOMMENDATION

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code to Regulate Police Acquisition and Use of Controlled Equipment.

BACKGROUND

The acquisition and use of certain police equipment and weapons pose grave threats to civil liberties and public health and safety. It is in the public interest that acquisition of any police equipment with the potential to impose physical or psychological harm to community members should be thoroughly reviewed by the Police Accountability Board (PAB) or the Police Review Commission until such time that the new board is established, and Council. Legally enforceable safeguards, including transparency, oversight, and accountability measures, must be in place to protect the public's welfare, safety, civil rights, and civil liberties before certain categories of equipment are funded, acquired, or used.

The Council already relies on the Police Review Commission to review certain Police equipment acquisitions and uses. In addition, the Council has imposed limits directly, for example: limiting further acquisition of military material from the Department of Defense 1033 Program, acquisitions of armored vehicles and surveillance equipment, the use of pepper spray in crowd control situations, and the use of tear gas. However, the City currently lacks a comprehensive framework for reviewing and regulating the acquisition of a broad spectrum of potentially problematic equipment.

The Oakland Police Commission is also currently in the process of recommending to the Oakland City Council a new policy inspired by Berkeley's Surveillance Technology Ordinance and California Assembly Bill AB 3131, a prior attempt to regulate military equipment statewide, to thoroughly consider the proposed acquisition and use of potentially problematic police equipment *before* community members can be harmed.

The list of Controlled Equipment defined in Berkeley's ordinance is in part inspired by equipment definitions President Obama's Executive Order 13688 and California

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

Assembly Bill AB 3131. The list of equipment is not exhaustive and may be added to or subtracted from as needed.

President Biden is reportedly in the process of readopting President Obama's executive order limiting transfers of military equipment to police departments as well as requiring local oversight and approval of such acquisitions. This ordinance operates under the same premise: local governments should oversee the acquisition and use of equipment that has the potential to impact public safety and civil liberties.

Deployment of such equipment, regardless of whether it is actually fully utilized, may have a significant impact on community members during police operations and crowd management and control events. For example, the deployment of militarized armored vehicles, or drones may elicit outsized fear and trauma in the populace, and ultimately contribute to a further breakdown in community-police relations.

Before the Ordinance was reviewed by the Public Safety Committee, a subcommittee of the Police Review Commission, including representative of the BPD, held extensive conversations over six full meetings, and reviewed every concept in the proposed ordinance. The full Commission approved the Ordinance. It was also carefully considered by the Public Safety Committee for more than 120 days. The Ordinance is a product of thorough and thoughtful consideration by various policy making bodies and is ready for consideration and adoption by the full Council.

### **Definition of Controlled Equipment**

The proposed Ordinance, as reviewed by the Police Review Commission and the Council's Public Safety Committee, defines the following equipment types as Controlled Equipment:

- Vehicles that are built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.
  - Police versions of standard passenger vehicles are specifically excluded.
- Multi-purpose wheeled vehicles that are: built to operate both on-road and off-road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; or built or modified to use a breaching or entry apparatus as an attachment.
  - Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.
- Tracked vehicles that are built or modified to provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

- Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.
- Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.
- Firearms of .50 caliber or greater.
- Ammunition of .50 caliber or greater.
- Specialized firearms, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, “bean bag,” rubber bullet, or specialty impact munition (SIM) weapons, and equipment used to disperse chemical agents.
- Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- Explosives, pyrotechnics, such as “flashbang” grenades, and chemical weapons such as “teargas,” CS gas, pepper spray, and “pepper balls”.
- Batons 30 inches or longer.
  - Batons 30 inches or longer in length shall only be deemed “deployed” when used for management or control of crowds.
- Active area denial weapons, such as the Taser Shockwave, microwave weapons, and water cannons and the Long Range Acoustic Device (LRAD).
- Any other equipment as determined by a majority of the City Council to require additional oversight.

**Significance of the LRAD**

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

Despite legitimate uses of the LRAD, including for Fire and Police Department dispersal orders during natural disasters and crowd events, there is still significant potential for these devices to be used in ways that could impact human health and safety. Depending on how LRAD devices are used, they can be used to project both verbal instructions and tones of various frequencies. It is the latter setting that prompts concern for public safety.

According to Popular Mechanics, LRAD devices deployed by police departments in other jurisdictions cause “horrible, nauseating pain” across the entire body, causing disorientated protesters to collapse to the ground. The setting can induce permanent hearing damage, and was originally developed by the U.S. military to deter terrorists from approaching naval ships. It has since reportedly been used during the Dakota Access Pipeline protests, the 2017 Washington D.C. Women’s March, and during various protests following the murder of George Floyd. LRADs can generate sounds up to 160 dB, despite the fact that sounds over 85 decibels cause permanent damage.<sup>1</sup>

Although BPD policy 707 explicitly forbids BPD from using the LRAD system as “a weapon,” it is unclear whether officers are forbidden from using the LRAD for non-verbal sounds in order to deter protesters from certain areas. In fact, policy section 707.4 states that the LRAD may be legitimately used to “Establish safety zones and humanely enforce permitters” in addition to communicating with protesters. Therefore, this Ordinance requires impact and use policies for LRAD devices, and annual reporting is triggered only when the device is used for purposes other than verbal dispersal communications. LRAD deployments providing lawful verbal instructions would not be reportable under this ordinance. Only the potentially most harmful uses of LRAD (non-verbal tones) would be reportable. This recent amendment responds directly to the Public Safety Policy Committee’s recommendations regarding the ordinance.

### **Ordinance Overview**

The primary concepts of the proposed Oakland and Berkeley Ordinances are as follows:

1. Controlled Equipment Use Policies and Controlled Equipment Impact Reports must be reviewed and adopted before the use of Controlled Equipment may be authorized.
2. Requires the Police Department to submit Controlled Equipment Use Policies and Controlled Equipment Impact Reports to the Police Commission for review and recommendation.

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<sup>1</sup> Lynne Peskoe-Yang, “How to Dodge the Sonic Weapon Used by Police,” Popular Mechanics, June 17, 2020, <https://www.popularmechanics.com/military/weapons/a32892398/what-is-lrad-sonic-weapon-protests/>. See also, Tyler Tracy, “Long Range Acoustic Devices (LRAD) and Public Safety,” ACENTECH, August 10, 2020, <https://www.acentech.com/blog/long-range-acoustic-devices-lrad-and-public-safety/>.

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

3. Requires the PAB to review submissions at a public hearing and determine whether such submissions warrant a recommendation to Council for adoption or rejection within 90 days.
4. Requires the City Council to ratify or reverse the PAB's recommendations following the Board's review of Controlled Equipment Use Policies.
5. Requires the Police Department to submit an annual report describing the use of authorized Controlled Equipment during the year prior.
6. Requires the PAB to review the annual Controlled Equipment report, determine whether covered equipment has complied with the standards for approval, and recommend renewal or modification of Use Policies, or the revocation of authorization for use.
7. Requires the City Council to ratify or reverse the PAB's recommendations following the Commission's review of the Controlled Equipment annual report.

The Berkeley Surveillance Ordinance model of thoroughly considering the impact of acquiring and using certain technology has served the public well since adoption in early 2018. A similar regime is appropriate for consideration of police equipment.

Similar to the Surveillance Ordinance, the item provides the Police Department with a year from the date of passage to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval. This process will assist the public, Council and Commission in better understanding the scope of controlled equipment inventory, use policies and impact. Like the Surveillance Ordinance, this ordinance does not presuppose that certain equipment is harmful or should be disallowed; it simply flags certain equipment acquisitions for further review and approval by civilian bodies.

Reporting mandated by this ordinance may actually serve the Department's fundraising goals, by creating an account of how equipment is used. Just as grants require reporting on use that are often the basis for grant renewals, tracking the legitimate uses of equipment that is often perceived by some people as militarized or controversial creates a solid basis for future funding decisions.

In cases where the department applies to acquire Controlled Equipment that is subject to a time-sensitive grant application, the PAB will have 30 days to provide a recommendation to the Council.

This ordinance does not provide any obligations on other jurisdictions providing mutual aid to Berkeley.

### **Reporting Threshold**

The ordinance requires annual reporting when Controlled Equipment is deployed. The word "deployed" is defined in the Ordinance as meaning: "to utilize, employ, or arrange Controlled Equipment for a deliberate purpose in the presence of members of the public during management or control of crowds, or to affect some response from members of

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

the public during any operation or critical response.” Deploy does not mean storing controlled equipment such as a baton or pepper spray on an officer’s belt, or carrying a Colt M4 rifle in a vehicle. Deploy is clearly defined in an active sense in the presence of community members during any crowd control situation. However, during any critical response or operation, the definition of “deployed” is modified to be limited to only situations when equipment is deployed to affect some response from members of the public. The clear and concise definition of “Deployed” was added to the ordinance in response to the Public Safety Policy Committee review process.

Reports will include specific data about the geographic location of the deployment of Controlled Equipment. This will assist the Department, PAB and Council in monitoring whether there are any disparities in how such equipment is deployed.

The reporting requirements of this ordinance are distinct from the Use of Force Policy. For example, Use of Force reporting only occurs when force is used (except in the case of pointing firearms in the presence of an individual), whereas this ordinance is concerned with the deployment of equipment even if force does not result. In addition, it may be difficult, if not impossible, to know controlled equipment was used in a Use of Force event because the report is focused on the force used and not on the equipment itself. Finally, this policy includes important reporting requirements such as geographic location and type of event (e.g., in a demonstration, against an individual, in hostage situations), which will help facilitate an understanding of how and how often Controlled Equipment is being deployed across the City and whether inequities exist. The Use of Force reporting scheme does not yet include such geographic details.

**Reporting Pursuant to Use of Force Policy vs. Controlled Equipment Ordinance**

	<b>Use of Force Policy 300</b>	<b>Proposed Controlled Equipment Ordinance</b>
Reporting Threshold	<ul style="list-style-type: none"> <li>Levels 1-4 uses of force;</li> <li>Use of spit hoods and body wraps;</li> <li>drawing or discharging a firearm</li> </ul>	Utilization or employment of Controlled Equipment for a deliberate purpose in the presence of members of the public during management or control of crowds, or to affect some response from members of the public during any operation or critical response.
Publicly Available Reporting	<ul style="list-style-type: none"> <li>Annual and quarterly reports including analysis of use of force incidents with demographic details (e.g., race, gender and age)</li> <li>Types of Force delineated in Levels 1, 2, 3, and 4.</li> <li>Identification of any trends in force used</li> <li>Training needs/ recommendations</li> <li>Equipment needs recommendations</li> <li>Policy revisions recommendations</li> </ul>	<ul style="list-style-type: none"> <li>Annual report including the following information for the immediately preceding calendar year:                             <ul style="list-style-type: none"> <li>Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department’s possession.</li> <li>A summary of how Controlled Equipment was used. For the purposes of annual reports, “use” of equipment shall refer to equipment that is Deployed, not to transfers of location or placement of equipment inside Department vehicles.</li> <li>If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police</li> </ul> </li> </ul>

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

		<p>Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.</p> <ul style="list-style-type: none"> <li>○ A summary of any complaints or concerns received concerning Controlled Equipment.</li> <li>○ The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.</li> </ul>
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**Examples of Controlled Equipment Deployment Pursuant to the Ordinance**

The following are examples illustrating the intent of the Ordinance with respect to what is not and what is not considered deployment of Controlled Equipment:

- Carrying pepper spray or a baton during crowd management in the presence of the public, or during an operation, in a passive or inactive fashion such as on a belt or on the back with a strap, **is not a deployment** of controlled equipment:



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- Holding a specialized rifle ~~during an active shooter situation~~ to secure an area, but not to affect a response from a member of the public **is not a deployment**:

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<sup>2</sup> Photo by Michael Tracey, "NYPD Officer Seen Carrying a Large Pepper Spray Canister at the Six-Month Anniversary of Occupy Wall Street," A Great Big City, March 17, 2012, <https://agreatbigcity.com/nypd-officer-seen-carrying-a-large-pepper-spray-canister-at-the-six-month-anniversary-of-occupy-wall-street>.

<sup>3</sup> "Pepper Spray Holsters," Best Pepper Spray Online, <https://bestpeppersprayonline.com/pepper-spray-holsters/>.

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment



- Holding a specialized rifle in the presence of the public during a crowd control situation, regardless of whether it is fired or pointed **is a deployment**.



- Holding a baton during crowd management or control in the presence of the public, or during an operation, regardless of whether officers attempt to strike individuals **is a deployment** of controlled equipment:

<sup>4</sup> M. Spencer Green / AP Photo, "Chicago Gunman Kills Self at FedEx," Daily Beast, April, 24, 2017, <https://www.thedailybeast.com/cheats/2011/11/17/chicago-gunman-kills-self-at-fedex>.

<sup>5</sup> "Baton Rouge police say group stole guns and wanted to shoot officers," Reuters/Shannon Stapleton, July 13, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/07/12/authorities-suspects-who-took-guns-in-burglary-threatened-baton-rouge-area-police/>.

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment



- Holding pepper spray (as opposed to carrying on their belt or elsewhere on their person) in the presence of the public, or during an operation, in an active or deliberate manner ***is a deployment*** of Controlled Equipment:



### **Enforcement Provisions**

The ordinance, [like the Surveillance Ordinance](#), includes enforcement remedies for alleged violations ~~of the ordinance~~. [Any person or entity seeking injunctive relief against the City or any employee must first provide written notice to the City Manager by serving the City Clerk regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the court finds the City's](#)

<sup>6</sup> ABC News "Several Arrests Made Amid Black Lives Matter Protest at Mall of America," December 23, 2015, <https://abcnews.go.com/US/arrests-made-black-lives-matter-protests/story?id=35923269>.

<sup>7</sup> Katie Forbes / Kforbesphotography, "Issue 2: Columbus Voters Get Say On Civilian Police Review Board," WOSU, <https://news.wosu.org/news/2020-10-08/issue-2-columbus-voters-get-say-on-civilian-police-review-board>.

Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

~~action was arbitrary or capricious, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees, including injunctive relief, declaratory relief, writ of mandate in the Superior Court of the State of California to enforce this Ordinance and attorneys' fees. Individuals subject to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater). Violators of the ordinance may result in consequences that may include retraining, suspension, or termination, subject to due process requirements and applicable City policies.~~

**FINANCIAL IMPLICATIONS**

Staff time.

**ENVIRONMENTAL SUSTAINABILITY**

No environmental impact.

**CONTACT**

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**ATTACHMENTS:**

1. Ordinance

ORDINANCE NO. -N.S.

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

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

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

**Chapter 2.100**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

**2.100.010 Name of Ordinance**

**2.100.020 Definitions**

**2.100.030 Controlled Equipment Use Policy Requirement**

**2.100.040 Acquisition and Use of Controlled Equipment**

**2.100.050 Reports on the Use of Controlled Equipment**

**2.100.060 Enforcement**

**2.100.070 Transparency**

**2.100.080 Whistleblower Protections**

**2.100.090 Severability**

**2.100.010 Name of Ordinance**

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

**2.100.020 Definitions**

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

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

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

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

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

(3) Tracked vehicles that are built or modified to provide ballistic protection to their

occupants and utilize a tracked system instead of wheels for forward motion.

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

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

(6) Firearms of .50 caliber or greater.

(7) Ammunition of .50 caliber or greater.

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

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

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

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

(12) Batons 30 inches or longer in length.

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

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

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

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

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

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

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

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

the public.

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

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

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

(D) Except as provided below, “Deployed” means to utilize or employ Controlled Equipment for a deliberate purpose in the presence of members of the public during management or control of crowds, or to affect some response from members of the public during any [Special Response Team deployment or any other](#) operation or critical response. “Deployed” shall not mean an officer merely wearing a piece of Controlled Equipment on their belt or elsewhere on their person.

(1) Batons 30 inches or longer in length shall only be deemed “deployed” when used for management or control of crowds.

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

(F) “Police Accountability Board” means the body established by Charter Article XVIII. The Police Review Commission, established by Ordinance No. 4,644-N.S., as amended, shall serve any and all functions and duties set forth by this chapter before and until they are transferred to the Police Accountability Board pursuant to Charter Article XVIII.

### **2.100.030 Controlled Equipment Use Policy Requirement**

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

### **2.100.040 Acquisition and Use of Controlled Equipment.**

(A) Restrictions Prior to Submission and Approval

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

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

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

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

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

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

#### (B) Submission to Police Accountability Board

(1) At least 15 days prior to any public meeting to consider the adoption of any Controlled Equipment Use Policy or Controlled Equipment Impact Report, the Use Policy and Impact report shall be published for public review.

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

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

#### (C) Criteria for Police Accountability Board Recommendations

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

(a) The Controlled Equipment is needed and there is no practicably available alternative equipment which is not Controlled Equipment that is sufficient for the purposes.

(b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.

(c) The Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the Police Accountability Board's recommendation for approval for the funding, acquisition, or use of the Controlled Equipment shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need for the Police Department to take proactive steps to minimize those effects.

#### (D) Temporary Use in Exigent Circumstances

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

- (a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged under local, state or federal law;
- (b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Section 2.100.040; and
- (c) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.

#### (E) Police Accountability Board Review Required Before City Council Consideration of Approval.

- (1) The Police Accountability Board shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.
- (2) The Police Accountability Board shall present its recommendations to City Council.
- (3) Failure by the Police Accountability Board to make its recommendation on a proposal within ninety (90) days, or thirty (30) days in instances where the proposal is subject to a time-sensitive grant application, of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

#### (F) Police Accountability Board Review of Prior Recommendations

- (1) The Police Accountability Board shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year.
- (2) A Police Accountability Board recommendation to City Council that a prior approval be revoked shall be presented to Council. If City Council does not act on such a recommendation within four (4) City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment.

#### (G) Review Process for Previously-Acquired Equipment

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

(2) To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment, and the Police Accountability Board shall consider this ranking in determining the order in which to perform its review.

(H) City Council Approval Process

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

(2) If the City Council does not approve such item within four (4) regular City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.

**2.100.050 Reports on the Use of Controlled Equipment.**

(A) Annual Report on Controlled Equipment

(1) The Police Department shall submit a report on Controlled Equipment to the Police Accountability Board within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The report shall be provided no later than March 15<sup>th</sup> of each year, unless the Police Accountability Board advises the Department that an alternate date is preferred. The Department shall also make each annual report publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

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

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to equipment that is Deployed, not to transfers of location or placement of equipment inside Department vehicles.

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

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

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

(B) Compliance or Revocation of Approval

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

(2) If the Police Accountability Board determines that any Controlled Equipment has not complied with the standards for approval set forth in Section 2.100.040, it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations shall be forwarded to City Council in accordance with the approval process in Section 2.100.040.

(3) After review by the Police Accountability Board, the Police Department shall submit the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.

### **2.100.060 Enforcement.**

#### **(A) Remedies for Violations of this Ordinance**

This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in ~~his or her~~[their](#) official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees.

### **2.100.070 Transparency**

#### **(A) Disclosure Requirements**

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

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

### **2.100.080 Whistleblower Protections.**

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

### **2.100.090 Severability**

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

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.