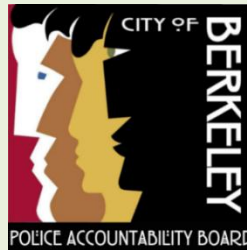


Page numbers for this agenda packet are marked in **blue** to distinguish them from the numbering within individual documents.

PUBLIC MEETING MATERIAL



**POLICE ACCOUNTABILITY BOARD
REGULAR MEETING AGENDA PACKET
SUPPLEMENTAL**

**July 22, 2026
6:30 PM**

Board Members

Joshua Cayetano (Chair)	Leah Wilson (Vice-Chair)
Randy Wells	Joshua Buswell-Charkow
Benjamin Nash	Stephanie Allan
Patrick DeTemple	Jasmina Viteskic
Dwayne Philips (Alternate)	

MEETING LOCATION

Office of the Director of Police Accountability
1900 Addison Street, Floor 3
Berkeley, CA 94704

Agenda Item Materials

Item	Description	Page
9.b.	Memorandum from Chair Cayetano titled "Item 9.b: City Council Proposal to Reinstate Use of Tear Gas" and Proposed Draft Letter to the City Council.	1

Item 9.b.

**Memorandum from Chair Cayetano titled “Item 9.b: City Council Proposal
to Reinstate Use of Tear Gas” and Proposed Draft Letter to the City
Council.**



MEMORANDUM

Date: July 21, 2026
To: Honorable Members of the Police Accountability Board (PAB)
From: Joshua Cayetano, Chair of the PAB
Subject: PAB Agenda Item 9.b. (July 22, 2026 meeting) – City Council Proposal to Reinstate the Use of Tear Gas

Recommendation:

Approve the attached draft letter to City Council urging the City Council to defer action on the proposal to reinstate tear gas until after consideration of the Berkeley Police Department's proposed revisions to Policy 300 Use of Force, highlighting key items of concern, and proposing additional policy limitations on the use of tear gas if approved.

Rationale:

Councilmember Rashi Kesarwani proposed a resolution rescinding the current ban on the use of smoke, OC spray, and tear gas by the Berkeley Police Department. The Police Accountability Board (PAB) submitted a letter to the Public Safety Policy Committee (PSPC) that questioned why re-authorization of tear gas and other chemical agents was necessary, and highlighted critical procedural safeguards and policy limitations that should be implemented if the Council ultimately re-authorized their use. The PSPC recommended that the sponsoring councilmember revise the proposal to address many of the PAB's concerns. Councilmember Kesarwani submitted an item that purported to address the PAB's concerns, but fell short in key ways, detailed further below.

The Council agendized the matter to be decided at its July 14, 2026 meeting. During the July 14 meeting, however, Mayor Ishii explained that she would like to defer the item until **after** the Council's consideration of the Department's proposed revisions to Policy 300 Use of Force. (The Department informed the Council that the current plan is for the Council to hear the item at its September 29 meeting.) The Council, however, voted 5-4 to agendize the item at its September 15, 2026 meeting. In other words, the item is

scheduled to be heard **prior to** the Council's consideration of the proposed revisions to the Department's use of force policy.

Councilmember Kesarwani's resolution proposed to re-authorize the use of tear gas by the Department's Special Response Team (SRT) in "critical incidents," which it defined as:

as rapidly evolving or complex, high-risk events posing a significant threat of death or serious bodily injury in which conventional tactics are unlikely to resolve the situation safely, including but not limited to: armed barricaded suspects refusing to exit an enclosure; suspects shooting at officers during a high-risk warrant service; hostage rescue situations; and other potential high-risk situations outside these categories that present a threat to officer or public safety.

The proposal prohibits the use of tear gas in "crowd control" situations. The proposal did not impose any additional restrictions, but instead pointed to existing policy, specifically Policy 300 (Use of Force), Policy 303 (Control Devices and Techniques), and Policy 428 (First Amendment Assemblies).

The resolution also would lift the moratorium on smoke and OC spray. Specifically, the resolution authorizes the Department to use OC spray "in crowd control situations to address: violence between opposing groups; violence committed by a specific individual against another person or an officer; directing a crowd away from an area of active violence; or when distance is needed for officers repositioning away from a violent crowd."

The revised proposal was submitted to the Rules and Agenda Committee without notice to the PAB, and the PAB never considered whether Councilmember Kesarwani's revised resolution incorporated the PAB's recommendations in a satisfactory manner.

Over the weekend, because it appeared inevitable that the Council would in fact take final action on July 14, I submitted a letter in my personal capacity to the City Council explaining my concerns with the item as drafted.

** **

Last week, I discussed my concerns with the Department's representatives during our working group meeting on the Use of Force policy revisions. They provided some helpful context that answered some of my questions, reassured me that they were not seeking to authorize tear gas in any crowd control context, and explained some of the rationale for seeking its use in the three situations outlined in the item. With the benefit of that conversation, I submit a revised letter for the Board's consideration that raises the following concerns with the proposal to reinstate the use of tear gas:

1. The Department's three uses of tear gas in 40 years demonstrate that tear gas does not meet the standards imposed by California's AB 481.
 - a. The Department has not demonstrated a need.
 - b. Berkeley's own history of use of tear gas demonstrates the lack of compliance with policy and impact on civil liberties.
2. The proposal would create an ambiguous standard for the use of tear gas that is not tailored to the use cases offered to justify its reauthorization.
3. The limitations in the proposed resolution are not sufficient particularly because:
 - a. the resolution's safeguards are borrowed entirely from Policy 300 (Use of Force), Policy 303, and Policy 428—but Policy 300 is currently undergoing a wholesale rewrite by the Department that would expand rather than narrow officer discretion;
 - b. the resolution and the underlying policies repeatedly emphasize that less-lethal tools, including tear gas, may never be used "indiscriminately against a crowd," but tear gas and other chemical agents by definition cannot be used in a targeted manner.
4. The proposed resolution must be narrowly tailored to the specific use cases and include clear policy language implementing additional safeguards.

The letter explicitly recommends that the Council express approval of the PAB's recommended policy language and defer final action until the Department submit its proposed use of force policy revisions so that the item can be considered with the benefit of full context.

Attachment:

Draft letter to the City Council regarding Item 24a on the July 14, 2026 Council agenda, titled "Resolution Reinstating the Berkeley Police Department's Ability to Use Tear Gas for Critical Life-Threatening Incidents Only and Lifting the COVID-19 Moratorium on Smoke and Oleoresin Capsicum (OC) Spray."

See also, in PAB Agenda packet for July 22, 2026:

1. Councilmember Kesarwani's Proposal Submitted as Item 24a on the July 14, 2026 Berkeley City Council Agenda. (Packet p. 114)
2. Councilmember Blackaby's Supplemental Material Submitted for Item 24a on the July 14, 2026 Berkeley City Council Agenda. (Packet p. 200)
3. Police Accountability Board Memorandum to the Public Safety Policy Committee, Proposed Resolution to Reinstatate Berkeley Police Department's Use of Tear Gas and Related Chemical Agents (January 26, 2026). (Packet p. 283)

ATTACHMENT 1

Draft letter to the City Council regarding Item 24a on the July 14, 2026 Council agenda, titled “Resolution Reinstating the Berkeley Police Department’s Ability to Use Tear Gas for Critical Life-Threatening Incidents Only and Lifting the COVID-19 Moratorium on Smoke and Oleoresin Capsicum (OC) Spray.”



Joshua Cayetano
Chair of the Police Accountability Board
JCayetano@berkeleyca.gov

July 21, 2026

VIA ELECTRONIC MAIL [Email]

Honorable Mayor and Members of the City Council
Council@berkeleyca.gov
2180 Milvia Street,
Berkeley, CA 94704

Re: Item 24a (July 14, 2026 Council Agenda)—Resolution Reinstating the Berkeley Police Department's Ability to Use Tear Gas for Critical Life-Threatening Incidents Only and Lifting the COVID-19 Moratorium on Smoke and Oleoresin Capsicum (OC) Spray

Dear Honorable Mayor and Councilmembers,

The Police Accountability Board (PAB) writes to raise its concerns with Councilmember Kesarwani's proposal to reinstate the Berkeley Police Department's authority to use tear gas, smoke, and OC spray, and recommend that the Council adopt the PAB's proposed revisions to the scope of authorized tear gas use and defer final action on the proposal until after the submission of the proposed revisions to Policy 300 (Use of Force). As drafted, the resolution's vague language and lack of definite policy safeguards opens the City to liability and undermines public trust in the City's promise to only use chemical agents like tear gas in the very narrow situations highlighted in the recommendation.

1. The three uses in 40 years demonstrate that tear gas does not meet the standards imposed by California's AB 481.

As the Board's earlier letter to Council on this proposal explained, state law only permits a department to acquire or use a chemical agent like tear gas in limited circumstances. California's AB 481 instructs that the City shall only approve a policy to use military equipment like tear gas if it determines:

- a) The military equipment is necessary because there is no reasonable alternative that can achieve the same objective of officer and civilian safety.

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- b) The proposed military equipment use policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- c) If purchasing the equipment, the equipment is reasonably cost effective compared to available alternatives that can achieve the same objective of officer and civilian safety.
- d) Prior military equipment use complied with the military equipment use policy that was in effect at the time, or if prior uses did not comply with the accompanying military equipment use policy, corrective action has been taken to remedy nonconforming uses and ensure future compliance.

Berkeley's record does not demonstrate that tear gas is "necessary" for the Department's objectives of officer and civilian safety. The staff report accompanying this item catalogs the Department's three reported uses of tear gas. BPD *only once in 40 years* deployed tear gas in response to a barricaded suspect or a hostage situation. The two other deployments occurred during civil unrest: the December 2014 demonstrations in Berkeley, and the May 2020 response to the protests in Oakland following the murder of George Floyd. The record in the staff report does not even contain specific examples of when the Department would have found tear gas "useful" during the period it has not been authorized, let alone necessary.

The resolution's premise is that an armed, barricaded suspect, a high-risk warrant service, or a hostage rescue justifies a chemical agent that saturates an enclosed space and affects everyone inside it, including any hostages, bystanders, or officers who later enter. But the Department's own military equipment inventory shows it already possesses tools built for exactly these scenarios. The Department's diversionary devices (flash-bangs) are described in the Department's own equipment inventory as intended for "barricaded subject or hostage situations and high-risk search warrant services"—the same three categories offered to justify tear gas—and are meant to create a reactionary gap that lets a tactical team make an apprehension using the minimal amount of force possible. The Department also has reconnaissance robots that let officers assess a barricaded space before anyone, including a suspect or hostage, is exposed to a chemical agent at all.

AB 481 also requires assurances that the uses will safeguard civil liberties and that prior uses complied with the military equipment use policies. The staff report omits the hundreds of pages of reports by the Department and the Police Review Commission following the December 2014 deployments of tear gas. In those reports and subsequent discussions with the community, the City as a whole ultimately acknowledged a series of tactical missteps, including the excessive use of tear gas, that escalated the situation and required a six-figure settlement for the resulting injuries. The lessons learned from the December 2014 deployments should be in the official record and inform the Council's decision on Tuesday night.¹

¹ The Berkeley Police Department's public report can be found here: <https://newspack-berkeleyside-cityside.s3.amazonaws.com/wp-content/uploads/2015/06/BPD-Response-to-Civil-Unrest1.pdf>; the Police Review Commission's independent review can be found here: <https://berkeleyca.gov/sites/default/files/2026-01/2015-12-01-Item-32a-Report-of-Investigation.pdf>; there is also a multitude of articles on the incident at Berkeleyside and other publications.

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The Council should also consider the lessons learned from uses of tear gas around the country. For example, following the police use of tear gas and other less-lethal in the summer of 2020, cities collectively agreed to pay well over \$80 million in settlements.²

2. The proposal would create an ambiguous standard for the use of tear gas that is not tailored to the use cases offered to justify its reauthorization.

The resolution states that tear gas will only be used for “critical incidents only (not crowd control),” and provides examples of armed barricaded suspects, armed attacks during service of high-risk warrants, and hostage situations.

The resolution itself, however, does not contain a bright-line rule limiting the uses of tear gas to the narrow set of paradigmatic emergencies that it points to as justification for the re-authorization of tear gas. Instead, it provides multiple, ambiguous standards:

- The Recommendation section of the staff report characterizes the recommendation as allowing BPD “to use tear gas under circumstances in which there is a *significant risk of injury or death*”;
- The Recitals (“Whereas” clauses) states that BPD seeks to use tear gas in “critical incidents” which are defined as “a rapidly evolving or complex, high-risk event... posing a *significant threat of death or serious bodily injury in which conventional tactics are unlikely to resolve the situation safely*.”
- The Resolution, however, would authorize the Department’s SRT to use tear gas “when responding to critical incidents as defined that pose a *significant threat to public or officer safety*, and excluding its use solely for crowd control, in accordance with Policies 300, 303, and 428.”

Regardless of which standard the sponsor intended, the resolution as drafted would authorize the use of tear gas in a great number of contexts beyond the three specific critical incidents identified by the Department. The resolution includes no redline of the actual policy language it purports to reinstate. Rather than proposing specific text for the policy that would actually govern how and when tear gas may be deployed, the resolution describes its intended scope. Before Council acts, the Department should be required to produce the specific policy language it intends to adopt, including an exhaustive list of authorized circumstances, so that Council and the public can evaluate the actual rule that will govern officers in the field, rather than a description of it.

The PAB recommends that, at minimum, the Council limit the scope of reauthorized use to the three specific critical incidents cited to as justification for the change in policy. The PAB has approved the language in Appendix A.

² That figure was accurate as of May 2023. <https://www.theguardian.com/us-news/2023/may/25/us-cities-settlement-protesters-blm-racial-justice>. The sum is much larger now as cities continue to pay out settlements. <https://www.loevy.com/denver-settles-protest-lawsuit/>. For an in-depth review of the use of tear gas in Portland, see here: <https://www.theguardian.com/us-news/ng-interactive/2023/apr/17/teargas-effect-portland-police-investigation>.

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3. The proposal does not contain the necessary policy safeguards.

As drafted, the resolution does not contain the necessary policy safeguards but instead relies on existing policy to provide the guardrails on its use. That reliance is misplaced for a few reasons.

First, Policy 300 is currently undergoing a wholesale rewrite by the Department. Authorizing tear gas now, on the promise that its use will be constrained by a use-of-force policy that may look very different by the time this authorization takes effect, gives Council no meaningful way to evaluate what protections will actually be in place when the tool is used.

Second, the resolution and the underlying policies repeatedly emphasize that less-lethal tools, including tear gas, may never be used “indiscriminately against a crowd.” That standard is meaningful for OC spray and impact projectiles, which can be aimed at a specific individual engaged in violence. It is not a meaningful constraint on tear gas. Tear gas is a gas: once deployed, it disperses through an area and affects everyone within that area, rather than a targeted individual. Unlike OC spray or a 40mm launcher, there is no way to deploy tear gas “discriminately” in the way the policy requires of other less-lethal tools. Put simply, tear gas can only be used indiscriminately compared to the other less-lethal options already at the Department’s disposal. The only way to prevent indiscriminate use is to take reasonable steps to ensure that only the target individual is within a defined area, and that non-targets are provided with the opportunity to evacuate the area.

Third, existing policy is not tailored to the use of tear gas, which is a type of military equipment that carries unique risks to the public. Even in the limited circumstances where tear gas could be used to resolve a hostage situation, officers should consider whether the risks of using tear gas in that incident outweigh the risks of not using tear gas. After all, tear gas carries health risks not only to the suspect but also to the hostages, bystanders, and the officers themselves. Requiring officers to exercise their judgment and evaluate the scene to assess the risks of acting and not acting is consistent with the commitment to deescalation and the minimizing the use of force, even when a higher level of force could also be effective.

Following its discussion with the Department, the additional safeguards that the PAB recommends are:

- Requiring Watch Commander approval prior to use
- Requiring verbal warnings when feasible to allow bystanders to move to safety
- Requiring the provision of medical care following a use
- Explicitly prohibiting the use of tear gas during crowd control and homeless encampment abatements

4. The Council should still defer action pending final approval of Policy 300 (Use of Force)

The Department has proposed revisions to Policy 300 that substantively change a number of standards, including:

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- Policy 300.1.2 (Use of Force Standard);
- Policy 300.2.2 (Duty to Intercede);
- Policy 300.3.3 (De-Escalation Tactics);
- Policy 300.3.9 (Chokehold Prohibition);
- Policy 300.4 (Use of Deadly Force);
- Policy 300.4.1 (Drawing and Pointing Firearms);
- Policy 300.11 (Use of Force Analysis).

Given the scope of the Department's proposed revisions, the impact of these proposed changes on the authorization of the use of tear gas, and the fact that the PAB and the Department are continuing to discuss proposed compromises in light of competing considerations, the PAB recommends deferring final action on the item until after the revised Use of Force Policy is approved by the Council.

For the reasons set out above, the PAB does not believe Item 24a should be adopted in its current form. The PAB recommends that the Council adopt its proposed policy language described in Appendix A that includes a closed list of authorized use cases and clear safeguards and defer action until the Council has considered Policy 300.

Sincerely,

Joshua Cayetano, Chair
Police Accountability Board

Appendix A: PAB-Approved Policy Language for the Use of Tear Gas in Limited Circumstances

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Appendix A. PAB-Approved Policy Language for the Use of Tear Gas in Limited Circumstances

“Tear gas shall only be used upon approval by the Incident Commander by trained members of the Special Response Team during the following tactical operations, provided that the suspect refuses to comply, and the supervisor reasonably believes that the risks of deploying tear gas are outweighed by the risks of not deploying tear gas:

- (a) Barricaded subject operations;
- (b) Service of a high-risk warrant; or
- (c) Hostage situations.

If feasible, prior to the use of tear gas, the SRT should (1) issue verbal warnings and (2) take reasonable steps to ensure that the suspect is in a controlled, contained area and that non-suspects are provided with the opportunity to leave the area.

Following the use of tear gas, the SRT shall ensure that any impacted person is offered medical care as soon as feasible.

Tear gas shall not be used for crowd control or during homeless encampment abatements”