



Kate Harrison
Councilmember District 4

REVISED AGENDA MATERIAL

Meeting Date: November 2, 2020

Item Number: 2

Item Description: **Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment**

Submitted by: Councilmember Harrison

Revisions

1. Accepted Police Review Commission edits;
2. Clarified that the LRAD is controlled equipment to the extent that it is used as an crowd dispersal tool;
3. Moved definition of Exigent Circumstances to the definitions section;
4. Clarified that the ordinance applies to the Police Review Commission or successive agency;
5. Clarified that BPD shall report on controlled equipment annually.

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).

(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.

(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) "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.

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 Review Commission ("Police Review Commission"), 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 Review Commission

(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 Review Commission 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 Review Commission Recommendations

(1) The Police Review Commission 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 despite available alternatives.

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

(c) The use of 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 Review Commission'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 to avoid them proactively.

(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;

(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.

~~(2) "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.~~

(E) Police Review Commission Review Required Before City Council Consideration of Approval.

(1) The Police Review Commission 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 Review Commission shall present its recommendations to City Council.

(3) Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission 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 Review Commission 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 Review Commission shall consider this ranking in determining the order in which to perform its review. .

(H) City Council Approval Process

(1) After the Police Review Commission 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 Review Commission 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 Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use, ~~for any Controlled Equipment not included in a Use of Force report~~. The report shall be provided no later than March 15th of each year, unless the Police Review Commission 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 deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, 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 Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission 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 Review Commission determines that any Controlled Equipment has not complied with those standards, 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 Review Commission, 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 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.

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

2.100.045 Reports on the Use of Controlled Equipment

2.100.056 Enforcement

2.100.067 Transparency

2.100.078 Whistleblower Protections

2.100.089 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" ~~means equipment that is military or militaristic in nature and~~ includes, but is not limited to, all of the following:

(1) ~~Special-purpose wheeled vehicles~~ Vehicles that are ~~either~~ 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: ~~either~~ 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 ~~vehicles~~ 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) ~~Weapon-bearing aircraft~~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 "riot guns" 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 ~~explosive breaching tools~~, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls".

(12) ~~Crowd-control equipment, such as riot batons 30 inches or longer in length, riot helmets, and riot shields, but excluding service-issued telescopic or fixed length batons.~~

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

(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.

(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) "City Staff" means City personnel authorized by the City Administrator or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.~~

~~(D)~~(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. The purposes and reasons for which the Berkeley Police Department (hereinafter, "Police Department") proposes to use each type of Controlled Equipment.~~

(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, ~~and what specific affirmative measures will be implemented to safeguard the public from potential adverse impacts.~~

(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, ~~the annual costs of alternative method or methods, and rationale for selection over alternative methods. the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.~~

~~(7) Location: The location(s) it may be used, using general descriptive terms.~~

~~(8)~~(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

~~(9)~~(8) Track Record: The relevant experiences of other jurisdictions with the proposed controlled equipment, including its effectiveness at achieving its stated purpose and any know adverse impacts on the public of the experience (if any) other entities, especially government entities have had with the proposed Controlled Equipment, including, if available, quantitative information about the effectiveness of the Controlled Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Controlled Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

(D) "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.

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. ~~"Controlled Equipment Use Policy" means a publicly released, legally enforceable written document governing the use of Controlled Equipment by the Berkeley Police Department that addresses, at a minimum, all of the following:~~

~~(10) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.~~

~~(11) — Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.~~

~~(12) — Prohibited uses: A non-exclusive list of uses that are not authorized.~~

~~— Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment or a reference to applicable BPD training policy.~~

~~(3) Auditing and Oversight: The mechanisms to ensure compliance with the Controlled Equipment Use Policy, including which independent persons or entities have oversight authority, and what legally enforceable sanctions are put in place for violations of the policy. City Attorney likely to reject codified sanctions.~~

~~(3) Transparency: The procedures by which members of the public may register complaints or concerns or submit questions about the use of each specific type of Controlled Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.~~

~~"Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.~~

~~"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.~~

2.100.0430 Acquisition and Use of Controlled Equipment.

(A) Restrictions Prior to Submission and Approval

(1) The ~~Berkeley~~ Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before submit to the Berkeley Police Review Commission (hereinafter "Police Review Commission"), 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, prior to engaging in any of the following:

(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) Collaborating with another law enforcement agency, such as commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.~~

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

~~(f)~~(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.

~~(1) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Review Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.~~

~~(f) Notwithstanding the above, The Chair of the Police Review Commission, in consultation with the Vice Chair, may provide limited approval, in writing, for the Department to solicit funding for Controlled Equipment prior to the submission of before submitting a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(f) If funding is received, the Controlled Equipment funded under the exception provided by this subsection shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Review Commission for review and subsequently approved by City Council, pursuant to the general requirements of as required by this section~~

~~(1) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.~~

(B) Submission to Police Review Commission

~~(1) When seeking the review and recommendation of the Police Review Commission, the Police Department shall submit to the Police Review Commission a proposed Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(2)~~(1) At least 15 days prior to any public ~~hearing~~ 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 concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. ~~Publishing to the Department's website shall satisfy the requirements of this subsection.~~

~~(3)~~(2) In order to facilitate public participation, ~~any proposed or~~ 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 ~~proposed or~~ available for use.

~~(4)~~(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a ~~regularly noticed~~ meeting.

(C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall ~~only~~ 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 despite available alternatives.
- (b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- (c) The use of 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.

~~(-) The use of Controlled Equipment is the most cost-effective option among all available alternatives.~~

~~(3)(2)~~ (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 Review Commission's a recommendation for approval for the funding, acquisition, or use of the Controlled Equipment ~~by the Police Review Commission pursuant to this Ordinance~~ shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(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;~~
- ~~(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~~

~~(-) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.~~

(E) Police Review Commission Review Required Before City Council Consideration of Approval.

(1) The Police Review Commission 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) If the Police Review Commission proposes that the Controlled Equipment Use Policy be modified or rejected, the Police Review Commission shall propose such modifications to City Staff. City Staff~~ The Police Department Review Commission shall present ~~such modifications or notice of rejection~~ the Police Review Commission's

recommendations to City Council ~~when seeking City Council approval pursuant to this Ordinance.~~

~~(b)(3)~~ Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year. ~~review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Controlled Equipment at least annually and vote on whether to recommend renewal of the approval.~~

(2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council ~~for immediate consideration.~~ If City Council has does not ~~reviewed and taken action~~ on a Police Review Commission ~~such a~~ recommendation ~~that a prior approval be revoked~~ within four (4) City Council meetings from when the item is was initially first ~~scheduled for City Council consideration,~~ the City 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 ~~pursuant to this Ordinance~~ 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. ~~The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this ordinance if, after one year, no approval, pursuant to the requirements of this Ordinance, has been granted.~~

(2) ~~In order to~~ 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 ~~possessed and/or used by the City,~~ and the Police Review Commission shall consider this ranking in determining the order in which to perform its review. ~~previously acquired Controlled Equipment that is prioritized for review.~~

(H) City Council Approval Process

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

~~(1) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy only after first considering the recommendation of the Police Review Commission, and then subsequently making a~~

~~determining that the City's interest in community safety outweighs the potential adverse effects of using Controlled Equipment.~~

~~(3)(2) For approval of existing Controlled Equipment for which the Police Review Commission has failed to make a recommendation within the required ninety (90) days as provided by this Section, if the City Council has does not reviewed and approved such item within four (4) regular City Council meetings from when the item was is first initially scheduled for City Council consideration, the City Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.~~

2.100.0450 Reports on the Use of Controlled Equipment.

(A) Annual Report on Controlled Equipment

(1) The ~~Berkeley~~ Police Department shall submit ~~to the Police Review Commission an annual~~ report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The ~~annual~~ report shall be provided no later than March 15th of each year, unless the Police Review Commission advises the ~~Police~~ Department that an alternate date is preferred. The ~~Police~~ Department shall also make each annual report ~~required by this section~~ 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 deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, 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.

~~(e) The total annual cost for each type of Controlled Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Controlled Equipment in the calendar year following submission of the annual report.~~

~~(1) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Review Commission shall place the report as~~

~~an agenda item for an open session of a regular meeting. After review and approval by the Police Review Commission, City Staff shall submit the annual report to City Council.~~

(B) Compliance & or Revocation of Approval

~~(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission shall determine, based on the annual report, whether each type-piece of Controlled Equipment identified in that reported on has complied with the standards for approval set forth in Section 32.100.040.~~

~~(2) If the Police Review Commission determines that any Controlled Equipment identified in the annual report has not complied with those standards for approval set forth in Section 3, the Police Review Commission 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 pursuant to this section shall be forwarded to City Council in accordance with the approval process in Section 32.100.040.~~

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

2.100.0650 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 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.~~

~~Any violation of this Ordinance, or of a Controlled Equipment Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.~~

~~(0) Any person who has been subjected 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).~~

~~(0) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under subpart (1) or (2) above.~~

~~Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirement.~~

2.100.0670 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.

2.100.0870 Whistleblower Protections.

~~(A) Protections Against Retaliation~~

~~(1) Neither the City nor anyone acting on behalf of the City may take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment, including but not limited to discriminating with respect to compensation, terms and conditions of employment, access to information, restrictions on due process rights, or civil or criminal liability, because:~~

~~(a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Controlled Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or~~

~~(b) The employee or applicant was perceived to, about to, or assisted or participated in any proceeding or action to carry out the purposes of this Ordinance.~~

~~(c) It shall be grounds for disciplinary action for a city employee or anyone else acting on behalf of the city to retaliate against another city employee or applicant who makes a good faith complaint that there has been a failure to comply with any Controlled Equipment Use Policy or administrative instruction promulgated under this Ordinance.~~

~~(a) Any employee or applicant who is injured by a violation of this Section may institute a proceeding for monetary damages and injunctive relief against the city in any court of competent jurisdiction.~~

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.

2.100.0980-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 23. 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.