

INTRODUCED BY COUNCILMEMBER KAPLAN


CITY ATTORNEY'S OFFICE

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

ORDINANCE ADDING CHAPTER 9.65 TO THE OAKLAND MUNICIPAL CODE ESTABLISHING RULES FOR THE OAKLAND POLICE DEPARTMENT'S ACQUISITION AND USE OF MILITARY AND MILITARISTIC EQUIPMENT.

WHEREAS, the City Council finds that the acquisition of military and militaristic equipment and its deployment in Oakland can adversely impact the public's safety and welfare, including introducing significant risks to civil rights, civil liberties, and physical and psychological well-being, and incurring significant financial costs; and

WHEREAS, the Law Enforcement Equipment Acquisition Working Group created by President Barack Obama in Executive Order 13688 (later rescinded by President Donald Trump) recommended requiring "local civilian government (non-police) review of and authorization for law enforcement agencies' request for or acquisition of controlled equipment," and that such review included detailed justification for the acquisition and collecting information on and reporting on its use; and

WHEREAS, the City Council finds that the public has a right to know about any funding, acquisition, or use of military or militaristic equipment by the City of Oakland, as well as a right to participate in any City decision to fund, acquire, or use such equipment; and

WHEREAS, the City Council finds that decisions regarding whether and how military or militaristic equipment is funded, acquired, or used should give strong consideration to the public's welfare, safety, civil rights, and civil liberties, and should be based on meaningful public input; and

WHEREAS, several studies indicate that police departments in the United States that acquire military-grade equipment are more likely to use violence and are no more successful in reducing crime than those that acquire less such equipment;¹ and

¹ Jonathan Mummolo, "Militarization fails to enhance police safety or reduce crime but may harm police reputation," *Proceedings of the National Academy of Sciences*, September 11, 2018 (37) 9181-9186; Casey Delehanty, Jack Mewhirter, Ryan Welch, and Jason Wilks, "Militarization and police violence: The case of the 1033 program," *Research and Politics*, April-June 2017, 1-7; and Edward Lawson Jr., "Police Militarization and the Use of Lethal Force," *Political Research Quarterly*, 2018, 1-13.

WHEREAS, the City Council finds that 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 military or militaristic equipment is funded, acquired, or used; and

WHEREAS, the City Council finds that the lack of a public forum to discuss the acquisition of military or militaristic equipment jeopardizes the relationship police have with the community, which can be undermined when law enforcement is seen as an occupying force rather than a public safety service; and

WHEREAS, the City Council finds that if military or militaristic equipment is acquired, reporting measures must be adopted that empower the City Council and public to verify that mandated civil rights safeguards have been strictly adhere to; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. Name of Ordinance.

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

SECTION 2 Oakland Municipal Code Chapter 9.65 is hereby added as set forth below (chapter and section numbers are indicated in **bold type**).

Chapter 9.65 REGULATIONS ON CITY'S ACQUISITION AND USE OF MILITARY AND MILITARISTIC EQUIPMENT

9.65.010. Definitions.

(A) "Controlled Equipment" means:

- (1) Wheeled 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 consumer vehicles are specifically excluded from this section.
- (2) 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 vehicles 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.
- (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, vessels, or vehicles of any kind, whether manned or unmanned.
- (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, equipment that is ballistic, such as a slug, or equipment that is explosive in nature.
- (6) Firearms of .50 caliber or greater.
- (7) Ammunition of .50 caliber or greater.
- (8) Specialized firearms and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (9) Projectile launch platforms, such as 40mm projectile launchers, "bean bag" or specialty impact munition ("SIM") weapons, and "riot guns" used to disperse chemical agents.
- (10) Any weapon designed for hand-to-hand combat, including any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat, but excluding service-issued telescopic or fixed-length straight batons.
- (11) Explosives and pyrotechnics, such as "flashbang" grenades and explosive breaching tools, and chemical weapons such as "teargas" and "pepper balls".
- (12) Crowd-control equipment, such as riot batons, riot helmets, and riot shields, but excluding service-issued telescopic or fixed-length straight batons.
- (13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, water cannons, and the Long-Range Acoustic Device (LRAD). Only LRAD use as an area denial tool shall trigger the reporting requirements of this Chapter.
- (14) Military surplus equipment.
- (15) Other equipment as determined by the City Council by amending this Chapter.

(F) "City" means any department, agency, bureau, and/or subordinate division of the City of Oakland as provided by Chapter 2.29 of the Oakland Municipal Code.

(G) "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 Chapter.

(H) "Controlled Equipment Impact Report" 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 purposes and reasons for which the Oakland 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 estimated or anticipated costs of each proposed use, the estimated or anticipated costs of potential adverse impacts, and the estimated or anticipated 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: A summary of all alternative method or methods the Police Department considered to accomplish the purposes for which the Controlled Equipment is proposed to be used, the annual costs of alternative method or methods, and 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) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third-party service providers.
- (9) Track Record: A summary 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).

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

- (1) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.
- (2) Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.
- (3) Prohibited Uses: A non-exclusive list of uses that are not authorized.
- (4) 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.
- (5) 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.

- (6) 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.
- (I) “Annual Controlled Equipment Report” means a publicly released written document that includes, at a minimum, all of the following information for the immediately preceding calendar year:
- (1) Production descriptions and specifications for Controlled Equipment and inventory numbers of each type of Controlled Equipment in the Police Department's possession.
 - (2) A summary of how Controlled Equipment was used.
 - (3) If applicable, a breakdown of where Controlled Equipment was used geographically by 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.
 - (4) A summary of any complaints or concerns received concerning Controlled Equipment.
 - (5) The results of any internal audits, any information about violations of Controlled Equipment Use Policies to the extent permitted by law, and any actions taken in response.
 - (6) The estimated 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.
 - (7) Impact: An updated assessment specifically identifying any potential impacts that the use of the 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.
 - (8) Mitigations: Specific, affirmative technical and procedural measures that have been implemented to safeguard the public from such impacts.
 - (9) Alternatives: An updated summary of all alternative method or methods the Police Department considered to accomplish the purposes for which the Controlled Equipment is proposed to be used, the annual costs of alternative method or methods, and the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.
- (F) "Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.
- (J) “Review Packet” means a City Council agenda packet containing, at a minimum,

the following:

- (1) Controlled Equipment Impact Report or Annual Controlled Equipment Report, as applicable
- (2) All Relevant Controlled Equipment Use Policies
- (3) Police Commission recommendations, where applicable.

9.65.020. Acquisition and Use of Controlled Equipment.

(A) Restrictions Prior to Submission and Approval

- (1) The Oakland Police Department shall submit to the Oakland Police Commission (hereinafter "Police Commission") a Controlled Equipment Impact Report and a Controlled Equipment Use Policy 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) Accepting funds for Controlled Equipment, including, but not limited to, 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 Oakland.
 - (e) Using any new or existing Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the governing body pursuant to this Chapter.
 - (f) 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.
- (2) The Police Department shall not accept funding for, acquire, or use Controlled Equipment without the review and recommendation, by the Police Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Chapter.
- (3) The Police Department shall not seek or apply for state, federal or private funds or in-kind or other donations for Controlled Equipment without prior review and approval by the Police Commission at a regularly noticed meeting. The Police Department may seek such approval here without submitting an Impact Report and/or a Controlled Equipment Use Policy, by informing the Police Commission of the needs for the funds and/or equipment, or otherwise justifying the request.

(B) Submission to Police Commission

- (1) When seeking the review and recommendation of the Police Commission,

the Police Department shall submit to the Police Commission a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

- (2) In order to facilitate public participation, Controlled Equipment Impact Reports and Controlled Equipment Use Policies shall be made publicly available on the Department's website for as long as the Controlled Equipment is proposed or approved for use.
- (3) The Police Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review during at least one open session of a regularly noticed meeting.

(C) Criteria for Police Commission Recommendations

- (1) The Police Commission shall only recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter if it determines all of the following:
 - (a) The Controlled Equipment is needed despite available alternatives.
 - (b) The 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 in a manner that disproportionately impacts members of the public based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability.
 - (d) The use of Controlled Equipment is the most cost-effective option among all available alternatives.
- (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, a recommendation for approval for the funding, acquisition, or use of Controlled Equipment by the Police Commission pursuant to this Chapter 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) Police Commission Review Required Before City Council Consideration of Approval.

- (1) The Police Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy.
- (2) If the Police Commission proposes that the Controlled Equipment Use Policy be adopted, the Police Commission shall submit its notice of adoption to City Staff. City Staff seeking City Council approval shall schedule a Review Packet for City Council consideration at least fifteen (15) days prior to a public meeting.
- (3) If the Police Commission proposes that the Controlled Equipment Use Policy be rejected or modified, notice of rejection or proposed modifications shall be submitted to the City Council as follows:
 - (a) If the Controlled Equipment Use Policy is also subject to Police Commission review under Charter Section 604(b)(4) or (b)(5), a

Review Packet shall be submitted to the City Council in accordance with the applicable Charter section.

- (b) For all other Controlled Equipment Use Policies, the Police Commission shall submit its notice of rejection or modification to City Staff. City Staff seeking City Council approval shall schedule a Review Packet for City Council consideration at least fifteen (15) days prior to a public meeting.
- (4) Failure by the Police Commission to submit its recommendation on a proposal within one hundred and twenty (120) days of the Police Department's submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(E) Police Commission Review of Prior Recommendations

- (1) The Police Commission may review any recommendation that it has adopted pursuant to this Chapter approving the funding, acquisition, or use of Controlled Equipment at any time and may vote on whether to recommend renewal of the approval.
- (2) The Police Commission may recommend to the City Council that a prior approval be revoked or modified by submitting a notice of rejection or proposed modification in accordance with Section 9.65.020 (D)(3).

(F) Review Process for Previously Acquired Equipment

- (1) The Police Department shall have one year from the date of passage of this Chapter to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval pursuant to this Chapter if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Chapter. The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this Chapter if, after one year, no submission, pursuant to the requirements of this Chapter, has been made.
- (2) In order to ensure that the review of previously acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of Controlled Equipment possessed and/or used by the City, and the Police Commission shall consider this ranking in determining order in which previously acquired Controlled Equipment is agendaized for review.

(G) City Council Review Process

- (1) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy after first considering the recommendation of the Police Commission, where applicable, and subsequently making a determination that the City's interest in community safety outweighs the potential adverse effects of using Controlled Equipment.
- (2) The City Council shall consider the Police Commission's recommendation within one hundred and twenty (120) days of the Commission's vote on the

Department's proposed changes and may approve or reject the decision. If the Council does not approve or reject the Commission's decision, the Commission's decision will become final.

- (3) If the Police Commission proposes that the Controlled Equipment Use Policy be rejected or modified, City Council shall review the notice of rejection or proposed modifications as follows:
 - (a) If the Controlled Equipment Use Policy is also subject to Police Commission review under Charter Section 604(b)(4) or (b)(5), the City Council shall review it in accordance with the applicable Charter section.
 - (b) For all other Controlled Equipment Use Policies, if the City Council has not reviewed and approved such item within four (4) regular City Council meetings from when the item was initially scheduled for City Council consideration, the City shall cease its use of the Controlled Equipment until such review and approval occurs.

9.65.030. Annual Reports on the Use of Controlled Equipment.

(A) Annual Controlled Equipment Report

- (1) The Oakland Police Department shall submit an Annual Controlled Equipment Report to the Police Commission no later than March 15th of each year, unless the Police Commission advises the Police Department that an alternate date is preferred. The Police Department shall make each annual report required by this section publicly available on its website for as long as the Controlled Equipment is available for use. Within 60 days of the Police Department's submission and publication of an Annual Controlled Equipment Report, the Police Commission shall place the report as an agenda item for an open session of a regular meeting.

(B) Compliance & Revocation of Approval

- (1) The Police Commission shall determine, based on the Annual Controlled Equipment Report whether the use of each type of Controlled Equipment identified in that report continues to meet the criteria for approval set forth in Section 9.65.020(C).
- (2) If the Police Commission determines the use of all Controlled Equipment identified in the Annual Controlled Equipment Report continues to meet the criteria for approval set forth in Section 9.65.020(C), City Staff shall submit a Review Packet, including the report, to City Council.
- (3) If the Police Commission determines that the use of any Controlled Equipment identified in the report no longer meets the criteria for approval set forth in Section 9.65.020(C), the Police Commission may recommend to the City Council that a prior approval be revoked or modified. Recommendations for revocations or modifications pursuant to this section shall be submitted to and considered by the City Council in accordance with the processes in Section 9.65.020.

9.65.040. Enforcement.

(A) Remedies for Violations of this Chapter

- (1) Any violation of this Chapter, or of a Controlled Equipment Use Policy promulgated under this Chapter, 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 Chapter. An action instituted under this paragraph shall be brought against the Police Department and the City of Oakland.
- (2) Any person who has been subjected to the use of Controlled Equipment in violation of this Chapter may institute proceedings in the Superior Court of the State of California against the City of Oakland 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.
- (3) A person has been “subjected to” the use of Controlled Equipment if the use caused substantial and unreasonable interference with the person’s lawful exercise of free speech or enjoyment of property or caused substantial and unreasonable physical or emotional injury or discomfort. Whether the impact of an occurrence is substantial and unreasonable shall be measured by the objective standard or a person of ordinary and normal sensitivity and sensibility.
- (4) 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.
- (5) Violations of this Chapter by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirements.

9.65.050. 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 Chapter, 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.

9.65.060. 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 Chapter; 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 Chapter.
- (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 Chapter.
- (d) 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.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES – FIFE, GALLO, KALB, KAPLAN, REID, TAYLOR, THAO AND
PRESIDENT FORTUNATO BAS

NOES –
ABSENT –
ABSTENTION –

ATTEST: _____
ASHA REED
Acting City Clerk and Clerk of the
Council of the City of Oakland, California

Date of Attestation: _____

NOTICE AND DIGEST

ORDINANCE ADDING CHAPTER 9.65 TO THE OAKLAND MUNICIPAL CODE ESTABLISHING RULES FOR THE OAKLAND POLICE DEPARTMENT'S ACQUISITION AND USE OF MILITARY AND MILITARISTIC EQUIPMENT

This ordinance will add a chapter to Oakland's Municipal Code to regulate the Oakland Police Department's acquisition and ongoing use of specified military and militaristic equipment by requiring the Police Department to submit policies, impact reports, and annual reports regarding the equipment to the Oakland Police Commission for review, by requiring the Police Commission to make recommendations to the City Council regarding the acquisition and use of the equipment, and by creating private rights of action for violations of this ordinance.