



Kate Harrison, Jesse Arreguín
Councilmember District 4, Office of the Mayor

ACTION CALENDAR

June 9, 2020

To: Members of the City Council

From: Councilmember Harrison (Co-Author), Mayor Jesse Arreguín (Co-Author),
Councilmembers Davila and Bartlett

Subject: Urgency Resolution: Directing the Police Review Commission and City
Manager to Submit Revised Berkeley Police Department Use of Force
Policy for Council Review and Approval Before the 2020 Summer Recess

RECOMMENDATION

Adopt an Urgency Resolution directing the Police Review Commission (“PRC”) and City Manager to:

1. Finalize revisions to the use of force policy as referred by Council in 2017 and drafted by the department for PRC review in January, 2020;
2. Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;
3. Incorporate revisions included the October 31, 2017 Council referral and all outstanding “8 Can’t Wait” use of force policy reforms.

BACKGROUND

A. Introduction

The recent murders of George Floyd, Breonna Taylor and Ahmaud Arbery have ignited the nation in passionate protest against police brutality and racial injustice. Across the country, citizens have protested for the past week demanding change and calling out enduring systemic racism and police brutality that has defined the United States for too long. Among the more immediate demands are calls for local jurisdictions to use their power to implement reforms that reduce or restrict the circumstances in which police can use force and expand use of force transparency and accountability.

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Prior to the COVID-19 emergency, the Police Review Commission commenced its review of a revised BPD Use of Force Policy following Council direction in 2017 to strengthen the policy. Council had urgently requested that this policy return for final adoption approximately two years ago. This work was further delayed the COVID-19-related suspension of non-essential Boards and Commissions.

Given the growing interest and demands for police reform, and the upcoming Council recess period in late July, it is critical that this item be added to the June 9, 2020 City Council agenda so Council can provide direction to bring back a new Use of Force policy prior to our summer recess. This item also includes any outstanding reforms suggested by the 8 Can't Wait campaign. This new policy will govern all BPD use of force and require greater reporting and transparency.

It is incumbent upon the City to continue its efforts towards addressing and remedying ongoing instances of inequity. These issues are of particular urgency given that the City has endowed the police with the responsibility to enforce the law and keep the peace. Most critically, the police are empowered to reasonably employ lethal, less-than-lethal and non-lethal force for the purpose of achieving these ends when justified by law and city protocols and procedures. In short, the City has the means and power to dramatically affect the lives and liberties of the people within its jurisdiction. Therefore, to ensure the public's safety and liberty, the utmost prudence must be demonstrated in internal policies governing the use of force.

The BPD has embraced modern policing policies, including de-escalation training, and has not had an officer involved shooting in the last five years. Still, every step must be taken to ensure that the department is using the least amount of force necessary. Broadly supported reforms that were initiated in the last three to five years, including Council actions requesting refinement of the department's use of force protocols, have faced unfortunate delays. It is in the public interest that these initiatives and additional national use of force best practices be adopted as policy before the Council Summer Recess.

B. October 31, 2017 Council Direction to the City Manager on Use of Force

A June 27, 2017 draft report commissioned by BPD and authored by the Center for Policing Equity—an independent, non-profit, grant-funded organization—had advised that BPD policy is not comprehensive in tracking use of force by BPD officers:

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“BPD departmental policy does not require the comprehensive tracking of use of force incidents. In particular, BPD policy does not require that an officer’s use of physical force be reported unless the officer used a weapon, the subject was injured, or the subject complains. As a result, incidents of physical force not involving a weapon are not comprehensively reported or tracked by BPD, and are not reflected.”¹

On October 31, 2017 the Council unanimously directed the City Manager to urgently amend the BPD’s General Order U-2 governing use of force policy to address these deficiencies and to update it consistent with best practices and community concerns and to provide an update by December 2017.² The Council item incorporated various use of force best practices adopted by neighboring Bay Area Departments in the wake of the Black Lives Matter movement and police reform campaigns such as Campaign Zero. The primary elements of the item were to:

1. Enhance BPD’s use of force policy statement;
2. Create a definition of use of force;
3. Require that all uses of force be reported;
4. Categorize uses of force into levels to facilitate reporting, investigation, documentation and review requirements;
5. Require Use of Force to be captured in a manner that allows for analysis; and
6. Require that the Department prepare and submit an annual analysis report about use of force to to the Chief of Police, Police Review Commission (“PRC”) and Council.

On December 21, 2017 the Deputy City Manager provided an Off-Agenda Memo³ to the Council stating that a BPD working group had formed and drafted new and revised

¹ The Science of Justice: Berkeley Police Department National Justice Database City Report Center for Policing Equity Report, Center for Policing Equity, May 2018, https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2018/Berkeley%2520Report%2520-%2520May%25202018.pdf&sa=U&ved=2ahUKEwjFveyU4_LpAhXKJzQIHSjFDHYQFjAAegQIAxAB&usg=AOvVaw3e931R0uxtMvplCy-AKoeV

² “Direct the City Manager and the Berkeley Police Department Regarding the Berkeley Police Department’s Use of Force Policy,” Berkeley City Council, October 31, 2017, https://www.cityofberkeley.info/Clerk/City_Council/2017/10_Oct/Documents/2017-10-31_Item_26_Direct_the_City_Manager_and_BPD_-_Rev.aspx

³ Update; Use of Force Policy Development, Berkeley City Manager’s Office, December 21, 2017, [Officehttps://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-)

language to U-2, including:

- Language regarding the value of human life and dignity, without prejudice to anyone;
- Language regarding using de-escalation tactics and techniques which seek to minimize the need to use force and increase the likelihood of voluntary compliance;
- A definition of force;
Expanding the threshold for reporting force, including subcategories of physical force;
- Approaches to categorizing force levels; using plain language to increase transparency;
- Posting use of force statistics on the City's Open Data Portal;
- A model report to serve as a template for an annual use of force report.

The memo also noted that “[e]xternal factors which could affect implementation of the completed policy include: necessary review from the City Attorney’s office, and the need to meet and confer with the Berkeley Police Association. Once finalized, the policy will be provided to the Police Review Commission.”

In addition, Council directed the City Manager on April 24, 2018 to convene a broad task force to create, present and execute a departmental action plan to address racial disparities in policing, including use of force.⁴ The task force did not launch. On April 30, 2019 the Chief of Police stated his expectation that the final use of force policy would be ready for Council adoption in June 2019.⁵ That same meeting, Council referred the task force idea and related policing disparity referrals to the Council’s Public Safety Policy Committee.⁶

[_General/Use%20of%20Force%20Update%20Memo%20122117.pdf](#)

⁴ Accept and Acknowledge Report from the Berkeley Police Review Commission, “To Achieve Fairness and Impartiality,” and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council, Berkeley City Council, April 24, 2018, https://www.cityofberkeley.info/Clerk/City_Council/2018/04_Apr/Documents/2018-04-24_Item_38b_Accept_and_Acknowledge_-_Rev.aspx

⁵ Referral Response: Update on Various Referrals and Recommendations Regarding Stop Data Collection, Data Analysis and Community Engagement, Berkeley City Manager, April 30, 2019, https://www.cityofberkeley.info/Clerk/City_Council/2019/04_Apr/Documents/2019-04-30_Item_29_Referral_Response_Update_on_Various.aspx

⁶ Annotated Agenda: April 30, 2019 Berkeley City Council Meeting, April 30, 2019, https://www.cityofberkeley.info/Clerk/City_Council/2019/04_Apr/Documents/04-

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On June 3, 2019 the committee recommended that the Mayor convene the task force in lieu of the City Manager.⁷ On July 23, 2019, the Mayor announced that he would lead an ad hoc task force.⁸ The task force convened in December 2019 and continued to meet until the COVID-19 pandemic in March.

C. January 2020 BPD Proposed Use of Force Policy Draft Presented to PRC

On January 8, 2020, more than two years after the Council passed the referral, and approximately two year after the deadline Council established for presenting a final updated policy, BPD presented a proposed revised Use of Force Policy to the PRC.⁹

The PRC formed a subcommittee to review the updated policy and make recommendations to the Council, but by March, non-judicial PRC meetings were suspended due to the COVID-19 pandemic.

The current PRC draft represents a marked improvement from the 2017 General Order U-2 policy. For example, it enhances the Department's policy statement, includes a more expansive definition of force (including physical force), encourages de-escalation tactics, expands reporting requirements, increasing transparency and facilitating analysis, and requires annual Council reporting.

D. Campaign Zero's '8 Can't Wait' Use of Force Reforms

30_Annotated_Agenda_pdf.aspx

⁷ Minutes June 3, 2019 Berkeley City Council Public Safety Policy Committee, <https://www.cityofberkeley.info/uploadedFiles/Clerk/2019-6-3%20Annotated%20Agenda%20-%20Public%20Safety.pdf>.

⁸ Referral Response: Update on Various Referrals and Recommendations Regarding Stop Data Collection, Data Analysis and Community Engagement, Berkeley City Council, July 23, 2019, https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/Clerk/City_Council/2019/07_Jul/Documents/2019-07-23_Item_40_Referral_Response_Update_on_Various_Referrals.aspx&sa=U&ved=2ahUKEwjf5IO42fLpAhWoHzQIHd-tBfU4ChAWMAZ6BAgBEAI&usg=AOvVaw0Gkjo3kl6eqeltwmbYWinX

⁹ January 8, 2020 Police Review Commission Packet, Berkeley Police Review Commission, January 8, 2020, https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2020/2020-01-08-prc-handouts.pdf

The 8 Can't Wait campaign is a project of Campaign Zero, an organization established by Black Lives Matter activists and focused on clear policy solutions to reduce and end police deaths and other forms of police violence.¹⁰ Their studies indicate that eight use of force policies are effective at decreasing police violence by up to 72%.

According to the Campaign, requiring police officers to exhaust less than lethal means before shooting or requiring comprehensive reporting each decreases police killings by 25% for each policy. In addition, prioritizing de-escalation decreases violence by 15%, and banning shooting at moving vehicles reduces police killings by 8%.

This project has enjoyed increased exposure following the deaths of George Floyd and Breona Taylor, and others by law enforcement. In a matter of days, hundreds of Berkeley residents have contacted the Mayor's office and City Council to express their support for this campaign and urging immediate adoption. These eight policies are essential reforms and align with best national policing practices.

Over the past decades, Berkeley had already adopted four of the policies:

- Ban on chokeholds and strangleholds
- Requiring a warning before shooting
- A duty to intervene
- Implementing a Use of Force Continuum

The outstanding recommendations from the 8 Can't Wait campaign that Berkeley will implement under this Urgency Resolution are as follows:

- Requiring de-escalation tactics
- Exhausting all alternatives before using lethal force
- Banning the discharge of weapons at moving vehicles
- Requiring officers to report each time they use force or threaten to use force against civilians

E. Final Policy

The January 2020 BPD Revised Draft would achieve at least two additional Campaign Zero objectives, including: requiring de-escalation tactics wherever feasible and prohibiting officers from shooting at moving vehicles in instances where only the vehicle

¹⁰ 8 Can't Wait, Campaign Zero, <https://8cantwait.org/>.

itself is perceived as a threat, except for exigent circumstances such as a mass casualty vehicle event.

However, the current draft does not require that officers exhaust alternatives, including non-force and less lethal force options, before using lethal force. For example, the San Francisco Police Department's Policy Language: Section VI.G: states:

"It is the policy of this Department to use deadly force only as a last resort when reasonable alternatives have been exhausted or are not feasible to protect the safety of the public and police officers. The use of firearms and other deadly force is the most serious decision an officer may ever make. When safe and feasible under the totality of circumstances, officers shall consider other objectively reasonable force options before discharging a firearm or using other deadly force."¹¹

Although BPD's draft before the PRC incorporates significant improvements to use of force reporting, including a requirement to report all force to include physical force, the draft provides a blanket exemption for reporting use of control holds when no pain or injury is reported. While this exemption may be appropriate when escorting arrestees to custody, it is arguably not appropriate in other situations such as when officers gain control of an alleged suspect.

In addition, the PRC draft eliminates the existing General Order U-2's existing language regarding the use of force continuum. The Council's 2017 referral explicitly highlighted the importance of retaining and further clarifying the force continuum. The continuum concept is also one of the eight Campaign Zero policy objectives: "Force continuums restrict the most severe types of force to the most extreme situations and create clear policy restrictions on the use of each police weapon and tactic."

The 2017 Council referral also requested that any force used be broadly categorized into four categories,¹² as is done by the Oakland and BART Police Departments, so that

¹¹ San Francisco Police Department Use of Force Policy, [https://www.sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20\(Rav.%2012-21-16\)_0.pdf](https://www.sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20(Rav.%2012-21-16)_0.pdf)

¹² For example, categories could include:

Level 1 Incident Parameters:

- (a) No suspect injury or complaint of injury due to interaction with officer.
- (b) No allegation of misconduct against officer, regarding force.

the degree of force used by the department can be evaluated over time and approaches to reduce the level of force developed.

By implementing the proposed use of force amendments, the BPD would be furthering existing internal, local and national efforts to update its use of force policies, and would be acting to enhance safety of the public and the officers sworn to protect them. It is the public interest to act now to update Berkeley's use of force policy.

FINANCIAL IMPLICATIONS

Staff time.

ENVIRONMENTAL SUSTAINABILITY

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- (c) Officer body camera was activated in a timely manner, per policy and recorded the use of force.
 - (d) Officer used lesser levels of force (e.g. Control holds/pressure point application; Leverage; Grab; Bodyweight; Physical technique or tactic applied to a vulnerable area, excluding strikes [e.g., hair grab, pressure to mastoid or jaw line; and shoulder muscle grab]; Vehicle pursuit with no collision; Firearm drawn/deployed but not fired, suspect contacted)

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report

Level 2 Incident Parameters:

- (a) Would have otherwise been classified as a Level 1, except one of more of the following apply:
Suspect injury or complaint of injury due to interaction with officer
 - (1) Suspect injury or complaint of injury due to interaction with officer.
 - (2) Allegation of misconduct against officer, regarding force.
 - (3) Officer body camera was not activated during use of force.
- (b) The use of force is Level 2 if the officer used more severe force (e.g. Takedowns, lifts and leg sweeps; Chemical Agents/Munitions [e.g., Oleoresin Capsicum, CS]; Impact weapon strikes [e.g., baton]; Use of body or body parts; Intentional pointing of a firearm at another person; Use of any other non-lethal or less-than-lethal weapon)

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report. Use of Force involving OC will be documented and reviewed additionally in a Use of Pepper Spray Report.

Level 3 Incident Parameters:

- (a) Use of firearm, officer involved shooting
- (b) Any intentional firearm discharge at a person, regardless of injury
- (c) Any unintentional firearms discharge
- (d) Any intentional impact weapon strike to the head
- (e) Any use of force investigation that is elevated to a Level 3 approved by a Watch Commander
- (f) Any force likely to cause death or serious bodily injury

An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to General Order P-12 (See also General Order C-16).

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No environmental impact.

CONTACT

Councilmember Kate Harrison

kharrison@cityofberkeley.info | 510-981-7140

Mayor Jesse Arreguín

mayor@cityofberkeley.info | 510-981-7100

ATTACHMENTS:

1. Resolution
2. October 31, 2017 Council Direction to the City Manager on Use of Force
3. December 21, 2017 Off-Agenda Memo
4. January 8, 2020 Use of Force Policy Revised Draft

RESOLUTION NO. ##,#### N.S.

DIRECTING THE POLICE REVIEW COMMISSION AND CITY MANAGER TO
SUBMIT REVISED BERKELEY POLICE DEPARTMENT USE OF FORCE POLICY
FOR COUNCIL REVIEW AND APPROVAL BEFORE THE 2020 SUMMER RECESS

WHEREAS, the recent murders of George Floyd, Breonna Taylor and Ahmaud Arbery have ignited the nation in passionate protest against police brutality and racial injustice, and across the country, citizens have protested for the past week demanding change and calling out the enduring systemic racism, white supremacy and police brutality that has defined the United States for too long; and

WHEREAS, among the more immediate demands are calls for local jurisdictions to use their power to implement reforms that restrict the prevalence of police force and the circumstances in which police can use force; and

WHEREAS, on October 31, 2017 the Council unanimously directed the City Manager to urgently amend the BPD's General Order U-2 governing use of force policy to address deficiencies and to update it consistent with best practices and community concerns; and

WHEREAS, on January 8, 2020, more than two years after the Council passed the referral, and 1 year and 10 months after the deadline Council established for presenting a final updated policy, BPD presented a proposed revised Use of Force Policy to the PRC; and

WHEREAS, the current PRC draft represents a marked improvement from the effective 2017 General Order U-2 Use of Force policy, enhancing the Department's policy statement, including a more expansive definition of force (including physical force), encouraging de-escalation tactics, expanding reporting requirements, increasing transparency and facilitating analysis, and requiring annual Council reporting; and

WHEREAS, the 8 Can't Wait campaign is a project of Campaign Zero, an organization established by Black Lives Matter activists and focused on clear policy solutions to reduce and end police deaths and other forms of police violence;

WHEREAS, the campaign's studies demonstrate that eight use of force policies are effective at decreasing police violence by up to 72%; and

WHEREAS, according to Campaign Zero, requiring police officers to exhaust less than lethal means before shooting or requiring comprehensive reporting each decreases police killings by 25% for each policy. In addition, prioritizing de-escalation decreases violence by 15%, and banning shooting at moving vehicles reduces police killings by 8%; and

WHEREAS, the Council relied on the campaign when drafting the 2017 referral and the project has enjoyed increased exposure following the deaths of George Floyd and Breonna Taylor, and the countless others whose lives have been lost at the hands of law enforcement; and

WHEREAS, in a matter of days, hundreds of Berkeley residents have contacted the Mayor's office and City Council to express their support for this campaign and urging immediate adoption of all outstanding policies; and

NOW THEREFORE BE IT RESOLVED that the City Council endorses these essential reforms to ensure harm reduction and alignment with best practices;

BE IT FURTHER RESOLVED, that the City Council directs the Police Review Commission and City Manager to:

1. Finalize revisions to the use of force policy as referred by Council and drafted by the department for PRC review.
2. Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;
3. Incorporate revisions included the October 31, 2017 Council referral and all outstanding "8 Can't Wait" use of force policy reforms.