

## DRAFT ORDINANCE ON ACQUISITION AND USE OF MILITARIZED EQUIPMENT

WHEREAS, the City Council finds that the acquisition of military 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Law Enforcement Equipment Acquisition Working Group created by President Barack Obama in Executive Order 13688 (later rescinded by President Donald Trump) recommended requiring "local civilian government (non-police) review of and authorization for law enforcement agencies' request for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 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 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;<sup>1</sup> and

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 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 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 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.

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

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<sup>1</sup> 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.

**SECTION 1.** This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

REGULATIONS ON CITY’S ACQUISITION OF MILITARY POLICE EQUIPMENT

**SECTION 2. Definitions**

**A. “Military Equipment”** means equipment that is militaristic in nature and includes, but is not limited to, all of the following:

- (1) Wheeled vehicles that are either built or modified to provide ballistic protection to their occupants, including a mine-resistant ambush protected (MRAP) vehicle or an armored personnel carrier.
- (2) Wheeled vehicles that are either built to operate both onroad and offroad in supporting military operations, 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 with a breaching or entry apparatus attached.
- (3) Tracked vehicles that provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.
- (4) Command and control vehicles that are either built or modified to facilitate the operational control and direction of public safety units.
- (5) Weaponized aircraft, vessels, or vehicles of any kind, whether manned or unmanned.
- (6) 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.
- (7) Firearms of .50 caliber or greater.
- (8) Ammunition of .50 caliber or greater.
- (9) Specialized firearms and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (10) Any firearm or firearm accessory, excluding the service weapons described in paragraph (9), that is designed to launch small projectiles, including, but not limited to, a grenade launcher or a riot gun used to disperse chemical agents.
- (11) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- (12) Explosives and pyrotechnics, including grenades referred to as flashbang grenades and explosive breaching tools.
- (13) Riot batons, riot helmets, and riot shields, but excluding service-issued telescopic or fixed-length straight batons.
- (14) Sonic weapons, such as the Long Range Acoustic Device sound cannon.
- (15) Area denial weapons, such as the Taser Shockwave and microwave weapons.
- (16) Any other equipment as determined by the City Council.

**(B) "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.

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

(D) "**Military 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 Military Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Military Equipment.
- (2) Purpose: The purposes and reasons for which the Oakland Police Department (hereinafter, "Police Department") proposes to use each type of Military Equipment.
- (3) Fiscal Cost: The fiscal cost of each type of Military 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 Military 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 Military 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 Military 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 Military Equipment, including, if available, quantitative information about the effectiveness of the Military Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Military Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

(E) "**Military Equipment Use Policy**" means a publicly released, legally enforceable written document governing the use of military 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 Military Equipment is intended to achieve.
- (2) Authorized Use: The specific uses of Military Equipment that are authorized, and rules and processes required prior to such use.
- (3) Prohibited Uses:
- (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 Military Equipment.

(5) Auditing and Oversight: The mechanisms to ensure compliance with the Military 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 Military Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.

(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.

(G) "**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 Military Equipment.

### **SECTION 3. Approval of Military Equipment Acquisition.**

(A) (1) The Oakland Police Department shall submit to the Oakland Police Commission (hereinafter "Police Commission") a Military Equipment Impact Report and a Military Equipment Use Policy prior to engaging in any of the following:

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

(b) Seeking funds for Military 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 Military Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Collaborating with another law enforcement agency, including commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Military Equipment within Oakland.

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

(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, Military Equipment.

(B) (1) In seeking the review and approval of the Police Commission pursuant to Section 3, subdivision (A), the Police Department shall submit to the Police Commission a proposed Military Equipment Impact Report and a Military Equipment Use Policy.

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

(C) The Police Commission shall consider proposed Military Equipment Impact Reports and Military Equipment Use Policies as an agenda item for review at an open session of a regularly noticed meeting.

(D) (1) The Police Commission shall only approve a request to fund, acquire, or use Military Equipment pursuant to this chapter if it determines all of the following:

- (a) The Military Equipment is needed despite available alternatives.
- (b) The proposed Military Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- (c) The use of Military 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.
- (d) The use of Military Equipment is the most cost-effective option among all available alternatives.

(2) In order to facilitate public participation, any proposed or final Military Equipment Impact Report and Military Equipment Use Policy shall be made publicly available on the Department's website for as long as the military equipment is proposed or available for use.

(3) If the Military Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the approval for the funding, acquisition, or use of Military Equipment by the Police 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.

(E) Police Commission Review Required for New Military Equipment Before City Council Approval.

1. The funding, acquisition, or use of Military Equipment by the Police Department shall not be permitted without the review by the Police Commission of a Military Equipment Impact Report and the approval of a Military Equipment Use Policy submitted pursuant to this Ordinance.

2. The Police Commission shall recommend that the City Council adopt, modify, or reject the proposed Military Equipment Use Policy. If the Police Commission proposes that the Military Equipment Use Policy be modified, the Police Commission shall propose such modifications to City Staff. City Staff shall present such modifications to City Council when seeking City Council approval pursuant to this Ordinance.

3. Failure by the Police 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) (1) The Police Commission shall review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Military Equipment at least annually and vote on whether to recommend renewal of the approval.

(G) (1) The Police Department shall have one year from the date of passage of this Ordinance to submit a Military Equipment Use Policy for approval, pursuant to this Ordinance, for the continued use of Military Equipment acquired prior to the passage of this Ordinance.

(2) If the Police Department seeks to continue the use of any Military Equipment that was acquired prior to the passage of this Ordinance, it shall commence the approval process in accordance with this Ordinance and present to the Police Commission a list of Military Equipment possessed and/or used by the City. The Police Department shall provide a prioritized ranking of Military Equipment possessed and/or used by the City, and the Police Commission shall consider this ranking in determining the Military Equipment that is prioritized for review. Within sixty (60) days of the Police Commission's prioritization of review, City Staff shall begin the submission of proposals, beginning with the highest-ranking items as determined by the Police Commission, and continuing until a Military Equipment Impact Report and a Military Equipment Use Policy has been submitted for each item on the list.

(H) City Council Approval Process

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

2. The City Council shall only approve a proposed Military Equipment Impact Report and proposed Military Equipment Use Policy after first considering the recommendation of the Police Commission, and subsequently making a determination that the City's interest in community safety outweighs the potential adverse affects of using Military Equipment.

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

(I) Use of Unapproved Military Equipment during Exigent Circumstances

(1). City Staff may temporarily use, or allow use by other entities, of Military Equipment without following the notification and review requirements of this Ordinance only when Exigent Circumstances exist.

(2). If City Staff uses, or allows use by other entities, of Military Equipment pursuant to the above-mentioned circumstances, City Staff shall:

- (a). Use the Military Equipment solely to respond to the Exigent Circumstances.
- (b). Cease using the Military Equipment when the Exigent Circumstances end.

- (c). Only keep and maintain Military Equipment that is directly relevant to an active, ongoing investigation, and discharge such Military Equipment once investigation has concluded, absent an intervening approval for retention pursuant to this section.
- (d). Following the end of the Exigent Circumstances, report the use of Military Equipment to the Police Commission at their next meeting for discussion and possible action.

#### **SECTION 4. Reports on the Use of Military Equipment.**

(A) The Oakland Police Department shall submit to the Police Commission an annual report on Military Equipment to the Police Commission within one year of approval, and annually thereafter for as long as the Military Equipment is available for use. The annual report shall be provided 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 also make each annual report required by this section publicly available on its website for as long as the military equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

- (1) Production descriptions for Military Equipment and numbers of each product in the Police Department's possession.
- (2) A summary of how Military Equipment was used.
- (3) If applicable, a breakdown of where Military Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Military 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 Military Equipment.
- (5) The results of any internal audits, any information about violations of Military Equipment Use Policies, and any actions taken in response.
- (6) An analysis of any discriminatory, disparate, any other adverse impacts that the use of Military Equipment may have had on the public's safety, welfare, civil rights, and civil liberties and on any community or group, including, but not limited to, those protected by the First, Fourth, and Fourteenth Amendments to the United States Constitution.
- (7) The total annual cost for each type of Military Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Military Equipment in the calendar year following submission of the annual report.

(B) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Commission shall place the report as an agenda item for an open session of a regular meeting. After review and approval by the Police Commission, City Staff shall submit the annual report to City Council.

(C) The Police Commission shall determine, based on the annual report submitted pursuant to Section 4, whether each type of Military Equipment identified in that report has complied with the standards for approval set forth in Section 3. If the Police Commission determines that any Military Equipment identified in the annual report has not complied with the standards for

approval set forth in Section 3, the Police Commission shall either recommend revocation of the authorization for that piece of Military Equipment or modify the Military 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 3.

### **SECTION 5. Enforcement.**

(A). Violations of this Ordinance are subject to the following remedies:

(1). Any violation of this Ordinance, or of a Military 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 Oakland, and, if necessary to effectuate compliance with this Ordinance or a military equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Military Equipment subject to this Ordinance, to the extent permitted by law.

(2). Any person who has been subjected to the use of military equipment in violation of this Ordinance 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 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.

(4). Violations of this Ordinance by a city employee shall result in consequences that may include retraining, suspension, or termination, subject to due process requirements and in accordance with any memorandums of understanding with employee bargaining units.

### **SECTION 6. Transparency**

(A) It shall be unlawful for the City to enter into any Military 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.

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

### **SECTION 7. Whistleblower Protections.**



(A). 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:

1. The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Military Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or
2. 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.
3. 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 Military Equipment Use Policy or administrative instruction promulgated under this Ordinance.
4. 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.

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