

ITEM:



Memorandum

TO: CITY COUNCIL

FROM: Mayor Sam Liccardo
Vice Mayor Chappie Jones
Councilmember Raul Peralez
Councilmember Lan Diep
Councilmember Magdalena Carrasco

SUBJECT: SEE BELOW

DATE: June 5, 2020

APPROVED:

San Diep

DATE: 6/5/20

SUBJECT: DISCUSSION AND ACTIONS RELATED TO POLICE USE OF FORCE AND CROWD CONTROL MEASURES

RECOMMENDATION

Per the current state of emergency for civil unrest and under Emergency Orders, seek 2/3 approval from council to place the following item on the Council agenda, to direct the City Manager—through the Chief of Police and other staff—and Independent Police Auditor to:

- 1) Describe in detail which requisite conditions— of violence or destructive conduct—the SJPD duty manual authorizes for the deployment the following methods or uses of force for what is commonly referred to as “crowd control”:
 - a. Officers in significant numbers (eg two dozen or more) in “riot gear”
 - b. Tear gas
 - c. Kinetic impact projectiles (KIPs) such as rubber or foam bullets
 - d. “Flash-bang” devices
 - e. Use of batons and/or physical contact

- 2) For each of the days/ episodes in which any of these approaches were deployed during the recent protests, describe in specific detail the circumstances that gave rise to the decision to uses of any of these methods or uses of force since May 29.

- 3) In light of recent experience, indicate what changes to the Duty Manual the Department should or will consider to any of these policies or protocols for crowd control.
- 4) Either at today's meeting or at the earliest possible opportunity, indicate why Council should not prohibit the use within dense crowds of kinetic impact projectiles (KIP), i.e., rubber or foams bullets, either by directing the City Manager to amend the SJPD Duty Manual, or alternatively directing the City Attorney to amend San Jose Municipal Code Section 10.32. Specifically:
 - a. Reveal whether the safety of KIP design or composition has substantially improved since the time of the studies referenced in this memorandum, below;
 - b. Describe the approximate number of rounds discharged in crowds over the past week;
 - c. Explicitly evaluate the relative imprecision of this tool, and its likelihood of striking persons other than its intended targets; and
 - d. Compare options, including (a) other less-than-lethal tools, other than a baton-strike; (b) substantially reducing the frequency of their use by raising the threshold justifying discharge, and (c) an assessment of whether any alternative KIP composition will reduce the risk of harm to members of the public.
- 5) To provide greater transparency to the public and accountability:
 - a. For the approximately half-dozen video clips that have raised substantial public concern on social media regarding potential SJPD misconduct or possible unlawful use of force, release to the public any videos in possession or readily available to SJPD that provide a fuller picture of the incident, such as longer duration (particularly the period prior to the video clip in question), alternative view angles, etc., within two weeks, so long as consistent with what is allowable under California state law.
 - i. Those videos should include, at a minimum,
 - the incident involving the collision between the police motorcycle and the running pedestrian, and
 - the incident involving a physical altercation between police and a male who is pulled back behind the police line by multiple officers, and subjected to repeated blows by police, and
 - the incident involving an officer responding to a protester with expletives
 - b. At the earliest opportunity for public hearing—whether at our upcoming Independent Police Auditor use of force review or for the after-action report--public hearing, present to the Council and public the IPA and SJPD findings relating to investigations and investigation reviews of each of those clips.
- 6) Establish a process, consistent with that advocated by the Obama Foundation's My Brother's Keeper Alliance Mayoral Action Pledge, to review our "use of force" policies, engage our community, seek the feedback of our community on the findings, and reform those policies consistent with the best thinking nationally. The process should engage the entire community, including faith leaders, social justice advocates, leadership within our

communities of color, criminal justice experts, the police union, the police rank-and-file, the Chief of Police, and the Independent Police Auditor.

7) Return to Council by the first week of August with ballot language articulating the expansion of authority for the Independent Police Auditor. This language should provide a higher level of transparency and accountability over “use of force” investigations and access to police records, including body worn camera footage, as achieved through negotiation with the Police Officers’ Association. Further explore additional expansion of IPA authority within the legal parameters mandated by the California Supreme Court’s decision in Seal Beach Peace Officers Association v. Seal Beach. This can include language to allow for future expansion of authority through a meet and confer process that doesn’t require a Charter Amendment.

DISCUSSION

The murder of George Floyd at the hands of officers in the Minneapolis Police Department has shaken our nation, and exposed longstanding wounds created by generations of racism. Protests expressing outrage are righteous and necessary. We are fortunate to live in a community in which the overwhelming majority of participants in these protests have exercised their First Amendment rights peacefully.

There have been exceptions, however, and the episodes of assaults, bottle-throwing, arson, window-smashing, looting, and the like have forced our exhausted police officers to take actions to respond to violence and destructive activity while ensuring that protesters can safely continue to express themselves. Throughout the several recent days of tense standoffs between protesters and police, we have observed commendable restraint by the overwhelming majority of police officers forced to dodge rocks, bottles, exploding fireworks, and even accelerating automobiles. We fully expect and demand that any exceptions to that exemplary restraint—that is, where any officer is alleged to have used force unlawfully or excessively— will be fully investigated and met with serious consequence.

However, as these demonstrations wear on, it remains imperative for the Council and the public to fully understand whether our uses of force for what is commonly referred to as “crowd control” meet our high standards for the San Jose Police Department.

In particular, we express concern and a desire to closely scrutinize the use of KIP’s—rubber or foam bullets—under the relatively chaotic circumstances of a large, fast-moving crowd. Anecdotal evidence—of journalists and seemingly non-violent protesters being struck by the rubber bullets—demonstrates what appears to be well-known: this is a very imprecise tool, with a high probability of inaccuracy. While typically shot toward the ground to reduce the likelihood of head strike, the ricochet of the rubber bullets continues to expose members of the public to risk of a rising bullet striking their head, where the risk of harm rises sharply. As evidenced by the piercing of 2nd and 3rd story windows along East Santa Clara Street, the ricochet of these bullets appears very difficult to control.

More troubling are sources of academic and health research suggesting that KIP's pose a significant risk of unintentional death or serious injury. Kaiser Health report raises serious concerns, citing a 2017 study of all kinetic-impact-projectiles (KIP)—including rubber, plastic, and bean-bag bullets—with disturbingly high (3%) mortality rate and a 15% rate of serious injury.¹ Another source identifies that seven individuals struck by rubber bullets in the U.S. since 1971 have died, a phenomenon that typically results from ocular penetration of the bullet.² In the British medical journal, *The Lancet*, a 2002 study of the use of rubber bullets for crowd control in Israel determined that three of the 151 people suffering rubber-bullet injury died, and 59 others incurred penetrating injury of varying severity. The study's abstract recites its conclusion, "Inaccuracy of rubber bullets and improper aiming and range of use resulted in severe injury and death in a substantial number of people. This ammunition should therefore not be considered a safe method of crowd control."³ An older study, published in 1975, of 90 persons struck by rubber bullets in Great Britain identified one death and seventeen suffering permanent disability or deformity. Forty-one of the patients had injuries requiring admission to a hospital.⁴ Of course, it remains critical for us to know to what extent rubber bullets have been made safer in design or composition since the time of these studies, and what less-than-lethal options may remain for police officers without them. For that reason, we seek to probe further, and understand more about the weapon and its use, and whether there are viable, less harmful alternatives.

We have received emails and calls from community members who witnessed or were subject to the use of batons and/ or direct physical contact by law enforcement. We seek to better understand what parameters are contained in the Duty Manual that allow for use of a baton and / or physical contact as a form of crowd control.

We also express concern and a desire to closely scrutinize the use of tear gas. Many chemicals are banned under international law. In 1993, tear gas was classified as a chemical weapon and in 1997 it was banned from use in international warfare. Yet, it is continued for use against civilians. Tear gas exacerbates COVID. ProRepublica published a paper today outlining that tear gas has long-term health consequences, including for those who it is not intended for. The U.S. military conducted the most comprehensive study about tear gas exposure amongst 6000 recruits and found that increased their risk of getting influenza, pneumonia, bronchitis and other respiratory illnesses. After tear gas was deployed in Turkey, it showed that respiratory irritation, chest pain, and hemoptysis lasted for weeks after. Moreover, all these studies have been completed on predominantly healthy, white male participants, whereas the use of tear gas during the protests hardly represents this group.

This week, 1300 UC physicians wrote a letter of guidance articulating that tear gas can spread COVID for two reasons. Because tear gas results in coughing and irritation, people are more likely to remove their masks to touch their face or breathe. This puts not only other protestors at risk, but also law enforcement officials. Moreover, higher exposure means that people are more likely to get acute respiratory illness after they have been exposed. Therefore, even when people left the protests they have a higher chance of catching COVID in their day to day lives. Finally, more recent literature from COVID patients highlights that for some individuals, their lungs may

¹ <https://khn.org/news/police-use-rubber-bullets-on-protesters-that-can-kill-blind-or-maim-for-life/>

² <https://slate.com/news-and-politics/2000/10/what-are-rubber-bullets.html>

³ <https://www.sciencedirect.com/science/article/pii/S0140673602087081>

⁴ <https://doi.org/10.1002/bjs.1800620613>

be prone to residual scarring, higher risk of strokes, blood clots, and other cardiac damage. Therefore, tear gas is systematically worse during COVID.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.