

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
PUBLIC LEGAL OPINION

TO: COUNCIL PRESIDENT BAS AND MEMBERS OF THE CITY COUNCIL

FROM: CITY ATTORNEY BARBARA J. PARKER

DATE: DECEMBER 16, 2022

RE: **CITY COUNCIL'S AUTHORITY TO MODIFY OAKLAND POLICE DEPARTMENT MILITARY EQUIPMENT USE POLICIES**

I. INTRODUCTION

State and local law require that the Oakland Police Department (“OPD”) obtain City Council approval to acquire and/or use “military equipment.” (Government Code section 7070 et. seq. and Oakland Municipal Code Chapter 9.65.) Before requesting City Council approval, OPD must draft a policy governing the use of military equipment (hereinafter a “Military Equipment Use Policy”) and present the draft policy to the Police Commission for feedback. After reviewing a Military Equipment Use Policy, the Police Commission must make a recommendation to the City Council.

Earlier this year OPD initiated this process and submitted various Military Equipment Use Policies to the Police Commission for feedback. In September 2022, the Police Commission completed its review of several Military Equipment Use Policies. OPD then scheduled an ordinance on the October 18, 2022 City Council agenda (hereinafter referred to as the “October Draft Ordinance”) that would authorize the acquisition and/or use of multiple forms of military equipment.¹

The Police Commission did not agree to recommend OPD’s initial proposals in the Military Equipment Use Policy governing robots. However, the OPD and the Commission ultimately agreed to terms for that policy after a collaborative process and revisions. The policy covering robots submitted with the October Draft Ordinance includes the modifications OPD ultimately decided to recommend to the City Council based on the Police Commission’s recommendations.

¹ These Military Equipment Use Policies are: (1) Department General Order K-7: **Military Equipment Funding, Acquisition and Use Policy**; (2) Department General Order K-6: **Department Rifles**; (3) Training Bulletin III-H: **Specialty Impact Munitions**; (4) Training Bulletin III-P.04: **Armored Vehicles**; (5) Training Bulletin III-G: **OPD Crowd Control and Crowd Management Policy (for Riot Helmets)**; (6) Training Bulletin V-F.2: **Chemical agent**; (7) Department General Order I-25: **Unmanned Aerial Systems (UAS)**; (8) Training Bulletin III-P.05: **Noise-Flash Diversion Devices** (“Flash Bangs”); and (9) Department General Order I-26: **Remoted Controlled Ground Systems (Robots) and Pole Cameras**,

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At its October 18, 2022 meeting, the Council voted to continue the October Draft Ordinance to the November 1, 2022 City Council meeting. During the November 1, 2022 meeting, our office advised that the City Council could accept or reject the proposed policies but could not modify them. The City Council adopted a motion to continue the item and requested that the Police Commission further review the policies and consider additional modifications based on public input.

Following the November 1, 2022 meeting, the Police Commission did not recommend additional modifications to the policies provided in the October Draft Ordinance.

At the December 6, 2022 City Council meeting, Council President Bas asked whether the City Council could propose modifications to amend the policies included in the October Draft Ordinance. Our Office advised that the City Council could propose modifications; and the Council then passed a motion continuing to the December 20, 2022 Council meeting the October Draft Ordinance (as well as a separate draft ordinance that would approve other forms of Military Equipment). The October Draft Ordinance was is Item No. 7 and the other Military Equipment Draft Ordinance is Item No. 8 on the Council's December 20, 2022 meeting agenda. However, at its December 15, 2022 meeting, the Rules and Legislation Committee continued these items to the January 17, 2023 Council meeting.

We issue this public legal opinion to clarify our Office's advice regarding when and how the City Council can propose modifications to OPD's Military Equipment Use policies. Consistent with our Office's longstanding practice, this is a public legal opinion because it addresses the relative powers of the City Council and the Police Commission under the City Charter. Like all public opinions, this opinion will be posted on the City Attorney's web site at <https://www.oaklandcityattorney.org/Ops-Reps/Opinions.html>. This legal opinion also will be submitted to the Clerk's office for inclusion in the agenda packet for the January 17, 2023 City Council meeting.

II. QUESTIONS AND BRIEF ANSWERS

Question No. 1:

Does the Council have the power to modify a Military Equipment Use Policy?

Brief Answer:

Yes, the Council has the power to modify a Military Equipment Use Policy in the following circumstances:

- (1) the policies in question fall within the scope of Charter Section 604(b)(4); and

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(2) either the Police Commission or the City Council (as opposed to OPD) *initiates* the policy-review process under Charter Section 604(b)(4).

To initiate the process, the City Council must adopt a resolution directing the Police Commission to review proposed changes to a Military Equipment Use Policy.

Question No. 2:

Does the City Council have the power to modify one or more of the Military Equipment Use Policies that Council was scheduled to consider at its December 20, 2022 meeting?²

Brief Answer:

No. The policy-review process that currently is underway was initiated by OPD, not by either the Police Commission or the City Council. The process therefore is not governed by Charter Section 604(b)(4). The applicable state and local laws only authorize the City Council to approve or reject the proposed policies.

Question No. 3:

Is there a deadline for City Council to approve or reject the Police Commission's recommendation to approve the military equipment use policies covered by the October Draft Ordinance (to be considered at the December 20, 2022 meeting)?

Brief Answer:

For military equipment acquired before January 1, 2022, City Council approval must occur within 180 days after such policies were first submitted for City Council consideration on October 18, 2022.

III. ANALYSIS

A. Scope of City Council's Authority to Modify OPD Military Equipment Use Policies

The City has two local laws that may be applicable in determining how equipment policies must be reviewed. If a policy governs OPD's acquisition and/or use of military equipment, the Oakland Municipal Code requires that the Police Commission review the policy before the City Council considers it.³ If a policy governs use of force, use of force review boards, profiling, or First Amendment assemblies, or if it directly relates to

² The Rules and Legislation Committee continued these items to the January 17, 2023 Council meeting at its December 15, 2023 meeting.

³ OMC Section 9.65.020.D.1.

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the City's duties under the Negotiated Settlement Agreement, the City Charter requires that the Police Commission review it, and further provides that the City Council must consider it under certain circumstances.⁴ Because the policies that the Council will consider at its December 20, 2022 meeting relate to military equipment *and* govern use of force and crowd control (i.e. First Amendment Assemblies), the process must comply with both the Charter and the Oakland Municipal Code.

As we explain below, there is only one circumstance in which the City Council may adopt its own changes to a policy that is before it for consideration. In all other circumstances, the City Charter, the Oakland Municipal Code and the California Government Code only authorize the City Council to approve or reject a proposed policy.

Charter Section 604(b)(4) explicitly allows the City Council to "approve, *modify and approve*, or reject" a policy that is before it for consideration. However, that section only applies when the Police Commission is the party that proposes changes to a policy, either on its own initiative or at the Council's direction.

Oakland City Charter Section 604(b)(4) provides in relevant part that the Police Commission may:

"[p]ropose changes at its discretion *or upon direction, by adoption of a resolution, of the City Council, including modifications to [OPD's] proposed changes to any policy*, procedure, custom, or General Order of the Department which governs use of force, use of force review boards, profiling based on any of the protected characteristics identified by federal, state, or local law, or First Amendment assemblies, or which contains elements expressly listed in federal court orders or federal court settlements . . . The City Council shall consider the Commission's proposed changes or modifications within one hundred and twenty (120) days of the Commission's vote on the proposed changes, *and may approve, modify and approve, or reject the changes*. If the Council does not approve, modify and approve, or reject the Commission's proposed changes or modifications, the changes or modifications will become final."(emphasis added).

However, if OPD proposed the policies that the City Council is considering, Charter Section 604(b)(4) does *not* apply. Charter Section 604(b)(5) may apply under certain circumstances, but that section only authorizes the City Council to "approve or reject" the Police Commission's recommendation.

⁴ Oakland City Charter Sections 604(b)(4) and (5)

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OMC Section 9.65.020.G.2 provides in relevant part that "[t]he City Council shall consider the police commission's recommendation within one hundred and twenty days of the commission's vote *on the department's proposed changes and may approve or reject the decision.*" (emphasis added).

B. The Military Equipment Use Polices Covered by the October Draft Ordinance Do Not Fall Under Charter Section 604(b)(4).

OPD initiated the policy-review process for the Military Equipment Use Policies covered by the October Draft Ordinance, by proposing policy changes to the Police Commission. The process, as our Office understands it, was collaborative, and OPD changed its proposed policy provisions numerous times based on input from the Police Commission. OPD incorporated the Police Commission's input into new drafts of the policies until the Police Commission was comfortable recommending the proposals to the City Council. The Police Commission did not initiate the process by recommending changes to OPD's policies. The policies proceeded through iterations during the collaborative process, but it does not appear that at any point OPD and the Police Commission reached an impasse such that the Police Commission intended to proceed with its own, separate and alternative proposal. Therefore, Charter Section 604(b)(4) does not apply. Rather, pursuant to OMC Section 9.65.020.G.2, the City Council has authority only to *approve* or *reject* authorization.

Accordingly, the City Council could adopt a resolution directing the Police Commission to consider modifying an OPD Military Equipment Use Policy that falls under the enumerated subject matter specified in Charter Section 604(b)(4).

C. Deadline for City Council to Approve or Reject Military Equipment Use Policies on Equipment Acquired Prior to January 1, 2022

Government Code Section 7071(a)(2) provides:

"No later than May 1, 2022, a law enforcement agency seeking to continue the use of any military equipment that was acquired prior to January 1, 2022, shall commence a governing body approval process in accordance with this section. If the governing body does not approve the continuing use of military equipment . . . within 180 days of submission of the proposed military equipment use policy to the governing body, the law enforcement agency shall cease its use of the military equipment until it receives approval of the governing body . . ."

For any applicable military equipment covered by the October Draft Ordinance, the polices were first submitted to the City Council for consideration at the October 18, 2022 City Council meeting. Accordingly, any applicable military equipment would be

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subject to the 180 day timeline for City Council approval specified by Government Code Section 7071(a)(2). That deadline will expire March 30, 2023.

IV. CONCLUSION

For the reasons we addressed in this opinion, the City Council has authority only to approve or reject the proposed Military Equipment Use Policies covered by the October Draft Ordinance.

Although the current policy-review process does not fall under Charter section 604(b)(4), please be advised that the City Council can initiate a review process under that section in the future. As we explained above, a review process initiated under Charter section 604(b)(4) provides the City Council discretion to modify the policies that are presented to the Council for its consideration. To initiate that process, the policies must fall within the subject-matter scope of Charter Section 604(b)(4) and the City Council must pass a resolution directing the Police Commission to propose policy changes.

Very truly yours,



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cc: City Administrator Ed Reiskin

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