



March 22, 2017

VIA EMAIL

The Honorable Ted Wheeler
Portland City Hall
MayorWheeler@portlandoregon.gov

Chief Michael Marshman
Portland Police Bureau
Michael.Marshman@portlandoregon.gov

Attn: Ashley Lancaster
Senior Management Analyst
Ashley.Lancaster@portlandoregon.gov

Re: Comments from American Civil Liberties Union of Oregon, Portland Chapter of the National Lawyers Guild, and Oregon Lawyers for Good Government. Portland Police Bureau Proposed Directive 635.10 Crowd Management/Crowd Control

Dear Mayor Wheeler and Chief Marshman:

On behalf of the American Civil Liberties Union of Oregon (ACLU)¹, the Portland Chapter of the National Lawyers Guild (NLG)², and Oregon Lawyers for Good Government (OL4GG)³ (collectively Legal Public Interest Groups) and all of our members, we submit these comments on Portland Police Bureau (PPB) proposed directive 635.10 on crowd management and crowd control (the Directive). We appreciate the opportunity to provide feedback on this important PPB policy.

I. Introduction

On January 13, 2017, the City of Portland (City) and Portland Police Bureau (PPB) invited comment on the Directive. During this comment period, organizations submitted suggested

¹ The ACLU of Oregon has over 37,000 members in Oregon, including nearly 20,000 members in the City of Portland.

² The NLG has over 100 members in its Portland Chapter.

³ Oregon Lawyers for Good Government has approximately 700 members in Oregon.

revisions, including the NLG and ACLU.⁴ In subsequent meetings with the City and PPB, the Legal Public Interest Groups learned that the City and PPB had made significant changes to the Directive and requested the opportunity for further public comment. On March 16, 2017, the City and PPB posted their proposed draft of the Directive for further comments. These comments are due March 31, 2017.

The City of Portland has long prided itself as a hub for First Amendment activity. In its recent report, the Crowd Control Workgroup of the Citizen Review Committee noted that “Portland has a very engaged and activist-minded citizenry,” with numerous public marches and large crowds each year.⁵ Public assemblies enrich the fabric of Portland by providing:

- a means of expression when people feel unheard through other methods
- a beacon of solidarity and connection for people impacted by the issues subject to protest
- a vehicle to spark conversations and debate about important issues
- an opportunity to form community and connections, leading to constructive engagement, organizing and action

The City cannot sustain these benefits without PPB policies that clearly support, and do not suppress, the exercise of First Amendment rights. Unfortunately, as the CRC Report notes, there is a history of confrontation between PPB and the public involved in protest activity. Some of this history is documented in a comprehensive report from the NLG and the Northwest Constitutional Rights Center.⁶

In the wake of a divisive presidential election in 2016, which produced far-reaching political and social change in our country, protest activity has increased markedly in Portland. This creates a new urgency for PPB to adopt directives on crowd management and crowd control that emphasize restraint, de-escalation, and use of force only as a last resort means to ensure public health, safety, and welfare. The Legal Public Interest Groups, who monitor the policing of

⁴ The ACLU submitted their revisions on February 15 pursuant to an agreement with the City.

⁵ *Crowd Control and the Portland Police, A Policy Review Conducted by the Crowd Control Workgroup of the Citizen Review Committee* at 2 (September 2014) (CRC Report), available at <https://www.portlandoregon.gov/ipr/article/556654>.

⁶ National Lawyers Guild and Northwest Constitutional Rights Center, *Whose Streets? Recommendations to the Portland Police Bureau for Responding to First Amendment Assemblies* (2007), available at https://nlgpdx.files.wordpress.com/2017/01/report_crowd-control-final-1.pdf.

protests, have communicated concerns on this issue several times since November 2016.⁷

The Legal Public Interest Groups request that PPB incorporate their comments and meaningfully revise the Directive. The Directive cross-references proposed directive 1010.00, which addresses use of force in crowd management and crowd control situations in a few provisions. We request that changes be made to the use of force directive to conform to the changes recommended in these comments. This will provide an important roadmap for constructive engagement between PPB and the public involved in constitutionally-protected protest activity.

II. Specific Revisions to Proposed Directive 635.10

The Legal Public Interest Groups offer the following revisions (in track changes) and explanatory comments to each section of the Directive.

635.10 Crowd Management/Crowd Control

Refer:

- ORS § 181.575 Specific Information Not to be Collected or Maintained
- ORS § 131.675 Dispersal of Unlawful or Riotous Assemblies
- DIR 344.05, Bias-Based Policing/Profiling Prohibited
- DIR 635.20, Community Member Observation of Police
- DIR 700.00, National Incident Management System (NIMS) and Incident Command System (ICS)
- DIR 900.00, General Reporting Guidelines
- DIR 905.00, Non-Force After Action Reporting
- DIR 1010.00, Use of Force

Definitions:

- Civil Disobedience: A non-violent form of protest or resistance to obeying certain laws,

⁷ Letter from Oregon Lawyers for Good Government to Mayor Wheeler and Chief Marshman (Feb. 8, 2017) (attached); Letter from National Lawyers Guild to Mayor Wheeler Regarding Portland Police Bureau's Crowd Control Activities on Jan. 20, 2017 (Jan. 27, 2017), available at <https://nlgpdx.files.wordpress.com/2017/01/nlg-letter-to-mayor-wheeler-re-j20.pdf>; ACLU, *Portland's Protest Problem*, ACLU of Oregon Blog (Jan. 25, 2017), <http://www.aclu-or.org/content/portland-protest-problem>; Letter from ACLU to Chief Marshman and Mayor Wheeler Regarding Surveillance and Law Enforcement Presence at Inauguration Day Protest (Jan. 25, 2017), available at http://www.aclu-or.org/sites/default/files/ACLU_Public_Records_Request_J20_Portland.pdf; Letter from Lawyers for Good Government to Mayor Wheeler and Chief Marshman (Jan. 19, 2017); Letter from ACLU to Mayor Hales and Chief Marshman Regarding The Arrest of PDX Resistance Organizers During Peaceful Protest (Nov. 22, 2016), available at <http://www.aclu-or.org/content/letter-mayor-hales-and-chief-marshman-regarding-arrest-pdx-resistance-organizers-during-peac>; ACLU, *An Open Letter to Mayor Hales Regarding Free Speech* (Nov. 14, 2016), available at <http://aclu-or.org/content/open-letter-mayor-hales-regarding-free-speech>.

demands or commands of a government.

- Civil Disturbance: An unlawful assembly that constitutes a clear and present danger to public safety~~the breach of peace or any assembly of persons where there is a threat of collective violence, destruction of property, or other criminal activity~~s. A civil disturbance is an illegal assembly subject to dispersal.
- Crowd Control: Law enforcement response to a pre-planned or spontaneous event, activity, or occurrence that has become a Ceivil Deisturbance and may require dispersal of the crowd and/or arrests.
- Crowd Management: Encompasses law enforcement management, intervention, and control strategies when responding to all forms of public assemblies and gatherings. Also refers specifically to strategies and tactics employed before, during, and after a gathering for the purpose of maintaining the event's lawful activities.
- Crowd Management Incident Commander (CMIC): For the purposes of this Directive, a command member who has received special training in crowd management/crowd control. The Chief of Police will designate a command staff member to serve as the CMIC for every major demonstration and/or special event. This position possesses the overall responsibility for managing the demonstration by establishing objectives, planning strategies, and implementing tactics in accordance with this Directive and Directive 700.00, National Incident Management System (NIMS) and Incident Command System (ICS). This position reports to the Assistant Chief of Operations during demonstrations.
- Demonstration (or Protest): A lawful assembly of persons who have organized primarily to exercise their First Aamendment right to express political or social doctrine views and attract public attention. Planned or spontaneous demonstrations include, but are not limited to, the distribution of literature, displaying of banners, vigils, rallies, marches, strikes or other similar activity (e.g., event, concert, festival, street theater, etc.). A demonstration can be a lawful assembly without a permit. Lawful demonstrations can become devolve into civil disturbances ~~that necessitate enforcement action~~.
- Freedom of Speech and Assembly: The right to speak, associate, assemble, and petition by the government; speech that is protected by the First Amendment to the United States Constitution and Article I, sSections 8 and 26 of the Oregon Constitution. For the purposes of this Directive, the rights issuing from both the federal and state Constitutions are collectively referred to as First Amendment rights.
- Incident Action Plan (IAP): A proposal that provides a concise and consistent means of capturing and communicating overall incident priorities, objectives and strategies for both operational and support activities.
- Mobile Field Force (MFF): Sworn members, who are trained in basic crowd control tactics

and techniques, organized into a squad and deployed to assist in the management of a crowd.

- Operations Section Chief: A member, designated by the Assistant Chief of Operations, who develops and implements strategy and tactics to carry out incident objectives. The designated member organizes, assigns, and supervises the tactical response resources.
- Persons-In-Charge: The person(s) designated by a demonstration organizer or permit holder to act on behalf of, and with the authority of, the demonstration organizer or permit holder.
- Portland Police Bureau Demonstration Liaison: A Bureau member who has been designated by the CMIC as the primary contact for communication with the demonstration's Person-In-Charge to police.
- Rapid Response Team (RRT): The Bureau's team of members who are specially trained in crowd management and control tactics and techniques.
- Riot: Five-Six or more persons (not including persons passively present and resisting arrest) engaging in tumultuous and violent conduct and thereby intentionally ~~or recklessly creating a grave risk of~~ causing public alarm. The "risk of causing public alarm" must be reasonable to an objective observer. In order to cause "public alarm" there must be a clear and present danger to public safety.
- Special Event: Generally, a non-routine activity within a community that brings together a large number of people.
- Squad: A group of members tasked with accomplishing certain goals and missions. A minimum of one sergeant shall be assigned to each squad. The maximum span of control is twelve members per sergeant. (ICS refers to this group as a "strike team")
- ~~Unlawful Assembly: Whenever two or more individuals assemble to carry out a lawful or unlawful purpose in a manner likely to seriously jeopardize public safety, peace or order, or when a lawful assembly of not less than two persons agrees by actions or words to engage in conduct likely to seriously jeopardize public safety, peace or order.~~

Comments: The term "breach of peace" is vague and should be replaced with language that makes clear that a lawful assembly becomes an unlawful civil disturbance because of a "clear and present danger to public safety." *See City of Portland v. Hemstreet*, 199 Or App 239, 850 P2d 1131 (April 21, 1993). The Directive should define a civil disturbance according to the law and it should use that term only. This will avoid implying that police may disperse an "unlawful assembly" that does not present a clear and present danger to public safety. In addition, the definition of unlawful assembly now included in the draft Directive does not appear to be based on any statutory authority or case precedent. Also, we have clarified in the definition of "Demonstration (or Protest)" that a lack of a permit

does not make the demonstration “unlawful.”

“Riot” is defined by statute in Oregon. *See* ORS 166.015. The statute requires a minimum of six participants. *Id.* (“A person commits the crime of riot if while participating with five or more *other* persons...”) (emphasis added). To “recklessly create a risk” is unconstitutionally vague, so we have removed it from the definition of riot. *See* Order, Granting Demurrer in Part, Entered April 22, 2016, *State v. Raiford* (CR33805) (allowing defendant’s demurrer with respect to the deletion of “and recklessly create a risk of”). Our comments clarify that any perceived risk of public alarm must be reasonable. *See State v. Chakerian*, 325 Or 370, 383-84 (1997) (holding that in order to avoid being unconstitutionally vague, the statute must be interpreted to contain a reasonableness standard). Under the statute, the person charged must have actually “engage[d] in violent and tumultuous conduct.” *Id.* at 375, n. 8. Given the limited number of cases interpreting the term “riot,” and the potential for serious misuse by the current or future federal administrations,⁸ we encourage the City and PPB to further restrict the definition of riot by defining “public alarm” as meaning clear and present danger to public safety.

We request that PPB and the City draft a directive regarding Rapid Response Teams (RRT). Currently, there is no PPB directive about the (1) creation of a RRT; (2) selection process for assignment of a PPB member to a RRT; or (3) the qualifications of PPB members assigned to RRTs. When assembling a RRT, we urge PPB to consider only members with no prior excessive force complaints; complaints involving allegations of poor judgment; or complaints regarding selective enforcement of laws or selectively following PPB Directives.

Policy:

1. The purpose of this Directive is to provide guidance for demonstrations, special events, the managing of crowds during demonstrations, and controlling crowds during civil disturbances.
2. Freedom of speech, association, and assembly, and the right to petition the government are subject to ~~reasonable~~^{lawful} restrictions on the time, place, and manner of expression; the content of the speech does not provide the basis for imposing limitations on First Amendment rights.
3. The Portland Police Bureau recognizes that the City of Portland has a tradition of free speech and assembly. It is the responsibility and priority of the Portland Police Bureau not to unduly impede the exercise of First Amendment rights and to provide for the safe and lawful expression of speech, while also maintaining ~~the public~~ ^{safety} ~~peace and order~~. A police response that impedes otherwise protected speech must be narrowly tailored to serve ~~based~~

⁸ Mat dos Santos, *Why Is DHS Labeling Protesters “Domestic Terrorists”?* Speak Freely, ACLU Blog (March 10, 2017, 12:45 PM), <https://www.aclu.org/blog/speak-freely/why-dhs-labeling-protesters-domestic-terrorists>.

~~upon~~ a compelling government interest.

4. While the First Amendment provides broad protections for the expression of speech, it does not provide protection for criminal acts including, but not limited to, trespassing, destruction of property, ~~disorderly conduct~~, and assaults.
5. In managing a demonstration, it is the goal of the Bureau to apply the ~~minimum~~appropriate level of coordination, assistance, guidance, and management, to protect constitutional rights, ~~life, property,~~ and to maintain public ~~safety, peace and order~~. The Bureau recognizes that demonstrations and events are dynamic in nature. Accordingly, members will monitor the crowd throughout the event to assess the level of risk posed to both demonstrators and the public at large, with the goal of minimizing potential ~~disorderly or violent outbursts~~violence or injury. Member response should be commensurate to overall crowd behavior, and members should differentiate between groups or individuals who are engaging in criminal behavior or otherwise posing a threat to the safety of others and those in the crowd who are lawfully demonstrating. Members will ~~strive to~~ maintain a non-confrontational presence to dissuade participants from ~~engaging in disorderly behavior~~behavior that threatens public safety and to encourage crowd self-monitoring. Members should not display military style "hard gear" equipment and clothing unless a demonstration has become~~evolved into a civil disturbance~~.
6. If a demonstration becomes a civil disturbance, the Bureau has a responsibility to reasonably protect public safety. ~~While~~The preferred police response is one of crowd management rather than crowd control ~~restore order and the public peace. In restoring the public peace and order,~~ the Portland Police Bureau ~~may~~should employ only necessary~~reasonable~~ crowd management and/or crowd control tactics to ~~contain, control, and~~ de-escalate the situation. If there is an escalation in violent ~~or disorderly~~ behavior that is no longer isolated to individuals or small groups, members shall adjust their tactical response to adequately resolve the incident in an attempt to remove the threat to public safety from~~restore order to~~ the demonstration and de-escalate the situation. ~~reduce the need for an enhanced police presence~~.
7. All members are expected to conduct themselves in a professional manner when interacting with persons involved with demonstrations and special events. Members shall identify themselves by wearing a visible name badge ~~or~~and identification number at all times. A member's communication with members of the crowd will remain content neutral.

Comments: We appreciate the helpful policy additions in subsections 5-7. Consistent with our comments above, the edits are designed to ensure that this Directive focuses on supporting First Amendment activity and directs intervention only when an assembly presents a clear and present danger to public safety or involves criminal acts. We removed ~~disorderly conduct~~ from the list of criminal conduct in subsection 4, because of the significant First Amendment limitations applicable to this crime. *See, e.g., State v. Ausmus, 336 Or 493, 85 P3d 864 (2003) (finding disorderly conduct statute unconstitutionally vague).*

Procedure:

1. Section 8 of this Directive and Directive 1010.00, Use of Force, governs all uses of force in crowd management and crowd control situations.
2. The Bureau shall use the national, standardized and exhaustive system established in the Incident Command System (ICS) to plan and manage significant incidents and events. Members shall refer to Directive 700.00, National Incident Management System (NIMS) and Incident Command System (ICS), for specific guidance regarding incident management.
 - 2.1. When time and circumstances permit and a police response is reasonably anticipated, the CMIC, or their designee, shall develop an Incident Action Plan (IAP) prior to the start of an incident or event.
3. Communication.
 - 3.1. The Bureau's goal is to facilitate, in the least intrusive manner, participants' lawful objectives and protect their right to assemble. Furthermore, where event participants do not present a threat to public safety~~comply with City laws and ordinances~~, the Bureau shall empower participants to monitor themselves in an effort to limit member involvement.
 - 3.1.1. When a police response is necessary:
 - 3.1.1.1. The Bureau shall make reasonable efforts to contact known event or demonstration organizers to assist in the Bureau's planning and to develop an understanding of the organizers' needs and objectives. Similarly, the Bureau should communicate its expectations and inform participants on permissible and restricted actions during the event or demonstration.
 - 3.1.1.2. The Bureau, through the PPB Demonstration Liaison or another designee, shall attempt to maintain communication with known event or demonstration organizers before and during the event. The Liaison shall maintain communications with the CMIC to keep them apprised of the situation.
 - 3.1.1.3. The Bureau, through the Public Information Officer (PIO) or another designee, shall communicate through the use of social media and other conventional outlets to keep the public, including the crowd, informed throughout the event.
 - 3.2. ~~When feasible, m~~Members should ~~strive to~~ engage and interact with the crowd in a positive and non-confrontational manner.

Comments: We appreciate the new communications policies in subsections 3.1 and 3.2, but eliminated language that unnecessarily qualified these policies.

4. Demonstrations and Special Events.
 - 4.1. Planned Demonstrations and Special Events.
 - 4.1.1. If there is adequate notice of a demonstration or special event, the Assistant Chief of Operations or the Chief of Police shall designate a CMIC as soon as practicable

to establish and maintain command and planning of the event in accordance with ICS.

4.1.2. The CMIC, or their designee, shall determine if any police response is warranted.

4.1.3. If the CMIC deems police response necessary, the CMIC, or a designee, should use the “Event General Planning Reference Guide” to assist in the development of the IAP for the demonstration or special event.

4.1.3.1. The CMIC shall activate RRT for events that are anticipated to involve civil disturbance.

4.1.3.2. Any time RRT is activated, the CMIC shall notify the Detective Division to ensure mass-arrest resources are available. The CMIC is responsible for determining the appropriate scale of the mass arrest team response.

4.2. Spontaneous Demonstrations.

4.2.1. Many spontaneous events can be lawful and facilitated with minimal police assistance. An unplanned/spontaneous event does not automatically mean that it is an unlawful assembly.

~~4.2.1.4.2.2.~~ The on-duty precinct supervisor shall respond to the incident, assume command and determine if an additional police response is warranted.

~~4.2.1.1.4.2.2.1.~~ The on-duty supervisor will remain as the incident supervisor until relieved. The on-duty supervisor may contact a RRT supervisor or the RRT commander ~~person~~ if RRT supervisors are unavailable to determine an appropriate level of response.

~~4.2.1.1.1.4.2.2.1.1.~~ After a consultation, the incident supervisor shall notify the CMIC.

~~4.2.1.1.1.1.4.2.2.1.1.1.~~ The CMIC shall determine the level of response and activate RRT, if needed.

~~4.2.1.2.4.2.2.2.~~ A Sergeant who is the first supervisor on scene of a spontaneous demonstration shall notify their Lieutenant, who may then respond to the scene and assume command when there are two or more squads involved.

4.3. If an event requires MFFs from multiple Responsibility Units (RUs), the on-scene supervisor shall consult with the RRT commander.

4.3.1. After a consultation, the incident supervisor shall notify the CMIC.

4.3.1.1. The CMIC shall determine the level of response and activate RRT, if needed.

4.4. Demonstrations may be photographed and audio and video recorded to provide situational awareness to the CMIC, and may be used for prosecution of criminal acts and defense in civil court. Such recordings will comply with ORS §~~181-575~~181A.250. To the extent not governed by other policies, any recorded audio or video not containing alleged criminal acts for prosecution, shall be deleted within a reasonable time period. ~~turned over to the city attorney’s office to be stored.~~ No such recording shall be used to monitor individuals or groups solely based on political association or affiliation.

Comments: We are concerned that Section 4 lacks standards to guide the decision about what police presence is “needed” or “warranted.” Permissible standards (e.g., location of event, number of people expected, efficacy of de-escalation tools, type of event, possibility of counter-protesters, communication with group organizers) and impermissible standards (e.g., subject matter of event, profiling, retaliation for previous protests) should be stated. In addition, there is no reason to indefinitely maintain recordings that do not contain alleged criminal acts for prosecution, and this approach is contrary to ORS 181A.250 (formerly 181.575). We continue to disagree that PPB can photograph and record demonstrations without violating ORS 181A.250 because these activities constitute collecting information without a direct relationship to criminal activities. ORS 181A.250 says, “No law enforcement agency, as defined in ORS 181A.010, may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.”

We further request that this directive include clear objective factors that the CMIC uses to “anticipate” a civil disturbance (4.1.3.1) to ensure that the PPB is not making determinations about activating the RRT based on the impermissible standards detailed above.

5. Member Responsibilities during Demonstrations.

5.1. The CMIC shall:

- 5.1.1. Oversee the development, dissemination, and implementation of the IAP for the demonstration in accordance with this Directive and the Event Planning Reference Guide;
- 5.1.2. Determine the mission and objectives and consider what crowd tactics are ~~necessary~~ reasonable and warranted, if any, to maintain public safety based on the totality of the circumstances;
- 5.1.3. When feasible, attempt to maintain communication, through the PPB Demonstration Liaison, with the Person-In-Charge, or their designee, during demonstrations;
- ~~5.1.4.~~ 5.1.4. Ensure announcements communicated to the crowd are clear, consistent, lawful, and appropriate for the circumstances. The content and timing of the announcement shall be documented and, ~~if feasible, shall be~~ audio recorded; ~~and~~
- ~~5.1.4.5.~~ 5.1.5. Take reasonable steps to ensure orders to the crowd have been heard and understood;
- ~~5.1.5.~~ 5.1.6. Activate RRT when deemed necessary;
- ~~5.1.6.~~ 5.1.7. Authorize the use of force as authorized in this Directive and in the Use of Force Directive only as necessary to protect the public from a serious risk to public safety. deployment of riot control agents and/or special impact munitions, when

~~necessary, to address civil disobedience and crowd dispersal.~~

5.2. The Operations Section Chief shall:

- 5.2.1. Assist the CMIC in determining staffing levels, probable missions, and possible tactical strategies during the planning for the event; and
- 5.2.2. Assign units to specific missions during the event to meet the objectives established by the CMIC.

5.3. The Detective Division Commander or Supervisor shall:

- 5.3.1. Coordinate with the CMIC to determine the scale of the mass arrest team response;
- 5.3.2. Assign detectives to assist with mass arrests;
- 5.3.3. Manage the processing of all arrests pursuant to the Detective Division SOP; and
- 5.3.4. Ensure that all required documentation for arrests is collected.

5.4. Sergeants shall:

- 5.4.1. Verify that all members have the proper equipment;
- 5.4.2. Ensure that members are briefed prior to the start of the event; and
- 5.4.3. Communicate orders from the CMIC to their assigned squad to ensure that the mission and objectives are appropriately executed.

5.5. Members shall:

- 5.5.1. Follow the directions of the sergeant; and
- 5.5.2. Not take independent police action, unless exigent circumstances require immediate action for protecting themselves or others from physical harm.

Comments: We strongly object to Subsection 5.1.6, which appears to allow the use of force against peaceful demonstrators conducting acts of “civil disobedience,” fails to cross-reference the Use of Force policy, and uses undefined terminology (e.g. “riot control agents”).

6. Coordination with Other Agencies

6.1. The Bureau may request assistance from other law enforcement agencies to sufficiently staff and respond to a demonstration or special event, but must ensure that these agencies are aware of and agree to follow the Bureau’s Crowd Management/Crowd Control and Use of Force Directives.

6.1.1. The Bureau CMIC, or their designee, shall appropriately brief outside agency personnel prior to their deployment.

6.1.2. The Bureau CMIC shall maintain the authority to determine tactical objectives; direct the overall police response (all agencies); and determine how and when force may be used consistent with the Bureau’s Crowd Management/Crowd Control and Use of Force Directives, ~~when necessary and reasonable, to deploy less lethal munitions to address civil disobedience and/or disperse the crowd.~~

6.1.3. The Bureau expects assisting agencies to act in accordance with the lawful orders of the Bureau CMIC; however, their members’ conduct is also subject to the

outside agency's policies and procedures.

Comments: If PPB seeks assistance from other agencies, they should follow PPB's Crowd Management/Crowd Control and Use of Force Directives.

7. Announcements and Warnings.

7.1. Member shall make loud ~~and~~, intelligible and consistent announcements and warnings to the crowd.

7.2. Announcements are designed to convey general information to the crowd in an effort to keep an event lawful. They should not be used to harass or intimidate organizers and protesters.

7.3. Civil Disturbance.

7.3.1. When issuing warnings, members should cite specific offenses and violations being committed and caution the crowd that these acts of civil disturbance will not be permitted and can result in arrest or, if a serious threat to the public safety is clear and imminent, necessitate the use of force. To reduce or eliminate the necessity for force, members shall give clear directions in an attempt to ~~gain compliance~~ mitigate threats to safety. Members shall issue a minimum of two warnings to alert the crowd of possible impending ~~force arrest or force~~ that may be used, unless doing so would present a danger to the member(s) or others.

~~7.3.1.~~ 7.3.2. Members shall document the warnings in an appropriate police report and ensure the audio is recorded (e.g., date, time, announcing officer, messages, confirmation received by identified staff on the other end.)

~~7.4. Unlawful Assembly.~~

~~7.4.1.~~ 7.3.3. Prior to ordering the dispersal of a ~~civil disturbance~~ unlawful assembly, and ~~when tactically feasible and time reasonably permits~~ members shall issue a minimum of two warnings at reasonable intervals to allow the crowd to comply, unless doing so would present a danger to the member(s) or others. ~~prior to taking decisive action.~~

~~7.4.2.~~ 7.3.4. Members shall document the warnings in an appropriate police report; and ~~if feasible,~~ ensure the audio is recorded (e.g., date, time, announcing officer, messages, confirmation received by identified staff on other end).

Comments: We have merged the civil disturbance and unlawful assembly Sections because, as defined in our revisions to this Directive, an assembly is unlawful only if it is a civil disturbance.

8. Prohibited Crowd Control Tactics/Use of Force for Crowd Management, Crowd Control and Crowd Dispersal.

8.1. Consistent with applicable provisions in the Use of Force Directive, mMembers shall not take the following actions to manage, control or disperse a crowd:

- 8.1.1. Use fire hoses;
 - 8.1.2. Deploy Canine Units; ~~and~~
 - 8.1.3. Use a conducted electrical weapon (CEW);
 - 8.1.4. Use Deadly Force;
 - 8.1.5. Use Skip Fired Specialty Impact Projectile Less-Lethal Munitions (e.g., Stinger Grenades). Weapons designed to be skip fired or otherwise deployed in a non-directional, non-target specific manner shall not be used for crowd management, crowd control, or crowd dispersal purposes under any circumstances;
 - 8.1.6. Use Direct Fired Specialty Impact Projectile Less-Lethal Munitions (e.g., Bean Bags, Rubber Bullets, Pepper Spray Bullets, Wooden Bullets). Impact projectile weapons designed to be direct fired shall not be used for crowd management, crowd control, or crowd dispersal purposes. Direct impact projectile weapons may be used against a specific individual, consistent with the Use of Force Directive, when the individual can be targeted without endangering other crowd members or bystanders. Direct impact projectile weapons may never be used indiscriminately against a crowd or group of persons, even if some members of the crowd are violent and disruptive; and
 - ~~8.1.3.~~8.1.7. Use Aerosol Hand Held Chemical Agents (e.g., Pepper Spray). Aerosol Hand Held Chemical Agents shall not be used for crowd management, crowd control, or crowd dispersal purposes. Aerosol hand held chemical agents may never be used indiscriminately against a crowd or group of persons, but only against specific individuals who are engaged in specific acts of serious unlawful conduct or who are actively resisting arrest, consistent with the Use of Force Directive.
- 8.2. The Bureau shall not use mounted patrol units (MPUs) against passively resistant demonstrators ~~who are sitting or lying down.~~
- 8.3. Motor vehicles shall not be brought into contact with protesters or used to surround or push protesters.
- 8.4. Use of Non-hand Held Chemical Agents (e.g., Tear Gas). If authorized by the Mayor and the Chief of Police, members may use non-hand held crowd control chemical agents for crowd management, crowd control and crowd dispersal as a last resort if other techniques, such as de-escalation, encirclement, arrests and police formations, have failed or will not accomplish the policing goal determined by the CMIC. Chemical agents can produce serious injuries or even death, especially in vulnerable populations (such as elderly persons, infants, and people with asthma). Members shall use the minimum amount of chemical agent necessary to stop the threat to public safety. Chemical weapons shall not be used without first giving an audible warning of their imminent use, as set forth in Section 7, and reasonable additional time to disperse safely to the crowd, media and legal observers.
- 8.5. Use of Sound, Light and Chemical Diversionsary Devices (e.g., Flash Bangs). If the

CMIC is authorized by the Mayor and the Chief of Police, members may use sound, light and chemical diversionary devices as a last resort if other techniques, such as de-escalation, encirclement, arrests and police formations, have failed or will not accomplish the policing goal determined by the CMIC. The use of sound, light and chemical diversionary devices presents a risk of permanent loss of hearing or serious bodily injury from shrapnel. These devices shall be deployed to explode at a safe distance from the crowd to minimize the risk of personal injury, while moving or dispersing the crowd to address public safety concerns. Sound, light and chemical diversionary weapons shall not be used without first giving an audible warning of their imminent use, as set forth in Section 7, and reasonable additional time to disperse safely to the crowd, media and legal observers.

Comments: We have comprehensively revised this section of the Directive to prohibit or limit the use of weapons and techniques that could result in death or serious harm when used for crowd management, crowd control and crowd dispersal. As currently written, this Directive and the Use of Force Directive fail to adequately address the efficacy and risks associated with military-style weapons, such as stinger grenades and rubber bullets, for crowd management, crowd control, and crowd dispersal. To protect the public from the risk of harm associated with these weapons and techniques, we recommend: (1) a prohibition on the indiscriminate use of stinger grenades, impact projectile weapons, and pepper spray against crowds; (2) a restriction allowing impact projectile weapons and pepper spray only against specific individuals for specific criminal acts as long as others in the crowd are not impacted; (3) a restriction allowing tear gas and flash bangs as crowd control, crowd management and crowd dispersal tools only as a last resort, with explicit acknowledgement of the risks they present; and (4) a requirement that the CMIC seek and obtain approval to deploy tear gas and flash bangs from the Mayor and Chief of Police. We recommend that conforming changes be made to the Use of Force Directive, which currently addresses the use of force for crowd control, crowd management and crowd dispersal only as a secondary issue in just a few provisions.

9. Crowd Dispersal.

9.1. The CMIC may order the crowd dispersed when a demonstration or special event becomes a civil disturbance ~~because~~ the crowd presents a clear and present danger to the safety of the public or members.

9.2. Before giving the order to disperse, the CMIC must consider whether dispersal unduly endangers the public, police or participants in the crowd.

9.3. If the CMIC directs a crowd to disperse, information regarding dispersal shall be clearly communicated to the crowd and shall include: a reasonable amount of time to disperse, consequences of a failure to disperse, and the clear routes available for individuals to leave the area.

9.1.9.4. Members shall document the warnings in an appropriate police report and ensure the audio is recorded (e.g., date, time, announcing officer, messages, confirmation

received by identified staff on the other end.)

10. Detentions.

- 10.1. The failure to comply with the lawful order to disperse can transform otherwise legal conduct into criminal conduct if the protest has been determined to be a civil disturbance by the CMIC or if the crowd has been trespassed from a certain location. Members may be justified in detaining ~~a crowd~~ individuals engaged in civil disturbance ~~an unlawful assembly~~ after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order.

11. Arrests.

- 11.1. Absent exigent circumstances, arrests should only be made when authorized by the CMIC.
- 11.2. Careful consideration should be given to the timing, location, and method of the arrest and resources available.

11.3. To effect arrests, members must be able to articulate the individualized probable cause for the arrest of each person.

~~11.3-11.4.~~ No arrests shall be made of journalists or legal observers.

12. Reporting and Coordination Requirements.

12.1. The CMIC (or their designee) shall:

- 12.1.1. Write an After Action in accordance with Directive(s) 905.00, Non-Force After Action Reporting, or 1010.00, Use of Force, if force was used;
- 12.1.2. Review any uses of force by other agencies' personnel as part of the overall incident after action report;
- 12.1.3. Write an overall police report that describes the major decisions made by the police during the incident in accordance with Directive 900.00, General Reporting Guidelines;
- 12.1.4. Ensure all other applicable pertinent reports are submitted as required by Directive 900.00, General Reporting Guidelines, and 1010.00, Use of Force; and
- 12.1.5. Hold a formal debrief of the event to discuss the overall plan, tactics, staffing and areas of improvement. The debrief should include key supervisory member participants in the event.

12.2. The Detective Division Commander or Supervisor shall:

- 12.2.1. Ensure coordination with the District Attorney's Office when arrests ~~were~~ are made.

12.3. Supervisor Responsibilities.

- 12.3.1. The supervisor shall not independently direct management or crowd control tactics without the authorization of the Incident Commander, unless exigent

circumstances require immediate action.

12.3.2. At the end of the event, the lead supervisor of each squad shall conduct a debriefing of the incident with their personnel and complete an appropriate police report in accordance with Directive 900.00, General Reporting Guidelines, and 1010.00, Use of Force, documenting the actions of their squad during the incident.

12.3.3. The assistant supervisor, or a designated alternate supervisor, of each squad shall write an after action of any force used by the squad in accordance with Directive 1010.00, Use of Force, during the incident. This after action shall be submitted to the CMIC.

12.4. Members Responsibilities.

12.4.1. Members who use force, or witness force by another member during the incident, shall document such actions in an appropriate police report, in accordance with Directive 1010.00, Use of Force.

III. Conclusion

We look forward to working collaboratively with the City and PPB on revisions to proposed directive 635.10.

Sincerely,



Mat dos Santos
Legal Director
ACLU of Oregon



Brenna Bell
Member
National Lawyers Guild
Portland Chapter



Kristina Holm
Co-Leader
Lawyers for Good Government
Oregon Chapter



Katherine McDowell
Vice President, Litigation
ACLU of Oregon



Jonny Gersten
Member
National Lawyers Guild
Lewis & Clark Chapter
Portland Police
Accountability Project



Kimberly Mason
Member
Lawyers for Good Government
Oregon Chapter

ACLU of Oregon, NLG Portland Chapter, and OL4GG

Comments on PPB Proposed Directive 635.10

March 22, 2017

Page 17

cc: Barbara Buono, Barbara.Buono@portlandoregon.gov
Mary Claire Buckley, MaryClaire.Buckley@portlandoregon.gov
Steve Jones, Steve.Jones@portlandoregon.gov
Andrea Barraclough, Andrea.Barraclough@portlandoregon.gov
Tracy Reeve, Tracy.Reeve@portlandoregon.gov
Nicole Grant, Nicole.Grant@portlandoregon.gov
Berk Nelson, Berk.Nelson@portlandoregon.gov