



Oregon

June 15, 2020

SENT VIA EMAIL

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

Chief Chuck Lovell
Portland Police Bureau
Chuck.Lovell@portlandoregon.gov

Re: Comments from American Civil Liberties Union of Oregon on Portland Police Bureau Directive 635.10 Crowd Management/Crowd Control

Dear Mayor Wheeler and Chief Lovell:

On behalf of the American Civil Liberties Union of Oregon (ACLU of Oregon) and all of our members, we submit these comments on Portland Police Bureau (PPB) Directive 635.10, Crowd Management/Crowd Control (the "Directive"). We appreciate the opportunity to provide feedback on this important PPB policy.

I. INTRODUCTION

As we submit these comments, large, non-violent protests have been occurring nightly in Portland, as people here and across the country express outrage at the death of George Floyd and this country's and this city's long history of police killings and brutalization of Black Americans. On May 25, 2020, a Minneapolis police officer killed George Floyd by kneeling on his neck for eight minutes and 46 seconds, while three other officers stood by, ignoring the pleas of Mr. Floyd and bystanders to stop. Masses have gathered by the thousands to call for police reforms, for reimagining public safety, for defunding law enforcement and investing instead in agencies and activities that build healthier and more equitable communities, especially for Black people.

Over the past two weeks, ACLU of Oregon legal observers have documented PPB’s helter-skelter tactics, gratuitous escalation, and excessive use of force during these protests—which are aimed at stopping precisely these kinds of police behaviors. Since January 2017, ACLU of Oregon legal observers have consistently observed and documented the same problematic PPB responses to First Amendment activity in Portland.

It is past time to scrutinize this Directive and for the City to enact real change. For years, the ACLU of Oregon has advocated for such change, in numerous letters to the City and PPB,¹ in the ACLU of Oregon’s Report and Recommendations to Independent Police Review,² in four different comment periods on Directive 635.10,³ and in numerous state and federal lawsuits filed by the ACLU of Oregon on behalf of people present at protests. The ACLU of Oregon also participated in the City of Portland’s independent review of PPB crowd control practices from the National Police Foundation,⁴ and understand that their report is expected to be released soon. The ACLU of Oregon’s position has been clear: (1) the First Amendment requires the City to narrowly tailor its response to protests in a way that maintains peace and deescalates, rather than incites, violence with overly-militarized tactics and indiscriminate use of weapons, and (2) a relatively restrained approach to demonstrations reduces the risk of harm to all participants, and results in fewer arrests and less property damage and disruption.⁵ To date, PPB and the City have largely ignored our

¹ 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 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>.

² Available at: https://aclu-or.org/sites/default/files/field_documents/aclu_or_ipr_report_on_june_4_protests.pdf.

³ Comments from ACLU and the Portland Chapter of the National Lawyers Guild on Portland Police Bureau Directive 635.10 (March 17, 2018); ACLU letter to Mayor Wheeler re PPB’s Crowd Control Activities on May 1, 2017 (May 10, 2017); ACLU of Oregon, NLG Portland Chapter, and OL4GG Comments on PPB Proposed Directive 635.10 (March 22, 2017); ACLU Comments on PPB Proposed Directive 635.10 (Feb 15, 2017).

⁴ See [The National Police Foundation Will Conduct Independent Assessment of PPB Demonstration Response](#). (Last accessed June 11, 2020)

⁵ The Oakland Police Department’s Crowd Control and Crowd Management Policy, Training Bulletin III-G (the “OPD Policy”) provides language that achieves some of these goals. A negotiated settlement agreement arising out of an incident at the Port of Oakland resulted in a crowd control and crowd management policy crafted by members of the ACLU and the National Lawyers Guild and the OPD. The OPD Crowd Control and Crowd Management Policy, Training Bulletin III-G (October 28, 2005) resulted from that policy revision. Judge Henderson reaffirmed and reiterated the OPD duty to follow the Training

feedback.

We encourage PPB to act now to codify practices and policies that emphasize de-militarization and de-escalation to fully protect First Amendment rights and public safety in Portland. We also recognize that these comments come at a time when there is a resounding public call for the reimagining of what public safety means. We take that call seriously. Given this context, we request that PPB act immediately to change its crowd control directive, while continuing to accept feedback on these directives as the public imagines the community safety model we want to build. The ACLU of Oregon reserves the right to supplement or change these recommendations as we reflect on PPB's responses to ongoing protests, receive the National Police Foundation Report, and continue to learn from the community about what is needed to feel safe in Portland.

II. SPECIFIC REVISIONS TO DIRECTIVE 635.10

We offer the following **redlined** revisions with explanatory comments provided after each section of the Directive.⁶

635.10 Crowd Management/Crowd Control * * * *

Definitions:

- Civil Disobedience: A non-violent form of protest or resistance to obeying certain laws, demands or commands of a government.
- Civil Disturbance: An **unlawful** assembly **of five or more persons, acting in concert, and** that constitutes a clear and present danger **of riot, disorder, interference with traffic upon the public streets or when another immediate threat** to public safety, peace or order appears. **A person or assembly of persons passively present or passively resisting arrest are not a Civil Disturbance. Media and legal observers documenting a Demonstration, Civil Disturbance or police response thereto are also not a Civil Disturbance.**
- Crowd Control: Law enforcement response to a pre-planned or spontaneous event, activity, or occurrence that has become a **Ceivil Dd**isturbance 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

Bulletin III-G in 2013 as part of the City's settlement in Spalding v. City of Oakland, Case No. C11-2867 (ND CA, Sept. 9, 2013), <https://www.slideshare.net/MakeOaklandBetterNow/spalding-settlement> (last accessed June 6, 2020). We have incorporated aspects of the OPD Policy into our comments on Directive 635.10.

⁶ Additions drawn from the OPD Policy are highlighted in light grey.

of maintaining the event's lawful activities. These could include event planning, pre- event contact with group leaders, information gathering, and other means.

- 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): An ~~lawful~~ assembly of persons who have organized primarily to exercise their First Amendment 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.). ~~Lawful demonstrations can become civil disturbances.~~

- Freedom of Speech: The right to speak, associate, assemble, and petition the government; speech that is protected by the First Amendment to the United States Constitution and Article I, sections 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.

- Incident Commander (IC): The individual responsible for all incident activities, including the development of strategies and tactics and the ordering and release of resources. The IC has the overall authority and responsibility for conducting incident operations and is responsible for the management of all incident operations at the incident site.

- Mass arrest: the tactic of simultaneously arresting, in one action, more than 25 persons during a crowd management or crowd control event with the intent of taking them into custody or issuing them criminal citations.

- Mass detention: the tactic of simultaneously detaining, in one action, more than 25 persons during a crowd management or crowd control event for the purpose of investigating suspected criminal activity.

- 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 CMIC, who develops and implements strategy and tactics to carry out incident objectives. The designated member organizes, assigns, and supervises the tactical response resources.
- Passive Resistance: A person's non-cooperation with a member that does not involve violence or other active conduct by the individual. **This includes refusal to obey a member's order when that refusal is not accompanied by violence or other active conduct.**
- 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 IC as the primary contact for communication with the demonstration's Person-In- Charge to police.
- Rapid Response Team (RRT): The Bureau's all-hazard team of members who are specially trained to assist in the response to manmade/natural disasters and other emergency management situations which include, but are not limited to, the management and control of crowds through various tactics and techniques.
- Riot: Six or more persons engaging in tumultuous and violent conduct and thereby intentionally or recklessly creating a grave risk of causing public alarm, excluding persons who are engaged in passive resistance. **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")

Comments: As in prior comments, the ACLU of Oregon again urges PPB to refine its definition of "Civil Disturbance." The Directive should define a Civil Disturbance according to the current state of the law, which provides that a lawful assembly becomes an unlawful civil disturbance only when there exists a "clear and present danger to public safety." See *City of Portland v. Hemstreet*, 119 Or App 239, 850 P2d 1131 (1993). Further, the authority to disperse an unlawful assembly requires five or more persons are present, not including those who are passively present or resisting arrest. ORS 131.675; *City of Portland v. Roth*, 130 Or. App. 179, 182, 880 P2d 967 (1994).

As currently written, PPB may declare an assembly unlawful if it is a Civil Disturbance under subsection 9 of this Directive, and may use force against demonstrators under Directive 1010.00, Use of Force, subsection 6.4.6.1. Given the significant impact of the definition of Civil Disturbance on First Amendment rights as well as the health and safety of demonstrators, it is critical that vague terms such as “peace” and “order” be eliminated, and the definition be clearly written to assist PPB in dispersing assemblies and using force only when a clear and present danger to public safety exists.

Relatedly, the addition of the undefined word “unlawful” also is redundant and adds vague language to the directive. We are deeply concerned about the frequency with which groups of protesters that the City and PPB admit are largely peaceful are labelled an “unlawful assembly” and violently dispersed. PPB should avoid this vague phrase and apply more clearly defined terms like “civil disturbance” or specifically name any criminal activity that is being observed.

“Riot” should clearly define “public alarm” in accordance with the above cited case law. *See also State v. Moyle*, 299 Or 691, 700, 705 P2d 740 (1985); *State v. Chakerian*, 135 Or App 368, 378-79, 900 P2d 511 (1995) *aff’d*, 325 Or 370 (1997).

Finally, the ACLU of Oregon has added definitions for Mass Detentions and Mass Arrests in accordance with its below recommended addition to PPB policies in the new Section 13: Mass Detentions and Mass Arrests.

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, assembly, and the right to petition the government are subject to reasonable 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 content- and viewpoint-neutral and narrowly tailored to serve a significant government interest of maintaining public safety, public health, or safe access/egress from the area, and should restrict no more speech than necessary to further these governmental interests.

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, ~~R~~riot, ~~disorder~~, interference with traffic upon the public streets, or other immediate threats to public safety, ~~peace or order~~.

5. 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 violence, injury or damage to property. Member response should be commensurate to overall crowd behavior, and members should differentiate between groups or individuals who are posing a threat to the safety of others and those in the crowd who are lawfully demonstrating. Members will strive to maintain a diplomatic presence to dissuade participants from engaging in civil disturbance and to encourage crowd self-monitoring.

6. If a demonstration becomes a ~~C~~eivil ~~D~~isturbance, the Bureau has a responsibility to reasonably protect public safety ~~and restore peace and order~~. The preferred police response is one of crowd management rather than crowd control. The Bureau should employ only ~~objectively reasonable necessary~~ crowd management and/or crowd control tactics with the intent to de-escalate the situation. If there is an escalation to a ~~C~~eivil ~~D~~isturbance that is no longer isolated to ~~a~~ small groups, members shall adjust their tactical response to adequately resolve the incident in an attempt to restore safety, ~~peace and order~~. It is the policy of the PPB to minimize reliance on the use of physical force and authority to address a crowd management or crowd control issues.

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: Consistent with our comments above, we removed vague terms of “peace” and “order” to ensure that this Directive directs intervention only when an assembly presents a clear and present danger to public safety or involves criminal acts. We removed “disorder” from the list of criminal conduct in subsection 4, because it is not a crime and the term is vague. See *State v. Ausmus*, 336 Or 493, 85 P3d 864 (2003) (finding disorderly conduct statute unconstitutionally vague).

We also incorporated language from the OPD Policy specifying the governmental interests and encouraging minimal reliance on force.

Procedure:

1. **Section 9 of this Directive and** Directive 1010.00, Use of Force, governs all uses of force, including 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 IC shall develop an Incident Action Plan (IAP) prior to the start of an incident or event.
3. Communication.
 - 3.1. The Bureau's goals are to facilitate participants' lawful objectives and protect their right to assemble. Furthermore, where event participants **do not present a clear and present danger to public safety**~~comply with City laws and ordinances~~, the Bureau shall encourage and support participants' efforts to monitor themselves in an attempt to limit member involvement.
 - 3.1.1. When a police response is ~~requested or~~ deemed necessary by the Bureau
 - 3.1.1.1. The Bureau shall make reasonable efforts to contact and engage in dialogue with known event or demonstration organizers to assist the Bureau in its planning and to develop a shared 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 or the Person(s)-In-Charge

before and during the event. The Liaison shall maintain communications with the IC 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 appropriate, members should engage and interact with the crowd in a positive and non-confrontational manner. Members must maintain professional demeanor, and remain neutral in word and deed, despite unlawful or anti-social behavior on the part of crowd members. Unprofessional police behavior can inflame a tense situation and make control efforts more difficult and dangerous. Strong supervision and command are essential to maintaining unified, measured and effective police response. A response incorporating strong leadership and based upon teamwork is crucial to maintaining control and safety. Impulsive or independent actions by officers are to be avoided.~~

Comments: We eliminated language that unnecessarily qualified these policies and included language from the OPD Policy that sets forth the importance of member demeanor and provides more specific guidance. Most notably we removed the phrase “unlawful assembly.” This language is vague and has been inappropriately interpreted in ways that we have seen PPB justify the use of life-threatening force. We have also seen the phrase applied against crowds engaged in passive resistance, which is not a crime.

4. Demonstrations and Special Events.

4.1. Planned Demonstrations and Special Events.

4.1.1. Where the Bureau learns of an event at least twenty-four hours prior to its commencement, the Assistant Chief of Operations and the precinct commander nearest to the event location shall determine if the event should be staffed using the precinct’s resources or city-wide Bureau resources.

4.1.1.1. Events that are small in crowd size, or for which credible information indicates that there is little concern of civil

disturbance, shall generally be managed at the precinct level and staffed by the shift supervisor, who shall serve as the IC.

4.1.1.1.1. If crowd behavior escalates to a level that poses a ~~threat-clear and present danger~~ to public safety, ~~peace or order~~ during an event that is being managed by a shift supervisor acting as the IC, the shift supervisor must consult with a CMIC who will then determine if they (the CMIC) should assume command and request additional resources.

4.1.1.2. Events that are anticipated to have a greater critical impact, require a significant police response, and/or have the potential to become a civil disturbance shall have a CMIC designated by the Assistant Chief of Operations as the IC.

4.1.2. The IC shall determine the level of police response, if any is warranted.

4.1.3. In accordance with the ICS, if the IC deems a police response necessary, the IC, or a designee, should develop an IAP for the demonstration or special event.

4.1.3.1. If it is determined that basic Mobile Field Force (MFF) and bicycle units are not sufficient to manage the crowd, a CMIC shall be assigned to the event.

4.1.3.2. Only a CMIC may activate RRT or Mass Arrest teams.

4.1.3.2.1. If a shift supervisor is staffing an event as the IC, they shall consult with a CMIC prior to activating RRT.

4.1.3.2.2. Activation of Mass Arrest requires the CMIC to notify the Detective Division to ensure mass-arrest resources are available.

4.2. Spontaneous Demonstrations.

4.2.1. Events that the Bureau learns of with less than twenty-four hours before the start of the event are deemed spontaneous.

4.2.2. Many spontaneous events can be lawful and facilitated with appropriate

police assistance. A spontaneous or non-permitted event is not necessarily unlawful, nor does it automatically require a significant police response.

4.2.3. A supervisor at the precinct of occurrence shall respond to the event and determine if a police response is warranted.

4.2.3.1. If a police response is warranted, the on-scene supervisor shall serve as the IC for the incident and attempt to engage the event or demonstration organizer in an effort to facilitate participants' lawful objectives and protect their right to assemble.

4.2.3.1.1. 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.

4.2.3.2. The on-scene supervisor (IC) may contact an RRT supervisor, the RRT commander or a CMIC to help determine an appropriate level of response.

4.2.3.2.1. After consultation, if a higher level of police response is deemed necessary, a CMIC shall be called in and assume command.

4.2.3.3. If crowd behavior during the event escalates to a level that poses a ~~threat~~ **clear and present danger** to public safety, ~~peace or order~~ during an event that is being managed by a shift supervisor, the shift supervisor must consult with a CMIC, who will then determine if they (the CMIC) should assume command.

4.3. Demonstrations may be broadcast to Bureau facilities by live video feed to provide situational awareness to the IC. **All live video feed broadcasts of events will also simultaneously be made available to the public.** In accordance with ORS § 181A.250, the broadcast will not be recorded unless and until a member has reasonable suspicion that a crime is being committed, at which time the member will communicate this information up the chain of command to the IC, who will make the decision whether to authorize recording to commence. If a possible crime

is captured on the recording, that recording will be forwarded to Bureau's Detective Division for investigation and the District Attorney's Office, if requested. A copy will also be furnished to the City Attorney's office for the purpose of evaluating civil liability based on crimes charged or arrests made. Pursuant to Oregon Administrative Rules regarding records retention, recordings that do not have evidentiary value or aid in internal investigations shall only be retained by the City Attorney's office for thirty days. The Bureau will not keep a copy of any videos recorded under this Directive, and the IC will not authorize recording for the purposes of monitoring individuals or groups based solely on political associations or religious or social views.

- 4.4. Regardless of whether a parade permit has been obtained, PPB will try to facilitate demonstrations that may temporarily block traffic and/or otherwise use public streets, subject to time, place and manner circumstances, by regulating and/or rerouting traffic as much as practical. For a demonstration without a preplanned route, the IC shall evaluate the size of the crowd with regard to whether demonstrators should be required to stay on the sidewalk or whether demonstrators should be allowed to be in one or more lanes of traffic. This does not mean that demonstrations must be allowed to deliberately disrupt commuter traffic and bridge approaches. The IC shall balance the level of disruption to traffic against the PPB policy of facilitating First Amendment activity; the practicality of relegating the crowd to sidewalks or an alternate route; whether the traffic disruption is temporary as in a march; and the traffic disruption that would be entailed in making a mass arrest if demonstrators refuse to leave the street. PPB shall seek to communicate with organizers through their police liaison to resolve the problem if possible. Traffic control may also be essential at varying points in a demonstration, and may help accomplish crowd containment, crowd isolation or crowd dispersal.

- 4.5. **Public Records. Any documents collected or created by PPB in connection with a mass detention, mass arrest, or other crowd control event, is subject to the Oregon’s Public Records Law, ORS Ch. 192. For purposes of conditional exemptions, any event at which arrests are made or weapons deployed, the Bureau recognizes a presumption that the public interest weighs in favor of disclosure.**

Comments: Consistent with our comments above, we removed vague terms of “peace” and “order” to ensure that this Directive directs intervention only when an assembly presents a clear and present danger to public safety or involves criminal acts.

The Directive should provide guidance for police response based on traffic concerns. In past events, PPB has arrested protesters (sometimes violently) merely based upon their presence in the street, including events where sidewalk space was insufficient. These arrests can result in injuries, chaos, escalated tension, and even longer disruption to traffic. Much of this can be avoided by providing temporary facilitation or diversion of traffic. The Directive should include factors to assist members in determining the appropriate response to protesters’ temporary use of public streets.

5. Police Response to Demonstrations and Special Events.

5.1. Prior to a demonstration or event, the IC shall make a determination regarding the appropriate level of police response and the necessary allocation of resources to manage an event. Depending on the potential impact of the crowd (e.g., size, interference with commerce, street and pedestrian traffic, etc.), the Bureau may not need to be involved in the event.

5.2. The priority of the Bureau is to allow demonstration and event participants to self-police and manage their own events. To that end the IC shall monitor the event, weighing the totality of the circumstances to inform the decision to introduce police action to maintain public safety, ~~peace and order~~.

5.2.1. When deciding whether to use certain police tactics within a crowd, the IC shall balance the benefits of such action(s) to maintain public safety, ~~peace and order~~ against the impact on the demonstration or event participants’ First Amendment rights. **Officers in non-violent crowd situations shall not display weapons before a dispersal order is given or other enforcement action is implemented.**

- 5.2.2. PPB recognizes that a large and visible police presence may have a chilling effect on the exercise of free speech rights. Absent a compelling public safety reason, PPB officers and officers from supporting law enforcement organizations should not be present at demonstrations or special events. If officer presence is necessary, officers should attempt to remain not readily visible to the crowd. When possible, officers should be at their posts well in advance of arriving participants. Officers should be positioned at a reasonable distance from the crowd to avoid a perception of intimidation.
- 5.2.3. PPB members shall not be sent into an obviously hostile crowd solely for the purpose of communication. PPB members shall not penetrate an obviously hostile crowd for an individual arrest unless the targeted individual is involved in serious criminal conduct and the decision to move into the crowd is made by a supervisor or commander.
- 5.2.4. The IC, or a designee, shall authorize the appropriate level of protective equipment based on several factors to include, but not limited to:
- 5.2.4.1. Member safety,
 - 5.2.4.2. Individual and/or group physical resistance,
 - 5.2.4.3. The presence of weapons,
 - 5.2.4.4. Actual or credible threats or indicators of violent behavior,
 - 5.2.4.5. Actual or credible threats or indicators of criminal actions, and
 - 5.2.4.6. The potential impact or perceived effect that appearing in protective gear may have on the crowd.
- 5.2.5. When practicable, the IC should attempt to position members in protective gear in locations that minimize visibility until deployment is necessary.
- 5.3. If crowd behavior presents a clear and present danger that threatens the public safety, ~~peace or order~~, and the event can no longer be effectively managed through a minimal police presence, the IC may adjust crowd tactics to adequately respond.
- 5.3.1. When police action is necessary, members should endeavor to distinguish between individuals engaged in criminal behavior and ~~demonstration or~~

event participants who are ~~peacefully and lawfully~~ demonstrating. **PPB shall seek to minimize the risk that force and arrests may be directed at innocent persons. No person shall be arrested or subjected to force for engaging in Passive Resistance.**

5.3.1.1. The Bureau's assigned Demonstration Liaison, another IC-designated member and/or the member operating the sound truck shall, when feasible, attempt to convey the police action to the crowd via announcements and warnings.

5.3.2. The Bureau shall de-escalate its response when it is safe and tactically feasible to do so.

Comments: These revisions incorporate language from the OPD Policy, which codify best practices and social science research that find the presence of police, military equipment and weapons can inflame situations. They also make clear that passive resistance is not a crime or Civil Disturbance.

6. Member Responsibilities During Demonstrations.

6.1. The IC shall:

6.1.1. Oversee the development, dissemination, and implementation of the IAP for the demonstration in accordance with this Directive and ICS;

6.1.2. Determine the mission and objectives and consider what crowd tactics are **objectively reasonable necessary** under the totality of the circumstances;

6.1.3. When feasible, attempt to maintain communication, through the PPB Demonstration Liaison, with the Person-In-Charge, or their designee, during demonstrations;

6.1.4. Authorize the use of protective gear;

6.1.5. Ensure announcements communicated to the crowd are clear, consistent, lawful, **non-contradictory**, and appropriate for the circumstances. The content and timing of the announcement shall be documented and, if feasible, shall be audio recorded;

6.2. The CMIC shall (in addition to the IC responsibilities):

6.2.1. Activate RRT, when deemed necessary; and

6.2.2. Authorize the ~~deployment of riot control agents and/or special impact~~

~~munitions, when objectively reasonable, to address civil disturbance and crowd dispersal~~ use of force as provided in this Directive and in Directive 1010 - Use of Force, only as necessary to protect the public from clear and present danger that threatens public safety.

- 6.3. The Operations Section Chief shall:
 - 6.3.1. Assist the IC in determining staffing levels, probable missions, and possible tactical strategies during the planning for the event; and
 - 6.3.2. Assign units to specific missions during the event to meet the objectives established by the IC.
- 6.4. The Detective Division Commander or Supervisor shall:
 - 6.4.1. Coordinate with the IC to determine the scale of the mass arrest team response;
 - 6.4.2. Assign detectives to assist with mass arrests;
 - 6.4.3. Manage the processing of all arrests pursuant to the Detective Division SOP; and
 - 6.4.4. Ensure that all required documentation for arrests is collected.
- 6.5. Sergeants shall:
 - 6.5.1. Verify that all members have the proper equipment;
 - 6.5.2. Ensure that members are briefed prior to the start of the event; and
 - 6.5.3. Communicate orders from the IC or the Operations Section Chief to their assigned squad to ensure that the mission and objectives are appropriately executed.
- 6.6. Officers shall:
 - 6.6.1. Follow the directions of the sergeant; and
 - 6.6.2. Not take independent police action, unless exigent circumstances require immediate action for protecting themselves or others from **imminent** physical harm.

Comments: The use of force against protesters should be limited to that authorized by Directive 1010.00, Use of Force, and the other provisions of Directive 635.10. As discussed above, the definition of Civil Disturbance must be narrowed and clearly defined so as to prevent unnecessary crowd control and police intervention. Further, use of force must be “necessary to protect” rather than “objectively reasonable to address.” We also strongly

want to reiterate our call to prohibit the use of weapons that are inherently indiscriminate, including tear gas and flash bang devices.

7. Coordination with Other Agencies.

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

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

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

7.1.3. The Bureau expects assisting agencies to act in accordance with the lawful orders of the Bureau IC; however, their members' conduct is subject to the outside agency's policies and procedures.

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

8. Announcements and Warnings.

8.1. When feasible, members shall make loud, intelligible and consistent announcements and warnings to the crowd.

8.1.1. It is essential to recognize that all members of a crowd of demonstrators are not the same. Even when some members of a crowd engage in violence or destruction of property, other members of the crowd are not participating in those acts. Once some members of a crowd or PPB members become violent, the situation often turns chaotic, and many individuals in the crowd who do not want to participate in the violent or destructive acts may be blocked from leaving the scene because the crowd is so large or because they are afraid that they will move into a

position of heightened danger. PPB shall make every effort to ensure that force and arrests are not directed at innocent persons.

- 8.1.2. **Announcements must be made using adequate sound amplification in a manner that will ensure that they are audible over a sufficient area. Announcements must be made from different locations when the demonstration is large and noisy. Announcements must specify adequate egress or escape routes, and whenever possible, a minimum of two egress/escape routes should be identified and announced.**

8.2. Announcements are designed to:

- 8.2.1. Convey general information to the crowd in an effort to keep an event **lawful from developing into a Civil Disturbance;**
- 8.2.2. Communicate targeted information to specific individuals to provide direction; and
- 8.2.3. Serve as a de-escalation tool by directing and informing the crowd in an attempt to prevent the need for police action or the use of force.

8.3. Civil Disturbance.

- 8.3.1. Warnings ~~must are designed to~~ allow the crowd **sufficient** time to comply with orders given from police members. When tactically feasible and time permits, members shall issue a minimum of two warnings at reasonable intervals to notify the crowd of an impending order.
- 8.3.2. When issuing warnings, members should cite specific offenses and violations being committed and caution the crowd that these acts of **C**ivil **D**isturbance will not be permitted and can result in arrest or, **if a clear and present danger to public safety exists,** necessitate the use of force. An IC-designated member and/or the member operating the sound truck shall give clear directions in an attempt to reduce or eliminate the necessity for force. Members shall issue a minimum of two warnings to alert the crowd of possible impending arrest or force, unless doing so would present a danger to the member(s) or others.
- 8.3.3. Members shall document the warnings in an appropriate police report, and if feasible, ensure the audio (e.g., date, time, announcing member,

messages, etc.) confirmation received by identified staff on other end.

9. Crowd Dispersal.

9.1. Pursuant to ORS §131.675, the IC may order the crowd dispersed when a demonstration or special event becomes a Ceivil Disturbance.

9.1.1. The police may not disperse a demonstration or crowd that is not a Civil Disturbance. Isolated individual criminal acts do not justify a declaration that an assembly is Civil Disturbance so as to permit dispersal of a crowd. Unless emergency or dangerous circumstances prevent negotiation, crowd dispersal techniques shall not be initiated until after attempts have been made through contacts with the police liaisons and demonstration or crowd event leaders to negotiate a resolution of the situation so that the Civil Disturbance or individual criminal acts will cease and the First Amendment activity can continue. If a demonstration is blocking traffic or refusing to obey police announcements in a manner that does not constitute a Civil Disturbance, crowd dispersal techniques should not be used.

9.1.2. Before giving the order to disperse, the IC must consider whether dispersal unduly endangers the public, police or participants in the crowd. Crowd dispersal techniques shall not be initiated until PPB has made repeated announcements to the crowd, asking members of the crowd to voluntarily disperse and informing them that, if they do not disperse, they will be subject to arrest.

9.1.3. Prior to taking police action to disperse the crowd, 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. These announcements must be made using adequate sound amplification in a manner that will ensure that they are audible over a sufficient area. Announcements must be made from different locations when the demonstration is large and noisy. The dispersal orders should be repeated after commencement of the dispersal operation so that persons not present at the original broadcast will understand that they

must leave the area. Announcements must also specify adequate egress or escape routes, and whenever possible, a minimum of two egress/escape routes should be identified and announced.

9.1.4. When officers take action to move or disperse a crowd, steps should be taken to ensure that the crowd is not moved into a position or place that could be dangerous to persons in the crowd or bystanders, such as pushing them up against glass windows.

9.1.5. When a command decision is made to employ crowd dispersal techniques, attempts to obtain voluntary compliance through announcements and attempts to obtain cooperation through negotiation shall both be continued. At any point at which a crowd is dispersing, whether as a reaction to police dispersal techniques, through voluntary compliance, or as a result of discussion or negotiation with crowd leaders, PPB dispersal techniques shall be suspended and the crowd shall be allowed to disperse voluntarily. This directive does not preclude a command decision by PPB to reinstate dispersal techniques if crowd compliance ceases.

9.1.6. It is the responsibility of the on-scene PPB commanders to ensure that all such announcements are made in such a way that they are clearly audible to the crowd. Commanders shall constantly reassess and adjust tactics, as necessary, as the crowd's actions change.

9.1.7. If after a crowd disperses pursuant to a declaration of Civil Disturbance and subsequently participants assemble at a different geographic location where the participants are engaged in First Amendment activity, such an assembly cannot be dispersed unless the crowd is engaged in conduct that would justify declaring it a Civil Disturbance and the required official declaration has been adequately given.

9.2. ~~When the crowd has been ordered to disperse and does not heed repeated warnings, and no reasonable alternative is apparent, riot control agents (RCAs) and/or special impact munitions may be deployed to~~ Riot control

agents (RCAs) may only be used as a last resort and then only against a Civil Disturbance when necessary to prevent violence, injury or substantial property damage ~~and to avoid a greater application of force.~~

9.2.1. These weapons shall only be used at the direction of the CMIC, and only with the approval of the Mayor or City Commissioner with authority over the PPB and when avenues of escape (i.e., clear path or route) are available to the crowd. Pursuant to this policy and Directive 1010.00, Use of Force, members must issue warnings prior to deployment.

9.3. Force shall only be used in accordance with Directive 1010.00, Use of Force.

Comments: We added language from the OPD Policy to address the ACLU of Oregon's serious concerns about PPB's practice of declaring an unlawful assembly and using force against crowds of protesters who are not posing a clear and present danger to public safety. Declaring an assembly unlawful not only restricts First Amendment rights, but it threatens the safety of protesters and escalates tensions. Such declarations must be necessary after attempts at communication through liaisons and de-escalation techniques have failed, and only when the event is a Civil Disturbance under the appropriate definition described above. Demonstrators should be clearly and adequately warned before an assembly is declared unlawful and they must be free to leave through adequate routes of egress. Bystanders, those passively present, those attempting to disperse, and those passively resisting arrest should not be subject to use of force.

Protesters who disperse as ordered and subsequently assemble in a different location should be treated as a new and lawful assembly, and should not be subject to arrest or use of force until that assembly becomes a new Civil Disturbance.

10. Prohibited Crowd Control Tactics. Members shall not take the following **crowd control** actions ~~to disperse a crowd:~~

10.1. Use fire hoses.

10.2. Deploy Canine Units.

10.3. Use a conducted electrical weapon (CEW).

10.4. Members shall not deploy specialty impact munitions or aerosol restraints indiscriminately into a crowd.

10.5. The Bureau shall not use mounted patrol units (MPUs) against passively resistant demonstrators who are sitting or lying down.

10.6. Motor vehicles shall not be intentionally brought into contact with protestors (i.e.,

to push or strike).

10.7. Use Skip Fired Specialty Impact Less-Lethal Munitions (Wooden Dowels and Stinger Grenades).

10.7.1. Any and all less-lethal specialty impact weapons designed to be skip fired or otherwise deployed in a non-directional non-target specific manner shall not be used at all by PPB during demonstrations or crowd events. The use of the Stinger Grenade containing rubber pellets designed to be deployed in non-directional non-target specific manner is also prohibited for all crowd control use.

10.8. Use Direct Fired Specialty Impact Less-Lethal Munitions including but not limited to flexible batons (“bean bags”), indiscriminately against a crowd or group of persons even if some members of the crowd or group are violent or disruptive.

10.9. Use Aerosol Hand-held, pressurized, containerized chemical agents that emit a stream.

10.10. Use Non-hand Held Chemical Agents (e.g., Tear Gas, CS Gas)

10.11. Use of Sound, Light and Chemical Diversionary Devices (e.g., Flash Bangs), due to the risk of permanent loss of hearing or serious bodily injury from shrapnel.

Comments: We recommend comprehensively revising this section of the Directive to prohibit the use of indiscriminatory weapons and techniques that could result in death or serious harm when used for crowd management, crowd control and crowd dispersal, as has been urged by civil rights groups for years. We incorporated provisions of the OPD Policy, as they have effectively prohibited many of the most dangerous weapons for crowd management, crowd control, and crowd dispersal.

To protect the public from the risk of harm associated with these weapons and techniques, we included language and prohibitions that include: (1) a prohibition on the use of indiscriminate stinger grenades and impact projectile weapons, and (2) a prohibition on indiscriminate aerosols, chemical agents, and diversionary devices due to the serious risk they pose to the health of those protesting⁷. We recommend that conforming changes be

⁷ <https://aclu-or.org/en/press-releases/aclu-oregon-statement-portland-police-bureaus-response-protest>

made to the Directive 1010.00, Use of Force, 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.

11. Detentions.

11.1. 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 Ceivil Disturbance by the IC ~~or if the crowd has left from a certain location~~. Members may be justified in detaining individuals engaged in Ceivil Disturbance after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order.

11.2. To effect mass detentions, members must be able to articulate the individualized reasonable suspicion for the detention of each person.

12. Arrests.

12.1. Absent exigent circumstances, arrests should only be made when authorized by the IC.

12.2. Careful consideration should be given to the timing, location, and method of the arrest and resources available. The IC shall make the decisions to engage in selective individual arrests or multiple simultaneous arrests as a crowd control technique with consideration given to the following factors:

12.2.1. The likelihood that police action will improve the situation relative to taking no action;

12.2.2. The seriousness of the offense(s) as opposed to the potential for the arrest to escalate violence or unlawful activity by crowd members;

12.2.3. Whether individual or mass arrests will be more effective in ending the criminal activity at issue;

12.2.4. Whether clear and secure escape routes have been established for the crowd and police;

12.2.5. Whether communication has been established with crowd representatives;

12.2.6. What contingency plans are available; and

12.2.7. What types of force can be used in effecting the arrests, if necessary.

- 12.3. To effect arrests, members must be able to articulate the individualized probable cause for the arrest of each person. This principle means the officer must have objective facts based on his own knowledge or information given him by other officers sufficient to believe that each specific individual being arrested committed the offense.
- 12.4. Media or legal observers will not be arrested solely for their role in observing, capturing, and/or reporting on demonstrations or events. Members will not interfere with media or legal observers performing their respective functions, so long as they are performed in a safe manner and in compliance with police orders, but such persons must do so in compliance with the law. Even after a dispersal order has been given, clearly identified media and legal observers shall be permitted to carry out their professional duties in any area where arrests are being made unless their presence would unduly interfere with the enforcement action. However, such persons must comply with all police orders and may be subject to arrest for failure to do so.

Comments: PPB should be prohibited from its practice of “kettling” demonstrators, absent the constitutionally required reasonable suspicion for a detention, or probable cause for an arrest. We have therefore added a new section with specific guidance as to when and how mass detentions and arrests may be conducted. We included factors from the OPD Policy to guide the IC in determining whether to conduct arrests. These factors will improve public safety at crowd events. We also included language that clarifies the requirements of the 4th Amendment to the U.S. Constitution.

13. Mass Detentions and Mass Arrests

- 13.1. The IC will not authorize a mass detention unless there is individualized reasonable suspicion for each individual detained. In the context of mass detention, there is individualized reasonable suspicion if the individuals detained are acting as a group in such a manner that the IC reasonably suspects that each individual in the group has committed a crime or is about to commit a crime.
- 13.2. The IC will not authorize a mass arrest unless there is individualized probable cause for each individual arrested. In the context of mass arrest, there is individualized probable cause if the individuals arrested are acting as a group

in such a manner that the IC reasonably believes such that there is a substantial objective basis for the IC to believe that it is more likely than not that each individual in the group has committed a crime.

13.2.1. In reaching the conclusion that there is individualized reasonable suspicion or individualized probable cause, the IC may rely on information known to other officers with whom the IC is communicating, information received from third parties, advice of legal counsel, and the IC's own observations, experience, and training.

13.2.2. The IC will consider the following factors before authorizing a mass detention or mass arrest:

13.2.2.1. Whether sufficient officers and resources are available to expeditiously investigate individuals who are detained or process individuals who are arrested.

13.2.2.2. Whether other, less intrusive, tactics are reasonably available to stop or investigate the criminal activity.

13.2.2.3. How a mass detention or mass arrest would affect public safety and the safety of the group being detained or arrested.

13.3. As soon as feasible following a mass detention or mass arrest, PPB will announce to the group detained or arrested what is occurring and attempt to convey clear, intelligible, loud, and consistent directions and instructions.

13.4. Any photographs of individuals taken by or obtained by PPB in connection with a mass detention or mass arrest at a crowd management or crowd control event will be treated in accordance with Section 4.3 of Directive 635.10.

13.5. If an IC authorizes a mass detention or mass arrest, the IC (or their designee) will document:

- 13.5.1. The criminal activity that gave rise to the authorization, including a brief description of the information relied on to conclude there was reasonable suspicion or probable cause to issue the authorization.
- 13.5.2. Any alternatives that the IC considered prior to determining that a mass detention or mass arrest was appropriate.
- 13.5.3. How the mass detention or mass arrest affected public safety and the safety of the group detained.
- 13.5.4. Any announcements that were given to the group detained or arrested, either before or after the detention, including the manner in which the announcements were communicated to the group.
- 13.5.5. What resources were deployed to assist in expediting the investigation or processing of the individuals who were detained or arrested.

14. Reporting and Coordination Requirements.

14.1. The IC (or their designee) shall:

- 14.1.1. 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;
- 14.1.2. Review any uses of force by other agencies' personnel as part of the overall incident after action report;
- 14.1.3. 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;
- 14.1.4. Ensure all other applicable pertinent reports are submitted as required by Directive 900.00, General Reporting Guidelines, and 1010.00, Use of Force; and
- 14.1.5. 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.

14.2. The Detective Division Commander or Supervisor shall:

- 14.2.1. Ensure coordination with the District Attorney's Office when arrests are made.
- 14.3. Supervisor Responsibilities.
 - 14.3.1. The supervisor shall not independently direct management or crowd control tactics without the authorization of the IC, unless exigent circumstances require immediate action.
 - 14.3.2. 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.
 - 14.3.3. The supervisor shall review all reports written by their squad's members pursuant to Directive 900.00, General Reporting Guidelines.
 - 14.3.4. 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 routed to the IC.
- 14.4. Members Responsibilities.
 - 14.4.1. 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

Thank you for the opportunity to comment on Directive 635.10. We reiterate our request to supplement these recommendations following the release of the National Police Foundation's independent review, and once PPB's response to the continuing protests can be more fully evaluated. We look forward to continuing to engage with the City of Portland and PPB on revisions to this important directive.

Sincerely,



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