



THE CITY OF SAN DIEGO

M E M O R A N D U M

DATE: May 25, 2021

TO: David Nisleit, Chief of Police
via Chris McGrath, Executive Assistant Chief

FROM: Jeffrey Jordon, Captain, Chief's Office/Special Projects

SUBJECT: Responses to Commission on Police Practices – Department Procedure 4.17

Introduction:

The San Diego Police Department (SDPD or Department) implemented Department Procedure (DP) 4.17, First Amendment Activity Facilitation and Management, and the intent was to give officers a roadmap to protect and facilitate the safe expression of First Amendment rights in cooperation with all community members.

This procedure was also intended to be completely transparent, so the public has a clear understanding of how and why SDPD makes public safety decisions relating to First Amendment activities.

In drafting DP 4.17, the San Diego Police Department researched case law, solicited subject matter expert input, reviewed after-action reports from around the country, and examined existing policies from other law enforcement agencies.

The California Commission on Peace Officer Standards and Training (POST) released a document in April of 2021 titled, "POST Guidelines Crowd Management, Intervention, and Control." While the document does not list "best practices," it provides a number of examples, discussions, and considerations. Many of the considerations in the POST document were already present in DP 4.17.

As with previous collaborations, SDPD believes the Commission on Police Practices' (CPP) recommendations are an opportunity to assess its current procedure, participate in an open dialogue, and provide clarity to its decisions and ongoing efforts to meet community expectations.

This memorandum addresses CPP’s recommendation in three parts. In Part I, SDPD outlines the recommendations where there is immediate agreement to modify DP 4.17 to address expressed concerns.

In Part II, SDPD reviews the recommendations from CPP which DP 4.17 appears to either largely incorporate or are addressed through pre-existing Department Procedures. SDPD highlights these procedures within this memorandum. Additionally, SDPD welcomes discussion with CPP to fully explore remaining concerns and determine how they should be addressed.

In Part III, SDPD identifies CPP recommendations which are operationally or legally problematic for SDPD to include within DP 4.17. Part III also offers a detailed explanation examining the potential impact of these recommendations more thoroughly.

The Department anticipates its responses will generate further discussion and looks forward to participating in this process with CPP to answer additional questions, enhance understanding, and determine where additional solutions might be found.

Part I: Accepted Recommendations

CPP Recommendation – Penal Code 407:

“The procedure references the verbiage of California Penal Code 407 in the definition of an unlawful assembly. However, we would like assurances that a protest will not be declared unlawful simply because it is “boisterous.” The policy should be clear that per case law, there must be a clear and present danger to persons or property before an unlawful assembly can be declared.”

SDPD Response:

This is correct and the procedure will be amended accordingly.

CalCrim 2685 Participating in an Unlawful Assembly (Pen. Code, §§ 407, 408) states in the Bench Notes:

Penal Code section 407 defines an ‘unlawful assembly’ as two or more people assembled together ‘to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.’ The Supreme Court has held that “the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.’ (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.)

Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is ‘boisterous or tumultuous’ does not establish a violation of the statute.

CPP Recommendation – Mobility Issues:

“Clarify “ample means of egress,” factoring in considerations like participants which may have mobility issues.”

SDPD Response:

SDPD will add inclusive language regarding this consideration.

CPP recommendation – Enhanced Communication:

“For pre-planned protest activities, add communication options to include languages other than English and Spanish. For example, traffic signage to assist those that may be hearing impaired.”

SDPD Response:

SDPD will amend DP 4.17 to include the POST recommended considerations. Per POST, methods that may be used to deliver and document dispersal orders include (not in priority order):

- Loud speech
- Amplified sound
- Ensuring that the order is heard in remote areas
- Using unmanned aircraft equipped with amplified sound flown to inaccessible areas
- Pre-recorded unlawful assembly messages in multiple languages as appropriate
- **Display of signage, including electronic signage and billboards, indicating unlawful assembly, dispersal and clearly identified routes of egress**
- Gaining the attention of the crowd and documenting affirmative responses of crowd members prior to the declaration of unlawful
- Positioning law enforcement personnel to the rear of a crowd to confirm and document hearing the transmission of the dispersal order
- Acquiring multiple-language capability
- Community alert system(s)
- Provide easy to understand directions that help the crowd disperse so that they clearly understand the desired response
- Using video/audio recording equipment for documentation of the dispersal order, the crowd response and their ability to hear
- Use of social media platforms to send out alerts to specific areas

CPP Recommendation - EMS:

“When staging for EMS, require that EMS providers have proper materials on-hand for the situation. For example, ample water shall be available to decontaminate participants that have had OC utilized on them per existing policy 1.06.”

SDPD Response:

While SDPD does not exercise authority over Fire/EMS service, SDPD will add appropriate language that cooperative pre-planning with SDFD is recommended to ensure adequate resources are available to address potential situations involving decontamination.

Part II: Recommendations Currently Addressed in Existing Department Procedures

SDPD strives to publish clear and concise procedures. Care is taken not to duplicate pre-existing procedures. All officers are responsible for abiding by all SDPD policies and procedures.

Department Policy 1.01 – Department Policies, Procedures, Orders, Communications, and Correspondence, states:

Department directives (e.g., Legal Updates, Orders, Policies, Procedures and Training Bulletins) are written directives that convey the same authority. All members of the Department will be held responsible for abiding by the information contained in Legal Updates, Orders, Policies, Procedures and Training Bulletins.

Department Policy 9.03 – Obedience to Rules Policy, states:

Members shall not commit any acts nor fail to perform any acts that constitute a violation of the policies, procedures, directives or orders of the Department, the City of San Diego Administrative Regulations, the Personnel Regulations Manual, the Civil Service Rules, or the City Charter.

The CPP provided a number of additional recommendations which DP 4.17 appears to already incorporate. In some cases, the CPP recommendations are covered by other, pre-existing Department Procedures.

SDPD will present additional details, beyond this memorandum, at a mutually acceptable time with CPP to explore whether the current DP 4.17 and related procedures adequately address the recommendations in this section and seek guidance on where further modifications are warranted.

CPP Recommendation – Pre-Protest Planning:

“Include in the policy, SDPD’s existing guidelines regarding pre-protest planning with event organizers. As it currently stands, the new policy reads more strictly as crowd control, rather than facilitation of First Amendment protected activities.”

SDPD Response:

DP 4.17 includes extensive sections on facilitation and cooperation, specifically:

Section V.A.1: When appropriate, and consistent with Department Procedure, 8.04, the Incident Commander shall be responsible for developing a written contingency or incident action plan, consistent with the Department’s goals and objectives to minimize harm, honor constitutional rights, communicate with the event participants, and facilitate First Amendment Activity. This plan may be in a Department Memorandum format or the ICS 201 format. All or parts of the contingency or incident action plan may be exempt from public disclosure pursuant to the California Public Records Act. Each plan shall be marked accordingly.

Section V.A.5: Stakeholder involvement is essential to the overall success of managing First Amendment Activities. When knowledge exists that a First Amendment Activity may occur, the Incident Commander or designee shall proactively make reasonable attempts to establish and maintain communication and cooperation with representatives or the First Amendment Activity leaders.

Section V.A.6: If communication is established, the Incident Commander or designee shall make reasonable efforts to identify the event's representatives or leaders and identify a primary police liaison. The primary police liaison should be requested to be in continuous contact with an assigned police representative designated by the Incident Commander.

Section V.A.7: In planning for First Amendment Activity, Incident Commanders, or their designees, should consider the following factors in determining the appropriate resources and level of preparation necessary:

What type of First Amendment Activity is expected to occur? (Press conference, demonstration, protests, static event, labor strike, picket line, march, caravan, sit-in/dine-in, etc.)

What is the goal of the First Amendment Activity? (Raise awareness, disrupt a target location, counter another demonstration, engage in criminal activity, etc.)

When will the First Amendment Activity occur? (Day of the week, holiday, time of day/traffic patterns, daytime/nighttime, conflict with other events at the same time.)

Will there be an organizing individual/group, or will this be a crowd without identified leadership?

Has the Department previously worked with the organizers? Have prior First Amendment Activities been lawful?

Where will the First Amendment Activity likely occur? Will the event affect critical infrastructure like police stations, jails, courthouses, freeways, government buildings, etc.? Will the effect be deliberate or collateral?

If the group intends to be mobile, what will the predicted or planned route(s) be? (First Amendment Activity participants may not provide their own traffic control.)

What will be the projected size of the First Amendment Activity event?

What will the composition of the group be? (Juveniles, students, labor unions, known local groups, known groups from outside the area, unified as to a single cause, or diverse causes and points of view within the group, etc.)

Will the hosting group provide its own marshals or monitors?

Will an opposing group attend the First Amendment Activity event?

Is there a likelihood of improvised or conventional weapons?

Are arrests likely? Will prisoner processing be necessary?

Is civil disobedience planned or likely?

Is unlawful assembly planned or likely?

Is riot planned or likely?

CPP Recommendation – Protest Safety:

“We would also like to see a section that discusses protecting the safety of peaceful protesters.”

SDPD Response:

SDPD is committed to the safety of all persons present, even those who are criminal suspects.

SDPD uses de-escalation techniques (DP 1.55), requires officers to report misconduct (DP 9.33) and requires officers to intervene in unreasonable force (DP 1.56). SDPD also uses appropriate escalation measures to maintain order and tactics intended to isolate and address individual offenders based on their level of criminal conduct and resistance:

DP 4.17, Section III: Background states:

Article 1, sections 1 through 3, of the California Constitution also guarantees the rights to life, liberty, acquiring and possessing property, pursuing safety, happiness, and privacy, as well as the rights to speak freely, to freedom of the press, to petition the government for redress of grievances, and to assemble freely to consult for the common good.

The San Diego Police Department supports all people's fundamental right to peaceably assemble and their right to freedom of speech and expression.

The goal of police involvement at peaceful First Amendment Activities is to preserve the peace, prevent criminal activity, control traffic, and facilitate the safe exercise of an individual or group's First Amendment rights.

In furtherance of these rights, and to facilitate the safe and peaceful exercise of an individual or group's First Amendment rights, the Department will act swiftly and with resolve to protect human life, property, and maintain peace when confronted with violence, threats of violence, assaults, or other criminal acts.

CPP Recommendation – Restatement of Policies and Procedures:

“Clearly restate that existing policies and procedures remain in full force and effect during protest activities. Specifically, body worn camera (1.49), de-escalation (1.55), duty to intervene (1.56), and identification of officers (5.10 and 9.19).”

SDPD response:

All SDPD officers are responsible for abiding by all SDPD rules and regulations at all times (DP 1.01, DP 9.03).

CPP mentions several specific sections, which are referenced in DP 4.17 as listed below:
Body Worn Camera (BWC) Policy is referenced in section IV.J:

Supplemental Video Team (SVT) – The Supplemental Video Team is a resource available to the Incident Commander during First Amendment Activity covered under this procedure. The SVT will consist of personnel from the Media Services Unit. The objective will be to use video cameras to capture images, video and audio recordings to supplement information captured from officers' Body Worn

Cameras (BWCs). The SVT will adhere to Department Procedure 3.26- Media Evidence Recovery and Impounding/Preserving Procedures.

BWC Policy is referenced in section VII.C.6:

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

BWC Policy is referenced in section IX.6.B:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

BWC Policy is referenced in section IX.6.F:

Any video captured by either Body Worn Camera or the Supplemental Video Team will be properly preserved per Department Procedures 1.49 and 3.26.

De-Escalation Policy is referenced in section V.A.8:

The operations plan created to address a First Amendment Activity event should anticipate various scenarios and devise a police contingency plan. All plans shall include de-escalation considerations in compliance with Department Procedure 1.55.

The Identification Policy, 5.10, is referenced in section V.A.10:

ID only name tags may only be worn during a Mobile Field Force (MFF) event with Incident Commander approval, consistent with Department Procedure 5.10.

CPP Recommendation - Juveniles:

“Address how juveniles are treated during protest activities in line with existing procedures, for example, handcuffing or detention of minors.”

SDPD Response:

Officers are responsible for abiding by all existing SDPD rules and regulations, including the following, which apply to both juveniles and adults: DP 1.04 – Use of Force, DP 1.06 – Use of Liquid Chemical Agents, DP 1.07 – Use of Tasers, 1.36 – Use of Specialty Munitions, DP 3.06 – Juvenile Procedures, DP 4.01 – Stop, Detention, and Pat-Down Procedures, DP 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures, etc.

CPP Recommendation – Preservation of Life:

“Include in the policy, a statement that preservation of life shall take precedence over protecting property.”

SDPD Response:

This is interwoven into SDPD’s Vision Values and Mission Statement, as well as multiple Department Procedures. The very first value is Human Life:

Human Life: Our efforts will be oriented toward the goal of protecting human life and ensuring everyone has the opportunity to thrive.

This is followed by:

Integrity: Our actions will be guided by the highest level of virtue and ethical practice through open communication and transparency.

Partnerships: We will work collaboratively with our community to resolve challenges, protect individual rights, and promote prosperity.

Diversity: We embrace and appreciate the unique experiences and backgrounds that provide strength and unity to our organization.

Compassion: We will strive to show genuine concern for one another in both our interactions with the community and within our organization. We recognize that the complexities of life compel us to do nothing less.

Innovation: We are committed to leading the law enforcement community through innovative practices in order to maintain our position at the forefront of policing.

Courageous Justice: We will be undeterred in our pursuit of fairness, peace, and a genuine well-being for all people.

Department Policy 1.04 – Use of Force states:

Members shall only use force in accordance with law and established Department procedures. Members shall not use more force than is reasonably necessary under the circumstances. Department policy places a greater value on the preservation of life than on the apprehension of criminal offenders. Deadly force shall be used only when all reasonable alternatives have been exhausted or appear impractical. Members shall not mistreat persons who are in custody. Members shall handle such persons in accordance with all laws and established Department Procedures.

Department Policy 9.01 – General Duties Policy states:

Officers on duty shall at all times, lawfully protect life and property, detect and arrest violators of the law, prevent crime, preserve the public peace and enforce the laws of the state of California and the ordinances of the City of San Diego...

... When within the State of California, officers shall assist any law enforcement officer who appears to be in need of immediate assistance and shall assist in the prevention of the commission of any felony or in the apprehension of any felon. Officers shall also take appropriate action where a serious threat to life or property exists...

CPP Recommendation – BWC Activation:

“Specifically related to the issuance of dispersal orders once an unlawful assembly has been declared: Require officers to have their body worn cameras activated in Event Mode to record the circumstances in which created an unlawful assembly order.”

SDPD Response:

This is covered in DP 4.17, IX.C.6.b:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

This is further covered in DP 4.17, IX.C.6.e:

If the Incident Commander or designee determines that a lawful assembly has turned into an unlawful assembly, officers should be directed to place BWCs in Event mode to begin recording the unlawful activity. Additionally, the Incident Commander or designee should coordinate with the Supplemental Video Team (SVT) to provide supplemental video documentation of the event.

SDPD has to balance recording unlawful acts or lawful acts done in a violent manner or in a manner where violence is imminent against unnecessarily recording lawful First Amendment activity.

CPP Recommendation – Dispersal Orders:

“Require that the Officer making the dispersal order shall have their BWC activated to record the dispersal order as well as an Officer stationed behind the protest participants to ensure audible commands were able to be heard.”

SDPD Response:

This is covered in DP 4.17, VII.C.3.5 and 6:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order shall be given at least three (3) times, and when safe, with audible confirmation from officers behind the crowd.

The Incident Commander should ensure video recording occurs during unlawful assemblies, consistent with Department Procedures 1.49 and 3.26.

Officers shall activate their Body Worn Cameras before dispersal orders begin, consistent with Department Procedure 1.49.

CPP Recommendation - Scripts:

“Section VII. C. 2. states “the officer is not required to use any particular words,” however, this conflicts with 7 which provides a detailed script to be used. We recommend the specific script be used.”

SDPD Response:

DP 4.17, VII.C.2 references the legal standard under California law.

DP 4.17, VII.C.7 refers to Department Policy, which is far more restrictive.

If an Incident Commander does not have a printed version of the SDPD language, they may still give the order and be within legal guidelines, even if they are out of compliance with Department Procedures.

CPP Recommendation – Timing of Dispersal Orders:

“State that the dispersal order must be given at least three times, with one minute between each order and the script must include a clear time requirement for participants to depart the scene (for example, participants have five minutes to depart, but not less than three minutes).”

SDPD Response:

SDPD is unable to find a resource suggesting this as a best practice. Additionally, DP 4.17 is more restrictive than both law and POST guidelines.

POST states, “Dispersal orders should be repeated.”

DP 4.17, VII.C.3 states:

Dispersal orders should not be given until officers are in a position to support/direct crowd movement. Members of the crowd should be given ample means of egress. The dispersal order **shall** be given at least **three (3)** times, and when safe, with audible confirmation from officers behind the crowd (emphasis added).

The CPP-proposed one-minute interval does not allow for officers to make rolling announcements or to play a recording on a loop. Rolling or looping announcements allows for multiple messages in multiple languages and gives a wider audience the chance of hearing the order.

POST says, “Provide sufficient time to disperse after the order,” and the intent of a dispersal order is to give people an opportunity to voluntarily leave. Voluntary compliance is always preferred to physical confrontation.

However, there might be a time when a crowd is especially violent, and a person needs to be rescued/extricated, or there is an exigent circumstance requiring swift action.

In re Wagner, 119 Cal. App. 3d 90, 103 (1981) states: “If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group.”

CalCrim 2686: Refusal to Disperse includes as a required element of failure to disperse: “The defendant willfully remained present at the location...after the order to disperse.”

A person must leave the unlawful assembly immediately after being ordered to disperse.

Explicitly giving people a time to linger gives criminal actors a window to prepare/brace for police action. It explicitly gives people permission to remain at the scene longer, even though they are required to leave the area immediately.

In an “example dispersal order” POST does include a timeframe. However, POST does not list providing a timeframe for people to leave as a “consideration” under “Dispersal Orders.”

CPP Recommendation OC Spray:

“Reiterate that use of OC spray is prohibited at this stage of resistance (passive).”

SDPD Response:

This is already covered in DPs relating to use of force and chemical agents.

DP 1.06 – Use of Liquid Chemical Agents States:

OC may only be used on a person who is engaged in active resistance, assaultive behavior, or life threatening behavior. Department Procedure 1.04, Use of Force, describes the various levels of resistance and assaultive behaviors.

Generally, OC should not be used to disperse a crowd without the approval of the on-scene field supervisor or the incident commander. In a crowd control situation, it is imperative that officers respond in a coordinated manner.

DP 1.04 – Use of Force mirrors DP 1.06 – Use of Liquid Chemical Agents by listing Chemical Agents under “Active Resistance.”

CPP Recommendation – Flex-Cuffs:

“In the utilization of flex-cuffs procedure, specify that officers shall replace flex-cuffs should they tighten, by using the existing DP 6.01 procedures.”

SDPD Response:

This is already written in 4.17:

IX.C.5.e: Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.

CPP Recommendation – BWC Retention Periods:

“Add a new section for BWC retention periods for peaceful protest activities (no arrests, no complaints).”

SDPD Response:

There is a demonstration/protest retention category for BWC. The retention period is designed to maintain footage in case of a complaint or city claim, which may be filed years after an event. It is not uncommon for a person to make a complaint when no force was used and no arrest was made. The BWC showing the absence of police intervention is valuable in these cases.

CPP Recommendation – BWC and Legal Protest Activities:

“Add a clear statement that any BWC of protest activities shall or must not be used, stored, logged or cataloged to document or create a database of individuals participating in legal protest activities.”

SDPD Response:

DP 4.17 section IX.C.6.b addresses this:

Consistent with Department Procedures 1.49 and 3.26, Department members should refrain from video recording or photographing lawful First Amendment Activity. During lawful First Amendment Activity, officers should operate Body-Worn Cameras (BWCs) in the buffering/Stand-by mode. If officers witness crimes occurring among the demonstrators or believe an arrest is likely, they should begin recording in the Event mode, consistent with Department Procedure 1.49.

CPP Recommendation – Audio/Video Recording:

“Officers shall not request nor require media or other members of the public to stop, pause or discontinue audio or video recording.”

SDPD Response:

This is already covered in DP 3.26 – Media Evidence Recovery and Impounding/Preserving Procedures in section IV.B.1. states:

- B. Video Recording, Audio Recording, and Photographing by Third Parties
 - 1. Recording and Photographing of Police Activity

- a. The general public has a First Amendment right to video record, and/or photograph Department members while they are conducting official business or while acting in an official capacity in any public space, unless such recordings interfere with police activity.
- b. A bystander has the same right to take photographs or make recordings as a member of the media as long as the bystander has a legal right to be present where he or she is located—public or private property; including an individual’s home or business, and common areas of public and private facilities and buildings.
- c. Members shall not threaten, intimidate, or otherwise discourage an individual from recording police enforcement activities or intentionally block or obstruct cameras or recording devices.
- d. The fact a bystander has a camera or other recording device does not, however, entitle the bystander to cross a police line, to enter an area that is closed to the public, or to enter any designated crime scene.
- e. A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, incite others to violate the law, or interfere with police activity. Interference consists of conduct, threats, actions or activities that prevent or hinder, or purport to prevent or hinder, members from doing their job.
- f. A person’s recording of members’ activity from a safe distance, and absent any action that obstructs the activity or threatens the safety of the member(s), does not constitute interference. Criticism of the police or the police activity being observed also does not amount to interference.
- g. Members are encouraged to provide ways in which individuals can continue to exercise their First Amendment rights, as officers perform their duties.

CPP Recommendation – Officer Identification:

“Include an unambiguous prohibition of officers obstructing their badge, name and/or ID numbers as well as a clear prohibition of providing false identification details.”

SDPD Response:

This is covered in DP 9.19:

Officers shall furnish their names and Department member identification numbers to any person requesting this information when they are on duty or while representing the Department in an official capacity, except when the withholding of such information is necessary for the performance of police duties or is authorized by the proper authority.

When a Mobile Field Force (MFF) activation takes place, the Incident Commander may authorize the use of ID only name tags. When this occurs, officers will only be required to furnish their Department identification number to any person requesting their name, ID number and/or badge number.

CPP Recommendation – ID Numbers:

“Reconsider the policy of allowing only ID numbers to be given during protest activities.”

SDPD Response:

Allowing ID numbers protects officers from the growing threats against them, which includes doxing. Doxing has been defined an act of publishing personal information of a person to harass, threaten, or incite violence against them, and doxing against law enforcement officers is well-documented. ID numbers, BWCs, and Vehicle Locators/GPS, not to mention citizen-provided-video, all provide ample ability to identify officers accused of misconduct.

CPP Recommendation – Officer Mobility and Monitoring:

“Consider addressing how officers deal with individuals participating in peaceful civil disobedience such as officers using bicycles as weapons or shields and using “follow cars” during protest activities.”

SDPD Response:

The use of police bicycles to form a fence is not a reportable use of force.

If a group aggresses/assaults a bicycle officers, officers may respond with an appropriate level of force under DP 1.04.

The use of a bicycle to push back a crowd is no different than the use of a baton to push back a crowd.

A bike officer must maintain control of their police bike. They must not let the bike be taken or used against them. This leaves officers with limited force options other than the bicycle when holding or moving a line.

The use of police bikes in this manner is a reasonable and widely-used tactic. Additionally, follow cars have become a necessity after Charlottesville when a suspect drove through a protest in a malicious attack. https://en.wikipedia.org/wiki/Charlottesville_car_attack

Vehicle attacks have spiked over the last 12 months. Thirty-nine people were charged across the country with maliciously hitting protestors with their vehicles.

<https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/>

The purpose of follow-cars is to control vehicular traffic and prevent accidental and intentional physical harm to those exercising their First Amendment rights.

Part III: Recommendations with Operational or Legal Challenges

CPP provided some recommendations that are operationally or legally problematic for SDPD.

CPP Recommendation – Mutual Aid:

“Require that if outside law enforcement agencies participate in City of San Diego protests under mutual aid agreements, such outside agencies should be subject to SDPD policies and procedures.”

SDPD response:

Every agency is responsible for its own employees and enforcement of its policies and procedures. SDPD has no authority to discipline any officer/deputy from another agency.

CPP Recommendation – Rights of Legal Observers:

“Add a new section that addresses the status and rights of legal observers and/or non-participants. Legal observers should be clearly identified and shall not be specifically targeted by officers.”

SDPD Response:

POST does not provide any guidance on this topic, and this is a developing area of law.

Until there is a published legal opinion or guidance from POST, SDPD must rely upon existing law. Sections governing unlawful assembly, riot, rout, and dispersal orders do not provide any special considerations for “non-participants” or “legal observers.”

By being present at an unlawful assembly/rout/riot, a person becomes a participant in the event. *In re Wagner*, 119 Cal. App. 3d 90, 103 (1981) states: “If it were necessary that each member of

an unlawful assembly commit an unlawful act before that member could be convicted, then there would be no necessity to make participation in an unlawful assembly a crime.”

Officers must assess their actions and responses according to individual citizen conduct. Officers should not specifically target anyone except for those engaged in criminal conduct.

It is incumbent upon officers to exercise sound judgment based upon specific articulable facts.

CPP Recommendation – Passive Resistance:

“We do not believe those individuals exhibiting “passive resistance” should be subject to the use of “impact weapons, impact weapon control holds, pain compliance or pressure points” which would technically be permitted under the existing Use of Force Matrix per 1.04. “

SDPD Response:

This issue has been litigated in *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994). These techniques are minimally-invasive, lesser controlling force options that result in temporary discomfort.

Without these methods, there are virtually no other ways of addressing passively resistant individuals refusing to obey a lawful order. Arrestees are legally obligated to comply with lawful arrests. See California Penal Code section 834a.

CPP Recommendation – Reasonable Time to Disperse:

“Define ‘a reasonable time.’ The procedure needs to be clear as to what a reasonable time is for a crowd to disperse. We propose this time be not less than three minutes.”

SDPD Response:

The courts have consistently used the “reasonableness” standard. The courts have never imposed a time limit. Moreover, nothing in the POST guidelines references any sort of specific timeline.

SDPD must also be mindful not to establish “three minutes” as an absolute standard. Many times, more than three minutes is appropriate. During exigent circumstances, such as extreme violence, rescue, extrication, etc., three minutes may be unreasonable and dangerous.

CPP Recommendation – Flex-Cuff Identification:

“Officers shall write their ID number on the flex-cuffs of each individual they take into custody. Officers shall mark the flex-cuffs indicating initial placement to assist in visually observing if flex-cuffs unexpectedly tighten.”

SDPD Response:

As noted below, the Department recognizes the legitimate concerns about the use of flex-cuffs to restrain persons. However, writing ID numbers onto a set of flex-cuffs would likely be impractical during the chaotic reality of an unlawful assembly situation. Additionally, Officers would have to have the means (e.g., permanent marker) with them at all times when using flex-cuffs to write their names and mark the “notch” of the cuffs, and the texture of flex-cuffs results in the markings smearing and becoming illegible.

Additionally, the marking of the flex-cuffs may indicate if the flex-cuffs tightened after application, but it does not remove the obligation of the officer to check the tightness of the flex-cuffs per DP 4.17 as detailed in section IX.C.5 of the current procedure:

- c. All persons subject to arrest during a demonstration or crowd event shall be handcuffed per Department Procedure 6.01 – Handcuffing, Restraining, Searching, and Transporting Procedures.
- d. Officers should be cognizant that flex-cuffs may tighten when arrestees' hands swell or move, sometimes merely in response to pain from the cuffs themselves.
- e. Each unit involved in detention or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available. **When arrestees complain of pain from overly tight flex-cuffs, members shall examine the cuffs to ensure proper fit.**

CPP Recommendation – Incident Commander:

“Require officers to provide the name and ID number of the incident commander.”

SDPD Response:

Incident commanders may change throughout an event. Members of the public can file a complaint, even anonymously, and IA will determine who the commander of record was at the time of the complaint.

CPP Recommendation – Specialty Munitions:

“In the section regarding the use of specialty munitions, list options to be utilized in order of escalation by munition type as well as have clear and significant descriptions as to when and how they are utilized, handled and removed.

40 mm foam baton rounds should be utilized only as a last resort.

CS gas grenades and rubber sting balls need to have clear and explicit references as to when use is permissible.”

SDPD Response:

These concepts are covered in both DP 4.17 and DP 1.36 – Use of Specialty Munitions.

DP 4.17 section IX.C.3.c states:

Use of Specialty Munitions – Use of specialty munitions shall comply with Department Procedure 1.36. Generally, munitions 1-4, listed below, may be used while on the line and should be a coordinated effort directed by an Incident Commander. Munitions 1-4 may generally be used in coordination with the SWAT Munitions Team. Authorization for munitions 5 and 6, listed below, shall be obtained by an Assistant Chief level officer and carried out by the SWAT munitions Team Leader

1. OC spray (Oleoresin Capsicum)
2. 40 mm foam baton rounds
3. Pepperballs (OC)
4. Flashbangs
5. CS gas grenades
6. Rubber Sting Balls- defensive maneuver for law enforcement personnel when faced with overwhelming aggression placing officers in immediate physical risk of serious bodily injury or death. This directive does not prohibit officers' abilities to use appropriate force options to defend themselves or others as defined in Department Procedure 1.04.

Conclusion:

The San Diego Police Department has carefully considered every recommendation made by CPP and views this response as part of a process. We look forward to meeting with CPP to provide additional details, answer questions, and further explore these recommendations.

Respectfully,

Captain Jeff Jordon
Special Projects/Legislative Affairs