From: Wheeler, Ted <Ted.Wheeler@portlandoregon.gov>
Sent: Friday, September 25, 2020 5:05 PM
To: Lovell, Charles <Charles.Lovell@portlandoregon.gov>
Cc: Dennis, Kristin <Kristin.Dennis@portlandoregon.gov>; Reeve, Tracy <Tracy.Reeve@portlandoregon.gov>
Subject: Clarification regarding use of CS gas

Chief Lovell,

Attached please find an email from Portland City Attorney Tracy Reeve to the United States Department of Justice setting forth the criteria and process for the use of CS gas by PPB, and for securing my authorization to use CS should it become necessary under the exigent circumstances described below. Please work with the City Attorney to ensure that you send an order within PPB as contemplated by Directive 0010.00 memorializing my direction regarding PPB's use of CS gas.

My prior direction that PPB not use CS gas remains in effect, subject to the following

exception:

PPB may use CS gas upon my (or my designee's) express authorization as Police Commissioner. The standard for the use of CS which I will apply is "an immediate risk of death or serious physical injury which cannot otherwise be safely addressed without a greater application of force." Prior to authorizing the use of CS gas, the Incident Commander must first call me (or my designee) and provide a description of the facts showing "an immediate risk of death or serious physical injury which cannot otherwise safely be addressed without a greater application of force." I commit to being available directly or to have a designee available at all times to take such a call.

In addition, the Governor has today issued Executive Order No. 20-54 and Declaration of Emergency and taken over all protest related police and law enforcement activity in Multnomah County for a 48 hour period starting at 12:01 a.m. Saturday. The Governor's action was undertaken pursuant to ORS 401.175(2) which expressly authorizes the Governor to take control of the activities of local police during a declared emergency. I understand that for a 48 hour period beginning at 12:01 a.m. Saturday morning, September 26, 2020, PPB officers assigned to the protests will operate under the unified command and control of the Oregon State Police and the Multnomah County Sheriff's Office. I understand that during this period, PPB shall follow the lawful orders of OSP and MCSO, including lawful orders pertaining to riot control agents.

Ted

Mayor Ted Wheeler
Pronouns: He/Him/His
1221 SW Fourth Avenue, Suite 340
Portland, OR 97204
www.portland.gov/wheeler

The City of Portland is committed to providing meaningful access. To request translation, interpretation, modifications, accommodations, or other auxiliary aids or services, contact 503-823-1125, Relay: 711.

(503) 823-1125: 口笔译服务| Chiaku me Awewen Kapas | अनुवादन तथा व्याख्या |Устный и письменный перевод | Turjumaad iyo Fasiraad | Traducción e Interpretación | Письмовий і усний переклад | Biên Dịch và Thông Dịch |

From: Reeve, Tracy <Tracy.Reeve@portlandoregon.gov>
Sent: Friday, September 25, 2020 4:38 PM
To: Cowall, Laura (CRT) <Laura.Cowall@usdoj.gov>
Cc: dennisrosenbaum3@gmail.com <dennisrosenbaum3@gmail.com>; Buckley, Mary Claire <MaryClaire.Buckley@portlandoregon.gov>; Geissler, Jonas <jonas.geissler@usdoj.gov>; Hager, Jared <jared.hager@usdoj.gov>; Dennis, Kristin <Kristin.Dennis@portlandoregon.gov>; Lovell, Charles <Charles.Lovell@portlandoregon.gov>; Grant, Nicole <Nicole.Grant@portlandoregon.gov>; King, Robert <Robert.King@portlandoregon.gov>; Plaza, Rebeca <Rebeca.Plaza@portlandoregon.gov>; Davis, Chris <Chris.Davis@portlandoregon.gov>; Bent-Albert, Anika <Anika.Bent-Albert@portlandoregon.gov>; Rowan, Laura <Laura.Rowan@portlandoregon.gov>; Brown, Heidi <Heidi.Brown@portlandoregon.gov>; Taylor, Robert <Robert.Taylor@portlandoregon.gov>
Subject: Re: Correspondence re CS gas

Dear Ms. Cowall,

Thank you for your letter sent late yesterday afternoon (copy attached) which set a deadline of today for the City's response.

The Mayor/Police Commissioner's (hereafter Mayor's) order suspending the use of CS gas (except in limited circumstances with the Mayor's authorization) is consistent with the authority granted in Directive 635.10 and the policy review process in Directive 0010.00. Directive 635.10(9) provides the circumstances where riot control agents may be used:
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 civil disturbance.
9.1.1. Before giving the order to disperse, the IC must consider whether dispersal unduly endangers the public, police or participants in the crowd.
9.1.2. 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.
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 prevent violence, injury or 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 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.

Under Directive 635.10, "the IC may order" the use of riot control agents to disperse a civil disturbance when "no reasonable alternative is present" to "prevent violence, injury or property damage and to avoid a greater application of force." The Mayor's order simply limits the use of a

specific riot control agent (CS gas) to a particular subset of circumstances permitted under 635.10 (and places the final determination of whether the circumstances warrant CS with the Mayor).

The Mayor's order applies only to one specific riot control agent, CS gas. To use CS gas, the IC must first call the Mayor (or designee) and provide a description of "facts showing an immediate risk of death or serious physical injury which cannot otherwise be safely addressed without a greater application of force." That specific scenario is simply a subset of the allowed uses of riot control agents to "prevent violence, injury or property damage and to avoid a greater application of force."

Directive 635.10 does not even specifically reference CS gas, but rather only provides the circumstances under which "Riot Control Agents" may be authorized by the IC. The City does not believe that the restriction on use of one specific Riot Control Agent requires a directive change or suspension. However, even if an order suspending the use of one Riot Control Agent by the Mayor did implicate Directive 635.10, another directive, Directive 0010.00 (governing the Directives Review and Development Process) provides for the temporary suspension of portions or the entirety of a directive by the Chief or designee. Given the Mayor's ability to direct the work of the Chief, this Directive provides the authority for a temporary change, such as the one made here. Directive 0010.00(12) provides:

12. Temporary Suspension of Directives.
12.1. The Chief or designee shall have the authority to temporarily suspend portions or the entirety of a directive if an operational need requires such action.
12.1.1. In these circumstances, the Chief or designee shall authorize the temporary suspension through a Special Order issued Bureau-wide. The Special Order shall note the date on which the original directive shall be reinstated.
Under Directive 0010.00, "portions or the entirety" of Directives such as 635.10 may be temporarily suspended "if an operational need requires such action." Here, there is an operational need to restrict the use of CS gas to only specific situations, since the use of CS gas in other situations may increase the volatility of the crowds or have adverse impacts on the environment and neighbors. The Mayor's order is simply a directive to the Chief to temporarily suspend the portion of Directive 635.10 that would permit the use of CS gas in situations other than those where the facts show an "immediate risk of death or serious physical injury which cannot be safely addressed without CS gas or resort to a higher level use of force." The Mayor is directing the Chief to issue a Special Order Bureau-wide that reflects the terms of this order, and that provides that it shall be in effect until otherwise directed by the Mayor. We will furnish that communication to you shortly.

On the issue of duration, Directive 0010.00 does not specify a time limit for a temporary suspension of a portion or entirety of a PPB Directive. The Mayor's temporary ban also does not specify a time limit, but as stated by the Mayor, is temporary. If the Mayor, or Council, determines that a permanent directive change is appropriate, then the City agrees that the DOJ must approve the change to the directive and such approval will certainly be requested. However, given that the change has only been in place since September 10, 2020, a permanent change has not occurred, and this temporary change is allowable under PPB directives, that is requirement is not implicated at this time.

Finally, I do want to address your statement that "for the past four months, PPB has not completed all protest-related force reports/after-action reports nor the auditing of protest-related force reports that do exist." As the City candidly informed DOJ in early June, due to the extraordinary and unprecedented protest events that occurred the last three days of May and into June (and which of course continue) PPB has not been able to timely complete all after-action reports from that period. Nonetheless, even in the early days, FDCRs were completed at the close of shifts or in limited instances in very short order thereafter. FDCRs are of course the key tool for force data collection, and these have since early June been completed at shift's end as required. Given the sheer volume of the FDCRs, and the difficulties encountered in cross-referencing them, it is true that many after-action analyses, particularly from the early days of late May and June, have been delayed. That problem has been largely corrected since that time. In other words, while PPB has not yet fully caught up with the first month or so of analyzing protest-related force reports, systems have since been improved and extra resources allocated to permit the City to now be timely on an ongoing basis. It is the City's goal to continue to be timely on the current protest-related uses of force, with the goal of getting "caught up" with the after actions from the earliest days of the protests (when tens of thousands of people were nonviolently protesting George Floyd's murder and a small subset engaged in significant riotous behavior) as soon as possible.

The Settlement Agreement does not, of course, focus on protests or crowd control. It is clear that PPB's force reporting system was not designed for, and did not contemplate, ongoing, large scale mass demonstration events involving civil disturbances. It has become clear that the system is not workable, from a timeliness perspective, in this unanticipated and extraordinary situation. Accordingly, we are already working on adjustments to the system to address many of the bottle necks and administrative hurdles preventing it from functioning within the timelines for "normal" uses of force. As you know, PPB is maintaining all timelines for force reporting with the exception of this unprecedented protest event. Finally, with regard to auditing, it is simply not true that PPB has failed to timely complete the auditing of protest-related uses of force. That has always been done on an annual basis under the Settlement Agreement and we expect it will be timely completed this year as well.

In sum, while the timeliness of PPB's force reporting process, and in particular the timely preparation and review of after-action reports, suffered in the earliest days of the protests, we have timely (or in limited circumstances near-timely) FDCRs completed from even those earliest days. At this point the system is timely for the ongoing protests, with the goal of catching up the after-actions from late May and June as soon as possible. We are confident that we have the data to fully comply with all of the substantive aspects of the force collection, analysis and reporting processes under the Settlement Agreement, although we concede that we were not able to do so within the timelines specified for approximately the first month of these extraordinary events. Even then, we continued to be timely with all force reporting except that related to the protests. So, we believe that the timeliness issue has been largely resolved going forward, albeit with a continuing need to "catch up" on the first month's after-actions.

Thank you for your collaboration as we continue our work to ensure that all Portlanders have a 21st Century police force that is responsive to their needs and to our community's strongly expressed desire for continued police reform and racial justice.

Best regards,

Tracy

TRACY REEVE | **City Attorney** (She/Her)
PORTLAND OFFICE OF THE CITY ATTORNEY
1221 SW Fourth Avenue, Room 430
Portland OR 97204
Voice: 503-823-4047 | Fax: 503-823-3089
Tracy.Reeve@portlandoregon.gov

Equal Access Notice: *The City of Portland complies with all non-discrimination and Civil Rights laws including The Civil Rights Act Title VI and ADA Title II. To help ensure equal access to City programs, services and activities, the City of Portland will reasonably modify policies or procedures and provide auxiliary aids or services to persons with disabilities. Please call (503) 823-4047, TTY 503-823-6868 or Oregon Relay Service: 711 with such requests, or click here.*
Portland City Attorney Confidentiality Notice: *This message may contain confidential or legally privileged information belonging to the sender. If you have received this message by mistake, please immediately notify the sender, delete the original message, and destroy all copies.*

From: Cowall, Laura (CRT) <Laura.Cowall@usdoj.gov>
Sent: Thursday, September 24, 2020 2:44 PM
To: Reeve, Tracy <Tracy.Reeve@portlandoregon.gov>
Cc: dennisrosenbaum3@gmail.com <dennisrosenbaum3@gmail.com>; Buckley, Mary Claire <MaryClaire.Buckley@portlandoregon.gov>; Geissler, Jonas <jonas.geissler@usdoj.gov>; Hager, Jared <jared.hager@usdoj.gov>
Subject: Correspondence re CS gas

⊖ The City's email systems have identified this email as potentially suspicious.
Please click responsibly and be cautious if asked to provide sensitive information.

Good afternoon Tracy,

Please find attached correspondence from DOJ regarding the City's new CS gas limitations. Thank you for your continued and prompt attention to this matter.

Laura

Laura L. Cowall (Coon)
Deputy Chief
Department of Justice

Civil Rights Division
Special Litigation Section
(202) 514-1089