



SEATTLE CITY COUNCIL | DISTRICT 1

COUNCILMEMBER LISA HERBOLD

December 29, 2023

Antonio Oftelie, U.S. District Court-Appointed Monitor for the Seattle Consent Decree
Tim Mygatt, U.S. Department of Justice
James Waldrop, Assistant U.S. Attorney U.S. Attorney's Office for the Western District of Washington

Dear Monitor Oftelie, Mr. Waldrop, and Mr. Mygatt,

I am writing today in follow up to my letter (attached) of November 7, 2022, and to respond to some of the statements in the Seattle Police Department memorandum of December 6, 2023, regarding crowd management policies. The SPD memo and policies were sent consistent with the Court's order of September 7, 2023, that stated, *"Consistent with City law, within 90 days of the filing date of this order, the City shall provide the draft crowd management policy and alternative reporting and review process discussed in Paragraphs 1 and 2 to the DOJ and the Monitor."*

Before addressing specific issues, I want to first say how much I appreciate that SPD's submittal attempts to incorporate not only policies consistent with [Ordinance 126422](#), but also recommendations issued by the Office of the Inspector General (OIG), the Office of Police Accountability (OPA), and the Community Police Commission (CPC). The consensus recommendations of the accountability bodies formed the starting point for the development of Ordinance 126422.

Italicized below as 1- 6 below are points raised in SPD's memo for which I want to provide several clarifications, alternative analysis, corrections, and/or legislative intent:

1. *"Provides no less-lethal option to intervene in property destruction by crowds."*

The ordinance does not regulate the use of several less lethal weapons, and thus allows their use to intervene to prevent or respond to property destruction. Consequently, I do not believe this statement is accurate. As noted in my letter of November 7, 2022, to you:

"To address concern that officers should have some less lethal option to intervene when property damage is occurring, but there is no risk of serious bodily injury, the legislation is silent on and does not regulate the use of non-chemical launchers, e.g. 40mm sponge-tipped rounds."

2. *“Provides no effective method to disperse violent crowds, even when that violence is directed towards people.”*

Section E of the ordinance permits Forty-millimeter launchers to be used to deploy chemical irritants and pepper balls when used by SWAT officers in a demonstration or rally for purposes other than crowd control in circumstances in which the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders.

Section F of the Ordinance allows OC spray to be used at a demonstration or crowd if these two conditions are met: (1) the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders, and (2) there is a violent public disturbance.

Finally, Section G of the Ordinance allows tear gas to be used to disperse a crowd when there is a violent public disturbance, under the direction of or by officers who have received training for its use within the previous 12 months.

3. *“Provides no viable means of rescuing victims in a crowd or creating space for a targeted arrest.”*

Section F would allow SPD to create space for purposes of a rescue by using OC spray if the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders. Similarly, Section E allows SWAT to use pepper ball launchers to create space to carry out a rescue if the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders.

4. *“Restricts the use of 40mm chemical launchers and OC spray to SWAT, which is contradicted by crowd management experts and impractical given current staffing levels.”*

This statement is accurate only as it relates to the use of forty-millimeter launchers used to deploy chemical irritants and launchers used to deploy pepper balls. The legislation does allow for use of pepper ball launchers in a demonstration or rally, but not for crowd control purposes, and only by SWAT and when the “risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders.”

This statement is not accurate as it relates to hand-held OC spray. The ordinance specifically says that OC spray is not banned as a less lethal weapon if it is being used outside the setting of a demonstration or rally, or at a demonstration or rally, for purposes other than moving crowds and the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders; the ordinance does not contain a SWAT deployment requirement regarding the use of OC spray.

5. *“Creates the necessity for SPD to disengage in circumstances where a violent crowd has not yet become a violent public disturbance (“12 or more persons who are present together use or threaten to use unlawful violence towards another person or group of*

people and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his [sic] personal safety,” as there are no available tools to disperse that crowd or practically intervene.”

The ordinance, in regulating less lethal weapons use, does not create a necessity for SPD to disengage. The “violent public disturbance” definition applies for the use of tear gas, and for OC in some cases only. It is not a prerequisite criterion for the use of other Less Lethal Weapons. For instance, OC spray CAN be used in a rally/demonstration that does not meet the definition of a “violent public disturbance” (see 3.28.146 F2) when “the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders,” but not to move large groups of people uninvolved (i.e. not for crowd control). Similarly, chemical launchers CAN be used by SWAT in a rally/demonstration that does not meet the definition of a “violent public disturbance” (see 3.28.146 E2) when “the risk of serious bodily injury from violent actions outweighs the risk of harm to bystanders, but not to move large groups of people uninvolved (i.e., not for crowd control).

The idea that SPD’s only recourse under the less lethal weapons regulations in Ordinance 126422, is to disengage if a group smaller than 12 people is threatening to use unlawful violence, seems to discount the value that SPD places on de-escalation, the use of other less lethal weapons, and the implementation of many of the OIG recommendations coming out of the Sentinel Review.

6. “...the Ordinance’s definition of “Less Lethal Weapons” does not appear to contemplate more common less lethal tools used outside of crowd management purposes, including tasers and canines. SPD also interprets this definition to effectively ban the use of the long batons (used in crowd management not as impact weapons, but to allow for separation between protestors and police, such as to push against a protestor seeking to advance on police).”

Because the legislation itself defines “less lethal weapons.” Any device or tool not mentioned is not regulated by the ordinance. In addition, the definition of “crowd control” distinguishes regulations of less lethal weapons to control groups of people, separate from other situations, such as addressing the behavior of individuals within crowds.

I do not agree that the legislation bans the use of long batons. The definition of Less Lethal Weapons (not all of which are regulated in the ordinance) is: “any other device that is primarily designed to be used on multiple individuals for crowd control and is designed to cause pain or discomfort.” If the long baton is not being used to cause pain or discomfort, but as SPD describes, to “allow for separation between protestors and police,” then for purposes of the ordinance, it is not considered a Less Lethal Weapon.

In closing, I appreciate that SPD, with this filing, is fulfilling the third obligation of the Court’s order of September 7, 2023, to submit policies around Crowd Management in accordance with Ordinance 126422. Nevertheless, I am concerned that the letter included with SPD’s submittal says that SPD “submits that a review of the SPD’s existing Interim Policy would be more

consistent with the Court's intent." It's worth noting that in practice, any legislation adopted by the City Council that involves the areas identified in the Consent Decree is required to first be converted into policies by SPD, prior to review by the Monitor and DOJ. However, this requirement is specific to City Council actions only. For example, when the Washington State legislature [adopted a state law](#) to establish [state code](#) limiting use of tear gas in 2021, the terms of the Consent Decree did not apply, and Seattle, along with all jurisdictions in Washington State, were subject to the law.

At the close of the memo of December 6, 2023, SPD seems to be asking the Court to "double-down" on limiting the democratic legislative process by suggesting that the Court review only SPD's existing Interim Policy, and not the policy that incorporates the requirements of the ordinance.

I do not believe that the intent of the Consent Decree between the City of Seattle and the US Department of Justice is to limit legislative authority. Nevertheless, in practice, that can be an outcome. SPD's request is that the Court not only limit the Council's legislative authority in an area covered by the Consent Decree, but, in practice, eliminate it.

In advance, I thank you for your review and feedback on the policies that are drafted with the intent to incorporate the regulations contained in Ordinance 126422.

Sincerely,



Lisa Herbold
District 1 Councilmember, Public Safety and Human Services Committee Chair

CC: Tim Burgess, Deputy Mayor

Andrew Myerberg, Chief Innovation Officer

Callie Ellis, Community Police Commission Director

Gino Betts, Office of Police Accountability Director

Lisa Judge, Inspector General

Kerala Cowart, Seattle City Attorney's Office

Ann Gorman, Council Central Staff

Attachment: Letter dated November 7, 2022