

MEMO

To: Members of the Berkeley Police Review Commission

From: Brian Hofer, Oakland Privacy; Chair, City of Oakland Privacy Advisory Commission

Re: *City of Berkeley – Surveillance and Community Safety Ordinance*

Date: July 26, 2017 Meeting of the PRC

Based on the ACLU's Community Control Over Police Ordinance ("CCOPS"), the Berkeley ordinance requires:

- **Informed Public Debate at Earliest Stage of Process:** Public notice, distribution of information about the proposal, and public debate prior to seeking funding or otherwise moving forward with surveillance technology proposals.
- **Determination that Benefits Outweigh Costs and Concerns:** Local leaders, after facilitating an informed public debate, expressly consider costs (fiscal and civil liberties) and determine that surveillance technology is appropriate or not before moving forward.
- **Thorough Surveillance Use Policy:** Legally enforceable Surveillance Use Policy with robust civil liberties, civil rights, and security safeguards approved by policymakers.
- **Ongoing Oversight & Accountability:** Proper oversight of surveillance technology use and accountability through annual reporting, review by policymakers, and enforcement mechanisms.

City Council Approval Required (Sections 4 & 8)

Prior to accepting funds or donations for surveillance technology, acquiring new technology, using existing technology in an un-approved manner, or entering into an agreement with a non-City entity to share or use technology, a City department must first obtain City Council approval.

Proposals will first be considered by the appropriate reviewing commission. When making the determination as to whether the benefits outweigh the concerns, the City Council must consider the commission's recommendation.

For pre-existing equipment, each City Entity has 180 days to complete the approval process required by Section 4. Based on my conversations with Chief Greenwood and Chief Dong, I conclude that BPD has two pieces of equipment that meet the definition of surveillance technology (including the pending BWC purchase), and BFD has two. My understanding of license plate reader use by the City of Berkeley is that Public Works operates the equipment, not BPD, and thus Public Works has at least one piece of equipment that is subject to this ordinance.

Informed Decision Making And Ongoing Oversight (Sections 6 & 9)

With each proposal, two documents are required. During the approval seeking stage described in Section 4, an Impact Report and a draft Use Policy will inform the public, appropriate reviewing commission, and the City Council as to the potential impact to civil liberties from use of surveillance equipment, and the draft use policy will demonstrate how the proponent intends to use the technology.

The Impact Report requires that an analysis be performed by the proponent. Among other requirements, the report must discuss implementation of safeguards designed to mitigate the impact to our civil liberties, analysis of the track record of the surveillance technology in other jurisdictions, discuss alternatives that were considered, the data that will be collected and how it will be secured, and generally how the equipment works and how it is intended to be used.

The draft Use Policy will describe the intended authorized uses, the data to be collected, who may access it and under what conditions, the length of data retention, whether third party data sharing is expected, and provisions for training and auditing.

For approved proposals, a third required document is the Annual Report, necessary for ongoing oversight and possible policy modifications. This document will summarize how the technology was used in the preceding year, whether data was shared with outside entities and for what purpose, where the technology was deployed, and the results of any internal audits. The report will also provide for information including crime statistics to help demonstrate success (or the lack thereof), and summarize total costs, providing for oversight and to help the Council make the determination described in Section 7.

Determination That Benefits Outweigh Costs And Concerns (Section 7)

The ordinance requires that the City Council determine that the benefits of a new use or acquisition, or continued use of an existing technology, outweigh the costs and concerns at two different stages: during the up-front approval process, and then again after review of the Annual Report. If the City Council does not make a favorable determination, a new proposal is denied. For existing technology with an adverse analysis, use must cease or modifications to the policy must occur, sufficient to result in a favorable determination as to continued use. At each determination stage, the recommendation of the appropriate reviewing commission will be considered.

Whistleblower Protections, Prohibition On Non-Disclosure Agreements (Sections 11 & 12)

The ordinance provides for whistleblower protections, and a prohibition on non-disclosure agreements. The public policy benefits of each should be self-evident.

Enforcement (Section 10)

The ordinance provides for a menu of enforcement mechanisms: a private right of action for injunctive relief against the City as a corporate entity; a private right of action against an

individual that uses surveillance technology or data in violation of the ordinance or pertinent policy; an award of attorney's fees and costs to a prevailing party; and a misdemeanor penalty for a willful or intentional violation of the ordinance or an underlying use policy.

Both state law and Berkeley's city charter provide authority for imposing a misdemeanor penalty for violation of an ordinance, including for acts of negligence, a lower standard than the current draft contemplates.

Other Jurisdictions

Santa Clara County: the first entity to adopt this model. The Santa Clara County ordinance is substantively the same in scope as Berkeley, and includes the "right to cure", an exigent circumstances provision, private right of action, award of attorney's fees, and a misdemeanor penalty for a willful violation, like the Berkeley draft ordinance.

Oakland: after unanimous approval by the Privacy Commission, the Public Safety Committee also unanimously approved the ordinance. The City is now going through a "meet and confer" process with two public unions, due to the penalty provisions of the ordinance. Oakland's template is the basis for the Berkeley draft. The Oakland language does not have an exigent circumstances provision or right to cure. The ordinance does include a private right of action, award of attorney's fees, and misdemeanor penalty for a willful violation, like the Berkeley draft.

BART: the first transit district to consider the model. The BART ordinance was approved by a Board committee, and is pending review by the full Board. The Santa Clara County version is the basis for the BART draft. The BART version includes a right to cure, exigent circumstances provision, a private right of action for injunctive relief against BART as a corporate entity, and an award of attorney's fees and costs.

Richmond: proposing to use the Oakland template as the basis for their ordinance, and to create a Privacy Commission in conjunction with the ordinance.

Palo Alto: the ordinance outline was approved by the Policy and Services Committee unanimously in June, and staff will present a fully drafted ordinance to the City Council in the fall.

Alameda County: in July, the Board voted to form an official working group that will use the Santa Clara County ordinance as the basis for an Alameda ordinance.