Re: OPD Response To Recent Demonstrations

Dear Chief Manheimer and other officials:

We wrote you on Friday, May 29, 2020, to inform you about the Oakland Police Crowd Control Policy, and that that Policy is a federal court order in the Spalding and Campbell cases. We are writing now to express our deep concern over the ongoing violations of each of the sections of the Crowd Control Policy referenced in our May 29 letter.

Unfortunately, the concerns expressed in that May 29 letter were realized that same day and multiple days since. OPD and assisting agencies shot Specialty Impact Munitions (SIM) and threw explosive CS Blast grenades and/or similar explosive devices directly into the crowd, used chemical agents improperly, failed to cite and release protesters, and failed to adequately supervise mutual aid, in violation of the OPD Crowd Control Policy (promulgated as OPD Training Bulletin III-G, hereafter, “the Policy”), and state and federal law.

We realize OPD and other law enforcement agencies have been faced with many challenges over the past few days. However, this cannot be allowed to justify the fact that OPD’s current violations of its own crowd control policy are the worst since 2012, eight years ago.

Use of Chemical Agents
Teargas was used on Friday, Saturday, Sunday and Monday in an excessive manner that is particularly concerning in light of the current COVID-19 pandemic, a respiratory illness.

Contrary to the narrative put out by Assistant Chief Armstrong, the use of teargas at 8th and Broadway on Monday, June 1, prior to the 8pm curfew, was precipitous, excessive, and endangered innocent people. We received the following statement from an Oakland resident in her 30s who had walked with the high school students from 14th and Broadway following the youth rally at Oakland Tech High School:
I’m writing because I, along with 1-200 others, experienced excessive force by the Oakland Police Department during last night’s peaceful protest. We were located on 8th and Broadway, and around 7:35pm, before our 8pm curfew, we were heavily and aggressively tear gassed. An announcement was made a couple of seconds prior to the bombardment of tear gas canisters and flash grenades. Many people in the crowd did not hear the announcement, and those that did could not hear what was being said. We were not given any time to disperse. The entire block between 8th and 9th St. was filled with a virtual wall of CS gas that we were forced to maneuver through despite trying to disperse as ordered. I was present with a walking buddy who is currently using a cane and cannot run. We both began to lose our vision as we tried to escape the gas at a walking pace. I began to lose my vision, and my lungs seized. There was nearly a full minute where I was not receiving oxygen. I believe I began to pass out as I felt my body start to keel over, and braced myself for losing consciousness by getting almost on all fours. I believe that another 20-30 seconds in that environment would have led to a loss of consciousness and possibly asphyxia.

The Policy specifies that “Chemical agents can produce serious injuries or even death. The elderly person or infant in the crowd or the individual with asthma or other breathing disorder may have a fatal reaction to chemical agents even when those chemical agents are used in accordance with the manufacturer's recommendations and the Department's training. Thus, crowd control chemical agents shall be used only if other techniques, such as encirclement and multiple simultaneous arrest or police formations have failed or will not accomplish the policing goal as determined by the Incident Commander.” (TB III-G, ¶ V.H.4.b, emphasis added.)

Indeed, public health and other medical experts have condemned the use of tear gas and other respiratory irritants on protesters as increasing the risk for COVID-19 by making the respiratory tract more susceptible to infection, exacerbating existing inflammation, and inducing coughing, as well as by forcing those exposed to remove masks that have been contaminated. On the other hand, the public health professionals’ statement recognizes that demonstrations calling attention to police lethal violence against Black people are vital to the national public health and the health specifically of Black people.

We have seen nothing indicating that there was any large scale aggression from the crowd necessitating this particular police use of force. In fact, the reports we have received indicate that many of the demonstrators were still near 14th and Broadway, and that those near 8th and Broadway at 7:45pm were mostly standing peacefully with their hands up when the chemical agents and other weapons were used. Others were actually just trying to walk home when they were tear gassed and shot at. It appears that the less forceful tactics specified in the Policy, including de-escalation and/or giving adequate warnings and opportunity to disperse, could have accomplished the police goal of avoiding property damage. Such tactics would have isolated whoever was engaging in the conduct you
describe in your email today, and would have benefited the police as well as demonstrators and residents.

**CS Blasts**

Throughout crowd events on Friday, Saturday and Monday, OPD used CS Blasts in conjunction with teargas. On Friday May 29, CS Blasts began being used by 9:22pm, and teargas at 9:27 – *simultaneous* with unlawful assembly announcements, such that the crowd did not have a chance to disperse in compliance with the order before being subjected to the chemical agents and volley of small explosives. There was only minor provocation from within the crowd prior to this police use of force, and the weapons were thrown into parts of the crowd that were obviously peaceful. Legal Observers report that there was no unlawful crowd activity in their vicinity when they were forced to run by chemical agents and CS Blasts and were unable to escape chemical agent exposure. At one point on Monday night three Legal Observers scrambled to get out of the street when police began tossing CS Blast grenades right at them, but when they went onto the sidewalk, motorcycle officers rushed at them. It was terrifying because they could not escape to safety and there were no announcements telling them what to do or where to go, and no illegal activity in the area at that time.

Contrary to the Policy, the police continued to shoot teargas canisters even though the crowd was dispersing. This indiscriminate use of force may have been precipitated by a few individuals throwing water bottles and setting off fireworks, yet this is exactly the type of challenging situation that the Oakland Police Department had in mind when it adopted the Policy, which was the product of many months of collaboration with OPD and the City. If the Policy only applied to completely peaceful events, there would be no need for most of its provisions. The Policy places special restrictions on the use of dangerous weapons such as CS Blasts, flash bangs, and Specialty Impact Munitions (SIM) in crowds precisely because crowds may include individuals who are breaking the law, mixed closely in with lawful protesters, journalists, observers and passersby. The indiscriminate use of force is illegal.

While using CS Blasts in conjunction with teargas may seem an expedient way to disperse crowds, it causes chaos. On Friday an individual was trampled and had to be carried out. Tossing the CS Blasts into the air above the crowd or at their feet can and has on other occasions caused shrapnel injuries, severe chemical burns, permanent hearing loss and tinnitus and subjected the City to major liability. The Policy specifies that such devices may only be deployed to explode a safe distance from the crowd, to turn the crowd’s direction consistently with police objectives, but that is not how they were used these past few days. Numerous videos show the CS Blasts or similar devices exploding within the crowd, causing people to run rather than encouraging safe, orderly dispersal. In fact, at least one person was trampled on Friday, May 29.

**Specialty Impact Munitions**

On Friday and other days, Direct Fired Specialty Impact Munitions (SIM) was shot into the crowd. Two different people were shot in the chest, a potentially lethal area close to their
hearts which OPD policy does not authorize targeting. (TB III-H, Specialty Impact Munitions.)

These individuals were engaged in peaceful protest. In the case of the person whose injury is depicted on the right, he was at least half a block from the police line at 7th and Broadway, standing on the median to try to see what was going on when he was shot. Everyone in his vicinity was completely peaceful. Having lost his health insurance because he lost his job due to the pandemic, he has been unable to get medical attention for his open wound.

Similarly, a photographer who was standing at least 50 feet from the police line around the same time was shot twice, one round burning and bruising her arm and another hitting her camera and breaking the professional lens.

A Legal Observer, clearly marked with a bright green “NLG Legal Observer hat” was also hit on the leg with SIM in the same location and time period.

Specialty Impact Less-Lethal Munitions (SIM) such as foam rounds and bean bags may never be used for crowd control or dispersal. In a crowd situation, the Policy requires a different standard for SIM than on patrol. SIM may only be used against a specific individual who is engaging in conduct that poses an immediate threat of loss of life or
serious bodily injury to him or herself, officers, or the general public or who is engaging in substantial destruction of property which creates an immediate risk to the lives or safety of other persons. In such instances, SIM shall be used only when other means of arrest are unsafe and when the individual can be targeted without endangering other crowd members or bystanders, i.e. when the officer has a clear shot – not in the midst of a crowd. (TB III-G, ¶ VI.F.2.)

OPD and the City adopted these restrictions to prevent another tragedy like the permanent brain damage sustained by Scott Olsen, a young veteran who was accidentally struck in the head with a police "bean bag" at a 2011 demonstration. Mr. Olsen received a $4.5 million settlement from the City, but will never regain full mental function. In Mr. Olsen’s case, he was shot at close range as the officer aimed for an individual behind him who was throwing something, when Mr. Olsen began to run because a CS Blast was detonated next to him. In the above four incidents, it may be that the officers were aiming at people closer to them, but inadvertently struck people who were at a greater distance. Because these people happened to be at long range they were not more seriously injured, but that is purely fortuitous. Continued violations of the Policy with regard to SIM are a tragedy waiting to happen.

Mutual aid
It appears that both OPD and Alameda County Sheriffs were involved in the use of force. OPD may claim not to be responsible for the actions of mutual aid partners. However, the Policy states that the OPD Incident Commander is responsible for ensuring that mutual aid agencies adhere to OPD’s Unity of Command structure under which only OPD Commanders may authorize the use of less lethal munitions for crowd control and dispersal; are briefed on OPD’s policy on prohibited weapons and force; are provided a copy of OPD’s Crowd Control Policy and Use of Force policies; and are not assigned to front-line positions or used for crowd intervention, control or dispersal unless there is a public safety emergency. (TB III-G, ¶ IX; General Order L-3.) Moreover, California Govt. Code § 8618 provides that the responsible local official in whose jurisdiction an incident requiring mutual aid has occurred shall remain in charge at such incident including the direction of personnel and equipment provided him through mutual aid.

It is our position that the OPD cannot do an end run around the Policy by allowing mutual aid agencies to violate the Policy. Toward that end, we would appreciate some verification that the mutual aid agencies involved in these incidents were actually briefed on and provided the CCP and agreed to adhere to it.

Failure to cite and release
Many arrestees have been turned over to ACSO for booking or citation at Santa Rita Jail. This included persons arrested for citable misdemeanor offenses, which violates Penal Code § 853.6, which mandates citation and release for misdemeanors. In conformity with this, the Policy requires that an officer seeking to book a misdemeanor arrestee into jail must have an articulable basis to believe that one of the specified statutory exceptions to mandatory cite and release applies to that individual -- and that the mere fact that further
demonstrations are likely to be held in the near future is not a proper basis to apply subdivision (7) of P.C. 853.6 ("reasonable likelihood that the offense may continue or resume") to individual demonstrators. (¶ VIII.D, E.)

In addition, the statewide Emergency Order has eliminated bail for many offenses precisely to reduce the number of people held in jail, a potential hotbed for infection. Yet, many protesters have been booked on zero bail offenses and not released until NLG attorneys have been able to advocate for them. If there is no bail for the offense, the arrestee should not be taken to jail and unnecessarily exposed to the potential fatal risk of contracting COVID-19 or spreading the pandemic in the Alameda County Jail.

**Inventory**

The Policy mandates that the Training Section maintain a munitions inventory log for all less-lethal munitions which are checked out during crowd control events, which is updated after each event to specify how many munitions were used and by which person. A copy of the inventory log is included in the after-action report. Please provide the Monitor and the undersigned with a copy of the inventory log for the May 29, 30, and June 1 events along with an explanation of the use of the weapons, and let us know whether OPD or mutual aid agencies used either of the following types of munitions:

![Munitions](image)

Your June 3, 2020 email indicates that you are willing to have a Zoom conference with us. We accept your offer and will be available any time today, or at a time to be scheduled.

Very truly yours,

*James B. Chanin*
*Rachel Lederman*
Attorneys for Spalding / Campbell Plaintiffs, and on behalf of the National Lawyers Guild, San Francisco Bay Area Chapter