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To: Board of Supervisors

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Subject: UPDATE re Draft Sheriff General Order #10.08: MILITARY
EQUIPMENT FUNDING, ACQUISITION AND USE

Introduction

For several months, the Sheriff’s Office has been working to meet new obligations in response to California Assembly Bill 481 (“AB 481”). Foremost among these is the development of a new policy that establishes a framework for “Military Equipment Funding, Acquisition and Use.” Consistent with the intent of the state law, the process – and of course the policy itself – has provided an unprecedented level of transparency and accountability with regard to certain weapons and other materials with special capabilities. AB 481 requires law enforcement agencies to declare the relevant items within their own inventories, define their uses, and receive authorization from the “applicable governing body” in order to maintain their possession and utilization.

Importantly, some of the AB 481 requirements are ongoing. Agencies are obligated to provide annual updates as to how (and how often) the relevant equipment was used and to share information about costs and any public complaints that may have emerged during the reporting period. But the obvious and necessary foundation for the future is the initial request for policy approval that is coming before your Board for consideration on August 16, 2022.

The latest version of the Sheriff's Office draft policy is the culmination of several recent stages in the process. In late May, your Board initially deferred its review of the then-draft so that it could receive additional information from different sources. One component of this was a request that OCLEM provide input as to whether the Sheriff's Office policy comported with the letter and spirit of the AB 481 legislation.

Toward that end, OCLEM provided an initial memorandum to the Board that was submitted on June 1, 2022. That report reflected OCLEM's own detailed evaluation of the then-draft policy, and described some of the interactions with Sheriff's Office personnel that had contributed to beneficial revisions of the earlier version. It also included six recommendations that were intended to strengthen the "final" draft of the policy as well as to better comply with the larger transparency goals of the legislation.

At its June 28 meeting, your Board considered the Military Use Policy and gave further direction based on that discussion. This included a request that the Sheriff's Office respond to the OCLEM recommendations, and direction for OCLEM to update the Board regarding any responsive changes in the draft policy.

This memo addresses those referrals as they relate to OCLEM. Specifically, it details our further interactions with the Sheriff's Office as it has continued to refine its Military Use Policy – and, importantly, other related policies – with an eye toward your Board's authorization. As discussed below, the Sheriff's Office has been extremely collaborative, receptive, and conscientious in its efforts to further develop its policies in a way that comports with heightened public expectations and goes beyond what most other law enforcement agencies have done. We consider the results to be commendable.

At the same time, we are sensitive to the concerns that gave rise to the AB 481 legislation in the first place. Throughout our several weeks of monitoring the process in Santa Clara County, we have heard the perspective of community members and activists who remain wary of the equipment at issue. Accordingly, we take this opportunity to reiterate our emphasis on the substantive importance of ongoing reporting requirements as established within the policy. It is only through learning and review of how equipment is being used can an informed decision be made about any continued advisability of use.

Status of Recommendations

Since the Board meeting on June 28, the Sheriff's Office has worked to refine its policy relating to military equipment including General Order 10.08, its appendices, and other related policies in keeping with the feedback it has received. As with the initial phase of OCLEM's involvement, we found the responsible Sheriff's personnel to be both diligent and extremely collaborative in working through identified issues. They provided OCLEM with multiple drafts for review, and these were discussed over the course of several meetings.

For the most part, this process both responded to and went beyond the parameters of the original six OCLEM recommendations in constructive ways. We explain below. We have also had encouraging conversations with the Sheriff's Office regarding the final recommendation, which relates to the substance of future annual reporting. We are expectant that the agency has both the current ability and the appropriate inclination to make its ongoing reporting obligations meaningful.

Recommendations 1 and 2: Limits on Authorized Use

Our first two suggestions were mechanical in essence: they were simply intended to take a substantive improvement to the Military Equipment policy that the Sheriff's Office had already made and "re-package" it so that it applied comprehensively rather than only partially.

The issue was an important one. It addressed concerns that authorized uses of various individual items were listed, but were accompanied by language indicating that potential uses "are not limited to" the specific examples provided. As we explained in our earlier memo to your Board:

"The use of the phrase 'but are not limited to,' could be interpreted to mean that the uses of military equipment are potentially unlimited and not controlled in any meaningful way.

"The Sheriff's Office acknowledged this concern. Their intention, they reported, was not to leave an open-ended 'free for all' when it came to the use of military equipment. Rather, they were concerned that they could not, nor should, create a comprehensive and exhaustive list of every scenario where use of military equipment was authorized."

Accordingly, the Sheriff's Office had drafted language in an interim update to the new policy that we considered to be very helpful.

These policies, as well as associated trainings, outline common situations in which less lethal weapon systems may be deployed to de-escalate and bring incidents under control. However, in recognition of the reality that emergency situations may present unique facts and circumstances and may be rapidly evolving, these policies do not offer a comprehensive list of each and every potential scenario where less lethal weapon systems may be deployed. Nevertheless, in every instance, deployment of less lethal weapon systems must comply with the legal and policy parameters described in these policies, including, but not limited to, the use of reasonable and proportional force, the use of de-escalation and alternatives to force where feasible, the limits on the less-lethal weapons in crowd control settings, and other requirements described in these policies.

At the same time, the draft (as it existed at that point in June) was structured in such a way that the above clarifying language was not universally applicable to all items within the Military Equipment inventory. That structural "glitch" prompted the following from OCLEM:

RECOMMENDATION 1:

The Sheriff's Office should amend the paragraph above to include all military equipment categories.

RECOMMENDATION 2:

The Sheriff's Office should incorporate this language into the main body of General Order #10.08 under the section titled MILITARY EQUIPMENT USE CONSIDERATIONS.

The Sheriff's Office agreed that adopting the recommendations would be consistent with its intent, and this change is reflected in the current draft policy. The updated language is now found in the section titled "Military Equipment Use Considerations" as we recommended.

STATUS: Complete

Recommendation 3: Changes to Other Related Policies

Our next recommendation related to another fundamental concern shared by some close observers of the AB 481 compliance process within Santa Clara County and in other jurisdictions: namely, that law enforcement agencies were avoiding some of the transparency goals of the legislation by incorporating other policies by reference – some of which were inevitably not subject to the same amount of scrutiny from elected officials, and some of which were not publicly available at all.

One relevant and newly developed Sheriff's Office policy that was being finalized at the time of our last report to the Board related to "Demonstrations and Civil Disorders," General Order 17.03. These changes were especially significant in light of the separate legislation from 2021 (AB 48) that required them and placed definitive restrictions on law enforcement response to crowd control situations. Many of these new guidelines related to how military equipment was deployed in this specific context – an animating reason behind the state's development of both new statutes.

Accordingly, the cross-references within General Order 10.08 to the "Demonstrations and Civil Disorders" policy meant that the latter deserves particular attention when it comes to ensuring the legitimacy of the former. OCLEM has reviewed the "Demonstrations and Civil Disorders" policy. We found that General Order 17.03 aligned with both new laws by first restricting the use of kinetic energy projectiles and gas in crowd management incidents (as required in AB 48) and listing the use cases for this military equipment (as required by AB 481).

And, as we indicated, we had offered suggestions to the Sheriff's Office for strengthening it. Those included adding definitions of terms such as "riot" and "unlawful assembly" into the policy and re-ordering the policy to better align with the stages of crowd management. We engaged in several conversations regarding these possible revisions. The Sheriff's Office agreed to consider these additions in the future, but did not complete them in advance of this memo.

Beyond this, our recommendation in the previous memo to your Board related to increased transparency and read as follows:

RECOMMENDATION 3:

The Sheriff's Office should carefully review any references to other policies to ensure that those policies are, where appropriate, available for the public. Where such documentation is missing, the Sheriff's Office should draft specific policies for the tools referenced in the General Order (e.g., the armored vehicle).

Again, we are appreciative of the Sheriff's Office responsiveness to our input and believe that the results are quite creditable. Two new policies are being finalized that will provide the public with greater information in two very relevant areas: the agency's armored rescue vehicle ("ARV") and the Sheriff's Emergency Response Team ("SERT").

With regard to the ARV, no specific policy existed previously (though relevant guidance did exist in training materials and other documents related to operations). The Sheriff's Office has not only addressed the gap by adding General Order 13.07, but it has revised the pending draft consistent with our suggested edits. These included the following:

- Prohibiting use of the ARV for public relations or community engagement purposes
- When the ARV is deployed, tracking of the mission's outcome
- Requiring that any advanced staging of the ARV be out-of-sight of the public

We find the elimination of "public relations" events from the list of authorized uses to be an especially salient example of the Sheriff's Office efforts to hear and accommodate public feedback during this process. At the national level, these vehicles have become emblematic of contrasting perspectives about the use of military equipment by local enforcement. As reassuring and impressive as they may seem to some people, to others – particularly among marginalized groups with a history of problematic encounters with the police – they represent intimidation and overreach. We commend the Sheriff's Office for acknowledging this reality and tailoring its policy to limited uses of the ARV to "situations where its use is necessary to assist with the preservation of life or enhance the safety of citizens," as stated in the new policy.

As for the SERT policy, while a detailed version did exist, it had been treated as confidential by the Sheriff's Office due to its tactical sensitivity. This was both

understandable and problematic. Many of the individual items in the proposed Military Equipment inventory are reserved for SERT personnel, and the reliance on cross-referencing to what is effectively a “secret” policy would defeat some of the goals of AB 481. Accordingly, we encouraged the Sheriff’s Office to revisit its approach and look for ways to provide more information while preserving (through redaction or relocation) the confidentiality of critical details.

Once again, agency personnel were extremely amenable to the both the core suggestion and to the specific additional ideas we contributed once a draft was in place. These include the following:

- Detailing the required SERT training for at least one member of the team
- Removing use of the term “et cetera” when referencing possible equipment or tools
- Referencing General Order 10.08, specifically as it relates to the authorized equipment used by SERT
- Limiting SERT to only deploy equipment procured and authorized under General Order 10.08

We find the current version to be a significant improvement that provides valuable information to the public and contributes to the soundness of the Military Equipment policy.

STATUS: Complete

Recommendations 4 and 5: Mutual Aid and Military Equipment

In our previous memo to your Board, we identified another potential pitfall in the then-draft policy. We described the issue as follows in June:

“Another area of potential concern in terms of an agency’s AB 481 policy is the efficacy of its guidance regarding mutual aid. Simply put, some of the clarity and reassurance that is provided by an approved policy has the potential to be vitiated if an outside agency is brought in to assist in an emergency, and is not bound by the same standards.”

By the time of our June memo, the Sheriff’s Office had provided us with *some* relevant reassurance. As we explained then:

“In operations requiring a mutual aid response within the Sheriff’s jurisdiction, the Sheriff is *operationally* in charge. Mutual aid resources would deploy under the Sheriff’s command, and deployment of any military equipment would be ultimately directed by the Sheriff’s Office and managed by a dedicated mutual aid liaison.

This command structure is detailed in the recently approved Sheriff’s Office policy on crowd management, General Order #17.03, ‘Demonstrations and Civil Disorders.’ Here, the policy states:

In “Mutual Aid” operations, the Sheriff shall retain final control over all agencies called, to assist and shall be constantly aware of local jurisdiction and their responsibilities. A liaison officer of the Sheriff’s Office will be assigned and remain with all “Mutual Aid” contingents.

While we found this element of the 17.03 policy to be relevant and helpful, we nonetheless included two recommendations that encouraged the Sheriff’s Office to go further:

RECOMMENDATION 4:

The Sheriff’s Office should review the current language related to mutual aid (General Order #10.08, COORDINATION WITH OTHER JURISDICTIONS) to ensure that the use of military equipment by responding agencies reflects the true intention of the Sheriff’s Office.

RECOMMENDATION 5:

The Sheriff’s Office consider language like that included in General Order #17.03 and detailed above, which explicitly states that the Sheriff’s Office operationally directs and manages the use of military equipment in mutual aid scenarios, while also requiring that other agencies adhere to their own policies.

In the ensuing weeks, this topic has proved to be another area in which the Sheriff’s Office has made a conscientious effort to strengthen its Military Equipment policy. It has added several paragraphs of clarifying language that

make clear its understanding of concerns and explain the mechanisms for ensuring control of how outside military equipment will be used when receiving (and providing) mutual aid. This language is also now found in the newly drafted ARV and SERT policies referenced above.

The additions go so far as to acknowledge foreseeable scenarios in which the Sheriff's Office may wish to utilize equipment possessed by other agencies but not part of its own authorized inventory. (Unmanned aerial vehicles – or “drones” – are offered as a specific example.) The policy then lists the principles that are meant to keep such instances from constituting “work arounds” to the spirit or letter of the AB 481 legislation.

We are unfamiliar with any other agency that has invested this level of thoughtfulness and intention in addressing a potential “loophole” in the AB 481 framework. The Sheriff's Office version is commendable and very much in keeping with the goals of our recommendations.

STATUS: Complete

Recommendation 6: Reporting

The requirements of the AB 481 legislation reflect the idea that the accountability of law enforcement agencies to their local governments – and their communities – is meant to continue into the future. Receiving authorization in the first place is of course a critical step, as is the public acknowledgment of equipment that many agencies have long possessed. But this is not a “one time” moment of reckoning for law enforcement. Instead, the legislation calls for an annual reporting process that will continue to provide this Board with opportunities to evaluate the Sheriff's Office performance, and to intervene based on new information or changing perspectives.

The proposed Sheriff's Office policy acknowledges this obligation and makes the requisite commitments. At the same time, the details and specific parameters of that reporting have yet to be formalized. This prompted the sixth and final recommendation in our June memo to your Board:

RECOMMENDATION 6:

The Sheriff's Office should prioritize the development of concrete plans for defining and tracking the contents of its future annual reports regarding military equipment, and should establish a definitive role for OCLEM in this process.

In the weeks both before and since making that recommendation, we have been told by Sheriff's executives that finalizing the new policy – and accommodating the related development/refinement of other policies – has been a consuming task that has effectively taken precedence over addressing the particulars of future reporting. We think there is validity to this explanation.

While our recommendation certainly stands, we did not necessarily anticipate or expect that plans for reporting would be finalized as a precursor to the initial approval process. (Indeed, we are not aware of any law enforcement agency that has established or publicized the substantive details with which it will address the reporting obligation established by AB 481.) Instead, we intended to flag the issue as one that merits ongoing attention.

What we *have* received since late June are assurances from the Sheriff's Office that they recognize the next steps that any initial authorization from your Board should prompt. They have also described the tracking mechanisms that are already in place; the challenge as we understand it is less about capturing the information at all than about centralizing the processing of it in meaningful, targeted ways.

We also noted that the newly drafted ARV policy includes a reporting section that aligns with the requirements of AB 481 and includes creation of a dedicated ARV deployment log specifically for reporting purposes. That the Sheriff's Office included this section shows their commitment to the future reporting requirements of this often-controversial piece of equipment.

Sheriff's Office representatives have pledged to continue their dialogue with OCLEM as they particularize the framework for record-keeping and future reporting, and have suggested a six-month interim review to help ensure effective progress. We would be glad to participate in such a process, and would be happy to apprise your Board of relevant developments as it unfolds.

STATUS: In Progress

Status of OIR Group Recommendations for AB 481 / General Order #10.08		
RECOMMENDATION		STATUS
1	The Sheriff's Office should amend the paragraph related to less-lethal munitions to include all military equipment categories.	Complete
2	The Sheriff's Office should incorporate the language referenced in Recommendation 1 into the main body of General Order #10.08 under the section titled MILITARY EQUIPMENT USE CONSIDERATIONS.	Complete
3	The Sheriff's Office should carefully review any references to other policies to ensure that those policies are, where appropriate, available for the public. Where such documentation is missing, the Sheriff's Office should draft specific policies for the tools referenced in the General Order (e.g., the armored vehicle).	Complete
4	The Sheriff's Office should review the current language related to mutual aid (General Order #10.08, COORDINATION WITH OTHER JURISDICTIONS) to ensure that the use of military equipment by responding agencies reflects the true intention of the Sheriff's Office.	Complete
5	The Sheriff's Office consider language like that included in General Order #17.03 and detailed above, which explicitly states that the Sheriff's Office operationally directs and manages the use of military equipment in mutual aid scenarios, while also requiring that other agencies adhere to their own policies.	Complete
6	The Sheriff's Office should prioritize the development of concrete plans for defining and tracking the contents of its future annual reports regarding military equipment, and should establish a definitive role for OCLEM in this process.	In Progress

Conclusion

As we have noted before, the AB 481 legislation is one of the most concrete examples we have seen of how the recent push for greater public influence over policing has been actualized. The statute changes the “default setting” of law enforcement autonomy and requires agencies to engage the public, secure the approval of elected officials, and give an annual accounting of their actions with regard to the use of military equipment. Ideally, the result is valuable dialogue and an increase in mutual understanding about what these items are and how they should be both used – and restricted – in our current environment.

Here in Santa Clara County, the Sheriff’s Office has done a commendable job of satisfying the spirit and the substance of the new law. The resultant policy is the strongest of its kind that we have seen across different jurisdictions. We appreciate the collaborative approach taken by Sheriff’s Office representatives in responding to our recommendations and suggestions during the process, and hope our influence will continue in this and other areas in which oversight can potentially strengthen the agency’s work.

While we recognize and respect the legitimate apprehensions about military equipment that exist among many members of the public, the Sheriff’s Office draft policy is a solid foundation for a responsible, accountable future. At the very least, it marks a significant improvement over the existing paradigm – in which the relevant equipment has been possessed and utilized with far less public input or control.