

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

TELEPHONE: (434) 978 – 3888 | EMAIL: staff@rutherford.org
www.rutherford.org

JOHN W. WHITEHEAD
Founder and President

February 1, 2023

By Electronic Mail

Police Commission
San Francisco Police Department
1245 3rd St, 6th Floor
San Francisco, CA 94158

Re: Use of Robots and Rights of On-Lookers under DGO 5.07, Items 7 & 8 on Feb. 1, 2023 Agenda

Dear Police Commissioners:

As a civil liberties organization that works to protect the public’s First Amendment rights as well as their freedom from the excessive use of force by militarized police, The Rutherford Institute¹ continues to call on local governments and law enforcement agencies to be mindful of the delicate constitutional balance that must be struck between liberty and security.

Item 7 – Use of Robots

We had previously written the San Francisco Board of Supervisors prior to their meeting on Nov. 29, 2022 to express concern about the proposed Law Enforcement Equipment Policy for the San Francisco Police Department (“SFPD”). Most concerning was item A: “Unmanned, remotely piloted, powered ground vehicle,” which proposed an “Authorized Use” of “deadly force.” Pursuant to the guidelines in Assembly Bill 481 (“AB 481”), we strongly encouraged the Board to reject that proposed use of equipment. We were thus relieved that the Board eventually modified Section 1.A.5 to state that “Robots will not be used as a deadly force option.”

As you plan to discuss this matter today, we want to take the opportunity to encourage SFPD not to seek such an authorized use again in the future.

AB 481 warns in Section 1 that “the acquisition of military equipment and its deployment in our communities adversely impacts the public’s safety and welfare, including increased risk of civilian deaths, significant risks to civil rights, civil liberties, and physical and psychological well-being, and incurment of significant financial costs. . . . Decisions regarding whether and

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

how military equipment is funded, acquired, or used should give strong consideration to the public's welfare, safety, civil rights, and civil liberties.”

Thus, Section 7071(d)(1)(A&B) of AB 481 directs that “the governing body shall *only* approve a military equipment use policy pursuant to this chapter if it determines *all* of the following: (A) The military equipment is necessary because there is no reasonable alternative that can achieve the same objective of officer and civilian safety. (B) The proposed military equipment use policy will safeguard the public's welfare, safety, civil rights, and civil liberties” (emphasis added). The proposed Section 1.A.5 in the military equipment use policy was not necessary or without a reasonable alternative, and it would not safeguard the public's welfare, safety, civil rights, and civil liberties. Therefore, AB 481 directed the Board not to approve such a policy.

Viewing situations remotely can limit a police officer's understanding and awareness of a situation as well as the officer's ability to resolve matters without deadly force. The wording in Section 1.A.5 of the previous proposed policy for using deadly force “when risk of loss of life to members of the public or officers is imminent and outweighs any other force option available” contained several vague and subjective terms that were capable of abuse. There was no definition or clear standard of what was sufficient to constitute a “risk of loss of life” or when that risk was “imminent.” Also, there was no standard for determining how that risk “outweighs” any other options available. There was thus a significant concern that those standards could be abused or misapplied to employ those robots when not necessary.

The Board eventually made the correct decision to reject Section 1.A.5 as proposed, and we would encourage the SFPD not to seek such authorization again.

Item 8 – Rights of Onlookers

We encourage the Commission to approve the proposed revised General Order 5.07 on the “Rights of Onlookers.”

Unfortunately, several police officers across the country fail to understand or recognize the First Amendment right of citizens to observe and record police officers in the performance of their duties. For example, police in New Hampshire seized a woman's camera and charged her with criminal offenses for disobeying a police officer, obstructing a government official, and unlawful interception of oral communications in retaliation for simply videotaping a police officer at a traffic stop from at least thirty feet away in a parking lot.² A police officer in Colorado stood in front of a YouTube journalist to intentionally block his camera view of a DUI traffic stop, shined a flashlight into his camera, drove his police cruiser at the journalist, and repeatedly blasted his air horn.³ Both courts found that the filming of police was clearly

² *Gericke v. Begin*, 753 F.3d 1, 3-4 (1st Cir. 2014).

³ *Irizarry v. Yehia*, 38 F.4th 1282, 1285-86 (10th Cir. 2022).

established First Amendment activity, and that the police were therefore not protected from liability under qualified immunity.⁴

In *Irizarry v. Yehia*, although the Tenth Circuit Court of Appeals acknowledged that it had not yet specifically recognized (though had previously indicated) a First Amendment right to film the police, it found that the right was nonetheless clearly established “beyond debate” by every circuit which had considered the issue—pointing out and summarizing cases from the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeal.⁵ The Tenth Circuit explained that “[f]ilming the police is a form of news gathering” and “is unambiguously speech-creation”⁶ Filming the police “acts as a watchdog of government activity, and furthers debate on matters of public concern.”⁷ The court warned that “[i]f the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech,” and thus “freedom of the press could be eviscerated.”⁸

Because police officers would not likely be granted qualified immunity for violating a person’s right to record their activity, it is in the officers’ and the department’s own financial interest to ensure that officers are properly instructed and trained not to violate this right. More importantly, allowing the public to record police activity without obstruction or retaliation displays greater transparency, which can help build the public’s trust and confidence in the police. Having public trust is critical for officers to safely and effectively perform their duties.⁹ “When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, [and] increases the likelihood people will fail to comply with legal directives.”¹⁰ Thus, while “police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights,” which includes “videotaping that memorializes, without impairing, [police] work in public spaces,” “[p]rotecting that right of information gathering not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.”¹¹

While the proposed revised General Order 5.07 will hopefully provide good guidance and help protect citizens’ First and Fourth Amendment rights, exceptions 1 and 2 under 5.07.02.A provide that onlookers do not have to be allowed to remain in close proximity to overhear and record an encounter when “officer or public safety could be jeopardized” or when an “onlooker obstructs or delays” police officers exercising their duties. We recommend that the Commission take steps to make sure that these two exceptions are not interpreted too broadly whereby police

⁴ *Gericke*, 753 F.3d at 10; *Irizarry*, 38 F.4th at 1298.

⁵ *Irizarry*, 38 F.4th at 1289-92, 1294.

⁶ *Id.* at 1289.

⁷ *Id.* (cleaned up).

⁸ *Id.* (quotation marks omitted).

⁹ See Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008) (“Being viewed as fair and just is critical to successful policing in a democracy.”).

¹⁰ Fred. O. Smith, *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018).

¹¹ *Gericke*, 753 F.3d at 7-8 (cleaned up).

San Francisco Police Commissioners

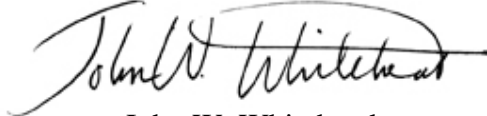
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officers would be given unnecessarily wide discretion in making illegitimate excuses to remove onlookers who are filming.

Otherwise, it is our hope that you will act to protect the First and Fourth Amendment rights of onlookers who film the police.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President