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To: Board of Supervisors

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Subject: Review of Draft Sheriff's Office General Order #10.08: MILITARY EQUIPMENT FUNDING, ACQUISITION AND USE

Introduction

In the May 24, 2022, Board Agenda Packet, the Sheriff's Office presented a draft of its Military Equipment Funding, Acquisition and Use Policy, prepared in response to Assembly Bill 481 (AB 481). AB 481, subsequently codified in California Government Code 7070, requires all California law enforcement agencies to "obtain approval of the applicable governing body, by adoption of a military equipment use policy, as specified, by ordinance at a regular meeting held pursuant to specified open meeting laws, prior to taking certain actions relating to the funding, acquisition, or use of military equipment."

The Board of Supervisors (BOS) requested that OCLEM review the Sheriff's Office draft policy and provide a written report related to compliance with AB 481 and the appropriateness of the listed equipment. What follows is an assessment of the Sheriff's Office process in developing its policy, the extent to which its updated draft policy meets both the letter and spirit of the legislation (with

recommendations for revisions), and the issues that merit the attention of your Board and the Sheriff's Office with regard to ongoing requirements.

We begin by sharing a few fundamental impressions. First, our sense is that the Sheriff's Office has been conscientious, thorough, and thoughtful in its efforts to meet the obligations imposed under AB 481. It has been receptive to public input at various stages of the process and seems to recognize and respect the new concerns that gave rise to the legislation as well as the expectations that the statute creates. Not coincidentally, the current draft policy reflects a commitment to transparency in providing detailed, relevant information: it is inclusive and clear with respect to the military equipment that the Office has in its inventory and hopes to acquire in the short term, the training required to use it, and the related cost to acquire and maintain it.

Moreover, we are pleased to report that the Sheriff's Office has been very willing to engage with OCLEM in the weeks since the Board's directive to us regarding AB 481. Representatives of the Office have circulated draft materials and joined us for multiple discussions about specific aspects of the policy (and related policies that directly affect the use parameters for the inventory). Those meetings have already led to mutually agreeable changes in the current policy language. Moreover, the Sheriff's Office has expressed its amenability to other specific suggestions that we have talked about since the latest draft was submitted. We discuss those below.

In short, we have been encouraged by the Sheriff's Office accessibility, candor, and receptivity in connection with this project. We hope our contributions to date and going forward will help strengthen the finished products.

Our third overarching point relates to the first two: we think the policy does several things well in its current form, and is largely successful in meeting the objectives of the new state law. At the same time, and as we have shared with the Sheriff's Office already, there are places where language could be strengthened or clarified in terms of framing the conditions for acceptable use of the various types of equipment. We offer some specific recommendations below, and also expect to continue discussions regarding aspects of the related policies (including "Crowd Control") that are newly drafted and relevant to the efficacy of the AB 481 policy.

Lastly, it is important to remember that any policy approval by elected officials in a given jurisdiction – including, of course, your Board – is a significant milestone,

but is far from the end of the reporting and accountability obligations that are features of the underlying legislation. Assuming your Board authorizes the Sheriff’s Office to maintain its inventory of military equipment for designated purposes, the agency will be required to provide an annual update on the specific instances of use for each individual item, as well as a “summary of any complaints or concerns received,” cost information, and notice of any violations of policy that may have occurred. This process – which is new to all agencies and which the Sheriff’s Office will specifically develop in the coming months – can provide a further mechanism for the public and the Board to learn about and influence the continued role of individual items within the organization’s inventory. We look forward to contributing to those evaluations in different ways, based on our access and role as the County’s independent monitor of law enforcement.¹

Overview and Methodology

AB 481 was one of several bills passed by the California legislature in 2021 that provided new standards for law enforcement. Its focus on military equipment related to concerns that have been longstanding for many interested parties, but that gained further definition in the wake of the George Floyd protest movement that peaked in May and June of 2020. In many jurisdictions, the use of armored vehicles, chemical agents, and less lethal munitions had exacerbated tensions and increased the sense that law enforcement was neither attuned nor accountable to public expectations. The statute speaks directly to that dynamic. It requires new levels of transparency about what an agency’s relevant equipment is and does, imposes new obligations for the acquisition of such equipment, and creates a framework for ongoing accountability as to uses. While the statute does not “ban” any particular type of equipment, it requires a public accounting of “military equipment,” public dialogue about its use, and direction by elected leadership on the conditions under which such equipment can be acquired and used.

¹ This report is *not* intended to address the philosophical questions of whether any particular item currently possessed by the Sheriff and considered “military equipment” under the statute is consistent with how County leadership and their communities want law enforcement to function in the County; that debate is better left to the informed sentiments of those residents served by the Sheriff’s Office.

It is interesting to note that many of the uses of the equipment at issue are subject to differing – or even contrasting – interpretations. Like other law enforcement agencies in California that have gone through a similar process in response to AB 481 mandates, the Sheriff’s Office has sought to frame the tools within its inventory as mechanisms that facilitate *de*-escalation and the safer resolution of dangerous situations.² But some members of the public find this assertion to be counter-intuitive at best. For example, where law enforcement sees an armored vehicle as a safe, secure way to gain tactical advantages and avoid confrontation, opponents consider the same equipment to be inherently or even intentionally aggressive – and more likely to incite than to de-escalate, particularly in the context of responding to First Amendment activity.

There is some amount of subjectivity that underlies this gap and increases the challenges of reconciling it. However, and importantly, the AB 481 legislation goes beyond the significant first step of heightened transparency by also imposing standards for future accountability in the form of both independent oversight and annual reporting obligations.

OCLEM staff members have tracked the progress of AB 481’s implementation in several jurisdictions prior to the Board’s recent referral. We are aware of some of the key concerns that activists and others have raised about proposed policies. Some of these are substantive and relate to the appropriateness/necessity of the equipment in relation to the community’s public safety needs; others are more technical and raise concerns whether policy language is sufficiently clear in establishing the parameters for use. A series of questions raised by Supervisor Ellenberg captured many of these issues; we reviewed that document as well as the Sheriff’s Office written response.

OCLEM then reviewed all materials drafted by the Sheriff’s Office in response to AB 481, including General Order (GO) #10.08, “Military Equipment, Funding, Acquisition and Use,” and three Appendices: one for Enforcement, one for Custody, and one for Stanford’s Department of Public Safety, which is staffed by reserve deputies.³ Based on our initial assessment, we raised several questions

² Importantly, much of the equipment that qualifies as “military” within the meaning of the statute has also *already* had a longstanding role in Sheriff’s Office operations; however, continued use of these items is contingent upon Board approval.

³ The Sheriff’s Office also provided us with access to confidential policies and directives that dictate the circumstances in which the “Sheriff’s Emergency Response Team” – the

during a meeting with a Sheriff’s Office official who had significant drafting responsibility for the policy. That discussion produced some revisions that were included in the updated and current version of the draft policy that was submitted to the Board in June; we mention them below.

From there, we looked at the new policy as well as “companion” policies that are cross-referenced throughout the proposed General Order and are relied upon in satisfying the statute’s obligation to delineate authorized uses of the individual equipment items. This led to further interactions with the Sheriff’s Office that we consider to have been productive, with more planned for the near future.

Assessment and Recommendations

WHERE DRAFT GENERAL ORDER IS INCLUSIVE & RESPONSIVE

The draft policy has been the subject of considerable internal attention and effort in recent months. Instead of adopting the more generalized Lexipol model policy that many California agencies have relied upon, the Sheriff’s Office appears to have treated the project as an impetus to evaluate its operations and to strengthen internal controls.⁴ And, in an abundance of caution, the Sheriff also included equipment that is standard-issue but may still be considered as military-grade (e.g., the Patrol AR-15 rifle).

The Sheriff also included equipment that it hopes to procure but which will now require Board approval. These include the “Remotec Spartan,” a bomb disposal robot, and a Mobile Command Post vehicle. In including these, reported the

special tactical unit to which deployment of many of the individual items in the inventory is limited – will be utilized.

⁴ We have also heard other agencies express the idea that the legislation has prompted worthwhile self-scrutiny and accounting that may not otherwise have occurred. Certainly, the public transparency and accountability aspects of the “481 response” process have been unique in our experience – a hallmark of the effectiveness of the statute.

Sheriff's Office, it intended to increase transparency of future acquisitions, both to the Board and for the public's review and comment.

We also reviewed the draft to determine the Sheriff Office's responsiveness to the intended purpose of AB 481. We found that the draft documents are responsive in the following ways:

- The draft details all military equipment currently in the Sheriff's inventory by category,⁵ including a definition from the manufacturer, a count of the Sheriff's Office current inventory, the cost to acquire, the expected lifespan, and the fiscal impact. This list includes two tools that the Sheriff's Office plans to acquire, as noted above.
- The training and/or certification(s) required to operate and/or deploy these tools.
- Cross-references to current Sheriff General Orders that authorize, define, and limit use of the equipment; namely, policies related to use of force and specialized teams.
- Example of use cases for each category.

We also make note of revisions that the Sheriff's Office made in the latest version of the draft, including references to OCLEM as a component of its independent oversight compliance. We look forward to participating in the review of any relevant investigations and otherwise monitoring future use of these items.⁶

LIMITS ON AUTHORIZED USE

In the "Authorized Use and Training" sections related to each military equipment category, the Sheriff's Office provided various examples of "situational authorized

⁵ AB 481 divides "military equipment" into 15 categories. The Sheriff's Office currently has equipment that meets the criteria for six of these 15 categories (1, 2, 5, 10, 12, and 14).

⁶ We also encourage the Sheriff's Office to be intentional in its updates to the Community Correction and Law Enforcement Monitoring commission ("CCLEM"). This group of community representatives meets monthly regarding issues of concern that revolve around the Sheriff's Office operations. It is a valuable source of insight into public perception, and a particularly appropriate forum for discussion regarding the broader issues of military equipment usage in Santa Clara County.

uses” of the equipment. In conversation with the Sheriff’s Office, we learned that the purpose of these “situational authorized uses” was to be responsive to AB 481’s requirement to provide use cases.

But we also noted that in each of these use case sections, the initial draft policy stated that the authorized uses “include, but are not limited to” the listed use cases. 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.

In fact, reported the Sheriff’s Office, the uses of all military equipment must comply with various, previously existing Sheriff Office General Orders and with laws restricting their use. To better describe these limitations, the Sheriff’s Office added the following language to the authorized uses of its less lethal weapon systems:

The use of various projectile launch platforms and associated munitions is governed by Sheriff’s Office General Order #12.00 [Use of Force], #12.04 [Use of Less Lethal Munitions Firearms], #17.03 [Demonstrations and Civil Disorders] and #19.02 [Sheriff’s Emergency Response Team].

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. (General Order #10.08, Appendix A, page 23-24; draft dated 6/8/22)

We consider this to be a worthwhile effort to bridge an understandable gap: on the one hand, the challenge of comprehensive – and perhaps problematically restrictive – itemization of uses; on the other, concerns that any lack of definition will swallow limitations altogether. Accordingly, we recommend that the Sheriff’s Office include this important language in the actual body of the General Order rather than in the Appendix. The Sheriff’s Office agrees with this modification, stating that the limitations listed in the paragraph above are equally applicable to all military equipment categories, not only to less lethal weapons systems.

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.

IMPORTANCE OF OTHER POLICIES

Given the above discussion and the central role of cross-referenced General Orders in the framing of the military equipment’s authorized uses, the relevant “collateral” policies are themselves worthy of attention and, in some cases, modification. The particulars of such revisions are beyond the scope of this memorandum; indeed, the Sheriff’s Office “Demonstrations and Civil Disorders” policy that is new, responsive to other state legislation, and directly related to potential deployment of military equipment items was only finalized internally within the last week. We have reviewed the version that the Sheriff’s Office provided and find it to be helpful. At the same time, we have concrete thoughts about potential ways it could be clarified or otherwise enhanced.

We look forward to engaging with the Sheriff's Office in that process in the near future and appreciate their stated openness to our input.

We also noted that the General Order references policies that are not available to the public or at all. Perhaps most notably, the draft policy references the "SERT" policy in applicable places, and that document is maintained as confidential based on the specific tactical nature of its content. The idea is that the publication might compromise this specialized team's operations. While acknowledging that some operational information meets this criterion and is accordingly sensitive, we encourage the Sheriff's Office to review its referenced confidential policies and make them publicly available at least as to the use of military equipment. Where the use of military equipment is specifically cited (in the SERT policy or elsewhere), it is important to honoring the intent of the legislation that descriptions of policies guiding its use are provided.

There are additional gaps in available information. For example, in the use case section related to the use of armored vehicles, the General Order states, "Armored vehicles shall be used only by deputies trained in their deployment and in a manner consistent with Departmental *policy and training*" (emphasis added). When we sought to review policy related to the use of armored vehicles, we could not find such policy. We reviewed the Sheriff's Office Command Vehicle policy (#13.05), which details the use of the Command Vehicle, but did not see any references to use of armored vehicles.

We do not think that this was an intentional omission by the Sheriff's Office; the information might be available in training documents, for example, but not codified in policy. In the short timeframe of our assignment, we did not request or review *training* materials related to use of military equipment.⁷

RECOMMENDATION 3

The Sheriff's Office should carefully review any references to other policies to ensure that those policies are, available for the public, at least as to how it informs the military equipment use policy. Where such

⁷ Even if training materials provide guidance on the equipment's use, it is important to codify the guidance provided therein into policy.

documentation is missing, the Sheriff's Office should draft specific policies for the tools referenced in the General Order (e.g., the armored vehicle).

MUTUAL AID AND MILITARY EQUIPMENT

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.

The draft General Order is explicit with respect to mutual aid: when other agencies respond to assist the Sheriff's Office or are otherwise conducting activities in the Sheriff's jurisdictions, they "shall comply with their respective military equipment use policies in performing such actions" (*General Order #10.08, COORDINATION WITH OTHER JURISDICTIONS, draft dated 6/8/22*).

This statement initially caused concern: if agencies are required to adhere to their own policies, and not those set out by the Sheriff's Office, does this create a de facto "back door" for use of military equipment that the Board has not authorized for the Sheriff by other responding jurisdictions?⁸ In other words, if other agencies have more permissive military equipment policies, can they use that equipment on the Santa Clara community?

We learned that the Sheriff's Office's position is that, while other agencies' personnel shall adhere to their own specific policies, they must also ultimately adhere to the command and control of the Sheriff (or individual acting as the Sheriff's Office Incident Commander). 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.

⁸ The Sheriff's Office acknowledged that their military use policy and current inventory of military equipment is more restrictive than that of other agencies that could conceivably provide mutual aid.

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.

RECOMMENDATION 4

The Sheriff's Office should review the current language related to mutual aid (General Order #10.03, 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.

REPORTING

As discussed above, a key element of AB 481's provisions imposes an annual reporting requirement as a condition for ongoing use/possession of the military equipment that a given law enforcement agency retains. Some of the particulars are defined by the legislation, but there is room for interpretation. Clearly, the intent of the reporting requirement is to extend the transparency and accountability elements that helped animate the statute's creation, and we encourage the Sheriff's Office to embrace the spirit of this requirement by providing detail and specificity where practicable. This may require further consideration of approaches to documentation, record-keeping, and compilation for purposes of the annual

report.⁹ We plan to engage with Sheriff’s Office personnel about defining OCLEM’s role in this review, and about the potential for our access to the underlying materials that are ultimately used to form the basis for the report.

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.

Conclusion

Throughout the state, the AB 481 process has formed the basis for an unprecedented exchange between law enforcement agencies and their local communities and elected officials. It is part of a larger movement in which the public has called for more transparent, accountable policing across a variety of categories. In the aftermath of nationwide concerns about police use of force, the law enforcement response to the widespread protests in 2020, and growing questions about the benefits and costs of a military orientation in approaches to public safety, AB 481 requires agencies to inform and be responsive in new ways.

As we explain above, we consider the Sheriff’s Office engagement with the process to have been a positive one in many ways – and we believe the agency’s intention is to go beyond mere compliance with the statute and achieve a meaningful level of both transparency and accountability.

With that said, and while acknowledging the strengths of the latest draft, we have cited specific further revisions that we believe to be worthwhile, and hope the Sheriff’s Office will adopt them in the next stages of this review. We also look forward to engaging with the Office regarding some of the collateral policies that are cross-referenced by, and relevant to the effectiveness of, the new military

⁹ The topic lends itself to questions such as what constitutes a “use” of an AR-15 rifle. Is it enough for deputies to arm themselves with the weapon in a specific context? Is that information tracked, or readily trackable? In the alternative, is anything short of actually firing it “below the threshold” for purposes of the AB 481 reporting requirement? And what about geographic or demographic information that might illuminate trends deserving of further study? We look forward to further discussions with the Sheriff’s Office regarding this framework.

equipment policy. Lastly, we hope to play an active role in the future compliance with the both the spirit and letter of the AB 481 legislation. Our involvement in assessment of complaint investigations, as well as the annual reporting process in general, will ideally contribute to the oversight that the statute requires.

We appreciate the opportunities we have had to work with the Sheriff's Office during the most recent phase of this important process.