

BOARD/COMMISSION RECOMMENDATION

Human Rights Commission

Recommendation Number: 20170227-4a: Negotiating Changes to the Austin Police

Department's Use of Force/Response to Resistance Policy: Increasing Transparency and

Accountability

WHEREAS, the Austin Human Rights Commission ("Commission") advocates on behalf of human rights for all people in the city of Austin ("City"); and

WHEREAS, the Commission's duties include, but are not limited to, advising and consulting with the Austin City Council as well as all City departments, advisory boards and regulatory agencies on all matters involving discrimination, including providing legislative recommendations and proposing measures to improve the ability of various departments and agencies, as well as initiating and facilitating discussions and negotiations between individuals and groups to lessen tensions and improve understanding in the community and aiding in the formulation of local community groups in neighborhoods as needed to carry out specific programs; and

WHEREAS, it is a fundamental human right to live and participate in society free of discrimination, including discrimination based on race and on status as a person with a disability; and

WHEREAS, both international human rights law¹ and the U.S. Constitution's Fourth Amendment² place limits on the force that may permissibly be used by law enforcement in conducting an arrest, investigatory stop of other seizure of a free person; and

WHEREAS, various community groups, the Austin Justice Coalition, Austin NAACP, and Disability Rights Texas, now come before the Human Rights Commission with concerns that the Austin Police Department's ("APD") use of force policy is resulting in disproportionate

See Art. 3 of the U.N. Code of Conduct for Law Enforcement Officials, GA resolution 34/169 passed on December 17, 1979, and U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/ 28/Rev.1 (1990).

² Graham v. Connor. 490 U.S. 386 (1989).

harm to African-Americans and to disabled persons, including, but not limited to, mental illness, substance use disorders, and cognitive/developmental impairments; and

WHEREAS, examination of APD Response to Resistance Datasets ("APD Datasets") for years 2010-2015 in conjunction with U.S. Census data indicates that, in each of those years, African-Americans in Austin were subject to arrest and police use of force at a rate that was approximately *three times* as high as their prevalence in Austin's population³; and

WHEREAS, a 2016 statistical study by two research institutes that examined the 2014-2015 APD Datasets concluded that "even when controlling for neighborhood levels of crime, education, homeownership, income, youth, and unemployment, racial disparities in both use and severity of force remained"; and

Summary "Use of Force Subjects by Race/Ethnicity" tables in 2010-2015 Datasets as compared to U.S. Census data.

Year	Austin pop.	Austin African-	Total APD	African-	Total APD	APD arrests of
	(as of 2010 U.S. Census)*	American pop. (as of 2010 U.S. Census)*	arrests	American subjects arrested by APD	arrests in which force was used	African- American subjects in which force was used
		3-5				
2010	790,390	60,760 (7.7%)	64,004	15,565 (24.3%)	1,519	410 (27%)
2011	790,390	60,760 (7.7%)	58,538	14,519 (24.8%)	1,863	529 (28.4%)
2012	790,390	60,760 (7.7%)	55,988	13,467 (24.1%)	1,992	539 (27.1%)
2013	790,390	60,760 (7.7%)	53,291	13,172 (24.7%)	1,989	533 (26.8%)
2014	790,390	60,760 (7.7%)	48,649	11,832 (24.3%)	1,686	466 (27.7%)
2015	790,390	60,760 (7.7%)	44,037	10,814 (24.6%)	1,888	511 (27.1%)

^{*} Author was unable to locate reliable estimates of change in population 2010-2015. 2010 Census data from City of Austin, Demographic Profile: 1990 and 2000 and 2010 Census Data, also with American Community Survey Data, available online at http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/city_of_austin_profile_2010.pdf. That document shows the City's African American population, as a percentage of total population, declined by 2.1% from 2000-2010. According to a 2013 American Community Survey posted on the City's Planning and Zoning Department website, the City's African-American population, as a percentage of total population, is estimated to have declined by an additional .3% by 2013. See http://www.austintexas.gov/sites/default/files/files/Planning/Demographics/CoA_ACS_Profile_2013.pdf. APD data from Austin Police Department, Response to Resistance Reports, 2010, p. 4 (Aug. 2011), 2011, p. 3 (Aug. 2012), 2012, p.3 (Aug. 2013), 2013, p. 3 (Aug. 2014) 2014, p. 3 (May 2015), 2015, p. 3 (Oct. 2016), all available online from link at http://www.austintexas.gov/page/response-resistance-reports.

Urban Institute and Center for Policing Equity, The Science of Policing Equity; Measuring Fairness in the Austin Police Department, p. 15 (Oct. 2016), available online at http://www.urban.org/sites/default/files/publication/85096/the-science-of-policing-equity_0.pdf.

WHEREAS, review of 2010-2015 APD Datasets shows that approximately three-quarters of all Austin use of force subjects were suspected to be intoxicated or emotionally disturbed at the time force was used⁵; and

WHEREAS, reference to U.S. Department of Health and Human Safety estimates of prevalence of substance abuse disorders and serious mental illness (which do not track the same categories of data as the APD Datasets) suggest that persons with serious mental illness and/or substance abuse disorders may be subject to police use of force at a rate higher than those persons' prevalence in Austin's population⁶; and

The chart below illustrates how often APD officers suspect use of force subjects are acting under the influence of drugs or alcohol ("UI") and/or due to emotional disturbance ("ED"). For general information purposes, the author included prevalence rates for "substance abuse disorder" and "serious mental illness" as those terms are defined within Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV). The two comportment data categories (UI and ED) will likely include other types of conditions (e.g. accidental drug interactions, misunderstood developmental disorder). Where the data is obviously incongruous, no statistical correlation may be drawn between any comportment category and any condition category.

Summary "Use of Force by Subject Characteristics" tables in 2010-2015 Datasets and U.S. Dept. of Health and
Human Safety estimates of prevalence of for drug/alcohol dependency/abuse and serious mental illness.

Year	% U.S. pop.	% APD Use	% U.S. pop.	%APD use of	% U.S. pop.	%APD use	%APD use
	with	of Force	with	force subjects	with "co-	of force	of force
	"substance	subjects	"serious	suspected	occurring	subjects	subjects
	abuse	suspected	mental	"emotionally	mental and	suspected	suspected
	disorder"	"under the	illness"	disturbed"	substance abuse	ED and UI	ED or UI
		influence of		("ED")	disorders"		
		drugs or			1		
	· '	alcohol"					
	(2014 est.)*	("UI")	(2014 est.)*		(2014 est.)*		-
2010	(2014 est.)* 8.1%	("UI") 60%	(2014 est.)* 4.1%	9%	(2014 est.)*	5%	75%
2010 2011		<u> </u>		9%		5% 8%	75% 77%
	8.1%	60%	4.1%		3%	_	
2011	8.1% 8.1%	60% 58%	4.1% 4.1%	10%	3% 3%	8%	77%
2011 2012	8.1% 8.1% 8.1%	60% 58% 54%	4.1% 4.1% 4.1%	10% 17%	3% 3% 3%	8% 11%	77% 82%

APD Dataset citations at note 4 supra.

Austin Police Department, Response to Resistance Reports, supra note 4, at "Reports by Subject Characteristics" for 2010-2015 on p. 5 of 2011-2015 reports.

^{*} estimates from the 2014 National Survey on Drug Use and Health. See Center for Behavioral Health Statistics and Quality, Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health (HHS Publication No. SMA 15-4927, NSDUH Series H-50), p. 2 (2015), available online at https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf.

[&]quot;Substance abuse disorder" defined as "when the recurrent use of alcohol and/or drugs causes clinically significant impairment, including health problems, disability, and failure to meet major responsibilities at work, school, or home." Id. "Serious mental illness" defined as "having, at any time during the past year, a diagnosable mental, behavior, or emotional disorder that causes serious functional impairment that substantially interferes with or limits one or more major life activities. Serious mental illnesses include major depression, schizophrenia, and bipolar

WHEREAS, upon information and belief, no researcher has studied any APD Datasets in relation to use of force on subjects with disabilities; and

WHEREAS, because police use of force data is not reported to any national database and because individual police departments, if they report disability-related phenomena at all, tend to report officer suspicions of medical conditions in nonclinical terms (as was the case in APD Datasets),⁷ research opportunities to analyze information related to use-of-force incidents vis-à-vis persons with disabilities are severely limited; and

WHEREAS, one recent 2016 study, funded by the National Institute of Justice, examined thousands of self-reported incidents from police departments in Colorado Springs (CO), Portland (OR), and St. Petersburg (FL) over a 2-year period and concluded that "mental illness is a significant predictor of the level of force used when the relationship is assessed in both a bivariate and multivariate manner⁸"; and

WHEREAS, it is customarily accepted that police use of force may be necessary to achieve legitimate law enforcement interests, and

WHEREAS, disproportionate harm suffered by use of force subjects who are African-American or persons with disabilities does not itself establish discrimination, and

WHEREAS, it is nonetheless necessary, appropriate, and exigent that the City examine whether one or more alternative use of force policies could reduce disparities in use of force while continuing to serve the APDs legitimate needs; and

WHEREAS, policy experts examining racial disparity in police use of force and disparate use of force outcomes for persons with disabilities have identified two principles that they believe should inform police use of force policies – (1) de-escalation⁹ and (2) development of policy

disorder, and other mental disorders that cause serious impairment." Id. "Co-occurring mental and substance abuse disorders" defined as "the coexistence of both a mental health and a substance use disorder." Id.

See discussion in Treatment Advocacy Center, Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters, pp. 1-2 (Dec. 2015) available online at http://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf. (discussing lack of reporting and estimating, based on studies of individual police department data from U.S. and abroad, that mental health disorders "are a factor is as many as 1 in 2 fatal law enforcement encounters.") Upon information and belief, the FBI is in the process of developing a means for national collection of use of force data. See Bruer, Wesley, DOJ to Enable Nationwide Collection of Use-of-Force Data, CNN, October 13, 2016, available online at http://www.cnn.com/2016/10/13/politics/police-force-justice-department-loretta-lynch/. It is unknown whether that data collection will include information relating to use of force on persons with disabilities.

Rossler, Michael and Terrill, William, *Mental Illness Police Use of Force, and Citizen Injury*, POLICE QUARTERLY, 0(0) 1-24 at p. 16 (January, 2016). For a reference to related studies, see literature review and reference sections.

A 2015 Presidential task force report recommended that, "[1]aw enforcement agency policies for training on use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate."

standards that are more rigorous than the "objective reasonableness" test (from *Graham v*. *Connor*, 490 U.S. 386 (1989)) used by courts to adjudicate excessive force cases under the 4th Amendment¹⁰; and

President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing ("21st Century Report"), U.S. Department of Justice, Office of Community Oriented Policing Services, Action Item 2.2.1, p. 20 (May 2015), available online at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

See also 21st Century Report at Action Item 1.5.4, p. 15 (recommending adoption of policies to limit physical control equipment and techniques used "against vulnerable populations—including children, elderly persons, pregnant women, people with physical and mental disabilities, limited English proficiency, and others", because use of force against those persons "can undermine public trust and should be used as a last resort").

See also President's Task Force on 21st Century Policing, The President's Task Force on 21st Century Policing Implementation Guide; Moving From Recommendations to Action (21st Century Guideleines"), U.S. Department of Justice, Office of Community Oriented Policing Services, p. 11 (Oct. 2015), available online at https://cops.usdoj.gov/pdf/taskforce/Implementation Guide.pdf. (urging police departments to "[r]eview and update policies, training, and data collection on use of force ... [and] ... [e]mphasize de-escalation and alternatives to arrest or summons in situations where appropriate").

See also March 2016 report by Police Executive Research Forum ("PERF"), concluding, after an 18-month study of police use of force, that "agencies should adopt General Orders and/or policy statements making it clear that deescalation is the preferred, tactically sound approach in many critical incidents," adding "[d]e-escalation policy should also include discussion of proportionality, using distance and cover, tactical repositioning, "slowing down" situations that do not pose an immediate threat, calling for supervisory and other resources, etc." Police Executive Research Forum, Guiding Principles in Use of Force ("PERF Report"), p. 40 (Mar. 2016), available online at http://www.policeforum.org/assets/30%20guiding%20principles.pdf.

The Police Executive Research Forum, examined the issue, finding that Supreme Court decision "outlines broad principles regarding what police officers can legally do in possible use-of-force situations, but it does not provide specific guidance on what officers should do ... [in other words, according to Washington D.C.'s Police Chief] The question is not, 'Can you use deadly force?' The question is, 'Did you absolutely have to use deadly force?'" PERF Report, note 10 *supra*, at pp 15-16.

The PERF Report did not recommend that agencies disregard the standard, rather it explained that:

Police agencies are always within their authority to adopt new policies, training, and tactics that they consider best practices in the policing profession, even if the new policies are not specifically required by court precedents. By adopting policies that go beyond the minimum requirements of Graham, agencies can help prevent officers from being placed in situations that endanger themselves or others, where the officers have no choice but to make split-second decisions to use deadly force. PERF Report, note 10 *supra*, at p. 17.

In another portion of the PERF Report, Nashville's Police Chief advocated for a move away from the standard, explaining:

Even if we think we know where that bright line is [under Graham v. O'Connor], are we willing to send our officers up to that line, assuring them that all is well—just don't touch the line? We owe it to our officers to safeguard not only their physical safety, but also protect them from the mental and emotional anguish that will ensue in the aftermath of any significant use of force. The headlines, the internal investigations, and the inevitable civil rights lawsuit will impact their lives forever. PERF Report, note 10 supra, at p. 72.

See also remarks by Vanita Gupta, former head of U.S. Dept. of Justice Civil Rights Division, discussing community expectations of policing and asserting that a move away from Supreme Court standard would prove

WHEREAS, in recent years, police departments in Baltimore (MD),¹¹ Seattle (WA),¹² Asheville (NC),¹³ and other U.S. cities¹⁴ have amended their use of force policies to clarify that departmental policy shall go beyond the minimum restrictions set forth by law to include de-escalation policies and requirements that force be "proportional" and "necessary" in addition to "objectively reasonable"; and

WHEREAS, upon information and belief, in recent years, police departments in major U.S. cities have also made complimentary changes to their related and situation-specific use of force policies (governing weapons, pursuit rules, etc.) including, but not limited to, prohibitions against chokeholds or strangleholds, prohibiting officers from shooting at moving vehicles, requiring officers to exhaust all other reasonable alternatives before resorting to using deadly force, and supplementing use of force reporting requirements¹⁵; and

WHEREAS, upon information and belief, all policies by which members of the APD must abide are contained within the APD Lexipol Policy Manual ("Manual"), which was adapted in 2011 from a document entitled General Orders¹⁶; and

WHEREAS, APD's use of force policies are located at Chapter 2 of the Manual, with its principal use of force policy located at Section 200 *et seq.*, entitled "Policy 200, Response to Resistance" ("Policy 200")(copy annexed hereto at Exhibit A), and several specific use of force policies governing Firearm Discharge Situations, Leg Restraint Guidelines, Control Devices and Techniques, TASER® Guidelines, Response to Resistance Inquiry, Reporting and Review, and

[&]quot;better for officer safety, much better for public safety, and much better for ... mutual understanding between the community and law enforcement," PERF Report, note 10 supra, at p. 36.

See Baltimore Police Department, policy 1115, available online at http://www.baltimorepolice.org/ sites/default/files/policies-and-procedures/1115_Use_Of_Force.pdf.

See Seattle Police Department Manual, Policy 8.000, Core Use of Force Principles, available online at https://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles.

See Asheville Police Department Policy Manual, Policy 402 (Draft), available online at http://www.ashevillenc.gov/civicax/filebank/blobdload.aspx?BlobID=26111.

Campaign Zero Police Use of Force Project, *Police Use of Force Policy Analysis* ("Campaign Zero Report"), p. 12 (Sep. 2016)(indicating de-escalation and other changes in police use of force policies in Minneapolis, MN, New York City, NY, Orlando, FL, San Francisco, CA and San Jose, CA), available online at https://static1.squarespace.com/static/56996151cbced68b170389f4/u/57e1b5cc2994ca4ac1d97700/1474409936835/Police+Use+of+Force+Report.pdf.

¹⁵ *Id.*

City of Austin Office of the Police Monitor, 2015 Annual Report ("2015 OPM Report"), at fn. 1 and p. 51 (Jan. 17, 2017), available online at http://www.austintexas.gov/sites/default/files/files/ OPM Annual Report 2015 FINAL2.pdf. A copy of the current APD Policy Manual ("2016 Manual"), (updated June 19, 2016) is available online at https://www.austintexas.gov/sites/default/files/files/Police/ APD Policy Manual.pdf.

Force Review Board located at Sections 202, 204, 206, 208, 211 and 212 respectively (collectively "Related Policies")(copy annexed at Exhibit B); and

WHEREAS, the remaining Manual Chapters inform and cross-reference Chapter 2 throughout; and

WHEREAS, Policy 200 does not contain de-escalation provisions; and

WHEREAS, Policy 200 provides a brief statement relating to "necessary force", at Section 200.2 ("Response to Resistance Policy"), ¹⁷ however the bulk of that policy section, as well as Sections 200.2.1 ("Determining the Objective Reasonableness of Force") and 200.1.2 ("Definition, Objectively Reasonable") articulate the *Graham v. O'Connor* standard, as do numerous references to "objectively reasonable" that are dispersed throughout Policy 200; and

WHEREAS, an advocacy group that has compared the use of force policies of 91 different police departments (including this City's) specifically criticized APD's Policy 200 and Related Policies and called for changes in the Manual that would – (1) establish a de-escalation policy, (2) prohibit chokeholds and strangleholds (except in situations where deadly force is authorized),

(3) prohibit police shooting at persons in moving vehicles (unless the subject presents a separate deadly threat other than the vehicle itself), (4) increase reporting obligations to require reporting anytime a firearm is pointed at a civilian, and (5) clarify, in its deadly force application policy (at Section 200.3), that officers exhaust all other reasonable alternatives before resorting to deadly force 18; and

WHEREAS, upon information and belief, other Chapters and sections within the Manual, such as, for example, those relating to responding to certain suicidal subjects (Section 412.2(c)) or those relating to care and transport of prisoners (Section 321), or DWI arrests (Section 355.2), etc., may also reflect standards that do not incorporate de-escalation principles or practices that advocates and/or policy experts currently recommend¹⁹; and

WHEREAS, in 2011, 2014 and 2015 the City of Austin Office of Police Monitor ("OPM") Citizen Review Panel ("CRP") made recommendations to APD proposing the adoption of a

²⁰¹⁶ Manual, note 17 *supra*, at Sec. 200.2, p. 49 ("While the type and extent of force may vary, it is the policy of this department that officers use only that amount of objectively reasonable force which appears necessary under the circumstances to successfully accomplish the legitimate law enforcement purpose in accordance with this policy").

See Campaign Zero Report, note 15 *supra*, at page 12, clicking on Google Chrome pop-up at "Austin" in chart of various police force policies.

¹⁹ 2016 Manual, note 17 *supra*, at Sec. 321, p. 184-185, Sec. 355.2, p. 248, Sec. 412,2(c), p. 332.

de-escalation policy, revisions to firearms discharge policy in relation to moving vehicles, and other changes relating to Policy 200, the Related Policies,²⁰ and other Manual Sections; and

WHEREAS, based on outcome reporting within those OPD Annual Reports and on review of the Manual and its amendments since 2011, none of the changes proposed by the CRP since 2011 have been implemented²¹; and

WHEREAS, since 2011, the APD has made some changes to the Manual, including minor changes to Policy 200 and more substantial changes to the Related Policies, ²² but, upon information and belief, none of those changes, taken at irregular intervals, were initiated as part of any regular, comprehensive or otherwise public review of the Manual; and

WHEREAS, policy experts looking at racial disparity in police use of force and at disparate use of force outcomes for persons with disabilities have stressed the importance of involving members of the general public and the community, including all relevant stakeholders, including but not limited to advocacy groups, individuals and families of individuals impacted by use of force issues, and any other individuals or groups possessing expertise in issues pertaining to use of force policies and their effect on public welfare ("Relevant Stakeholders"), and especially those disproportionately affected by a given policy, in a transparent process of developing and

²⁰¹⁵ OPM Report, note 17 supra, at pp. 12, 14-15 and 81-82 (10 separate CRP recommendations, including call for adoption of de-escalation policy and requests to meet with APD to discuss policy recommendations); OPM, 2014 Annual Report ("2014 OPM Report"), p. 73 (Mar, 6, 2016), available online at http://www.austintexas.gov/sites/default/files/files/OPM_Annual_Report_2014_FINAL_3.7.pdf. (CRP asked to be informed about the status of developing more detailed standard operating procedures to supplement the Firearms Discharge Situations Moving Vehicles policy); OPM, 2011 Annual Report ("2011 OPM Report"), p. 68 (Jul. 19, 2012), available online at http://www.austintexas.gov/sites/default/files/files/Police_Monitor/Reports/OPM_Annual_Report_2011_FINAL.pdf. (CRP recommended the use of force policy, specifically as it relates to multiple officers engaging one unarmed suspect, be reviewed for improvements).

OPM reports indicate APD did not respond to any CRP policy recommendations. 2015 OPM Report, note 17 supra, at pp. 81-82; 2014 OPM report, note 21 supra, p. 73; 2011 OPM report, note 21 supra, p. 68. ("2014 OPM Report"), p. 73. The only changes to Policy 200 after its introduction have been the removal of an extraneous cross reference to Firearm Discharge Situations (at 200.3.1, removed in 2012 draft) and the addition of Section 200.4.3 (relating to holding down limbs when assisting medical professionals). Upon information and belief, neither revision at Policy 200, or at any other policy contained within the Manual related to any CRP recommendation. Compare 2016 Manual, note 17 supra, at Sec. 200 et seq., pp. 48-52; 2014 Manual, Sec. 200 et seq., p. 50-54 (May 25, 2014), available online at https://www.austintexas.gov/sites/default/files/files/Police/APD_Policy_2014-2_Effective_5-25-2014.pdf; 2012 Manual, Sec. 200 et seq., p. 45-48 (Oct. 7, 2012), available online at https://austintexas.gov/sites/default/files/files/Police/APD-Policy_Manual_August_14_2011, pdf.

See note 22 *supra* relating to Policy 200 changes. Changes of Related Policies can be found by comparing Manual sections 202-212 of 2011, 2012, 2014 and 2016 Manuals. *See* 2011, 2011 and 2012 Manuals at note 22 *supra*, and 2016 Manual, note 17 *supra*.

evaluating policies and procedures on a basis that is regular and recurring (as opposed sporadic and in response to a specific tragedy).²³

NOW, THEREFORE, BE IT RESOLVED, that the City Council and City Manager, in consultation with the Austin Police Department, establish a transparent process for the bi-annual review of all the APD Lexipol Manual's policies relating to use of force, whereby members of the public may be notified of and offer comments upon the Manual or any proposed changes thereto, and whereby the City involves members of the community, including all Relevant Stakeholders, in that review process with the goals of effective crime reduction, reduction in the use of force, elimination of disparities in the use of force, and enhancement of the public trust in the APD.

Date of Approval: February 27, 2017

Record of the vote: Commissioner Brown moved for adoption, Commissioner Avashia second. The motion was approved on an 8-0 vote. Those members voting aye were Chair Davis, Vice Chair Caballero, Commissioner Avashia, Commissioner Brown, Commissioner Buls, Commissioner Casas, Commissioner Miguez, and Commissioner Normand. Commissioner Miller, Commissioner Royall, and Commissioner Yang were absent.

Attest:

Jonathan Babiak

Staff Liaison, Human Rights Commission

²¹st Century Report, note 10 supra, pp. 2, 15, 20, 46; 21st Century Guidelines, note 10 supra, p. 6; Police Executive Research Forum, Advice from Police Chiefs and Community Leaders on Building Trust: "Ask for Help, Work Together, and Show Respect," p. 14 (March 2016), available online at http://www.policeforum.org/assets/policecommunitytrust.pdf.