

ORDINANCE No.

Adopt new Post Deadly Force Procedures for Police Bureau and authorize legal proceedings to determine validity. (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. Trust between law enforcement agencies and the people they protect and serve is essential in a democratic society.
2. Procedural justice must be the guiding principle for the policies that govern the interactions between Portland Police Bureau (PPB) and those it serves, and the work of PPB officers.
3. Effective and transparent accountability systems are necessary to build public trust in PPB and achieve legitimacy.
4. The City Council is entrusted with the ultimate responsibility for ensuring that PPB carries out its responsibilities in accordance with policies that reflect community values and fulfil constitutional requirements.
5. The City, the community and PPB officers share an interest in ensuring that any police use of force is constitutional; is no greater than necessary to accomplish a lawful objective; is properly documented and reported; and is properly investigated, reviewed, evaluated and if necessary remedied.
6. The need for thorough and prompt investigations of use of force is particularly acute in cases involving the use of deadly force and the death of an individual while in police custody.
7. All uses of deadly force and in-custody deaths must be investigated promptly and with the utmost thoroughness and impartiality to determine whether officers' actions comport with the law and with PPB policies and training.
8. Following a use of deadly force by an officer, two separate investigations are conducted. A criminal investigation is conducted to determine if the use of force violates any criminal law. An administrative investigation is also conducted to determine if the use of force comports with City and PPB policies and training.
9. Under Oregon law, criminal death investigations shall be conducted under the direction of the District Attorney for the county where the death occurs. ORS 146.095(1) and ORS 146.100(1). Such investigations can

ultimately result in criminal prosecution if criminal wrongdoing is found to have occurred.

10. It is the policy of the City that all employees must comply with all criminal laws in carrying out their employment responsibilities. Should any employee, including any police officer, commit a crime, the City believes that employee should be subject to criminal prosecution to the full extent of the law. The City has a responsibility to be mindful of taking any action or implementing any policy which might interfere with the Multnomah County District Attorney's ability to hold a City employee, including a police officer, responsible for criminal behavior.
11. The City's administrative investigation is conducted by the Internal Affairs Division of the Professional Standards Division of the Portland Police Bureau. The purpose of the administrative investigation is to determine if the City's employee (the involved officer) followed City policies and training in connection with the use of deadly force. The administrative investigation can ultimately result in discipline up to and including the termination of employment if the officer is found to have violated City and PPB policies and/or training.
12. Pursuant to City work rules and the collective bargaining agreement between the City and the Portland Police Association, an officer can be compelled to answer questions in an administrative investigation and, depending upon the circumstances, an officer's refusal to do so can itself form the basis for discipline up to and including termination.
13. Police officers, like all people in the United States, have constitutional rights including the right against self-incrimination. The United States Supreme Court has held that it violates the right against self-incrimination for an officer to be compelled to answer questions in an administrative investigation under the threat of potential termination of employment, and have those compelled statements used against them in a criminal prosecution. *Garrity v. State of New Jersey*, 385 US 493 (1967).
14. The Oregon Court of Appeals analyzed the Oregon constitutional right against self-incrimination in *State v. Soriano*, 68 Or App 642 (1982), in a decision later affirmed by the Oregon Supreme Court. *Soriano* did not deal with the situation of a police officer facing both an administrative and criminal investigation, but did hold that an individual could not be compelled to give grand jury testimony without receiving complete immunity from prosecution for any crimes connected to the testimony.
15. The Multnomah County District Attorney has interpreted *Soriano* to mean that the City violates an officer's criminal right against self-incrimination under Article I, Section 12, of the Oregon Constitution by compelling the officer to give a statement in an administrative investigation prior to the

conclusion of any criminal proceedings, even if that statement is kept fully separate from the criminal investigation. The District Attorney believes that doing so affords the officer full immunity from prosecution and that the District Attorney's Office will therefore be unable to prosecute even if the use of force is believed to be criminal based on the investigation.

16. The Multnomah County District Attorney has made that position known in part through the memorandum attached as Exhibit A, as well as in verbal communications to the City.
17. The City acknowledges that the law is not entirely clear. The City believes, however, that this interpretation of the law frustrates the compelling public interest in a prompt and timely administrative investigation to determine whether an officer who has used deadly force resulting in death violated any City or PPB policies or training. The City believes that such an investigation can be conducted in a manner that preserves and protects the constitutional rights of the involved officer.
18. Specifically, the City can keep administrative employment investigations by the Professional Standards Division wholly separate from the criminal investigation overseen by the Multnomah County District Attorney, and thereby comply with all applicable state and federal standards and officers' constitutional rights.
19. The City believes that the Post Deadly Force Procedures attached as Exhibit B comply with all state and federal statutory and constitutional standards, and would further the City's compelling interests in ensuring that, in the event an officer uses deadly force in a manner that constitutes both a violation of policy and a crime, that officer could be both criminally prosecuted and disciplined or terminated as appropriate.
20. Because of the uncertainty of the law and the position taken by the Multnomah County District Attorney, the City has been unable to adopt and implement the procedures attached as Exhibit B, without running the unacceptable risk that doing so would preclude the District Attorney from prosecuting the officer even if the officer's conduct was believed after investigation to be criminal. The District Attorney interprets the law to be that if the City compels an officer to give a statement in an administrative proceeding, the courts would find that this grants transactional immunity—that is, full immunity from prosecution—and would therefore decline to prosecute.
21. Although history suggests that criminal prosecutions of officers in Multnomah County are rare, it would be irresponsible of the City to implement a policy that could immunize an officer from criminal prosecution in a situation where prosecution would be warranted. The City has been compelled to adopt the procedures attached as Exhibit C, to

ensure that were an officer to unlawfully use deadly force that officer could be criminally prosecuted by the Multnomah County District Attorney.

22. The procedures attached as Exhibit C, however, do not fully serve the City's compelling interest in ensuring that the Professional Standards Division can conduct a full and timely investigation of officers' use of deadly force to determine whether it was within or without City and PPB policy and training. These procedures require the City, in a case involving a use of deadly force resulting in death, to wait until the conclusion of the criminal investigation to compel a statement from the involved officer, which could be a period of weeks or possibly even months.
23. The City, PPB and its officers, the community and the Multnomah County District Attorney will all benefit from a court determination as to the legal validity of the City policy attached as Exhibit B, which it would not be prudent to implement until the courts examine *Soriano* in an employment context and determine that its implementation will not violate officers' constitutional rights nor as a matter of law immunize them from criminal prosecution.

NOW, THEREFORE, the Council directs:

- a. The Post Deadly Force Procedures attached as Exhibit B are adopted and shall become effective upon entry of a final judgment and conclusion of subsequent appeals, if any, in the action described in paragraph b below.
- b. The City Attorney's Office is authorized and directed to file legal proceedings and to join any appropriate parties to obtain a judicial determination of the validity of the Post Deadly Force Procedures attached as Exhibit B and to pursue them to their conclusion in any higher court.

Passed by the Council:

Commissioner: Mayor Wheeler
Prepared by: Tracy Reeve
Date Prepared: 7/21/17

Mary Hull Caballero
Auditor of the City of Portland
By
Deputy