

SUBSTITUTE

188546

ORDINANCE No.

* Direct Continuation of Existing Post Deadly Force Procedures for Police Bureau and Preparation of New Procedures Requiring Compelled Statements Within No More Than 48 Hours Absent Compelling Circumstances. (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 fulfill 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.
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 involve 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 believes that under *Soriano*, the Oregon courts could hold that it would violate an officer's right against self-incrimination under Article I, Section 12, of the Oregon Constitution to compel 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, and could further hold that such a compelled administrative statement entitles the officer to full immunity from prosecution.

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. Other lawyers, including the National Lawyers Guild, Portland, Oregon Chapter and the American Civil Liberties Union of Oregon, have carefully analyzed the issue and have concluded that it is possible to legally conduct concurrent criminal and administrative investigations without violating an officer's constitutional rights so long as the City's administrative investigation is kept wholly separate from the criminal investigation overseen by the District Attorney. The National Lawyers Guild, Portland, Oregon Chapter's Legal Memorandum is attached hereto as Exhibit A-1. The American Civil Liberties Union of Oregon testimony is attached hereto as Exhibit A-2.
18. The Portland City Attorney has reviewed these legal analyses and acknowledges that the law is not entirely clear. The City Attorney believes, however, that the Oregon courts would affirm that there is a 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 Attorney believes that other Oregon appellate court authority, such as *State v. Buegli*, 126 Or App 290 (1994), and the great weight of federal constitutional law support the reasonable position that a concurrent administrative investigation can be conducted in a manner that preserves and protects the constitutional rights of the involved officer.
19. 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.
20. The Portland Police Bureau should implement Post Deadly Force Procedures that both comply with all state and federal statutory and constitutional standards, and also further the City's compelling interests in ensuring that, in the event an officer uses deadly force in a manner that may constitute both a violation of policy and a crime, that officer could be both criminally prosecuted and disciplined or terminated as appropriate.
21. Because there is some uncertainty in the law, and notwithstanding that criminal prosecutions of officers in Multnomah County are rare, prudence dictates that the Chief of Police and the Police Commissioner, in consultation with the City Attorney, have the discretion to defer an administrative investigation until after the criminal investigation is completed where circumstances suggest such deferral is warranted in a particular case.

NOW, THEREFORE, the Council directs:

- a. The Portland Police Bureau shall withdraw the recently signed and posted version of Directive 1010.10, which is set to take effect on or about August 21, 2017, and which is attached hereto as Exhibit B.
- b. The Portland Police Bureau shall work in consultation with the Portland City Attorney and the United States Department of Justice to prepare and file within one week a revised version of Directive 1010.10 for Council approval by resolution which shall 1) continue to require that the Professional Standards Division conduct administrative investigations into all uses of deadly force resulting in death; 2) require that involved officers promptly give voluntary or compelled statements to the Professional Standards Division in all such administrative investigations within 48 hours of the deadly force event absent compelling circumstances; 3) require the Professional Standards Division to ensure that all compelled statements and other information gathered in such administrative investigations are kept wholly confidential within the Professional Standards Division and not released or provided to any person involved in or in any way connected with any criminal investigation or prosecution or to any source whatsoever outside the Professional Standards Division; and 4) ensure that involved officers are afforded all rights granted to them by the Constitutions of the United States and the State of Oregon.
- c. Until a revised version of Directive 1010.10 which conforms to these requirements is approved by Council and fully implemented, PPB shall continue to implement the version of Directive 1010.10, which is currently in effect and which is attached hereto as Exhibit C, and should a use of deadly force resulting in death occur, shall promptly obtain voluntary or compelled statements from involved officers while affording those officers all rights granted to them by the Constitutions of the United States and the State of Oregon.

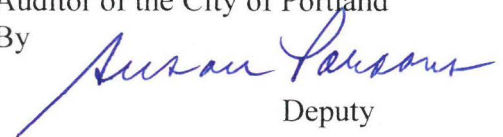
Section 2. The Council declares that an emergency exists because the Bureau is implementing and training on a new Directive 1010 governing use of force, and this Directive 1010.10 must also be implemented to serve the City's compelling interest in prompt administrative investigations.

Passed by the Council: **AUG 09 2017**

Commissioner: Mayor Wheeler
 Commissioner Fish
 Prepared by: Tracy Reeve
 Date Prepared: 08/08/17

Mary Hull Caballero
 Auditor of the City of Portland

By


 Deputy

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<p style="text-align: center;">INTRODUCED BY Commissioner/Auditor: Mayor Wheeler Commissioner Fish</p>	CLERK USE: DATE FILED <u>AUG 09 2017</u>
<p style="text-align: center;">COMMISSIONER APPROVAL</p> Mayor—Finance and Administration - Wheeler <i>W</i> Position 1/Utilities - Fritz Position 2/Works - Fish <i>W</i> Position 3/Affairs - Saltzman Position 4/Safety - Eudaly	<p style="text-align: center;">Mary Hull Caballero Auditor of the City of Portland</p> By: <u><i>Susan Parsons</i></u> Deputy
<p style="text-align: center;">BUREAU APPROVAL</p> Bureau: City Attorney's Office Bureau Head: Tracy Reeve	ACTION TAKEN:
Prepared by: T. Reeve Date Prepared: 08/08/17	
Impact Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	
City Auditor Office Approval: required for Code Ordinances	
City Attorney Approval: <i>SPP</i> required for contract, code, easement, franchise, comp plan, charter	
Council Meeting Date 08/09/17	

AGENDA

TIME CERTAIN
Start time: 1:00

Total amount of time needed: 1.5 hours
(1 of 3 items)
 (for presentation, testimony and discussion)

CONSENT

REGULAR
Total amount of time needed:
 (for presentation, testimony and discussion)

FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
		YEAS	NAYS
1. Fritz	1. Fritz	✓	
2. Fish	2. Fish	✓	
3. Saltzman	3. Saltzman	✓	
4. Eudaly	4. Eudaly	✓	
Wheeler	Wheeler	✓	