

Requested Review of the Draft Digest Language of the Taser Ballot Measure

2/27/2018

San Francisco, CA 94110

Dear Chair Packard and Committee Members:

My name is Alexander Post, I am a capital defense appellate attorney employed by the State of California, as well as Co-Chair of the Justice Committee of the Democratic Socialists of America, San Francisco Chapter, a committee focused on issues of public safety. I am writing you in my capacity as a member of the Executive Committee of the nascent “No on Measure ___” campaign forming in response to the Taser measure. We want to thank the Ballot Simplification Committee for your work and willingness to consider our suggestions. We have concerns about the proposed digest language of the proposed ordinance: Use of Tasers by San Francisco Police Officers (the “Taser Ballot Measure”).

I. Introduction

We understand the Ballot Simplification Committee does not choose the ultimate title of this ballot measure, but the current working title demonstrates a fundamental problem with the draft digest language under consideration. The San Francisco Police Commission, per their November 3, 2017 vote, has already authorized the use of Tasers by San Francisco police officers. The Taser Ballot Measure does not simply authorize the purchase of, and use of, Tasers by the San Francisco Police Department, subject to certain conditions. This measure substitutes a new policy, submitted by the measure’s authors, to override the one the Police Commission is currently developing with experts and community stakeholders. The Taser Ballot Measure creates a budgetary set-aside to “implement and maintain” the Taser program. And finally, it mandates that any general order or policy adopted by the Police Commission or Police Department must not contravene the policy set forth in the Taser Ballot Measure.

In other words, voters aren’t being asked to authorize the use of Tasers by San Francisco Police Officers, rather they are being asked to (i) authorize a specific policy for the use of Tasers, (ii) to insulate that policy from potential changes sought by the Police Department or the Police Commission, and (iii) to allocate money for Tasers under a specific line-item in every city budget in perpetuity.ⁱ

The legislative language of the Taser Ballot Measure sets forth the affirmative policy under which Tasers are to be used, not just the restrictive conditions noted in the draft digest language: “It shall be the policy of the City to equip officers with CEDs for the purpose of resolving encounters with subjects who are actively resisting, assaultive, or exhibiting any action likely to result in serious bodily injury or death of another person, themselves or a police officer.” (Section 2A.84-4, subd. a.) Subsection (b) of that section proceeds to place four explicit conditions for the use of Tasers. Finally, subsection (c) of that section mandates that: “Any general order or policy adopted by the Police Commission or Police Department regarding CEDs shall be consistent with this ordinance.”

In summary, this measure would lock-in the policy defining when SFPD officers will be *authorized* to use Tasers, and insulate those conditions from Police Commission review and revision. For example, the phrase “actively resisting,” in the Taser Ballot Measure is defined by the San Francisco Police Department Use of Force Guidelines as: “Physically evasive movements to defeat an officer’s attempt at control including bracing, tensing, running away, verbally or physically signaling an intention to avoid or prevent being taken into or retained in custody.”ⁱⁱⁱ If this measure were to pass, neither the Police Commission nor the Police Department would be permitted to adopt a policy or create a general order that would further restrict the use of Tasers, for example by forbidding the use of Tasers on individuals who are “verbally . . . signaling an intention to avoid . . . being taken into or retained in custody.” Such an order or policy would contravene subsection (c) of Section 2A.84-4 (“shall be consistent with this ordinance.”) The current draft digest language does not explain this “policy lock-in” to potential voters.

As for funding, the current language also does not convey to the average voter that funding for Tasers would also be locked-in under the Taser Ballot Measure, and those public dollars would be in addition to the general budget provided to the SFPD. Section 2A.84-4, subsection (d) states that: “It is the intent of the people in enacting this ordinance that *additional* funds be provided to the Police Department,” for the purpose of implementing the Taser program. The current draft digest notes that SFPD would make the first request for such funds 45 days after enactment, but it does not tell the voter that such requests will continue for every budget thereafter, and that the requests cannot be denied. “The City shall include in each proposed and enacted budget on and after that date a specific line item for funds appropriated for the purpose of implementing and maintaining,” the Taser program. Not only is this a budgetary set-aside, the measure further insulates Taser funding by including language in the “Purposes and Intent” section that the program is to be enacted without “cutbacks in other vital police functions and equipment.” (Section 2A.84-3.) Not only must the City set aside specific additional funds for Tasers, the measure restricts the City’s ability to counter-balance such funding by allocating it from other parts of the police budget. None of these monetary issues are presented or explained to the voters in the current draft digest language.

Given that SFPD already has been granted the right to use Tasers, and that this measure has more to do with how Taser policy will be set, and how Tasers will be funded, we are concerned that the current draft digest fails to impart to the reader the important ways this measure would change current policy. We will highlight some of these concerns in the following line-by-line review, but we would urge this Committee to consider re-drafting the Proposal section in full.

II. Proposed Digest Language: The Way It Is Now *“Conductive Energy Devices”*

The descriptor being used throughout the draft to describe the weapons at issue, “conductive energy devices” or “CEDs” is outdated and misleading. The most current and accurate terminology is “electronic control weapons.” The United States Department of Justice, in conjunction with the Police Executive Research Forum, a police research and policy organization, created a guidebook in 2011 for electronic control weapons, and noted that in the past these weapons had been referred to as “CEDs,” but the nomenclature had been updated to “reflect the reality that these tools are less-lethal weapons that are meant to help control persons,” and not mere “devices.”ⁱⁱⁱ

The proposed Taser measure references the United States Department of Justice in four of its six declarations, under Section 2A.84-2, demonstrating familiarity with that body’s Taser policies. For the sake of accuracy and clarity, this Committee should follow the recommendation of the Department of Justice and replace the outdated and inaccurate “CED” nomenclature with the more up-to-date terminology. Specifically, this Commission should substitute “electronic control weapons” for any instance of the phrase “conductive energy devices,” and should substitute the acronym “ECW” for any instance of the acronym “CED.”

[Electronic Control Weapons] are weapons that discharge electrical currents into an individual, causing incapacitation.

The description of Tasers as “. . . weapons that discharge electrical currents into an individual . . .” omits a crucial feature about how these weapons work, that an average voter may not intuit. A more accurate description might read: “. . . weapons that fire barbs which pierce the skin of an individual, allowing the user to discharge electrical currents into that individual.”

More importantly, the description concludes: “. . . discharge electrical currents into an individual, causing incapacitation.” The word “incapacitation” is misleading. The proposed measure itself notes that Tasers are less-lethal (as opposed to non-lethal) weapons. (Section 2A.84-2, subds. 1-2, Section 2A.84-2, subd. 1.) Tasers are classified as “less-lethal,” rather than “non-lethal” weapons because they can, and do, result in death. The average voter will understandably not interpret “incapacitation” to include potential death. The average voter would likely view “incapacitation” as a temporary, non-fatal state. Unfortunately, with Tasers that is not always the case.^{iv}

Utilizing the San Francisco Public Library's online database of past ballot measures submitted to San Francisco voters since 1907, we found no instances in which the public was asked to decide under what circumstances the public would grant the government the use of a new, potentially lethal, weapon that can be used on the public.^v Given this is an unprecedented question, it behooves us to ensure the voters are fully informed and aware Tasers are weapons that function by firing metal barbs which pierce the skin of the subject, allowing the user to administer an electric shock which can potentially result in injury or death, not mere incapacitation. An accurate description of the impacts of Tasers and the consequences of their use is critical for voters to evaluate this measure.

In November 2017, the Commission authorized the SFPD to use [ECW]s starting in December 2018.

We are concerned this sentence is incomplete. Given that this measure would lock-in a new policy under which Tasers may or may not be used, it would be more accurate to add: "The Commission is currently working with stakeholders to create and enact policies that will guide the SFPD in the use of ECWs."

. . . can allow a normal rhythm to resume following sudden cardiac arrest.

Because the ballot summary is intended to be as clear as possible, with a target of an 8th grade reading level, it might be preferable to substitute "heart attack" for "sudden cardiac arrest."

III. Proposed Digest Language: The Proposal

As discussed, we are concerned that, overall, the current draft digest does not fully impart to the reader the important ways this measure would change current policy and we urge this Committee to consider re-drafting the Proposal section in full.

"Proposition ___ would authorize the SFPD to purchase CEDs for each police officer."

From the standpoint of the average voter, this language seems to indicate that the SFPD will purchase Tasers. But the SFPD is not spending its currently allocated money to purchase Tasers under this measure. As discussed, this measure would require the City to provide additional funding as a budgetary set-aside in order to acquire Tasers. Perhaps a more accurate statement would be: "Proposition ___ would require the City to provide additional money to the SFPD to purchase ECWs for each police officer."

This measure would authorize officers to use [ECW]s, subject to all the following conditions:

As discussed in the introduction, this statement is problematic. The language, “subject to *all* the following conditions,” seems to convey that those conditions define how Tasers can be used. But the measure goes further than that. The measure affirmatively sets policy governing the use of Tasers and does not allow for changes in that policy by the Police Department or Police Commission. The statement as written leaves out the crucial change: pursuant to this measure Tasers are to be used to “resolve[] encounters with subjects who are actively resisting, assaultive, or exhibiting any action likely to result in serious bodily injury or death of another person, themselves or a police officer.” (Section 2A.84-4, subd. a.)

This crucial omission is why we advocate a more substantial re-write. The final language should communicate to the average voter when a Taser will be used, as currently a voter who reads this language may not realize that under this measure, unlike the latest Police Commission proposals, the SFPD will be authorized to use Tasers against people who merely “verbally signal” an intention to avoid detention, or on unarmed suspects who run away from the police. At a minimum this Committee should include the use language contained within Section 2A.84-4, and should define “active resistance” in the same way it currently defines automatic external defibrillators.

Only officers who have successfully completed training would be authorized to use [ECW]s

Again, given the wholesale changes the measure proposes, this language is incomplete at best. The language does not convey that the measure changes the way “training” is currently defined. Under the measure, the only Taser-specific training the officers would receive is training that is “department approved” and adopted. (Section 2A.84-4, subd. (b)(1).) In other words, the Police Commission is stripped of its power to require the department to adopt any Taser-specific training. A more substantial rewrite that communicates to voters that the proposed measure transfers oversight and policy-making on Tasers away from the Police Commission should resolve the problem with this specific clause.

Proposition ___ would require the SFPD to request that the City appropriate sufficient funds each year to implement this measure. The SFPD would have to make the first request for appropriation of funds 45 days after this measure is enacted.

Again, we fear that for an average voter, this language is misleading. The use of the term “request” makes it appear as if the City has discretion to deny funds, but, as discussed, the measure requires the City set aside additional funds in a line-item each year. Therefore, we suggest at minimum that the words “the SFPD to request that” to be deleted so that it is clear that Proposition ___ would require the City to appropriate funds (and we suggest adding language that clarifies these funds would be on top of the regular police budget).

A "YES" Vote Means: If you vote "yes," you want to authorize the San Francisco Police Department to purchase tasers for each police officer, and to authorize officers to use tasers, subject to specific conditions.

At the risk of becoming repetitive, we don't believe the draft language accurately conveys what a YES vote means, in terms of changes it would make to existing policy. Synthesizing the issues discussed throughout this letter, and assuming the definition of "actively resisting" is provided in the digest, a more representative explainer might read:

"A 'YES' Vote Means: If you vote "yes" you want to require the City to set-aside additional funds on a yearly basis to the San Francisco Police Department to purchase and maintain tasers for each police officer, to override current taser policy with a new policy that will authorize officers to use tasers on those who are actively resisting, assaultive, or exhibiting any action likely to result in serious bodily injury or death; a policy which cannot be changed by the Police Department or Police Commission."

Thank you for considering our request to review the current draft digest.

Sincerely,

Alexander Post

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ⁱ It is unclear if this includes the costs of Taser-related litigation and settlements.

ⁱⁱ San Francisco Police Department General Order 5.01 "Use of Force," (Rev. 12/21/16) Section IV (Levels of Resistance), p. 6.

ⁱⁱⁱ Melekian, Wexler, (March 2011) "2011 Electronic Control Weapon Guidelines."

^{iv} <https://www.reuters.com/investigates/special-report/usa-taser-911/> (Reuters documented 1,005 deaths since the early 2000s as a result of police use of a Taser).

^v In 1990 the voters were asked to decide whether Officer Bob Geary could use his own discretion on when to use his puppet "Brendan O'Smarty" while on duty, but that did not implicate the concerns at issue here. (<https://sfpl.org/index.php?pg=2000027201&propid=1497>)