ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

March 9, 2018

Commissioner L. Julius Turman, President
Members of the Police Commission
Police Commission Office
1245 Third Street, 6th Floor
San Francisco, California 94158

Re: DGO 5.02 Use of Electronic Devices

Dear President Turman and Commissioners:

I am submitting this letter on behalf of the American Civil Liberties Union of Northern California ("ACLU") for the Police Commission meeting on March 14, 2018. It contains the ACLU's comments, concerns and suggested revisions of the DGO. 5.02 "Use of Electronic Devices" ("Taser Policy") currently before the Commission.

As you know, the ACLU has actively participated in the collaborative reform process that the Commission has followed in reviewing and developing a revised Use of Force and now a new Taser Policy. We applaud the Commission for adopting and adhering to this inclusive process that has allowed the airing of different views. If San Francisco is to have tasers, the policy that will regulate their use should reflect the values of 21st Century Policing that were the guiding force behind the Use of Force Policy (DGO 5.01). It is because the ACLU believes that the current draft of the Taser Policy falls short of the principles set forth in the Use of Force Policy that we are writing this letter in the hopes that it will assist the Commission in its deliberations.

We concur with the suggested revisions submitted by the Department of Police Accountability. We would like to focus our comments on what is probably the single most important provision in the Taser Policy, and one that will, unless changed, create serious and dangerous problems for SFPD and the public it serves: namely, "AUTHORIZED USE OF THE EWCD" (Section III (H) (1-4)). It is very troubling, and frankly disappointing, that the Taser Policy before the Commission continues to present a standard of use that is confusing, contradictory and leaves far too much discretion in the hands of officers without giving them the guidance of specific and clear standards.

In the following respects, the ACLU believes the standard of use in the current Taser Policy is deeply flawed:

1. Subsection 1 authorizes taser use against a subject "armed with a weapon" when "the subject poses an immediate threat to the safety of the public, him/herself, or officers."

However, in Subsection 2 when the subject presumably does **not** have a weapon, the standard for taser use becomes much more permissive and leaves far more discretion to the officer. No longer is there a requirement for an "immediate threat;" rather a "verbal…display of an intention to assault the officer" alone justifies taser use. If an officer feels that a subject who is taunting him verbally is exhibiting an intention to assault the officer, a taser can be used; but if the same subject doing the same taunting has a knife, the officer has less discretion and must establish an "immediate threat to public safety."

2. Using the terms "assaulting" and "assault' in Subsection 2 is a very unfortunate choice of words. (The definition of "Assaultive" in Section II(B) does not help, as I will discuss below). As a legal term, "assault" has a variety of meanings; one common formulation is "the crime or tort of threatening or attempting to inflict immediate offensive physical contact or bodily harm." While a common perception of an "assault" is a physical attack, the correct use of the term is a threat or attempt to make a physical contact, and not the contact itself (which is a "battery"). And, importantly, an "assault" does not require a threatened "attack;" rather it includes a threat to make an offensive or nonconsensual touching, regardless of whether the touching causes any physical harm. This amorphous word – with its multiple meanings - is not a word that should be used as a criterion for taser use.

3. The term "battering" is even more problematic. The dictionary definition is "to hit someone using heavy blows." But the legal definition of "battery" is far broader – i.e., "intentionally or recklessly causing offensive physical contact." Again, a tap on the shoulder or a bump during an argument is technically a "battery," and thus could arguably trigger taser use.

4. The phrase "verbally or physically displaying an intention to assault" is the worst of all. This standard is untethered to any limiting factors – it does not require an "attempt" or "threat" or even an "assault," but just "displaying an intention to assault." In a heated verbal exchange between an officer and a subject, the officer is given the unbridled discretion to tase the subject if the officer decides that the subject is "displaying an intention to assault." The standard lacks any requirement of immediacy of the harm. It could include a verbal statement that an officer decides constitutes a threat to assault at some future time and place. If a subject says to an officer that "I'm going to get you," the policy as written could justify that the person be tased on the spot. This standard goes far beyond the scope of taser use that was reflected in the discussions of the Working Group.

5. The definition of "assaultive" just adds to the confusion (Section II(B)). First, the word "assaultive" is not even used in the Authorized Use section, so it's unclear why it is being defined at all. Putting that aside, the definition just includes and repeats the words and phrases from Section (H)(2), thereby just doubling down on their vagueness and lack of specificity. To define a "verbally …displaying an intention to assault" as "assaultive" is

just circular, and will in fact lead officers and supervisors around in circles in trying to enforce it.

The above discussion is not intended to nitpick words or debate dictionary definitions. Rather, we are trying to point out that the Taser Policy is relying on words and phrases that are, in the context of taser use, vague and contradictory, and therefore provide no enforceable or even understandable limits. The hope that officers will use common sense, or will get training to clarify these terms, is not a satisfactory solution. The purpose of public policy-making is to provide the public with assurances that the Commission, as the body in charge of SFPD, has enunciated clear standards and limits that can be understood by officers and the public alike.

Furthermore, the Authorized Use section of the Taser Policy is contrary to, and undermining of, the fundamental principles that SFPD and the Police Commission have adhered to throughout this collaborative reform process of "reengineering" the Use of Force. Those principles include minimal force, de-escalation and proportionality, and they are explicitly incorporated into the Taser Policy. The broad and vague and loose language currently defining when tasers may be used does not reflect the spirit and even the letter of those basic tenets. To adopt policy language that sweeps in non-immediate, non-dangerous verbal as well as physical conduct as justifying the use of this dangerous weapon conflicts with the notion that the use of force shall be proportional to the offense, and that officers shall only use force when it is necessary.

The use of tasers in San Francisco has been a matter of intense controversy. It has been debated numerous times before the Commission over the years. The public debate has not changed the fact that there are today many people with strong views on both sides of the issue. After hearing the debate, the Commission has in the past decided not to authorize tasers. For the first time, this year the Commission voted 4-3 in favor of introducing these new weapons. That decision was coupled with a promise that the Commission would establish a policy that would clearly set limits to taser use, taking into account the many concerns that were expressed by stakeholders and by the public, particularly from people with special vulnerabilities. Given that background, it is of the utmost importance that the Commission adopt a Taser Policy that is the best that it can be. With all due respect, it is the view of the ACLU that the Taser Policy before you falls short of this standard.

Accordingly, the ACLU proposes that the following revisions be made in the Taser Policy before you:

1. That the definition of "Assaultive" be deleted from the Definitions (Section (II(B));

2. That Subsection (2) of III(H) be deleted entirely and replaced with the following language:

   [when the subject is] **causing, or threatening to cause immediate physical injury to the officer or another person, under circumstances which cause the officer to**

reasonably believe that the subject has the intent and capability of carrying out the threat."

As an alternative formulation, the ACLU would support the following language proposed by DPA:

"[when the subject is] **posing an immediate threat of physical harm to the officer or another;"**

3. That the Policy should make it very clear that the authorization to use tasers does not in any way supersede or dilute the commitment that officers should first use de-escalation and crisis intervention techniques to try and avoid the use of force. This is particularly critical if the Commission decides to not revise the current standards to make them more specific and restrictive. The ACLU recommends that the following language be added to the introductory paragraph of Section H:

   "[accomplish a lawful objective.] **When feasible, officers shall use de-escalation crisis intervention techniques or lesser force options before using a taser."**

We appreciate that this has been a long process for everyone involved, especially the Commission and SFPD. We hope that you take into consideration our concerns and comments, and that they are helpful in achieving our shared goal of protecting the safety of the public and of the officers of SFPD.

Respectfully submitted,

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Senior Counsel