



State of California
Office of the Attorney General
Daniel E. Lungren
Attorney General

November 17, 1997

The Honorable Mike Thompson
California State Senate
State Capitol, Room 3056
Sacramento, California 95814

Dear Senator Thompson:

As mentioned in my November 10, 1997 letter, my office is reviewing the use of Oleoresin Capsicum (OC) by California law enforcement as well as the Humboldt County incident. I am happy to report that we have made great progress. The purpose of this letter is to share the preliminary results of our efforts with you. We looked into California's history with OC, reviewed the OC use reports submitted to my Department by law enforcement agencies, assessed the Humboldt County incident and finally, made recommendations resulting from that incident.

After reviewing this information, I feel confident that the Humboldt County application of OC as portrayed in the video tapes is an isolated incident and has not been duplicated anywhere else in the law enforcement community. As you will see in the recommendations, my staff is already working with the Commission on Peace Officer Standards and Training (POST) to develop specific training on civil disobedience and the appropriate use of force. Below, I share with you the results of our preliminary review.

Historical Overview

In early 1992, my office began a review of tear gas products to identify better alternatives to those non lethal products that had been previously approved. The products previously approved were less than 50% effective and had been directly attributed to deaths as a result of their application. The Los Angeles riots, along with an increase in violent confrontations between police officers and offenders, also played a role in our need to review these products. Utilizing a team of local, state and federal law enforcement experts, we examined alternative tear gas products. After examining these alternatives, the team recommended the approval of OC. Subsequent to that recommendation, we modified our tear gas regulations to include OC and



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turned to California Environmental Protection Agency (EPA) for a health hazard assessment. California EPA examined the data and provided us with a preliminary written assessment stating that their experts believed that OC was a safer alternative to existing tear gas products.

In August 1992, I conditionally approved two OC products for law enforcement use. Law enforcement's use was limited to controlling hostile or violent subjects. Additionally, use reports had to be submitted to my office following each application. These use reports were to be used by my office and California EPA to monitor the effectiveness and risks associated with OC. Within the first few months of use by California law enforcement, OC proved to be more effective and at least as safe as alternative tear gas products. I took a special interest in the use of OC, personally reviewed the first 1,000 use reports and was satisfied with both its safety and effectiveness.

In 1994, Assembly Member Jackie Spier successfully sponsored legislation to approve OC for civilian use. The next year she was successful in sponsoring additional legislation to deregulate tear gas altogether. Even with this deregulation, law enforcement agencies continued to submit use reports throughout 1995, with the last report received March 1996. From October 1992 through March 1996, law enforcement agencies submitted more than 23,000 use reports. These use reports reflected that OC was effective more than 85% of the time. Additionally, no coroner or any other medical report linked any death to the application of OC. The American Civil Liberties Union (ACLU) did, however, attempt to link deaths to OC. A careful review of their data reveals that autopsies pin-point the cause of death in these cases to other causes. In two of the deaths attributed to OC, the individuals died from gunshot wounds (in one case the individual died from a self-inflicted gunshot wound to the head and in the other instance, the individual died from being shot in the stomach). In a third death attributed to OC, the subject died from a stab wound. In other deaths ACLU attributed to OC, positional asphyxia, intoxication by both drugs and alcohol, and natural causes were deemed as the official causes of death.

During this period, my office was concerned over the safety of OC and monitored use reports and in-custody deaths. Additionally, my staff worked closely with the Commission on Peace Officer Standards and Training (POST) to modify training techniques and to address concerns regarding positional asphyxia and in-custody deaths following the application of tear gas.

History speaks for itself. OC has been used by law enforcement agencies in the United States for more than 15 years. OC continues to gain popularity in the law enforcement community. Today, more than 1 million OC units are sold to the public and law enforcement annually. To date, there has yet to be one death directly attributed to OC; however, OC is no panacea. As with any physical control option, however, over time deaths may be directly attributed to a particular physical control option.

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While there is no perfect less-than-lethal weapon, a reduction in officer-involved shootings have been attributed to the use of OC. As reported in the Los Angeles Daily News (March 9, 1995), the Los Angeles Police Department partly attributed the 21-year low in officer-involved shootings to the adoption of alternative weapons such as pepper spray.

OC Use Reports - A Second Review

During 1992-1996, use reports were reviewed by my staff to assess OC safety and effectiveness. Last week, I asked my staff to again review use reports to reveal if the Humboldt incident involving the swabbing of OC into the eyes of passive resistors as well as close (within three feet) spraying of OC, is within common police practices. Staff reviewed each of the Humboldt County use reports along with more than 2,000 additional randomly selected use reports in an effort to find any similar applications of OC. The review of the use reports revealed that the use of OC as portrayed in the Humboldt County incident is unprecedented.

Humboldt County Incident - Assessment

My staff carefully reviewed the Humboldt County video to determine if the applications of OC were consistent with accepted police community practices. I define accepted police community practices as practices that are supported by training and are practiced on an ongoing basis by law enforcement statewide. The Humboldt County application as portrayed in the video included what appeared to be the direct swabbing of OC into the eyes of an individual as well as the spraying of OC directly into the eyes of a subject from a distance of less than three feet. Application of OC at a distance of less than three feet is in conflict with POST training that recommends spraying at a range of between three and ten feet. As to the acceptance of this practice within the California law enforcement community, I could find no other examples where other agencies had applied OC at a range closer than three feet. The direct swabbing of OC into the eyes of an individual is neither supported nor directly addressed by training. The only germane POST training is the three foot minimum distance recommendation when applying OC.

POST is unaware of any agencies who applied OC in a manner similar to the Humboldt County incident. The only similarity discovered was a peace officer training technique whereby training officers apply OC under the eyes of a trainee usually with a cotton swab during chemical agent training. This is apparently performed to allow the officer to experience some of the effects of OC. Most agencies either do not apply OC in training or apply OC by spraying it into the face of a trainee at a distance of more than three feet. POST was not aware of any applications to the public similar to the Humboldt incident.

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Finally, my staff attempted to identify similar applications of OC in other states to no avail. Clearly, both swabbing of OC onto the eyes of an individual and the close spraying of OC are very unusual applications of OC and are not accepted police community practices.

Recommendations

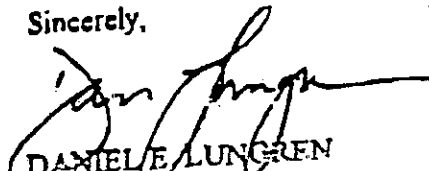
OC provides officers with another alternative to more lethal control options such as batons and firearms. While OC should generally be used to control hostile or violent individuals, situations can be envisioned where the use of OC might be appropriate to control nonviolent demonstrators. For instance, demonstrators could shut down commerce and impact emergency services by blocking for long periods of time a major traffic artery (e.g. the Golden Gate Bridge). Should such an incident occur, the application of OC may be appropriate as long as accepted application techniques are utilized.

Careful consideration should be given before we restrict the use of OC. Previously when conditions were placed on the use of OC, we along with Cal EPA, had a direct role in regulating these products and the restrictions that were placed during the evaluation of a relatively new product. This is not the case today.

Overall, California's experience with OC has been positive. OC has been attributed to a reduction of officer-involved shootings and injuries by providing law enforcement officials with an effective and relatively safe alternative to more lethal force. Based on what we now know, application of OC apparently used in the Humboldt County incident is unique. At the same time let me stress my belief that the California law enforcement community has acted reasonably and responsibly in their more than 30,000 applications of OC over the past several years. In an effort to more effectively train law enforcement in appropriately dealing with passive resisters, my staff is working closely with POST and local, state and federal experts in this area to develop training to effectively and safely control passive resisters.

I hope that you share my belief that we should learn from this experience and continue to provide law enforcement with the use of this important tool. Should you have any questions, please don't hesitate to contact me directly.

Sincerely,


DANIELE LUNGREN
Attorney General

cc: The Honorable John Burton