



CITY OF MADISON POLICE DEPARTMENT



INTER-DEPARTMENTAL CORRESPONDENCE

DATE: January 4, 2021

TO: Common Council
FROM: Victor Wahl, Acting Chief of Police
SUBJECT: Report on MPD use of Tear Gas

This document is being submitted in response to Resolution 20-0070 (Legistar file number 61265), requesting a report from MPD on “tear gas.” The resolution specifically requested that the report include:

- A history of the Department’s tear gas usage from 1990 up to and including August 1, 2020, that includes analyses of usage by year
- Incident type, including, but not limited to, crowd control, special operations, and smaller scale uses; estimated number of persons impacted; amount of tear gas used
- Justifications and efficacies of its usage compared to available alternatives; other pertinent information, and summaries thereof
- MPD or non-MPD de-escalation alternatives to the use of tear gas, and that alternatives include, but not be limited to, response options from other agencies, organizations, health care entities, and suggested recommendations by the Quattrone Center’s analysis of the MPD’s May 30-June 1, 2020 response

The resolution uses the term “tear gas,” which is not a term typically used by MPD (though it is defined in the resolution). MPD uses two types of chemical agents:

OC – oleoresin capsicum, commonly referred to as pepper spray. All commissioned personnel are trained in the use of OC and it is carried by all operational personnel. OC is also used by SET (Special Events Team) and SWAT (Special Weapons and Tactics) personnel. SET and SWAT personnel are trained in the use of additional delivery systems for OC that are not available to other MPD personnel. OC is lawful for civilians to possess and is widely available.

CS – chlorobenzylidenemalononitrile. This is the only substance defined as “tear gas” in the resolution that MPD uses. CS deployment is limited to SET and SWAT; it is not available to patrol officers or other personnel.

This report will focus on CS, but will include reference to OC as needed. As indicated above, CS use by MPD is limited to SWAT and SET personnel. There are two broad categories of circumstances where CS is utilized:

Crowd control: CS has been deployed in situations involving large groups where crowd behavior has escalated to include significant violence, looting, or property damage. CS deployment in these situations is typically accompanied by the declaration of an unlawful assembly. Wis. Stat. 947.06 defines unlawful assembly as, “an assembly which consists of 3 or more persons and which causes such a disturbance of

public order that it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.” The statute also adds additional conduct that qualifies as an unlawful assembly:

An “unlawful assembly” includes an assembly of persons who assemble for the purpose of blocking or obstructing the lawful use by any other person, or persons of any private or public thoroughfares, property or of any positions of access or exit to or from any private or public building, or dwelling place, or any portion thereof and which assembly does in fact so block or obstruct the lawful use by any other person, or persons of any such private or public thoroughfares, property or any position of access or exit to or from any private or public building, or dwelling place, or any portion thereof.

CS deployment in crowd control situations is primarily the responsibility of SET, though SWAT personnel have assisted on occasion.

CS is a standard police response to significant crowd violence situations. In 2020, U.S. major cities experienced more than 8,000 protests; more than 500 of these involved criminal violence. CS was deployed in 159 of those instances.

Tactical Operations (barricaded subjects): CS has been deployed to safely resolve high-risk tactical situations involving individuals barricaded in a residence or other dwelling. Chemical agents are only considered in these incidents if negotiation efforts are unsuccessful and when there is a public safety obligation to take the individual into custody.

OC may also be used during crowd control and tactical operations. While the perceived impact of CS and OC to those exposed is similar, CS offers some deployment options that OC does not.

MPD Historical use of CS

In general, CS can be deployed from either a hand-thrown canister or from a projectile. Both can be used in either crowd control or tactical operations, though hand-thrown canisters are more likely to be used in a crowd control context and projectiles are more likely to be used in a tactical operation. CS projectiles are fired from a dedicated launcher (currently MPD uses only 40mm devices for this purpose, though other types exist), and are most typically a mechanism to deploy CS into a dwelling occupied by a barricaded subject. Projectiles used to deploy CS are not fired directly at individuals.

While use of CS by MPD has been infrequent, it has been (and remains) a critically important option for resolving certain high-risk incidents. The table below outlines MPD use of CS from 1990 through August 1, 2020. Note that MPD did not maintain a use of force database until relatively recently, and the department has gone through several different records management systems since 1990. The table below reflects incidents located through a variety of database search methods.

Date	Type	Comments
April 2002	Barricaded Subject	MPD SWAT responded to a mutual aid request from the Dane County Sheriff’s Office in Monona. An individual was barricaded in his residence; he was believed to be armed with multiple firearms and had threatened to blow up the building.

		CS was eventually deployed into the apartment (seven 37mm CS projectiles). Officers subsequently entered and located the individual deceased from a self-inflicted gunshot. No one else was in the residence.
October 2002	Crowd Control	A large crowd on State Street (Halloween weekend) became violent. Projectiles were thrown at officers and multiple fires were set. CS was used to disperse the crowd (four hand-thrown CS canisters).
June 2003	Barricaded Subject	A homicide suspect was barricaded in his residence with a rifle refusing to exit. CS was eventually deployed into the residence (nine CS projectiles; 37mm and 40mm); the suspect exited and was arrested. No one else was in the residence.
December 2003	Barricaded Subject	MPD SWAT responded to assist with a subject barricaded in a hotel room who was actively firing a handgun. The suspect refused to exit and threatened to shoot officers. CS was eventually deployed into the room (fifteen CS projectiles; 37mm and 40mm); the suspect exited and was arrested. No one else was in the room.
May 2009	Barricaded Subject	MPD SWAT was searching a park area for a homicide suspect. CS was deployed into a cave where the suspect was believed to be (three 40mm CS projectiles). Officers subsequently entered the cave and determined that the suspect was not present (he was later located elsewhere in the park, deceased from a self-inflicted gunshot wound).
December 2012	Barricaded Subject	A suspect wanted for multiple violent felonies was barricaded in a hotel room. The suspect was believed to be armed with a handgun and had attempted to strike officers with a vehicle during an earlier attempted arrest. CS was eventually deployed into the room (one 40mm CS projectile); the suspect subsequently exited and was arrested. One additional occupant was in the room (in addition to suspect).
July 2013	Barricaded Subject	MFD arson investigators attempted to contact a suspect in an arson. The suspect slammed the door on the investigators and a strong odor of accelerants was noted. A handgun was visible in the residence as well. CS was eventually deployed into the residence (one hand-thrown CS canister). Officers subsequently entered and the suspect remained uncooperative; a less lethal beanbag round was deployed and the suspect was taken into custody. No one else was in the residence.
September 2013	Barricaded Subject	A suspect wanted for a parole violation was barricaded in his residence. The suspect had made homicidal statements to his neighbors and was believed to be in possession of a handgun. CS was eventually deployed into the residence (two 40mm CS projectiles and three hand-thrown CS canisters). Officers subsequently entered the residence and located the suspect barricaded in an interior basement room. The suspect physically resisted officers and a K9 and was taken into custody after a struggle. No one else was in the residence.
January 2016	Barricaded Subject	A suspect fired multiple shotgun rounds out of his residence into the surrounding neighborhood. Additional shots were fired after officers arrived. CS was eventually deployed into the

		residence (fifteen 40mm CS projectiles and one hand-thrown CS canister). A robot was introduced into the residence and located the suspect on the floor, unresponsive (from an apparent drug overdose). Officers entered and the suspect was conveyed to a hospital for treatment. No one else was in the residence.
February 2019	Barricaded Subject	A suspect strangled his girlfriend and pistol-whipped another individual. He then pointed a gun at someone else and barricaded himself in his residence. In addition, the suspect was wanted for a prior armed robbery. CS was eventually deployed into the residence (seventeen 40mm CS projectiles). Officers subsequently entered and found the suspect hiding in the trunk of a vehicle in the garage; he was arrested without incident. No one else was in the residence.
May/June 2020	Crowd Control/Civil Unrest	<p>During a three-day period in late May/early June Madison experienced significant civil unrest. This resulted in violence, extensive property damage, looting, and arson. More than 100 businesses or government buildings were damaged or looted; multiple MPD squads were damaged or destroyed; multiple fires were set; and the MPD rescue vehicle was struck by gunfire. Rocks, bottles, signs, and other projectiles were thrown at officers during the unrest (resulting in injuries to twenty-one officers). Law enforcement agencies from across the State were required to assist, as was the Wisconsin National Guard. Officers utilized CS (fifty-three hand-thrown CS canisters and nine 40mm CS projectiles) to address this behavior.</p> <p>MPD has enlisted the Quattrone Center for the Fair Administration of Justice (affiliated with the University of Pennsylvania Law School) to conduct a sentinel event review of the 2020 unrest in Madison. This work is well underway, and MPD has been fully involved in the process. I anticipate their work to be completed sometime in early 2021.</p>

Note that in some of these instances OC was deployed prior to, or in addition to, CS. Also, some of the canisters or projectiles deployed contained a combination of OC and CS. Training deployments are excluded.

De-Escalation

De-escalation refers to a variety of tactics that officers can use in an attempt to secure voluntary compliance and reduce the need for the application of force during an encounter. MPD policy states that officers should utilize de-escalation techniques any time it is safe and feasible under the circumstances. De-escalation generally requires two things: time and the ability to communicate. It is most relevant when engaging an individual suffering from mental illness or under the influence of alcohol/drugs, rather than simply a noncompliant criminal suspect. Typical de-escalation techniques include distance, cover, concealment, and communication/persuasion.

Effectiveness/Alternatives

The broad categories of CS deployment (tactical operations and crowd control) are quite different, and any meaningful assessment of CS use and potential alternatives must be focused on the deployment context.

Tactical operations – MPD’s primary historical use of CS has been to resolve high-risk barricaded subject incidents without injury. A barricaded subject is one who has taken a position in a physical location (most often a dwelling or vehicle) that does not allow immediate police access and is refusing direction to exit. The person could be a suspect in a crime, or someone who officers are attempting to contact for some other reason (to effect a mental health commitment or emergency detention, for example). If the person is known or believed to be armed, the risk level for officers and community members is heightened significantly.

The key decision point during a police encounter with a barricaded subject is whether the need to take the person into custody outweighs the challenges/risks associated with doing so. The primary factors for consideration are the severity of the crime/behavior, and the risk posed by the barricaded subject (either to the public at large or to a particular individual). In many cases, the best option for officers is to disengage and attempt to contact the subject in the future (when they are out of the dwelling and/or are in a different mindset). MPD regularly makes the decision to disengage from barricaded subject incidents.

If circumstances compel continued efforts to take the barricaded subject into custody, voluntary compliance through negotiations is the preferred outcome. MPD has a Crisis Negotiation Team (CNT) comprised of trained negotiators to facilitate these efforts. All CNT members have received specialized training in negotiation techniques and crisis intervention, and CNT efforts are fully integrated with tactical operations. CNT consults with mental health professionals and other stakeholders during incidents as needed, and works to de-escalate when negotiating with barricaded subjects.

In many cases, negotiation is successful, and subjects who were initially uncooperative and noncompliant can be persuaded to exit and be taken into custody without incident. In other instances, however, the subject cannot be persuaded to exit. Or – more commonly – officers are simply unable to establish communications with the barricaded subject.

If negotiations are not successful, and circumstances require action in the interest of community safety, officers would then explore tactical intervention options. Entering a dwelling occupied by an uncooperative, barricaded individual (who is likely believed to be armed) is a high-risk activity. So, the goal is to force the individual to come *out*, rather than send officers *in*.

Dispositions of the incidents described above where CS was deployed in barricaded subject incidents:

Subject exited without incident	3
Subject did not exit; officers entered; additional force required to control subject	2
Subject did not exit; officers entered; subject found hiding	1
Subject found deceased/incapacitated	2
No subject present	1

The size and layout of the dwelling has a significant impact on the capacity of officers to introduce CS (or

OC) from the exterior, and this impacts effectiveness. In the six instances where CS could have impacted the outcome, three resulted in the subject exiting and complying with no further use of force required. The risk in these situations cannot be understated, and officer entry in any of them could have resulted in additional force – even deadly force – being required. These positive outcomes demonstrate the value of and critical need for CS as an option in these high-risk contexts.

There are, unfortunately, very few options – other than chemical agents – available to force a barricaded subject from a dwelling. Examples include:

Illumination: directing lights at the windows of a dwelling occupied by a barricaded subject is a routine aspect of a tactical response. It might make it slightly less comfortable to remain in the residence but is unlikely to be successful in forcing someone to exit.

Cutting power: power can sometimes be cut to the dwelling where a barricaded subject is located. The intent is to make it less comfortable for the individual to remain inside by impacting temperature (depending on the time of year) and removing activities for the individual (watching television, etc.). Cutting power requires assistance from the applicable utility, and is typically only feasible for a single-family dwelling. It typically requires an approach to the dwelling (which creates risks), and has no impact on mobile devices.

Noise: Protracted loud noise/music can be used in an effort to force a barricaded subject (or subjects) to exit. Extremely high volume would be required to reach someone in a dwelling, and the adverse impact on surrounding residences is obvious. This is not a technique used by MPD.

Window/door breaching: Forcing a door or window open – but not immediately entering – is another option to encourage a barricaded subject to exit. Occasionally this will result in voluntary compliance, though it exposes officers to risk and generally is not effective with an uncooperative subject.

If entry is required, officers will utilize tools and techniques (robotics, for example) to minimize risk and increase the likelihood of a positive outcome.

So, when CS is utilized in a barricaded person incident, negotiation and de-escalation efforts have been exhausted without success. Public safety compels that the barricaded subject be taken into custody, and forcing him or her out of the dwelling is the safest way to do so. Very few options exist to attempt this; none are nearly as effective as introducing chemical agents into the dwelling. The situations where MPD has previously used CS in these contexts were extremely high risk, and CS deployment contributed to positive outcomes in these incidents.

Crowd Control – Madison has a long history of protests, demonstrations, and public engagement. MPD's Special Events Team (SET) was formed to ensure a coordinated and effective response to policing large events. The department's philosophy on policing events, crowds, and protests is known as "The Madison Method," and has received national attention as reflecting a progressive and professional approach. The principles of The Madison Method:

1. We protect citizens' constitutional rights to assemble, petition the government and engage in free speech.
2. We are impartial and remain neutral regardless of the issue.
3. We maintain open dialogue with citizens and the news media before, during and after demonstrations.
4. We monitor demonstrations and marches to protect individual rights and ensure public safety.
5. We balance the rights of demonstrators with the rights of the community at large.
6. We use restraint in the use of force. We protect people first and property second.
7. We, as peace officers pursue continuous improvement of our method.

MPD successfully polices dozens of large events every year. Larger events are handled by SET, while smaller events are handled by the MPD district in which the event occurs. The manner in which MPD approaches events/protests is intended to facilitate First Amendment expression, ensure a safe environment, and reduce the likelihood of any undesirable outcomes. Core aspects of this approach include:

Pre-event planning: MPD engages event organizers to determine what type of event is being planned. Details typically include: time, location, duration, size of anticipated crowd, travel route (if marching), security needs, traffic needs, points of contact, etc. Application for a street use permit often starts this process, though MPD will reach out to planners in circumstances where that process does not apply. MPD will also seek additional publically available information about the event when appropriate. Pre-event coordination contributes greatly to a safe outcome and successful event.

MPD will then engage in a planning process based on the anticipated event. During this process, command staff will evaluate staffing needs, determine assignments, and prepare an operational plan. Other City agencies may be part of this process, and for large events MPD may request assistance from other law enforcement agencies.

The design of a planned event can have a significant impact on the potential for undesired outcomes. The best example of this is the Freakfest event. In the early 2000's, Halloween weekend resulted in fires, property damage, and use of chemical agents for several consecutive years. The City created Freakfest, a sanctioned and ticketed event, and no significant unrest has occurred during these events.

Another example of how pre-planning reduces the chances for undesirable outcomes is the imposition of temporary glass bans prior to the Spring Student Party (Mifflin Street Block Party) and Halloween event. This is an action by the Common Council that temporarily bans possession of glass containers in public in/around these events. It reduces the availability of projectiles (that can be thrown at officers or others) and contributes to these events staying safe.

When event organizers do not cooperate or participate in this process, MPD develops plans based on the best information available. Spontaneous events/protests are challenging, as no pre-planning is possible.

Day of event: MPD personnel assigned to events are provided a briefing to start their shift. The briefing will cover operational specifics of the event, but will also reinforce MPD's core principles related to crowd management. The "Madison Method" philosophy is reinforced, as are goals specific to the particular event.

During the event, officers engage attendees in casual conversation, putting forth a neutral, but friendly, demeanor. Officers wear standard utility uniforms and engage attendees in a low-key manner. The focus of officers is on facilitating the event in a safe manner. Engaging attendees sets a positive tone and can build connections/relationships with those in the crowd. Disturbances or disputes are addressed individually by officers, and efforts are made to de-escalate any points of tension within the crowd.

In some instances, MPD has engaged community leaders ("peacekeepers" or "wise watchers") and requested their presence during protests/events that have the potential for tension. These volunteers are able to be present in the crowd and attempt to intervene in potentially problematic behavior before it escalates.

These strategies have been successful for MPD hundreds of times, often in challenging circumstances involving excessive alcohol consumption or anti-police themes. Some of these events have certainly included illegal behavior; officers focus on addressing those directly involved through citation or arrest. When problematic behavior occurs, officers attempt to prevent the situation from escalating to the point where the public safety risk requires that an unlawful assembly be declared (these efforts include arrests of those directly involved in criminal behavior; communication with event organizers; de-escalation efforts with crowd members; etc.).

In rare instances, however, crowd behavior escalates to the point where dispersal is required. This has happened infrequently in Madison, and dispersal is not considered unless a significant degree of violence, looting or property damage is occurring. Under these circumstances, behavior is such that a significant public safety concern compels police intervention. In addition, the situation precludes attempting a specific, targeted arrest (or arrests). As indicated above, officers will declare an unlawful assembly (as authorized by state statute) and issue orders to the crowd to disperse. Aside from deployment of chemical agents, there are several options available to disperse a crowd, including:

Physical force: Lines or groups of officers can approach and physical engage members of the crowd to force them from the area. This requires a large number of officers, creates a greater risk of injury, and is more likely to result in additional escalation/confrontation.

Batons: Lines or groups of officers approach a crowd and use batons to force crowd members from the area. This also creates an increased risk of injury and additional escalation/confrontation. MPD primarily views officer lines with batons as a static, defensive technique to deny access to a particular area (and avoids doing so whenever possible).

Impact projectiles: In the crowd control context, MPD SOP only allows the use of impact projectiles to address an imminent risk to officers or others. And while MPD SOP does not allow it, impact projectiles could conceivably be used to move or disperse a crowd. Doing so, however, would create elevated risks of injury.

There are a wide variety of impact projectile systems sold by manufacturers. MPD has chosen not to acquire or deploy most of these systems, based on accuracy, injury potential, or other issues.

Noise: Devices are available that can project loud audio towards a crowd or individual. The sound can be verbal commands/directions, or an “alert.” The “alert” sound is uncomfortable, and can be used as a mechanism to disperse crowds. Some have claimed that these devices can cause injury or hearing loss, and MPD has not utilized the “alert” option.

Water: While generally not used in the United States, some nations continue to use water cannon to disperse crowds. Use can create a potential for injury, and public perception associated with historical use in the U.S. make it an undesirable option.

Mounted Officers: Police horses can be used to physically move a crowd if needed. Typically this is more appropriate for nonviolent but noncompliant crowds, rather than under circumstances where an unlawful assembly has been declared (due to the risk to the horses from projectiles, fires, etc.).

Bicycles: Some agencies deploy officers with bicycles to create a static line/barrier, or to move a crowd. As with Mounted Patrol, this technique is most appropriate for nonviolent crowds. Using bicycles in this manner requires close proximity between officers and the crowd, and creates similar potential for additional confrontation or escalation as some other techniques (batons; physical force).

If an unlawful assembly is declared, that message will be communicated to the crowd (typically by verbal announcements over a PA), and the group will be provided an opportunity to comply. If the crowd does not voluntarily disperse, and if the violent/criminal behavior continues, intervention will be implemented. At that moment, a significant need for immediate police response exists and the circumstances preclude additional de-escalation efforts (immediate action is required; effective communication is not possible; etc.). Once the need for immediate action no longer exists, officers will attempt to de-escalate the situation (attempting communication, avoiding establishing lines of officers, moving to a position out of sight, etc.).

CS was fairly effective when used in 2002 for crowd control. Evaluating the effectiveness of the May/June 2020 deployments is much more complicated due to the size/scope of the unrest. I anticipate that further exploration of this will be included in the Quattrone Center report. While incidents requiring dispersal of a crowd are infrequent, use of chemical agents – including CS – is a standard law enforcement response to these uncommon events. Other strategies are much more likely to result in injury and additional confrontation.

Legal Issues

Possession or use of CS in the State of Wisconsin is generally illegal for civilians; exceptions exist for law enforcement and National Guard personnel.

Discussion on this topic has included assertions about the applicability of the Geneva Convention and

United Nations Chemical Weapons Convention on the use of CS. The Geneva Convention (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare) was signed in 1925. The two-page document prohibits the use – in war – of “asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices.” It does not specify any specific substances that are banned, nor does it have any applicability beyond the context of war.

The United Nations Chemical Weapons Convention is a much more modern and comprehensive document, adopted in 1992. The Convention specifies a number of substances that are expressly considered toxic chemicals and subject to verification measures; Chlorobenzylidenemalononitrile (CS) is not mentioned. Nations that are party to the Convention agree not to use “riot control agents” as a method of warfare. The Convention defines “riot control agents” as:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

The Convention specifically states that “law enforcement including domestic riot control purposes” is excluded from the scope of the Convention.

So, parties to the Convention agree not to use “riot control agents” in warfare, but recognize that the agreement does not limit or apply to law enforcement use. And, to the extent that the Convention applies to the use of CS in warfare, it would also seemingly apply to the use of OC in warfare (based on the definition of “riot control agent”) or any other similar substance. OC is a legal substance readily available to civilians.

Amnesty International recognizes the need for use of chemical agents (including CS) under certain circumstances (when the level of violence has reached such a degree that law enforcement cannot contain the threat by directly targeting violent persons only).

Summary

MPD has deployed CS very infrequently over the last 30 years. However, it has been critical to successfully resolving those instances in which it has been used, and has allowed MPD to safely resolve extremely high-risk incidents without injury. Other options available to resolve these situations are not effective, are not appropriate, or are likely to cause injury.