

## **CRIMINAL INVESTIGATIONS INTO FIRST AMENDMENT ACTIVITIES**

### **8.10.01 PURPOSE**

The purpose of this policy is to set policy, responsibilities, illustrative examples, and procedures, including the need for special authorization, relative to investigation directed at First Amendment activities ~~rights~~.

### **8.10.02 POLICY**

It is the policy of the San Francisco Police Department to ensure that the First Amendment rights guaranteed by the United States Constitution are protected for all individuals.

The First Amendment does ~~not allow prohibit~~ law enforcement personnel ~~to initiate~~ ~~from initiating~~ investigations into alleged criminal conduct involving expressive activity, ~~provided that only if~~ there is a legitimate law enforcement purpose for doing so. ~~reasonable law enforcement purpose for doing so.~~

SFPD members may not investigate, prosecute, disrupt, interfere with, harass, or discriminate against any person engaged in First Amendment activity for the purpose of punishing, retaliating, preventing, or hindering the person from exercising their First Amendment rights.

Members may conduct a criminal investigation directed at the First Amendment activities of persons, groups or organizations in accordance with the procedures of this policy as set forth below.

~~The Department acknowledges that all inquiries and investigations involving First Amendment Activity may only be conducted for a legitimate law enforcement objective.~~

~~The Department may conduct a criminal investigation directed at the First Amendment activities of persons, groups or organizations in accordance with the procedures of this policy as set forth below.~~

### **8.10.03 DEFINITIONS**

**First Amendment Activity:** All speech, associations and/or conduct protected by the First Amendment and/or California Constitution Article I, section 2 (Freedom of Speech) and/or Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief.) Examples of First Amendment activity include speaking, meeting, writing, marching, picketing or other expressive conduct protected by the First Amendment.

**Reasonable Suspicion to Detain:** Reasonable suspicion is a set of specific facts that would lead a reasonable person to believe that a crime is, was, or is about to occur and the person under suspicion is reasonably connected to the crime. Reasonable suspicion to detain is also established whenever there is any violation of law. Reasonable suspicion cannot be based solely on a hunch or instinct.

**Infiltrator:** An infiltrator is a SFPD member who, without disclosing his or her real identity, affirmatively identifies himself or herself as a member or participant in the group or organization and acts in a manner which influences or directs the organization.

**Source:** is a person, not a police officer, who is providing information not publicly available to the police about other individuals, groups of individuals, or organizations. This person may, but is not required to, receive a benefit or compensation.

**Undercover officer:** A sworn member, that needs to conceal themselves or change their identity in a specific neighborhood, location, or assignment to carry out their mission.

**Exigent Circumstances:** An emergency situation requiring swift action to prevent imminent danger to a person's life, serious damage to property, escape of a suspect, or destruction of evidence.

**Legitimate Law Enforcement Purpose** means that the investigation is intended to address unlawful conduct, either past, present, or future, including whether a person has knowledge of such past, present, or future unlawful conduct, or to address public safety issues, whether they amount to criminal conduct or not. A reasonable law enforcement purpose would include acquiring information or intelligence which may be useful in allocating resources for public safety and acquiring information or intelligence which may be useful for future criminal investigations.

#### **8.10.04. IMPERMISSIBLE INVESTIGATIONS**

SFPD members are prohibited from investigating any person for:

1. the purpose of preventing that person from engaging in conduct protected by the First Amendment;
2. the purpose of punishing or retaliating against that person for engaging in conduct protected by the First Amendment;
3. solely because that person advocates a position in his or her speech or writings which is offensive or disagreeable; or
4. the content of his or her speech if there is no reasonable law enforcement purpose, such as criminal conduct or public safety.

Example of investigation which violates the First Amendment:

1. A police officer undertakes an investigation of a crime allegedly committed by a member of a race-based hate group. During the course of the investigation, the officer decides to interview the employer of an admitted member of the group, even though there is no indication that the employer has any knowledge of the crime. The officer conducts the interview because he feels that the employer should be aware that one of his employees is a member of this type of organization. Although the investigation into the crime is permissible, there is no appropriate law enforcement justification for the interview with the employer, and therefore, it violates the First Amendment.
2. A police officer hears a CD which contains numerous songs with lyrics derogatory towards law enforcement, but none of the songs threaten violence. The officer

decides to investigate the musical group because the officer is offended by the lyrics. The officer talks to the group's producer, manager, and record label about why the group puts out music with such lyrics. There is no appropriate law enforcement justification for this investigation, and therefore, it violates the First Amendment and is impermissible.

#### **8.10.05 PERMISSIBLE INVESTIGATIONS WHICH REQUIRE NO SPECIAL AUTHORIZATION**

Investigations not based on First Amendment activity are permissible and require no special authorization under this policy.

If an investigation is begun based on a reasonable suspicion of criminal activity, such as illegal drug dealing, the unlawful use of weapons, or other illegal activity, special authorization for that investigation, even if at some point it involves examination of speech or other expression, is not required. However, such an investigation shall comply with section 8.10.04.

Example of investigations which require no special authorization:

1. An officer receives information that a suspect is selling marijuana at a particular location. The officer goes undercover to purchase marijuana from the suspect in order to gather evidence to prosecute the suspect criminally. During the drug transaction, the suspect mentions that he thinks marijuana should be legal in the United States. The investigation was undertaken due to the reasonable suspicion that the suspect was selling drugs, not as a result of his speech or opinion. Therefore, this directive does not require special authorization for the investigation of the suspect's drug activity, even though the suspect engages in his First Amendment right to express his opinion that marijuana should be legal. **NOTE:** If this investigation had been initiated based on the suspect advocating legalization of drugs, the investigation would have required special authorization
2. An officer has arrested several members of a street gang for violent criminal conduct. The officer wants to identify regular associates of these gang members, including searching the Internet for evidence of the gang member's associates. This investigation is based upon reasonable suspicion that the associates of these gang members are engaging in illegal conduct and is not based upon speech or other expression. Therefore, no special authorization is required.
3. A police officer begins an investigation in response to a report that music is being played too loudly at a tavern. In addition, the tavern is known for playing music whose lyrics offend some members of the population. This investigation requires no special authorization under this directive, even though music is generally protected by the First Amendment, because the investigation is undertaken to determine if there has been a violation of an applicable anti- noise ordinance rather than based upon the musical lyrics.
4. An informant tells an officer that an anarchist group plans to deface the building of a large corporate headquarters located in downtown Chicago. Based upon this information, the officer begins an investigation of this group, including a review of the Internet sites and any writings of the group, to determine the credibility and any details of the alleged plot. This investigation is based upon a reasonable suspicion of criminal

conduct, rather than the oral or written expressions of the group. Therefore, no special authorization is required. **NOTE:** Had this investigation been initiated based on the writings of the anarchist group that "corporations are ruining the country and need to be stopped," rather than upon information of planned criminal conduct, the investigation would have required special authorization.

## **8.10.06 PERMISSIBLE INVESTIGATIONS REQUIRING SPECIAL AUTHORIZATION**

### **A. AUTHORIZATION REQUIRED FOR AN INVESTIGATION**

1. Absent exigent circumstances, a member may undertake an investigation that comes within these guidelines only after receiving prior written authorization by the Commanding Officer of the Special Investigations Division (SID), the Deputy Chief of the Investigations Bureau, and the Chief of Police (or Acting Chief of Police when the Police Chief is not available).
2. Written authorization requires a memorandum, through the chain of command to the Commanding Officer of the SID, containing the following:
  - a. The identity of the subject of the proposed investigation, if known.
  - b. The facts and circumstances that create an articulable and reasonable suspicion of criminal activity.
  - c. The relevance of the First Amendment activities to the investigation.
3. Time limits. Written approval of an investigation is in effect for 120 calendar days. If the Department continues an investigation past 120 calendar days, a new memorandum and approval must be obtained. The new memorandum must describe the information already collected and demonstrate, based on that information, that an extension is reasonably necessary to pursue the investigation.
4. Exigent Circumstances. If exigent circumstances, an investigation may begin before a memorandum is prepared and approved, but verbal permission must be received as soon as practicable from the Commanding Officer of SID. The required memorandum must be written and approved within five days of the occurrence of the emergency.
5. Although it is expected that most investigations conducted under these guidelines will be initiated by the SID, if any member of the Department becomes aware of a criminal investigation that involves First Amendment activities as defined in these guidelines, the member shall refer the case to SID for a determination as to how the investigation should be conducted. These guidelines do not preclude investigations directed at First Amendment activities by divisions other than SID, but those investigations must be conducted in consultation with SID and must be conducted pursuant to these guidelines.

### **B. First Amendment Investigation**

First Amendment Information Gathering Investigation Defined

1. First Amendment information gathering investigation is the gathering and analysis of written or oral speech or other expression which is undertaken:
  - a. due to or on the basis of the content of the speech or other expression and;
  - b. for the purpose of preventing crime or for the purpose of aiding likely future investigations, even in the absence of an articulable suspicion to believe that a violation of law has occurred. B.

#### First Amendment Information Gathering Policy

1. Certain law enforcement investigations prompted by or based upon a person's speech or other expression, whether written or oral, are permitted provided that there is a reasonable law enforcement purpose for doing so. If an investigation is prompted by or based upon a person's speech or other expression and will be conducted for a reasonable law enforcement purpose, the investigation is permissible but requires special authorization as outlined in Section XXXXX.
2. It is permissible to gather information consisting of speech or other expression that is expected to serve a reasonable law enforcement purpose in the future even if not based on an articulable suspicion that a violation of law has occurred, and even when the investigation is undertaken on the basis of speech or other conduct protected by the First Amendment. Information gathering is a legitimate law enforcement function provided it is conducted for reasonable law enforcement purposes, such as preventing crimes or providing information that may constitute useful future investigative leads. Information gathering investigations undertaken in whole or part because of speech or other activity protected by the First Amendment require a reasonable law enforcement purpose and special authorization as provided in Section XXXXX.
3. Advocacy of violence or unlawful acts or expression of sympathy with violence or unlawful acts is protected by the First Amendment until such advocacy presents an imminent and credible threat. Nevertheless, law enforcement has a duty to gather information about groups and individuals who advocate law breaking or express sympathy with law breaking in order to determine whether these groups or individuals are engaged in or plan unlawful activities, as well as to obtain information that may be useful in future investigations and preventing crime.
4. Debriefing or questioning arrestees regarding their social, political, or religious views is not permitted unless specifically related to criminal conduct necessary for investigation of illegal conduct or pursuant to an authorized First Amendment information gathering investigation. For instance, a demonstrator at a rally who is arrested for blocking traffic will not be interrogated as to his or her political views.

#### Examples of First Amendment Information Gathering Investigations Permitted if Specially Authorized as Provided in this Policy:

1. A person is standing on a street corner, violating no laws, but is offering passers-by literature supporting the bombing of targets in the United States. A plainclothes officer accepts the literature. Based upon the literature, the officer initiates an investigation into the source of the literature, including all statements made by the source, to determine the source's intentions, capabilities, funding, and other information related to assessing future violence. This investigation was prompted by the expression contained in the literature but was undertaken for a proper law enforcement purpose and therefore constitutes proper gathering of First Amendment-related

information if special authorization is received.

2. A police officer discovers a site on the internet run by a hate group which espouses violence against government officials and lists the addresses and personal routines of certain government officials. The officer opens an investigation into the group and includes a request for undercover officers to attend meetings of the group. Although the investigation is not prompted by a reasonable suspicion of a specific crime, it is undertaken to determine the credibility of any threats and the future criminal plans of the hate group and is thereby permissible under this directive if special authorization is received. In this instance, placing an undercover officer in the meeting has a reasonable law enforcement purpose.

3. An officer learns that a radical cleric has opened a place of worship in San Francisco. This cleric preaches destruction of Western values and has a history of drawing persons involved in terrorist activities to places of worship that he organizes. Surveillance undertaken to determine if the cleric is drawing known terrorists to his place of worship has a reasonable law enforcement purpose even though not based upon reasonable suspicion of a specific crime and is therefore permissible under this directive if special authorization is received.

4. A public rally is planned. One of the groups urging its members to attend is also speaking about the need to target and destroy certain symbols of corporate America. Although the investigation is based upon the speech of the group, sending an undercover officer to the meeting of this group to determine if any and what criminal activity is planned for the rally is a reasonable law enforcement purpose and therefore is permissible under this directive if special authorization is received.

### C. METHODS FOR INFORMATION GATHERING

The use of sources, undercover officers, and infiltrators to investigate individuals, groups, or organizations involved in social or political activity have the potential to substantially impact protected First Amendment rights, with infiltrators posing the highest risk of such impact. The use of these investigative methods is not prohibited by the First Amendment, members shall use the least restrictive techniques possible given the specific nature of the investigation. Examples of less intrusive techniques include tactics such as researching departmental records or researching public records, the internet or other information sources accessible by the general public.

Use of sources, undercover officers and infiltrators should be used only to the extent necessary and in a manner designed to have the least impact upon First Amendment rights. When surveillance becomes necessary, the Police Department whenever feasible shall conduct that surveillance from a public location before undertaking surveillance from private property with or without the property owner's consent. Tactics employed by police personnel shall comply with existing law, shall not entail entrapment, and shall not further criminal acts. Undercover officers shall not assume leadership positions in the organizations under surveillance and shall not attempt to direct organizational activities.

The OIC of SID shall closely monitor these techniques to ensure that the method is used only when and to the extent reasonable under the circumstances and for proper purposes. The OIC of SID shall ensure that the termination of any investigation if information reveals that the reasonable suspicion which prompted the investigation is unfounded.

### 8.10.07 SPECIAL EVENT PLANNING

A. FUNCTIONAL RESPONSIBILITY FOR EVENT PLANNING INVOLVING FIRST AMENDMENT ACTIVITIES

1. Certain types of public gatherings require the Department to collect a limited amount of information in order to preserve the peace, assess the need to deploy members for crowd control purposes, facilitate traffic control, address public safety concerns at the event, and protect the rights of free expression and assembly. This information may only be collected openly and non-covertly as part of an Event Planning Inquiry.
2. The responsibility for conducting Event Planning Inquiries shall rest solely with the Event Commander or his/her designee. The Permit Unit may collect information about public gatherings only to the extent legally required and necessary in processing permit applications designated by city ordinance.
3. Unless invited, Departmental contacts with event organizers or participants should be made by telephone during normal business hours without officer(s) attending an organization's meetings. In the course of such contacts it should be made clear that communications are voluntary.
4. See Field Operations Bureau General Order 91-01 for details.

B. VIDEO OR PHOTOGRAPHIC RECORDING

The Department shall videotape or photograph only for crowd control training or evidentiary purposes. Evidentiary purposes shall include only:

1. Evidence that is reasonably likely to be used in administrative, civil, or criminal proceeding or investigations.
2. Evidence related to allegations against members of the Department.

This does not apply to Body Worn Cameras. (See DGO 10.11, 5.08)

**8.10.08 POLICE COMMISSION REVIEW**

- A. The President of the Police Commission shall designate a member of the Commission to be responsible for monitoring compliance with these guidelines.
- B. Every month, the designated Police Commission member shall review the written requests and authorizations for the initiation or continuance of an investigation that is required by these guidelines.
- C. On an annual basis, the Director of the Department of Police Accountability or his/her designee shall conduct an audit of the Department's files, records and documents and shall prepare a report to the Commission regarding the Department's compliance with the guidelines. In addition, the Police Commission may conduct or direct the DPA to conduct such an audit unannounced at any time.

1. In conducting the yearly audit, the Department of Police Accountability shall review the following:
  - a. All current guidelines, regulations, rules and memoranda interpreting the guidelines;
  - b. All documents relating to investigations subject to Section XXXX
  - c. All Agency Assisted Forms or other documentation relating to the transmittal of documents to other criminal justice agencies as described in Section XXXXX.
2. The Department of Police Accountability shall prepare a written report to the Police Commission concerning its annual audit, which shall include but not be limited to:
  - a. The number of investigations authorized during the prior year.
  - b. The number of authorizations sought, but denied.
  - c. The number of times that undercover officers or infiltrators were used.
  - d. The number and types of unlawful activities investigated.
  - e. The number and types of arrests and prosecutions that were the direct and proximate cause of investigations conducted under the guidelines.
  - f. The number of requests by members of the public for access to records, including:
    - (i) The number of such requests where documents or information was produced,
    - (ii) The number of such requests where the documents or information did not exist,
    - (iii) The number of requests denied.
  - g. The number of requests from outside agencies, as documented by an Agency Assist Form, for access to records of investigations conducted pursuant to these guidelines, including:
    - (i) The number of such requests granted and
    - (ii) The number of such requests denied.
  - h. A complete description of violations of the guidelines, including information about:
    - (i) The nature and causes of the violation and the sections of the guidelines that were violated.
    - (ii) Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
    - (iii) Recommendations of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.



- (iv) The report shall not contain data or information regarding investigations that are on-going at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.
- i. A complete description of violations of the guidelines, including information about:
  - (i) The nature and causes of the violation and the sections of the guidelines that were violated.
  - (ii) Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
  - (iii) Recommendations of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.
  - (iv) The report shall not contain data or information regarding investigations that are on-going at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.
- D. By the end of each calendar year, the Director of the Department of Police Accountability shall deliver to the Police Commission a report containing the information in Section C(2) (a) through (g).

## **8.10.09 FILES AND RECORDS**

### **A. Information Quality Control**

1. The collection, maintenance, and use of information pursuant to an authorization shall be limited to the scope stated in that investigative memorandum and authorization.
2. The Department shall not collect or maintain information of a personal nature that does not relate to a criminal investigation. In the absence of a specific investigation authorized under these guidelines, the Department shall not collect or maintain information such as names for political petitions, mailing lists, organizational memberships or writings espousing a particular view which is protected by the First Amendment.
3. Information to be retained in a criminal intelligence file shall be evaluated for source reliability and content validity prior to filing. The file shall state whether reliability or accuracy have been corroborated.

### **B. File Dissemination**

1. Dissemination of intelligence information is limited to criminal justice agencies with a specific need-to-know as well as right to know.
2. All requests for information shall be evaluated and approved prior to dissemination by the Commanding Officer or designee for the Special Investigations Division. The commanding officer or designee shall determine whether the requesting agency is reliable in treating the information with the requisite care and sensitivity and shall deny the request if the requesting agency is not considered sufficiently reliable.

3. All dissemination of information shall be done by written transmittal or recorded on an Agency Assist Form that describes the documents or information transmitted. A copy of the transmittal letter or Agency Assist Form shall be kept in the file from which the information was disseminated.
4. The first page of any information document transmitted to a recipient agency shall contain a notice limiting dissemination to the specific purpose for which the document was transmitted.
5. A master list of all written transmittals and Agency Assist Forms recording the dissemination of records governed by these guidelines to outside agencies shall be maintained in a binder by SID.

#### C File Purge

1. The Commanding Officer of SID shall be responsible for file purge, as follows.
2. Records shall be purged according to the current San Francisco Police Department Records Retention and Destruction Schedule which calls for destruction of intelligence files every two years from the last date of entry with the following exceptions:
  - a. Information may be maintained if it is part of an ongoing investigation.
  - b. All written memoranda requesting authorization to commence an investigation and subsequent authorizations shall be maintained for not less than five years after termination of the investigation.
  - c. Records showing violation of these guidelines shall not be destroyed or recollected for the purpose of avoiding disclosure.
3. The chain of custody for destroyed files shall be established and documented to provide a record establishing that the files have been destroyed.

#### D. File Security

1. A copy of the initiating memoranda and authorizations created pursuant to these guidelines shall be kept by the Commanding Officer of SID.
2. All documents created pursuant to these guidelines shall be locked and kept separate from other Department files. Access shall be limited to personnel working on an authorized investigation, command personnel, the Chief, the designated Commission member, and the OCC for the limited purpose of conducting the annual audit.
3. All files, whether kept in SID or another unit, shall be prominently marked with a notice that the material contained in the file is subject to these guidelines.

### **8.10.10 GUIDELINES LIMITED TO PROMOTION OF GENERAL WELFARE**

In undertaking the adoption and enforcement of these guidelines, the San Francisco Police Department is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on the City, Police Commission, Department officials, or employees, a duty or obligation to any person for equitable relief, money damages, or any other relief based on a claim that a breach will cause or has proximately caused injury.

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