

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.

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 allow law enforcement personnel to initiate investigations into alleged criminal conduct involving expressive activity, only if there is a legitimate 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.

8.10.03 DEFINITIONS

First Amendment Investigation: First Amendment investigation is the gathering and analysis of written or oral speech or other expression which is undertaken only when both of the following circumstances occur:

- a. due to or based on the content of the speech or associational activity or other expressions protection by the First Amendment and;
- b. for the purpose of preventing crime or for the purpose of aiding an investigation, in the absence of a reasonable suspicion.

Reasonable Suspicion: 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 cannot be based solely on a hunch or instinct.

Infiltrator: a member who, without disclosing their 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: a person, not a member, 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 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 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: an investigation that 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 legitimate law enforcement purpose would include:

- a. acquiring information or intelligence which may be useful in allocating resources for public safety; or
- b. acquiring information or intelligence which may be useful for future criminal investigations.

“Right to Know”: a term used when an agency seeks information about a group or person from another agency. In this case, “right to know” means the requestor has official capacity and statutory authority to the information being sought.

“Need to Know”: a term used when an agency seeks information about a group or person from another agency. In this case, “need to know” means that the requested information is pertinent and necessary to the requestor agency in initiating, furthering, or completing an investigation.

Fusion Center: a statewide effort supported by the Department of Homeland Security (DHS) for facilitating information sharing between local, state, tribal, and federal agencies for the purpose of combatting terrorism and transnational threats.

8.10.04. IMPERMISSIBLE INVESTIGATIONS

SFPD members are prohibited from recording and maintaining information or investigating any person for:

1. the purpose of preventing that person from engaging in conduct protected by the First Amendment; or
2. the purpose of punishing or retaliating against that person for engaging in conduct protected by the First Amendment.

Example of impermissible investigation:

1. A police officer undertakes an investigation for a crime allegedly committed by a member of a race-based hate group. During the investigation, the officer interviews 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 they feel the employer should be aware that one of their 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.

SFPD members are prohibited from investigating any person:

1. solely because that person advocates a position in their speech or writings which is offensive or disagreeable; or
2. for the content of their speech, if there is no reasonable law enforcement purpose, such as criminal conduct or public safety.

Example of an impermissible investigation:

1. A group of citizens have formed a group against the use of artificial intelligence technology (AI). They meet regularly in front of the building of an AI company, many with signs that have derogatory messages against the technology, the City, and the police department. An officer goes to the group's public online page to see if the group plans to do anything illegal. Once there, the officer investigates each person who posts on the page, going to their individual pages and printing out details about the person. The officer creates a file and saves this information without any evidence or potential threat of violence or illegal activity. This violates the States Right to Privacy Act which prohibits officials from maintaining unnecessary information about people.

8.10.05 PERMISSIBLE INVESTIGATIONS WHICH REQUIRE NO SPECIAL AUTHORIZATION

Investigations not based on First Amendment activity are permissible and do not require 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.

Example of investigations which require no special authorization:

1. A group call 'Climate Change is Real' conducts frequent, unpermitted marches from Harry Bridges Plaza to Civic Center Plaza. During these marches, there have been instances of graffiti and vandalism. The Market Street Business Improvement District has asked the Department to investigate these crimes during the next march. Plainclothes police officers walk in the crowd of protestors, with instructions to notify waiting arrest teams if they witness any crimes being committed and to keep the suspects in view until the arrest teams make contact, then take appropriate follow-up action.

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 designee.
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 effective for 120 calendar days. If the Department continues an investigation past that time, 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. In exigent circumstance, 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 calendar 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 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 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.
2. 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. Officers may gather First Amendment information after receiving special authorization.

3. Debriefing or questioning arrestees regarding their social, political, or religious views is not permitted unless specifically related to criminal conduct, and is necessary for investigation of illegal conduct or pursuant to an authorized First Amendment investigation. For instance, a demonstrator at a rally who is arrested for blocking traffic will not be interrogated as to their political views.

Example of First Amendment Investigations Permitted if Specially Authorized:

1. A group called 'Earth First Movement' is concerned about climate change. At their rallies, they call for acts of civil disobedience. They initially started with graffiti and vandalism but have become more violent. They have threatened elected officials with harm for not enacting eco-friendly legislation, set fire to a driverless vehicles, and assaulted a security guard. The Department learns that this group is expanding and have been recruiting new members at a local university. The Investigations Bureau wants to send an undercover officer to one of the meetings to attempt to join the group and identify members responsible for crimes currently under investigation.

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 has 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 categorically prohibited by the First Amendment, but members shall use the least intrusive techniques possible given the specific nature of the investigation.

1. Examples of less intrusive techniques include tactics such as researching departmental or public records, the internet, or other information sources accessible by the general public.

Use of sources, undercover officers, or 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 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 members shall comply with existing law, shall not entail entrapment, and shall not further criminal acts. Undercover members shall not assume leadership positions in the organizations under surveillance and shall not attempt to direct organizational activities.

The investigator shall regularly brief the Commanding Officer of SID as the investigation progresses. The Commanding Officer shall ensure that the investigative techniques are used only when and to the extent reasonable under the circumstances otherwise consistent with this policy. The Commanding Officer shall ensure that an investigation is terminated 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. The goal of event planning is to determine the appropriate role, if any, for law enforcement at the event. Most 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. These inquiries are limited to openly contacting organizations or persons knowledgeable about a public event, accessing open-source information such as public domain websites, etc., and examining public records.
 - a. Members may use publicly available materials (e.g. leaflets, public social media, etc.) for the limited purpose of gathering information as it relates to event planning and public safety noted above. Files should not be maintained past the end of the event.
2. The responsibility for conducting inquiring into the event shall rest solely with the Event Commander or their 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. During such contact it should be made clear that communications are voluntary.
4. See most recent Field Operations Bureau Order regarding event planning for details.

B. Video Or Photographic Recording

1. The Department shall videotape or photograph only for crowd control training or evidentiary purposes.
 - a. Evidentiary purposes means evidence that is reasonably likely to be used in administrative, civil, or criminal proceedings or investigation; or evidence related to allegations of misconduct by officers. Members should consider the following:
 - i. Videotaping or photography should be conducted in a manner that minimizes interference with the exercise of First Amendment rights by persons lawfully participating in the event.
 - ii. Videotaping or photography should comply with San Francisco Administrative Code 19B.4, relating to use of surveillance technology against a protected class.
 - b. In addition to the above, when videotaping or using photography for training purposes, members should consider the following:

- i. Members are only videoing or taking pictures of locations that are in public view and where there is no reasonable expectation of privacy; and
 - ii. Members protect a person's anonymity.
2. Members shall keep their body worn cameras (BWC) in Buffering Mode unless and until there is a reason for activation per DGO 10.11 *Body Worn Cameras*.

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 Department shall prepare a report to the Commission regarding the Department's compliance with the guidelines.
 1. The report shall include, but not be limited to:
 - a. The number of investigations authorized during the prior year.
 - b. The number of authorizations sought and denied the prior year.
 - c. The number of times 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 were produced,
 - (ii) The number of such requests where the documents or information did not exist, and
 - (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.
- i. The report shall not contain data or information regarding investigations that are ongoing 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. In addition, the Police Commission may conduct or direct the DPA to conduct such an audit unannounced at any time.

8.10.09 FILES AND RECORDS

A. Information Quality Control

1. When an Operations Plan is put in place (i.e. for a planned event), it should articulate whether collection of information by members is permissible; the reason for any collection, including specifics regarding the criminal behavior that is suspected (collecting information without a legitimate criminal reason is prohibited); who will collect it (e.g. uniform or plainclothes members); and how much information may be collected, used, or retained, as appropriate.
2. Publicly available information may be collected for pre-event assessment. It cannot be retained after the event if it is not relevant to a reasonable law enforcement purpose.
 - a. Any publicly available information obtained should be properly referenced as to its source.
3. Members will not maintain, use, or share information regarding persons or groups solely because they are involved in a constitutionally protected activity or because of the content of their speech.

B. Criminal Investigation

1. Members will not collect or maintain personal information unless relevant to a criminal investigation.
2. 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.

C. File Dissemination

1. Dissemination is limited to criminal justice agencies with a specific need-to-know as well as right-to-know.
2. All requests must be approved by the Commanding Officer or designee for the Special Investigations Division.
 - a. In some instances, it may be pertinent to share if there is a likelihood that the persons or groups associated with the event plan to engage in criminal

activity in connection with the event, or have in the past; and the event will also take place in another jurisdiction or in close proximity to another jurisdiction.

3. All dissemination will be done by written transmittal letter or recorded on an Agency Assist Form that describes the documents or information transmitted.
4. The first page will contain a notice limiting dissemination to the specific purpose for which the document was transmitted and conditioning further disclosure on the recipients first getting SFPD's permission.
 - a. A copy of the letter or form will be kept in the corresponding file.
5. SID will maintain a master list containing all transmittals.

D. RECORD RETENTION

1. The Commanding Officer of SID is responsible for following the department's retention schedule.
 - a. Records are maintained and destroyed in accordance with the most current SFPD Records Retention and Destruction Schedule.
2. 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.
3. Records showing violation of these guidelines shall not be destroyed or recollected for the purpose of avoiding disclosure.

E. File Security

1. All documents created pursuant to these guidelines shall be locked and kept separate from other Department files.
2. Access shall be limited to personnel working on an authorized investigation, command personnel, the Chief, the designated Commission member, and the DPA 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.
4. The chain of custody for destroyed files will be established and documented to provide a record establishing that the files have been destroyed.

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.