

OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



February 1, 2017

Joyce M. Hicks
Executive Director

Honorable Julius Turman, President of the San Francisco Police Commission
Members, Police Commission

**Re: 2016 FIRST AMENDMENT COMPLIANCE AUDIT OF SFPD RECORDS
PURSUANT TO DEPARTMENT GENERAL ORDER 8.10**

Dear President Turman and Commissioners:

This letter is submitted in compliance with the Department of Police Accountability's (DPA)¹ responsibility to conduct an annual compliance audit of San Francisco Police Department Records pursuant to Department General Order 8.10, Guideline for First Amendment Activities.

1. Introduction

Department General Order 8.10 sets forth requirements when an SFPD officer conducts a criminal investigation that involves the First Amendment activities of a person, group or organization. DGO 8.10 (I) (B) states in pertinent part:

The Department may conduct a criminal investigation that involves the First Amendment activities of persons, groups or organizations when there is an articulable and reasonable suspicion to believe that:

1. They are planning or are engaged in criminal activity
 - a. which could reasonably be expected to result in bodily injury and/or property damage in excess of \$2500
 - b. or which constitutes a felony or misdemeanor hate crime, and
2. The First Amendment activities are relevant to the criminal investigation.

¹ The San Francisco Office of Citizen Complaints was renamed the Department of Police Accountability pursuant to the adoption of San Francisco Proposition G on November 8, 2016. Proposition G amended the San Francisco City Charter to add section 4.136.

DGO 8.10 (II) (A) defines First Amendment Activity as “[a]ll speech, associations, and/or conduct protected by the First Amendments and/or California Constitution Article I, section 2 (Freedom of Speech) and 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.)”

To conduct a criminal investigation that involves First Amendment activities, an officer must provide a written justification for the investigation and obtain written approval by the Commanding Officer of the Special Investigations Division, Deputy Chief of Investigations, and the Chief of Police. (See DGO 8.10 (I) (C)(2)).

An officer’s written authorization must include:

- 1) the identity of the subject of the proposed investigation, if known;
- 2) the facts and circumstances that create an articulable and reasonable suspicion of criminal activity as defined in Section 1.B.; and
- 3) the relevance of the First Amendment activities to the investigation. (See DGO 8.10 (III) (B) (1-3).

Only after obtaining prior written approval by the Commanding Officer of the Special Investigations Division, Deputy Chief of Investigations, and the Chief of Police may the investigation be commenced. Written approval is in effect for 120 days. Investigations past 120 days require a new memorandum and approval. (See DGO 8.10 (III) (A)-(F)). DGO 8.10 (III) (F) also states that “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.”

In addition to written justification and approval for criminal investigations involving First Amendment activities, DGO 8.10 requires a designated member of the Police Commission to review monthly the written requests and authorizations for the initiation or continuance of investigations required by these guidelines. DGO 8.10 also mandates the DPA to conduct an audit of the Department’s records and prepare a report regarding the Department’s compliance with these guidelines. (See DGO 8.10 (VI)(A-C)).

On December 21, 2016, Deputy Director Erick Baltazar and Attorney John Alden met with Lieutenant David O’Connor, Officer-in-Charge of the Special Investigations Division, and Commander Greg McEachern, to conduct the Department of Police Accountability’s 2016 annual audit of SFPD records pursuant to Department General Order 8.10. Deputy Director Baltazar met again with Lieutenant O’Connor on January 12, 2017.

2. Guidelines, Regulations, Rules and Memoranda Interpreting the Guidelines

Pursuant to DGO 8.10 (VI) (C) (1) (a), the DPA reviewed the following guidelines, regulations, rules and memoranda interpreting the guidelines:

- Department General Order 8.10 (Guidelines For First Amendment Activities)
- Department General Order 5.17 (Policy Prohibiting Biased Policing)
- SFPD Bureau Order 2011-07 (Joint Terrorism Task Force)
- San Francisco Administrative Code Sec. 2A.74 (Police Department Participation In Federal Counterterrorism Activities)
- Standard Memorandum of Understanding Between The Federal Bureau of Investigation And The San Francisco Police Department (Signed By Chief Heather Fong March 1, 2007).
- SFPD's officer training video on DGO 8.10

3. Documents and Information DPA Requested From SFPD As Enumerated By DGO 8.10 (VI) (C)

- All documents relating to investigations subject to Section III (Authorization Required For An Investigation) and undercover techniques subject to Section (IV)(C), including 1) the number of investigations authorized, 2) number of investigations sought, but denied, 3) number of times that undercover officers or infiltrators were approved; 4) the number and types of unlawful activities investigated; 5) the number and types of arrests and prosecutions that were the direct and proximate cause of investigations conducted under the guidelines; and 6) the number of public record requests pursuant to this guidelines including the number of requests where documents or information was produced, denied, and/or did not exist.
- All Agency Assist Forms or other documentation relating to the transmittal of documents to other criminal justice agencies as described in Section IX.B. including the number of such requests granted and denied.
- DGO 8.10 officer training records of Special Investigations Division (SID) personnel.
- The Monthly Police Commission review log.
- Any violation of the guidelines.

4. Audit Results

The DPA reviewed the records SFPD provided in response to the DPA's request. Below is an account of the audit.

- a. There were no records of investigations authorized during 2016.
- b. There were no records of any request for investigations that was denied.
- c. There were no records of undercover officers or infiltrators being used during the prior year.
- d. There were no records of unlawful activities within the scope of this order investigated.
- e. There were no records of arrests or prosecutions that were the direct result and proximate cause of investigations conducted under the guidelines.
- f. Records provided by Police Legal indicated that members of the public made two requests pursuant to these guidelines for access to records involving cell-site simulators or what is commonly known as IMSI catchers or Stingrays. Of the two requests, one resulted in Police Legal providing documents and information and one resulted in a denial.
- g. There were four (4) records of requests from outside law enforcement agencies, as documented by the Agency Assist Forms, for access to information or assistance that reportedly was subject to DGO 8.10 guidelines.
 - (i) Four (4) requests were granted
 - (ii) No request was denied

Agencies included: United States Secret Service (request for a copy an incident report); Davidson County, North Carolina (request for assistance in locating homicide suspect); Royal Canadian Mounted Police / Richmond Detachment (request for assistance regarding suspect in false emergency service incidents in San Francisco and in Canada); Pennsylvania State Police / Bureau of Criminal Investigation (request for assistance for a search warrant).

- h. During 2016, the DPA concluded its investigation of a complaint that alleged a SFPD officer violated Department General Order 8.10 by conducting a criminal investigation involving an individual's First Amendment activities without complying with DGO 8.10's criteria concerning the type of criminal activity subject to investigation and the requisite documentation and authorization. The officer acknowledged that the investigation included First Amendment activities.

However, the officer did not believe that DGO 8.10 applied to the investigation because the investigation had a criminal basis with a terrorism nexus. The officer believed that the type of cases he was precluded from investigating were cases that solely involved First Amendment activities. Department General Order 8.10 applies to all investigations that involve First Amendment activities. The DPA concluded that the officer's actions were the result of inadequate training in light of Department policy and procedure.

5. Training

Lieutenant O'Connor provided documentation that nine (9) members of the Special Investigations Division (SID) participated in DGO 8.10 training. In addition, fourteen (14) members of the Department Operations Center (DOC) also participated in DGO 8.10 training.

6. Areas of Concern

The DPA's investigation and conclusion in the aforementioned complaint indicates the need for immediate training on DGO 8.10's requirements.

7. Police Commission Log

An examination of the Police Commission log indicated that from January through December 2016, a designated Police Commissioner signed the log thereby attesting that a Police Commissioner had reviewed written requests and authorizations for the initiation or continuance of an investigation as required by DGO 8.10.

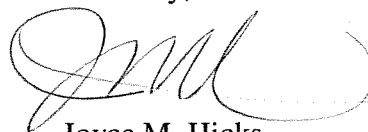
8. Recommendations

The DPA makes the following recommendations:

1. SFPD immediately update its DGO 8.10 training to address the standards for conducting an investigation that involves First Amendment activities, including the range of activities protected by the First Amendment, the reasonable suspicion standard, written documentation and supervisory approvals and numerous scenarios in which officers have an opportunity to test their understanding of DGO 8.10's application and requirements.
2. SFPD immediately issue a Department Bulletin on DGO 8.10's requirements.
3. DPA's First Amendment Audit pursuant to DGO 8.10 and SFPD's Joint Terrorism Taskforce Report as required San Francisco Administrative Code §2A.74(d) be presented to the Police Commission during the same annual hearing to enable a more comprehensive review of investigations involving First Amendment activities.

4. A Police Commissioner be designated to assist the DPA, SFPD and the stakeholders address issues raised by SFPD investigations involving First Amendment activities.

Sincerely,

A handwritten signature in black ink, appearing to read 'JMH', with a long horizontal flourish extending to the right.

Joyce M. Hicks
Executive Director

Investigator Assigned: Erick Baltazar
Deputy Director
Chief of Investigations

Attorneys Assigned: Samara Marion
John Alden