

Intelligence Procedures for First Amendment Activities

430.1 PURPOSE

The purpose of this policy is to provide guidance regarding intelligence gathering procedures and maintenance of intelligence files. Additionally this policy addresses the investigation of individuals and groups involved in First Amendment protected activities, and expressly limits such investigations to situations where a criminal predicate exists.

430.2 CONSTITUTIONAL RESTRICTION TO CRIMINAL ACTIVITY

The United States and California Constitutions provide people with the right of privacy, free expression and free association for any lawful purpose.

The California Constitution expressly provides that “privacy” is an inalienable right. The First Amendment of the US constitution prohibits the government from making a law establishing a religion or prohibiting the free exercise of religion, abridging freedom of speech or of the press, or preventing people from peaceable assembly (e.g., marches and picketing).

While there are certain categories of speech that are not protected (i.e., fighting words, defamation, etc.), these exceptions are limited and have been narrowly construed.

Under these constitutional restrictions, intelligence gathering by the Police Department is only permitted to investigate criminal activity. Intelligence gathering should not include political, religious, or social views or activities of individuals or groups, unless such views or activities directly relate to criminal conduct.

430.3 POLICY

It is the policy of the Berkeley Police Department to ensure that the First Amendment rights guaranteed by the United States Constitution are protected for all individuals and groups, including the press, and to permit police involvement in the exercise of those rights only to the extent necessary to provide for the legitimate needs of law enforcement in investigating criminal activity.

The Berkeley Police Department will obtain, maintain and use information from legal, reliable sources to meet the needs of the Department and the City of Berkeley in carrying out its efforts to protect the public and suppress criminal activity. When the group or individual being investigated is involved in constitutionally protected First Amendment activity, the Department will ensure that there is reasonable suspicion that a criminal predicate exists.

Officers involved in planning for or responding to any protest or event may utilize open source material and are encouraged to contact the individuals or groups organizing the public event in order to facilitate traffic control, crowd management, or other safety measures concerning the event. These measures would not be considered an investigation as defined by this policy.

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The Berkeley Police Department recognizes its critical task in balancing the need for law enforcement in its efforts to protect the broader society, versus the need to safeguard individual rights guaranteed by a democratic process. At times, law enforcement may need to resort to the use of undercover operations, surveillance, and the use of informants to protect the public from groups espousing violence and/or wanton destruction of property.

430.4 FEDERAL AND STATE GUIDELINES

The guidelines of this policy are based largely on the Californian Attorney General's Criminal Intelligence Guidelines and Title 28 Code of Federal Regulations, Part 23 (28 CFR 23). To the extent of this policy is more restrictive than the Attorney General's guidelines or 28 CFR 23, this policy must be adhered to.

430.5 DEFINITIONS

Criminal Predicate: The standard by which the determination as to whether information may be used to create an intelligence file is made. It means that there exists a "reasonable suspicion" based on the analysis of legally obtained information that the subject of the information is or may be involved in definable criminal conduct and/or activity that supports, encourages, or otherwise aids definable criminal conduct. For the purposes of this policy, infraction violations will not be considered sufficient to establish a criminal predicate. The underlying offense must amount to a misdemeanor or felony.

Reasonable Suspicion: Information which, when viewed in its totality, leads a person with appropriate training, specialized knowledge, and/or experience to conclude that a person, association of persons, or organization may be involved in definable criminal conduct and/or activity that supports, encourages or otherwise aids definable criminal conduct.

Open Source: Any source of news or information that could normally be accessed by any member of the public. Examples include the television news, newspapers, speeches at any public gathering or event, the Internet, the public in the form of casual conversations and information brought forward during routine contacts, the radio, billboards, and flyers. Open source information does not include meetings, such as planning meetings or closed-door meetings, where First Amendment protected activities are involved, unless the officers are in uniform and have been invited or are otherwise in a place they have a lawful right to be.

Informant: Non-law enforcement, non-City employees who are specifically gathering information on behalf, and at the request of the Berkeley Police Department.

Videotaping: For the purposes of this policy, the videotaping (whether surreptitious or in plain sight) of individuals or groups involved in First Amendment related activities.

430.6 INTELLIGENCE GATHERING

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430.6.1 OPEN SOURCES

Open source information can be accessed at any time by any member of the Department without reporting requirements, unless otherwise required outside of this policy. Accessing open source reformation does not constitute an investigation as defined by this policy. However, files on groups or organizations containing open source material shall not be created and maintained, absent a criminal predicate.

Open source information should be validated in compliance with the California Attorney General's Criminal Intelligence Guidelines and 28 CFR 23.

430.6.2 PLAINCLOTHES OFFICERS

Where the activity is First Amendment related, plainclothes officers may only be used where there is a reasonable suspicion of criminal activity arising to acts of violence, destruction of property, or a threat to public safety. Plainclothes officers may be utilized within crowds in public places involved in First Amendment related activities, but only in order to determine the best response for Police to safely address traffic-related issues because they would potentially be in danger even in uniform. In this situation, the plainclothes officers would not be gathering any specific information about the group or individuals, unless criminal activity occurred, just general information such as direction of travel, crowd size estimates and destination.

- (a) Plainclothes officers shall not be utilized at meetings, such as planning meetings or closed-door meetings where First Amendment related activities are involved, except as noted above.
- (b) The use of plainclothes officers at planning-meetings, or closed-door meetings where First Amendment related activities are involved shall require prior approval of the Chief of Police.
- (c) Plainclothes officers shall not, in any circumstance:
 1. Attend meetings or engage in other activities for the purpose of obtaining legally-privileged information, such as confidential sources of reporters, attorney-client communications, or physician-patient communications;
 2. Assume a leadership position or intentionally cause dissension within an organization;
 3. Initiate, propose or suggest, encourage, or incite criminal acts or plans to commit criminal acts;
 4. Use unlawful techniques to obtain information; or
 5. Participate in acts of violence or unlawful acts.

430.6.3 INFORMANTS

Informants may be utilized in First Amendment related activities where there is reasonable suspicion of criminal activity arising to acts of violence, destruction of property, or a threat to public safety.

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- (a) Informants shall not be utilized at meetings, such as planning meetings or closed-door meetings where First Amendment related activities are involved, except as noted above.
- (b) Use of informants where First Amendment related activities are involved would require prior approval of the Chief of Police and reasonable suspicion of a criminal predicate.
- (c) Information from informants should be validated in compliance with the California Attorney General's Criminal Intelligence Guidelines and Title 28 Code of Federal Regulations, Part 23 (28 CFR 23).
- (d) Informants shall be directed not to:
 - 1. Assume a leadership position or intentionally cause dissension within an organization;
 - 2. Initiate, propose or suggest, encourage, or incite criminal acts or plans to commit criminal acts;
 - 3. Use unlawful techniques-to obtain information;
 - 4. Participate in acts of violence or unlawful acts; or
 - 5. Attend meetings or engage in other activities for the purpose of obtaining legally-privileged information, such as confidential sources of reporters, attorney-client communications or physician-patient communications.

430.6.4 VIDEOTAPING

Videotaping is a useful tool with which to gather evidence in criminal cases and non-criminal civil complaints against the City. It is often difficult to ascertain whether criminal activity is going to break out during a protest, march, or during other protected First Amendment related activities. Additionally, due to the contentious nature of many of these events, there is often City liability involved, or the potential for allegations of police misconduct. Videotaping these events serves to protect both the City and the various constituents involved in these events. As such the Berkeley Police Department will routinely videotape protests, marches and other acts of protected First Amendment related activities that occur in public places.

- (a) In the event that no criminal predicate exists, no discernable civil liability can be discovered, and no personnel complaint is received, the tapes, if they are maintained, will only be maintained as a training tool. Tape that is not used for training shall be destroyed within 90 days of the incident, unless such tape is requested to be preserved as part of a personnel complaint, civil or criminal investigation or case.
- (b) Whenever possible, the videotaping will occur in a manner-that minimizes interference with people lawfully participating in First Amendment activity. Individuals shall not be singled out for videotaping or photographing because of their religious or political views.

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430.7 DEMONSTRATIONS

The Police Department will not investigate or gather intelligence of a planned demonstration from non-open sources, unless there is reasonable suspicion that the demonstration will result in criminal activity rising to acts of violence, destruction of property or a threat to public safety. The anticipation of acts of non-violent civil disobedience alone, without an accompanying threat to public safety, shall not be a basis to investigate or gather intelligence of a planned demonstration, other than from open sources for purposes such as estimating the time, size and route of the demonstration.

430.8 INTELLIGENCE FILES

The creation of intelligence files when investigating individuals and groups involved in First Amendment protected activities where a criminal predicate, exists shall meet the below criteria.

- (a) An intelligence file will consist of analyzed data from sources ranging from "open source" to "confidential" (such as informants and classified reports). The only limits Title 28 CFR 23 places on data that may be analyzed are:
 1. It must be legally obtained
 2. It may not include information about political, religious or social views, associations or activities unless such information is related to definable criminal conduct or activity and the subject of the information is reasonably suspected of involvement in that conduct or activity.
 3. It is within the California Attorney General Guidelines.
- (b) Once data has been lawfully collected, it goes through several steps that will terminate in one of three results:
 1. Destruction of the data because there is no criminal predicate and no reasonable likelihood of developing a criminal predicate;
 2. Determination that, although no criminal predicate then exists or no person or group has yet been linked to the predicate, there is a reasonable likelihood that – within a reasonable time (the Department of Justice uses one year) evidence of the predicate or identity of the person or group will be available; or
 3. Retention of the data based on a criminal predicate.
- (c) An intelligence file shall not be opened for reasonable suspicion of non-violent civil disobedience that is only a misdemeanor and does not pose a threat to public safety.

430.8.1 INFORMATION ACCESS AND DISSEMINATION

Information Access and Dissemination: Those personnel authorized to access and disseminate criminal intelligence file information shall ensure that prior to disseminating or allowing access to criminal intelligence file information that the requestor has:

- (a) The Right to Know: Requester has the right to obtain intelligence information because of his or her status (e.g., a sworn member of a law enforcement agency) or pursuant to a court order, statute or case law, and

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- (b) The Need to Know: Requester has an articulated need to obtain specific intelligence information in order to execute official law enforcement responsibilities or because the court order, statute or case law establishes such a need to know.

Access should never be granted when a requester has satisfied only one of these criteria.

430.9 AUTHORIZATION

When possible, in all cases involving an investigation into individuals or groups exercising Constitutionally protected First Amendment activities, approval will be obtained from the Chief of Police, or in his/her absence a division captain, prior to the initiation of an investigation. An approval period will last for 90 days. Any investigation that continues for more than 90 days must receive approvals from the Chief of Police at every 90-day interval.

- (a) If it is impractical to obtain prior approval, the Chief of Police shall be notified in a timely manner. Investigations shall only be initiated, where there is reasonable suspicion of planned, on-going, or prior criminal activity.
- (b) The Chief of Police will notify the City Manager of all investigations that are covered by this policy.

430.9 AUDIT AND REPORTING

On an annual basis, the Chief of Police, or his/her designee, shall review the Department's files, records and documents to determine whether the Department is in compliance with these regulations. The Chief of Police shall prepare a confidential summary report to the City Manager regarding all investigations conducted by the Police Department pursuant to this policy.

The Chief of Police, or his/her designee, shall prepare a statistical report annually for the Police Review Commission that will include the following information:

- (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 were used;
- (d) The number of unlawful activities investigated;
- (e) Arrest and violation information for completed investigations; and
- (f) The number of requests for information from outside agencies for information relating to investigations conducted pursuant to this policy.

430.10 OUTSIDE AGENCIES

The Berkeley Police Department will only cooperate with outside agencies consistent with this policy, the California Attorney General's Criminal Intelligence Guidelines and Title 28 Code of Federal Regulations, Part 23. Officers will follow this policy at all times when engaged in cooperative efforts with another agency.