



Office of the District of Columbia Auditor

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Audit of the Metropolitan Police Department's
Investigations and Preliminary Inquiries
Involving First Amendment Activities

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A Report by the Office of the D.C. Auditor
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For their time, information, insight, and cooperation during the audit process, we want to thank the staff of the Metropolitan Police Department (MPD), especially: Lt. Michael Pavlik, Criminal Intelligence Branch; and Sgt. Jeffrey Madison, Criminal Intelligence Branch.

Executive Summary

This audit of the Metropolitan Police Department (MPD) was conducted pursuant to the "Police Investigations Concerning First Amendment Activities Act of 2004" (the Act)¹. The Act requires the Office of the District of Columbia Auditor (Auditor) to perform an annual compliance audit of MPD investigations and preliminary inquiries involving First Amendment activities to determine whether MPD properly implemented and complied with the provisions of the Act.

The audit objectives were to determine whether MPD:

- complied with the requirements of the Act and implementing regulations when authorizing and conducting preliminary inquiries and/or investigations of First Amendment activities; and
- developed and implemented adequate internal controls to ensure compliance with provisions of the Act.

Our report contains seven findings that detail the deficiencies we found during the course of our audit. Specifically we found that:

1. MPD Did Not Properly Authorize 16 of 20 First Amendment Investigations
2. MPD Did Not Obtain Written Approval and Authorization For the Use of Undercover Officers In 17 First Amendment Investigations
3. MPD Did Not Properly Document Training of Criminal Intelligence Branch Members
4. Investigation Files Did Not Contain the Required Corroboration Statement
5. MPD Did Not Properly Review Three First Amendment Investigations That Exceeded 90 Days
6. MPD Failed to Properly Approve Two Investigations That Exceeded 120 Days
7. We Were Unable To Determine Whether MPD Complied with the Requirements of D.C. Code § 5-333.08(b)

¹ D.C. Code § 5-333.01, et seq.

To correct the deficiencies we found, we directed 13 recommendations to the Metropolitan Chief of Police. Specifically, we recommended that the Metropolitan Chief of Police:

1. Develop written Standard Operating Procedures that are consistent with the laws and regulations for authorizing preliminary and full First Amendment investigations. At a minimum, the Standard Operating Procedures should require the responsible official to affirm in writing that the First Amendment investigation was authorized. This authorization should include the authorizing official's printed name, position title, signature, and date signed.
2. Develop Standard Operating Procedures that outline the MPD's policy on purging investigative files. This Standard Operating Procedure should define the terms "accurate, reliable, relevant, and timely", as provided in the laws and regulations, and include the process MPD will employ to identify and remove information that MPD considers is not "accurate, reliable, relevant, and timely."
3. Develop Standard Operating Procedures that provide the Auditor with access to MPD's files and records to conduct audits of MPD's investigations of First Amendment activities. The Standard Operating Procedures should define documentation that must remain in the First Amendment investigation files to verify that MPD properly authorized preliminary and full investigations.
4. Designate, in writing, those MPD members who may, in the absence of the Chief of Police's signature, authorize the use of undercover officers in conjunction with MPD's investigations of First Amendment activities.
5. Develop Standard Operating Procedures for requesting and authorizing the use of undercover officers that clearly document approval to use undercover officers in the investigation.

6. Develop Standard Operating Procedures that require MPD to provide MPD staff members, who investigate First Amendment activities, initial and refresher training regarding:
 - a. authorizing, conducting, monitoring and terminating investigations and preliminary inquiries; and
 - b. the procedures or rules for conducting investigations and preliminary inquiries and the maintenance, dissemination, and purging of records, files and information in connection with First Amendment investigations.
7. Develop a curriculum, training agenda, and attendance documentation that would allow MPD and the Auditor to be able to determine: (1) what First Amendment training MPD provided; (2) the dates when MPD provided the First Amendment training; and (3) the names of MPD members that attended the First Amendment training.
8. Develop Standard Operating Procedures for First Amendment investigation file reviews. At a minimum, the Standard Operating Procedures should provide: (1) the name, title, and signature of the person performing the investigation file review; (2) the dates MPD conducted the investigation file review; and (3) a narrative description of the results of the investigation file review.
9. Develop Standard Operating Procedures that require MPD to review First Amendment investigations prior to filing, and include within the investigation file a statement that MPD has corroborated the reliability, validity, and accuracy of the investigative information.
10. Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations at least every 90 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, review results, and the documenting of review panel attendance and approval.
11. Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations that exceed 120 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, and the documenting of review panel attendance and review results.

12. Develop Standard Operating Procedures that require undercover officers to provide regular, routine and periodic status reports on the details of undercover activities conducted while performing First Amendment investigations.

13. Revise the record keeping and purging policies of the Metropolitan Police Department to allow the Auditor access to pertinent and relevant documents and records so that the Auditor can determine whether MPD complied with applicable laws when conducting First Amendment investigations.

The 13 recommendations center on the need for MPD to strengthen its internal controls and administrative processes for conducting First Amendment investigations and complying with provisions of the law and regulations.

Introduction

Numerous demonstrations and marches have been held in the District of Columbia. Demonstrations and marches can be peaceful examples of citizens exercising their First Amendment rights. However, over the years, some demonstrations have attracted participants seeking to engage in criminal acts such as property damage, traffic disruptions, and bodily harm. As the local law enforcement organization, the Metropolitan Police Department (MPD) has a vested interest in preventing criminal activities associated with demonstrations and marches.

MPD's handling of demonstrations held in conjunction with the 2000 and 2002 meetings of the International Monetary Fund and the World Bank resulted in the Council of the District of Columbia (Council) conducting a legislative investigation.² As a result of the legislative investigation, the Council enacted the "Police Investigations Concerning First Amendment Activities Act of 2004" D.C. Code § 5-333.01 (2012) (the Act), effective April 13, 2005.

The Act established responsibilities and procedures for MPD relating to First Amendment investigations and preliminary inquiries. The Act further required the Office of the District of Columbia Auditor (Auditor) to conduct an annual audit of MPD's compliance with the law.³ To implement the Act, the Chief of Police adopted rules entitled "MPD Investigations of Criminal Activity Conducted Under the Guise of First Amendment Activities" as recodified in D.C. Mun. Regs. Title 24, § 27 (2011)

² Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C., Mary M. Cheh, published in the Notre Dame Journal of Legislation, vol. 32, 2005, Pg 10.

³ D.C. Code § 5-333.12(d)(1) (2011)

Objectives, Scope, and Methodology

The audit objectives were to determine whether MPD:

- complied with the requirements of the Act when authorizing and conducting preliminary inquiries and/or investigations of First Amendment activities; and
- developed and implemented adequate internal controls to ensure compliance with provisions of the Act.

Audit Scope

The audit scope included all MPD First Amendment investigations and preliminary inquiries that were initiated and closed between Fiscal Year (FY) 2005 and FY 2011.

Limitations on Audit Scope

Generally Accepted Government Auditing Standards (GAGAS), Section 7.11, require the Auditor to report any significant constraints imposed on the audit approach by information limitations or scope impairments.

During the course of the audit, the Office of the D.C. Auditor requested access to emails exchanged between undercover officers on assignment to First Amendment investigations and their respective MPD supervisors. The purpose of our request was to determine whether undercover officer activities complied with the provisions of D.C. Code § 5-333.08(b) (2011). D.C. Code § 5-333.08(b) (2011) provides seven activities that undercover officers should refrain from when conducting First Amendment preliminary or full investigations. The seven activities that undercover officers should refrain from are provided with the finding titled *We Were Unable To Determine Whether MPD Complied with the Requirements of D.C. Code § 5-333.08(b)*, pg. 24.

MPD officials agreed to provide the emails. However, to protect the identities of the undercover officers, MPD indicated that they would redact some of the information contained in the emails. Upon receipt of the redacted emails, we observed that MPD redacted the officers' names, all dates, places, addresses, and names of the First Amendment events or activities that had been the focus of investigations. Consequently, we could not effectively evaluate the redacted emails to determine whether undercover officers complied with D.C. Code §5-333.08(b) (2011).

We informed MPD that the redacted emails did not provide sufficient and appropriate evidence for us to determine whether undercover officers complied with D.C. Code § 5-333.08(b) (2011). We explained that GAGAS, Section 6.56, requires the Auditor to obtain sufficient and appropriate evidence to support our findings and conclusions. Additionally, we informed MPD that the Act specifically requires the Auditor to protect the confidentiality of MPD files and records.

In an effort to address MPD's concerns regarding the protection of the identity of undercover officers, we offered to sign a confidentiality agreement, pledging to protect the identities of undercover officers and not to publish any information that could reveal their identity. Despite our offer, MPD refused to provide the Auditor full access to the emails.

While MPD allowed us to interview undercover officers, it is important to note that we were unable to obtain documentary support to validate statements made by the undercover officers. As a result, the Auditor was unable to determine whether undercover officers complied with D.C. Code § 5-333.08(b) (2011). Further, details of this audit limitation are included in the finding titled *We Were Unable To Determine Whether MPD Complied with the Requirements of D.C. Code § 5-333.08(b)*, pg. 24.

D.C. Code § 5-333.12(d) (2012) requires the Auditor to conduct an audit of MPD's First Amendment investigation activities. In order to properly and fully conduct the audit, we must have access to MPD files, records, and other documents to determine compliance with the Act and regulations. The refusal of MPD to allow us full access to emails between Criminal Intelligence Branch undercover officers and their MPD supervisors constituted a significant limitation on the evidence required to determine compliance with applicable laws and regulations.

MPD Notification of Potential Threat to ODCA Independence

At the conclusion of our audit fieldwork on June 5, 2012, the Auditor held a fieldwork closeout meeting. The purpose of the meeting was to inform the appropriate MPD managers of our audit results. On June 8, 2012, at the request of the Lieutenant who managed First Amendment investigations for the Criminal Intelligence Branch (CIB), a second meeting was held. At this second meeting, the Lieutenant stated that MPD had reason to believe that a member of the audit team held preconceived ideas and a bias against MPD that impaired the objectivity of the Auditor.

ODCA Inquiry Objectives - GAGAS provides a conceptual framework for government auditors to identify, evaluate and apply safeguards to address threats to independence. According to GAGAS, threats to independence are not acceptable if the threat “could expose the auditor or audit organization to circumstances that would cause a reasonable and informed third party to conclude that the integrity, objectivity, or professional skepticism of the audit organization, or a member of the audit team, had been compromised.” Additionally, GAGAS requires government auditors to evaluate identified threats to independence in accordance with the conceptual framework. As such, in response to the allegations made by the Lieutenant, the Auditor conducted an inquiry to determine whether:

1. the member of the audit team in question engaged in activity that would in fact impair their independence or give a third party the perception that their independence had been compromised;
2. the audit team member’s contribution was significant enough to warrant an actual declaration of independence impairment; and
3. the Auditor had implemented reasonable safeguards to address threats to independence.

ODCA Inquiry and Actions - At the beginning of an ODCA audit, each audit team member is required to sign an independence statement. This practice is consistent with most local, state, and federal audit organizations. The independence statement asserts that the audit team member is free from any personal or external impairments to independence in conducting the audit.

As a result of the inquiry, the Auditor determined that the member of the audit team in question executed an inaccurate independence statement for the MPD First Amendment audit. The statement was false because the audit team member in question was not free from personal impairments to independence. Additionally, the audit team member in question did not avoid the appearance of impairments to independence. As a result, the audit team member was immediately removed from the engagement. In addition, the audit team member was disciplined to the full extent of District personnel rules and regulations.

Inquiry Conclusions - The audit team consisted of an experienced audit manager, auditor-in-charge, a financial analyst, and the junior auditor in question. The audit was supervised by an experienced audit manager and auditor-in-charge. The audit manager and auditor-in-charge were responsible for managing the audit and reviewing all audit documentation for adherence to GAGAS and ODCA audit policies. As such, the audit manager and auditor-in-charge reviewed all audit work to ensure compliance with applicable audit standards and ODCA audit policies.

The Auditor concluded that the audit team member in question did not develop any findings or recommendations. Additionally, the audit team member was not involved in writing the audit report. As such, the contribution of the audit team member in question did not have a significant impact on the audit fieldwork, findings, or recommendations.

The Auditor believes reasonable and prudent actions were taken to address the concerns of MPD. In addition, these actions were consistent with GAGAS. Accordingly, the Auditor firmly maintains that the independence and integrity of ODCA were not compromised during the audit. Further, our findings and recommendations are fairly and objectively presented and free from prejudice and bias. The Auditor included MPD's question regarding independence in this report to ensure transparency and increase public trust in the operations of ODCA.

Notwithstanding the scope limitation and MPD's question regarding independence, we conducted this audit in compliance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Audit Methodology

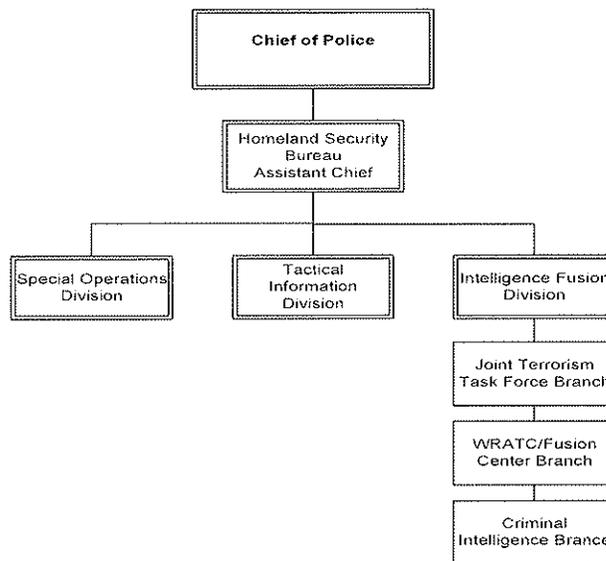
To accomplish our audit objectives we performed the following:

- gathered publicly available information about MPD's mission, budget, organization, and performance goals;
- conducted interviews with MPD management and staff;
- conducted interviews with other relevant organizations;
- reviewed relevant laws, regulations, and MPD policies and procedures regarding MPD investigations of First Amendment activities;
- researched the investigative practices of other police departments;
- reviewed the March 24, 2004, report of the Judiciary Committee of the Council of the District of Columbia on MPD's handling of certain demonstrations that took place in 2000 and 2002; and
- reviewed MPD investigative files and documents concerning MPD investigations and preliminary inquiries involving First Amendment activities.

Background

The Criminal Intelligence Branch (CIB) of the Intelligence Fusion Division is responsible for conducting investigations of First Amendment activities. The Intelligence Fusion Division is a part of the Homeland Security Bureau. Figure One presents the organization chart for the Homeland Security Bureau.

Figure One - Homeland Security Bureau Organization Chart



The mission of the CIB is to gather and share information about organized criminal activity to improve the ability of MPD to respond to and prevent crime. At the time of the audit, the Intelligence Fusion Division had 63 full-time employees, with 36 employees assigned or detailed to the CIB. The CIB had two undercover officers assigned to conduct First Amendment investigations and three staff members to monitor websites, manage investigations, and write annual reports on MPD First Amendment investigation activities. The remaining CIB members were assigned to other tasks.

The Criminal Intelligence Branch provided the Auditor with a memorandum dated November 21, 2011, that listed 28 First Amendment investigations conducted between January 2005 and November 21, 2011.

Results

MPD DID NOT PROPERLY AUTHORIZE 16 OF 20 FIRST AMENDMENT INVESTIGATIONS

The implementing regulations for the Act, specifically, D.C. Mun. Regs. Title 24, § 2705.5 (2011), provide that:

A full investigation must be authorized in writing by the Executive Director, Intelligence Fusion Division, or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander), upon a written recommendation setting forth the facts or circumstances that create a reasonable suspicion that a criminal act has been, is being or will be committed; and describing the relevance of the First Amendment activities to the recommended investigation. [Auditor's emphasis]

The Act and the implementing regulations provide which MPD members can authorize a full investigation into First Amendment activities. As such, we relied on the Act and the regulations to determine whether MPD properly authorized First Amendment investigations.

The Criminal Intelligence Branch (CIB) provided us with a memorandum dated November 21, 2011, that indicated that MPD had conducted 28 First Amendment investigations between January 2005 and November 21, 2011. Of the 28 First Amendment investigations, one investigation was open at the time of our review and not included in the investigations we reviewed.

We reviewed CIB's First Amendment investigation files to determine whether a full investigation was authorized in writing by the Executive Director, Intelligence Fusion Division, or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander). Figure Two presents the results of ODCA's review of the 27 MPD First Amendment investigations conducted between January 2005 and November 2011.

Figure Two – ODCA Review of 27 MPD First Amendment Investigations (January 2005 through November 2011)

Condition of Authorization	Number of Investigations
Properly Authorized	4
File purged	7
No signature Demonstrating Authorization as required by the Act and 24 DCMR Chapter 27	8
Not signed by Party with Appropriate Rank or Title as provided in D.C. Code or D.C. Municipal Regulations	8
Totals	27

Properly Authorized Investigations - We determined that four investigation files contained authorization memos with the signatures of either the Executive Director, Intelligence Fusion Division, or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander).

Purged Files - We determined that seven First Amendment investigative files had been completely purged of all records. These seven were the oldest files, consisting of investigations conducted from 2005-2006. The Lieutenant in charge of First Amendment investigations stated that MPD purged investigative files in accordance with D.C. Code § 5-333.11(g) (2011), which provides “[t]he Chief of Police or his designee shall periodically review information contained in Intelligence Section files and purge records that are not accurate, reliable, relevant, and timely.”

The Act did not define the terms “accurate, reliable, relevant or timely.” As such, the meaning of “accurate, reliable, relevant or timely” is subject to interpretation. Based on our review, MPD interpreted “accurate, reliable, relevant or timely” to mean that MPD could purge the investigative files at the end of each investigation.

While the Act became effective in 2005, this is the first ODCA audit of MPD files and records. The Auditor acknowledges that if required audits had been conducted each year since 2005, MPD's practice of purging investigative files would have been discovered and addressed earlier. However, MPD's purging of investigative files significantly impaired the Auditor's ability to determine whether MPD complied with applicable laws and regulations.

Since the investigative files were purged, the Auditor could not determine whether MPD properly authorized seven First Amendment investigations.

Improper Authorization of MPD First Amendment Investigations – In violation of D.C. Mun. Regs. Title 24, § 2705.5 (2011), 16 MPD First Amendment Investigations files did not include approval signatures of the Executive Director, Intelligence Fusion Division, or the appropriate supervisor of similar rank, including the Watch Commander for the Intelligence Fusion Division (who possesses the same authority as the Commander).

Specifically, we found that eight investigation files contained approval signatures by the Lieutenant in charge of First Amendment investigations. This Lieutenant lacked the authority to approve a MPD First Amendment investigation. Additionally, we found that eight different investigation files contained justification memoranda that included the names of attending panel members, including those authorized to approve First Amendment investigations. However, none of the eight memoranda contained the required signatures to authorize the investigations.

MPD did not fully comply with all District laws and regulations regarding obtaining authorization for First Amendment investigations.

We recommend that the Metropolitan Police Department Chief of Police:

1. **Develop written Standard Operating Procedures that are consistent with the laws and regulations for authorizing preliminary and full First Amendment investigations. At a minimum, the Standard Operating Procedures should require the responsible official to affirm in writing that the First Amendment investigation was authorized. This authorization should include the authorizing official's printed name, position title, signature, and date signed.**
2. **Develop Standard Operating Procedures that outline the MPD's policy on purging investigative files. This Standard Operating Procedure should define the terms "accurate, reliable, relevant, and timely", as provided in the laws and regulations, and include the process MPD will employ to identify and remove information that MPD considers is not "accurate, reliable, relevant, and timely".**
3. **Develop Standard Operating Procedures that provide the Auditor with access to MPD's files and records to conduct audits of MPD's investigations of First Amendment activities. The Standard Operating Procedures should define documentation that must remain in the First Amendment investigation files to verify that MPD properly authorized preliminary and full investigations.**

MPD DID NOT OBTAIN WRITTEN APPROVAL AND AUTHORIZATION FOR THE USE OF UNDERCOVER OFFICERS IN 17 FIRST AMENDMENT INVESTIGATIONS

In pertinent part, D.C. Code § 5-333.07(e) (2011), provides that undercover officers may be used in ". . . **an authorized investigation** involving First Amendment activities, after **written approval and authorization** is obtained from the Chief of Police or [her] designee." (alteration to original)

For the 17 full investigations for which MPD used undercover officers, the corresponding 17 investigation files did not include documentation that the Chief of Police or her designee provided written approval and authorization for the use of undercover officers as required. Additionally, MPD was unable to produce written evidence that the Chief of Police had formally and in writing designated her authority to authorize the use of undercover officers. Under the Act, the Chief of Police is not required to indicate in writing her designee(s) to authorize the use of undercover officers. However, without written designation neither MPD nor the Auditor can verify the individuals who were designated to authorize the use of undercover officers.

The Lieutenant stated that it was his recollection that the former Chief of Police made an oral delegation of authority in 2005. Further, the MPD General Counsel was unaware if a written delegation was prepared or necessary. The Lieutenant informed us that it is the practice of CIB to include a request for the use of undercover officers within the Request for Investigation Memorandum. Further, the Lieutenant stated that the authorizing official's signature on the front of the memorandum was considered sufficient to authorize both the investigation and the use of undercover officers.

For the authorizing official's signature on the front of the memorandum to have been sufficient to authorize the investigation and the use of undercover officers to be acceptable, the Chief of Police should have designated the same MPD members who approved a preliminary or full investigation as being authorized to approve the use of undercover officers. We found no documentation that would indicate such a designation took place. As such, we concluded that the use of undercover officers was not properly authorized in 17 First Amendment investigations.

We recommend that the Metropolitan Police Department Chief of Police:

- 4. Designate, in writing, those MPD members who may, in the absence of the Chief of Police's signature, authorize the use of undercover officers in conjunction with MPD's investigations of First Amendment activities.**
- 5. Develop Standard Operating Procedures for requesting and authorizing the use of undercover officers that clearly document approval to use undercover officers in the investigation.**

MPD DID NOT PROPERLY DOCUMENT TRAINING OF CRIMINAL INTELLIGENCE BRANCH MEMBERS

The Act provides that:

The rules issued under subsection (a) of this section shall require that all members assigned to the Intelligence Section, Special Investigations Branch, attend training on this subchapter and the rules. The rules shall require that all members of the Intelligence Section sign an acknowledgement that they have received, read, understood, will abide by, and will maintain a copy of this subchapter and the rules.⁴

The implementing regulations for the Act in D.C. Mun. Regs. Title 24, §§ 2709.1- 2709.2 (2011) provide respectively that:

MPD shall require all members assigned to the Intelligence Section, Intelligence Fusion Division, to attend training on the Police Investigations Concerning First Amendment Act of 2004 and the rules promulgated to implement the Act.

MPD shall require all members assigned to the Intelligence Section, Intelligence Fusion Division, to sign an acknowledgement that they have received, read, understood, will abide by, and will maintain a copy of this Act and the rules promulgated to implement it.

We requested documentation to demonstrate that MPD had provided CIB members training on conducting First Amendment investigations and that MPD obtained signed acknowledgements. The CIB provided us with a PowerPoint presentation, and signed acknowledgements. Additionally, the Lieutenant in charge of First Amendment investigations stated that all CIB members received approximately one hour of classroom training on First Amendment investigations and preliminary inquiries and related MPD standard operating procedures.

According to the Lieutenant in charge of First Amendment investigations, the PowerPoint presentation, entitled "First Amendment Assemblies", covered the requirements of the Act. Additionally, the Lieutenant stated that the presentation was available to all CIB members through the internet. We reviewed the presentation to determine whether the contents of the presentation were consistent with the requirements of the law.

⁴ D.C. Code § 5-333.08(c)(2011)

The topics presented in the "First Amendment Assemblies" presentation were:

- (1.) Definition of a First Amendment Assembly;
- (2.) DC ST § 5-331: First Amendment Rights and Police Standards;
- (3.) Restrictions on First Amendment Assemblies;
- (4.) Issuance of Plans for First Amendment Assemblies;
- (5.) MPD Response to First Amendment Assemblies;
- (6.) Fourteenth Amendment;
- (7.) Arrest and Encirclement;
- (8.) Seizure;
- (9.) Search Issues;
- (10.) Arrest Documentation during First Amendment Assemblies;
- (11.) Eighth Amendment;
- (12.) Use of Restraints during First Amendment Assemblies;
- (13.) Timeliness of Release;
- (14.) Written Notice of Release Options;
- (15.) Post and Forfeit Procedures;
- (16.) Media Access to First Amendment Assemblies;
- (17.) The Office of Police Complaints;
- (18.) Investigation of Political Activity and Organizations;
- (19.) Files and Records of Political Activity and Organizations;
- (20.) Uniform and Identification Requirements;
- (21.) Training for, Handling and Response to First Amendment Assemblies;
- (22.) Civil Rights Act of 1963 Section 1983;
- (23.) Civil Rights Act of 1963 Section 1983 and the Police Standards Act of 2004;

Of the 23 topics provided in the presentation, only three topics (Definition of a First Amendment Assembly, Investigation of Political Activity and Organizations, and Files and Records of Political Activity and Organizations) addressed the requirements of the Act. The presentation did not address other important issues such as: (1) authorizing, conducting, monitoring and terminating investigations and preliminary inquiries; or (2) the maintenance, dissemination, and purging of records, files and information from First Amendment investigations.

Additionally, MPD could not provide attendance logs or other documentation to verify that MPD provided the training, the dates that MPD provided the training and the names of CIB staff who attended the training.

We recommend that the Metropolitan Police Department Chief of Police:

6. Develop Standard Operating Procedures that require MPD to provide MPD staff members, who investigate First Amendment activities, initial and refresher training regarding:

a. authorizing, conducting, monitoring and terminating investigations and preliminary inquiries; and

b. the procedures or rules for conducting investigations and preliminary inquiries and the maintenance, dissemination, and purging of records, files and information in connection with First Amendment investigations.

7. Develop a curriculum, training agenda, and attendance documentation that would allow MPD and the Auditor to be able to determine: (1) what First Amendment training MPD provided; (2) dates when MPD provided the First Amendment training; and (3) the names of MPD members that attended the First Amendment training.

INVESTIGATION FILES DID NOT CONTAIN THE REQUIRED CORROBORATION STATEMENT

D.C. Code §5-333.11(a) (2011) provides that:

Information to be retained in an Intelligence Section file shall be evaluated for the reliability of the source of the information and the validity and accuracy of the content of the information prior to filing. **The file shall state whether the reliability, validity, and accuracy of the information have been corroborated.** [Auditor's emphasis]

The regulations implementing the Act add the requirements that “. . . [t]he Chief of Police or designee shall purge records that are not accurate, reliable, relevant, and timely.” D.C. Mun. Regs. Title 24, § 2707.1 (2011)

We determined that for the 27 First Amendment investigations we reviewed, 18 contained a case review document that indicated that MPD performed a file review. However, none of the 27 investigative files contained an explicit statement that MPD corroborated **the reliability, validity, and accuracy** of the investigative information. [Auditor's emphasis]

Though we acknowledge that MPD may have performed case reviews, we observed that many of the file review forms were incomplete. Specifically, some of the file review forms did not contain a narrative or description of the file review results, were not dated, and did not contain the printed name and signature of the person who performed the file review. As such, the Auditor could not determine what MPD accomplished during the file review.

The Lieutenant stated that no information was included in the investigation files unless MPD determined that the information was accurate, reliable, relevant, and timely. Regardless of the Lieutenant's assertion, the investigation files did not contain a statement of the reliability, validity, and accuracy of the information contained therein, as required by D.C. Code §5-333.11(a) (2011). As a result, MPD did not comply with the requirements of the Act.

We recommend that the Metropolitan Police Department Chief of Police:

8. Develop Standard Operating Procedures for First Amendment investigation file reviews. At a minimum, the Standard Operating Procedures should provide: (1) the name, title, and signature of the person performing the investigation file review; (2) the dates MPD conducted the investigation file review; and (3) a narrative description of the results of the investigative file review.

9. Develop Standard Operating Procedures that require MPD to review First Amendment investigations prior to filing and include within the investigative file a statement that MPD has corroborated the reliability, validity, and accuracy of the investigation information.

MPD DID NOT PROPERLY REVIEW THREE FIRST AMENDMENT INVESTIGATIONS THAT EXCEEDED 90 DAYS

D.C. Code § 5-333.12(a) (2012) provides that “[a]uthorizations of investigations and preliminary inquiries involving First Amendment activities are to be reviewed every 90 days by a panel of **no fewer than 3 MPD commanding officers designated by the Chief of Police.**” [Auditor’ emphasis]

D.C. Mun. Regs. Title 24, § 2705.7 (2011) provides that [a]uthorizations shall be reviewed, every 2 months, by a panel consisting of the Assistant Chief, Intelligence Fusion Bureau, Executive Director, Intelligence Fusion Division, commanding officer of the Intelligence Section and **the General Counsel**, before the expiration of the period for which the investigation or any renewal thereof, has been authorized. [Auditor’s emphasis]

In addition to the requirement provided in D.C. Code § 5-333.12(a) (2012) that “. . . no fewer than 3 MPD commanding officers designated by the Chief of Police.”; D.C. Mun. Regs. Title 24, § 2705.7 (2011) requires that the panel include one additional member, the MPD General Counsel.

According to the MPD memorandum dated November 21, 2011, there were three investigations that lasted more than 90 days.⁵ In our review of these three investigations, the Auditor acknowledges that MPD convened panels to review each of the three investigations. However, the composition of these panels did not always meet the requirements of the governing law and regulations. Three MPD **commanding officers** were not always present for the reviews as required by the Act. Further, we found that the General Counsel was not always present for the panels as required by the regulations.

To further promote transparency and accountability, MPD should ensure that three MPD Commanding Officers and the General Counsel are present for the two month reviews.

⁵ There were 28 total First Amendment Investigations; however, 7 had been purged and not available for review. One investigation was “open” at the time of our review and, therefore, not included in our review.

We recommend that the Metropolitan Police Department Chief of Police:

10. Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations at least every 90 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, review results, and the documenting of review panel attendance and approval.

MPD FAILED TO PROPERLY APPROVE TWO INVESTIGATIONS THAT EXCEEDED 120 DAYS

D.C. Code § 5-333.05(d)(2) (2011) provides that:

If the MPD seeks to continue an investigation past 120 days, a new memorandum and approval shall be obtained for each subsequent 120-day period. The new memorandum shall describe the information already collected and demonstrate that an extension is reasonably necessary to pursue the investigation.

Our review of MPD records found that two of the 27 investigations continued past 120 days. For one of these two investigations, the investigation file did not include a new memorandum and approval to continue the investigation past 120 days.

The other investigation exceeded 240 days and therefore required a new memorandum and approvals authorizing the extension of the investigation. A new memorandum authorizing an extension after the 120-day review was present; however, MPD records did not include a new memorandum authorizing an extension for the subsequent 120 day period.

We found that MPD failed to properly comply with the requirements of the Act. MPD should establish and implement procedures to obtain the required memorandum and approval authorizing investigations past 120 days.

We recommend that the Metropolitan Police Department Chief of Police:

11. Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations that exceed 120 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, and the documenting of review panel attendance and review results.

WE WERE UNABLE TO DETERMINE WHETHER MPD COMPLIED WITH THE REQUIREMENTS OF D.C. CODE § 5-333.08(b).

D.C. Code § 5-333.08(b)(2011) provides that:

The rules issued under subsection (a) of this section shall require MPD to direct undercover officers and informants to refrain from:

- 1) Participating in unlawful acts or threats of violence;
- 2) Using unlawful techniques to obtain information;
- 3) Initiating, proposing, approving, directing, or suggesting unlawful acts or a plan to commit unlawful acts;
- 4) Being present during criminal activity or remaining present during unanticipated criminal activity, unless it has been determined to be necessary for the investigation;
- 5) Engaging in any conduct the purpose of which is to disrupt, prevent, or hinder the lawful exercise of First Amendment activities;
- 6) Attending meetings or engaging in other activities for the purpose of obtaining legally privileged information, such as attorney-client communications or physician-patient communications; and
- 7) Recording or maintaining a record concerning persons or organizations who are not a target of the investigation or preliminary inquiry, unless the information is material to the investigation or preliminary inquiry, or the information would itself justify an investigation or preliminary inquiry under this subchapter.

In our review of the 17 First Amendment investigations for which undercover officers were used, we found that none of the investigation files contained status reports or any other communications from undercover officers that detailed the actions and activities of undercover officers while performing First Amendment investigations.

We were able to conduct one interview with an undercover officer assigned to First Amendment investigations. According to the undercover officer, MPD did not issue written instructions. Further, the undercover officer stated that written reports were not routinely submitted. The undercover officer checked in multiple times during the day via the telephone. Additionally, the undercover officer had weekly face-to-face meetings with a superior officer and submitted emails to a MPD superior officer. The undercover officer stated that these emails were usually sent to share specific pieces of information rather than provide a status and description of investigative activity.

Undercover Officers' Emails - We requested copies of emails sent from undercover officers to their superior officers. The purpose of our request was to determine whether the emails contained a written description of the undercover officers' actions during First Amendment investigations.

MPD agreed to provide the emails to the Auditor. However, to protect the identities of the undercover officers, MPD indicated that they would redact the emails. Upon receipt of the redacted emails, we observed that MPD redacted the names of the undercover officers, all dates, places, addresses, and the names of the events or marches. The condition of the redacted emails was such that we could not effectively determine what actions the undercover officers took while conducting First Amendment investigations.

The Auditor objected to the breadth of MPD's redaction. We requested full access to the requested emails. We informed MPD that Generally Accepted Government Auditing Standards required us to obtain sufficient and appropriate evidence to reach conclusions related to our audit objectives. Our objective in this audit was to make a determination regarding MPD's compliance with the Act. We further informed MPD that the Act requires the Auditor to protect the confidentiality of MPD files and records.

In an effort to address MPD's concerns regarding the protection of the identity of undercover officers, we offered to sign a confidentiality agreement pledging to protect the identities of undercover officers and not publish any information that could reveal their identities. Despite our offer, MPD refused to provide the Auditor full access to the emails.

Given the nature of undercover work, it is vital that MPD protect the identities of undercover officers. However, Generally Accepted Government Auditing Standards require the Auditor to obtain sufficient and appropriate evidence to make determinations and conclusions. As such, we were required to review documentation regarding the activities of undercover officers to determine whether the activities complied with the provisions of the Act.

In the absence of documentary evidence, the Auditor could not determine whether the activities of undercover officers were consistent with the Act.

We recommend that the Metropolitan Police Department Chief of Police:

12. Develop Standard Operating Procedures that require undercover officers to provide regular, routine and periodic status reports on the details of undercover activities conducted while performing First Amendment investigations.

13. Revise the record keeping and purging policies of the Metropolitan Police Department to allow the Auditor access to pertinent and relevant documents and records so that the Auditor can determine whether MPD complied with applicable laws when conducting First Amendment investigations.

Conclusion

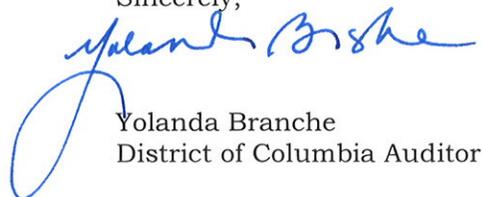
The Auditor found that the Metropolitan Police Department (MPD) did not fully comply with all of the requirements of the "Police Investigations Concerning First Amendment Activities Act of 2004" (the Act), when authorizing and conducting investigations of First Amendment investigations and activities. Additionally, MPD did not develop and implement adequate internal controls for conducting and documenting First Amendment investigations.

While the audit included a review of most MPD First Amendment activities, the Auditor could not conduct a complete review of the First Amendment activities of undercover officers. Specifically, we found that none of the MPD investigative files contained status reports or other communications from undercover officers that detailed the activities of undercover officers during First Amendment investigations. MPD did not issue written instructions to undercover officers and undercover officers did not routinely submit written reports. However, undercover officers submitted emails to their superior officers.

The Auditor requested full access to emails sent from undercover officers to their superior officers to determine whether the emails contained a description of the undercover officer's actions during First Amendment investigations. MPD denied the Auditor's request for full access to emails from undercover officers to their superior officers. As a result, the Auditor lacked the necessary documentation to determine whether the First Amendment investigation activities of undercover officers were consistent with the requirements of the Act.

In conclusion, it is important to note that MPD made an effort to fully comply with the requirements of the Act. However, providing the Auditor with full access to emails from undercover officers to their superior officers would have further increased public trust and confidence in the operations of MPD. Additionally, full access to emails from undercover officers to their superior officers would have provided the Auditor with the necessary documentation to determine whether the First Amendment activities of undercover officers were consistent with the Act.

Sincerely,



Yolanda Branche
District of Columbia Auditor

Agency Comments

On August 24, 2012, the District of Columbia Auditor submitted the draft report titled, "*Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities*" to the Metropolitan Police Department Chief of Police.

The Auditor received written comments from the Metropolitan Police Department Chief of Police on September 24, 2012. On September 26, 2012, the Auditor submitted written comments to address concerns that the Metropolitan Police Department Chief of Police indicated in MPD's responses. The Metropolitan Police Department Chief of Police's responses and the District of Columbia Auditor's responses are attached to this report.



GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT

September 24, 2012

Yolanda Branche
District of Columbia Auditor
717 14th Street, N.W., Suite 900
Washington, D.C. 20005

Dear Ms. Branche:

This is in response to your letter of August 24, 2012, requesting responses, if any, to the proposed recommendations resulting from the ongoing audit by the Office of the District of Columbia Auditor (ODCA) of Metropolitan Police Department (MPD) investigations involving First Amendment activities pursuant to the Police Investigations Concerning First Amendment Activities Act of 2004 (the "Act"), D.C. Law 15-352, 52 DCR 2296, April 13, 2005; *codified at* D.C. Official Code §5-333.01, *et seq.* (2008 Repl.). This ODCA audit is the first annual audit conducted under the Act, notwithstanding that the Act became effective in 2005.

Your letter described the policy of soliciting comments on draft reports from directly affected agencies before release of the final report. You asked that written comments be submitted no later than September 24, 2012. Please accept this letter as my written comments to the draft report. I understand that these comments will be incorporated into the final audit report. A copy of our comments is in the attached Audit Report Recommendations Summary.

Although we are prepared to adopt each recommendation in the draft report, we remain concerned with the wording of the headings and findings set forth in the section entitled "Results." As discussed during the exit conference of September 18, 2012, MPD believes that it acted in good faith in order to meet the requirements of the law and has satisfied those standards. However, it appears that MPD may not have done so to the satisfaction of the standards utilized by the D.C. Auditor. Had we known of the auditing standards and expectations back in 2005 when the Act went into effect, or in any of the intervening six years during which time no audit was performed, these issues would have been addressed earlier.

ODCA recognized that although the Act became effective in 2005, this is the first audit they have undertaken. If the audits had been initiated each year as required by the Act, MPD would have been notified of the perceived deficiencies from an audit standpoint as far back as 2006, and would have corrected the problems immediately (*i.e.*, lack of signatures affixed to the memoranda documenting case initiations, case reviews and determinations to continue the investigations; more detailed description of training courses and recordation of attendance; etc.

Thus, despite the Auditor's own six-year failure to comply with the law, the tone and tenor of the audit unfairly criticizes MPD for failing to meet audit criteria of which it was not aware. Although MPD took reasonable steps to initiate, conduct, extend, close and memorialize actions taken consistent with its authority to conduct investigations involving First Amendment activities under the Act and the implementing rules, it is unnecessarily being held to a higher standard based solely on criteria utilized by the Auditor, standards that were never communicated to the Department prior to this audit.

More troubling than the six-year failure to communicate its standards to the Department was the hidden agenda and lack of objectivity of one of ODCA's auditors. ODCA acknowledged on page 8 of the draft report under the heading "MPD Notification of Potential Threat to ODCA Independence," that the actions of one of the auditors having preconceived ideas and biases which impaired the objectivity of the audit was reported to ODCA on June 8, 2012. The ODCA conducted an inquiry to determine whether the actions of the audit team member in question had compromised independence. The goal of the inquiry was to determine whether:

1. the member of the audit team in question, engaged in activity that would in fact impair their independence or would give a third party the perception that their independence had been compromised;
2. the audit team member's contribution was significant enough to warrant an actual declaration of independence and impairment; and
3. the Auditor had implemented reasonable safeguards to address threats to independence.

*Draft Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities, Office of the District of Columbia Auditor, August 2012, page 9.*¹

ODCA found that the auditor in question "executed an inaccurate independence statement" and "the statement was false because the audit team member . . . was not free from personal impairments to independence." *Id.* As a result ODCA immediately removed that person from the task and she was "reprimanded and penalized to the full extent of District personnel rules and regulations." *Id.* The report then asserts that "the audit supervisor and auditor-in-charge reviewed all of the audit work to ensure compliance with applicable audit standards and ODCA audit policies." ODCA "concluded that the team member did not develop any findings or recommendations. Additionally, the audit team member was not involved in writing the audit report. As

¹ "According to [*Generally Accepted Government Auditing Standards*] GAGAS, threats to independence are not acceptable if the threat "could expose the auditor or audit organization to circumstances that would cause a reasonable and informed third party to conclude that the integrity, objectivity, or professional skepticism of the audit organization, or a member of the audit team, had been compromised." Additionally, GAGAS requires government auditors to evaluate identified threats to independence in accordance with the conceptual framework." *Id.*

such, the contribution of the audit team member . . . did not have a significant impact on the audit fieldwork, findings or recommendations.” *Id.* at 10.

These conclusions on independence do not seem properly grounded. During the fieldwork period, MPD observed the audit team members divide the case jackets among the three team members (including the team member in question), review the files, and take notes concerning contents of the jackets. In addition, MPD observed the auditor in question being solely responsible for reviewing what may be the majority of the case jackets. At the end of the case review fieldwork, the auditors had flagged certain documents for duplication and production. As a result of having several different auditors separately reviewing the files, the team members inconsistently identified documents from each case jacket. Nevertheless, the requested copies were provided to the auditors in redacted fashion.

Even after the ODCA learned about and acknowledged the above misconduct, it failed to reopen the audit to redo the fieldwork, and specifically failed to provide another review of the case jackets or to review the email messages that would be less heavily redacted in light of the removal of the dishonest audit team member. This leads me to believe that ODCA relied upon the compromised audit team member’s notes and whatever redacted documents that member requested in developing its report. This cannot help but to call into question the independence of the audit its conclusions still rest upon the compromised team member’s fieldwork.

I hold this opinion despite assurances made by Gregory Spencer at the exit conference that the remaining audit team members were able to use the redacted copies of the case jackets to support the conclusions. I base this on earlier communication from Joshua Stearns to Lieutenant Michael Pavlik that the copies of the case jackets and email messages were so heavily redacted that the audit team “would be unable to complete our analysis of MPD compliance with the law, which is the stated purpose of the audit.” See February 6, 2012 email message from Joshua Stearns to Lieutenant Pavlik.

As offered previously, and given the removal of the compromised auditor from the audit team, the Department again maintains its proposal to share less-heavily redacted versions of these documents to assist with the audit. In addition, within the framework that I have outlined above, we remain open to any other ideas that the Auditor has on a mutually acceptable compromise, and I and my colleagues will make ourselves available to you and to the Auditor’s counsel as may be helpful in achieving such an outcome.

Sincerely,


Cathy L. Lanier
Chief of Police

Attachment: Audit Report Recommendation Summary (12 pages)

**Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities
Audit Report Recommendations Summary**

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>I. MPD should develop written Standard Operating Procedures that are consistent with the laws and regulations for authorizing preliminary and full First Amendment investigations. At a minimum, the Standard Operating Procedures should require the responsible official to affirm in writing that the First Amendment investigation was authorized. This authorization should include the authorizing official's printed name, position title, signature, and date signed.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch has consistently gone far beyond what is required by the Act. The law has a number of points where decisions can be made by a single person. In addition, the law does not restrict the ability to authorize case continuations in periods less than 90 or 120 days. The Branch exceeded these requirements and followed a consistent procedure where all decisions regarding the authorization to open or continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers as needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the opening of the investigations. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets. Although each meeting at which the panels considered requests to initiate or continue such investigations was documented in a memorandum, the Executive Director of the Intelligence Fusion Division did not personally sign all of the memorandums that were prepared. In every case, however, the Executive Director did give verbal approval for initiation or continuation of all of the investigations. Each of the panel members also indicated approval.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>2. MPD should develop written Standard Operating Procedures that outline the MPD's policy on purging investigative files. This Standard Operating Procedure should define the terms "accurate, reliable, relevant, and timely", as provided in the laws and regulations, and include the process MPD will employ to identify and remove information that MPD considers is not "accurate, reliable, relevant, and timely."</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch has consistently gone far beyond what is required by the Act. The law has a number of points where decisions can be made by a single person. In addition, the law does not restrict the ability to authorize case continuations in periods less than 90 or 120 days. The Branch exceeded these requirements and followed a consistent procedure where all decisions regarding the authorization to open or continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers as needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the opening of the investigations. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets. Although each meeting at which the panels considered requests to initiate or continue such investigations was documented in a memorandum, the Executive Director of the Intelligence Fusion Division did not personally sign all of the memorandums that were prepared. In every case, however, the Executive Director did give verbal approval for initiation or continuation of all of the investigations. Each of the panel members also indicated approval.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>3. MPD should develop written Standard Operating Procedures that provide the Auditor with access to MPD's files and records to conduct audits of MPD's investigations of First Amendment activities. The Standard Operating Procedures should define documentation that must remain in the First Amendment investigation files to verify that MPD properly authorized preliminary and full investigations.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch has consistently gone far beyond what is required by the Act. The law has a number of points where decisions can be made by a single person. In addition, the law does not restrict the ability to authorize case continuations in periods less than 90 or 120 days. The Branch exceeded these requirements and followed a consistent procedure where all decisions regarding the authorization to open or continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers as needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the opening of the investigations. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets. Although each meeting at which the panels considered requests to initiate or continue such investigations was documented in a memorandum, the Executive Director of the Intelligence Fusion Division did not personally sign all of the memorandums that were prepared. In every case, however, the Executive Director did give verbal approval for initiation or continuation of all of the investigations. Each of the panel members also indicated approval.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>4. MPD should designate, in writing, those MPD members who may, in the absence of the Chief of Police's signature, authorize the use of undercover officers in conjunction with MPD's investigations of First Amendment activities.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch has consistently gone far beyond what is required by the Act. The law has a number of points where decisions can be made by a single person. In addition, the law does not restrict the ability to authorize case continuations in periods less than 90 or 120 days. The Branch exceeded these requirements and followed a consistent procedure where all decisions regarding the authorization to open or continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers if needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the use of undercover officers. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets.</p> <p>Although each meeting at which the panels considered requests to initiate or continue such investigations was documented in a memorandum, the Executive Director of the Intelligence Fusion Division did not personally sign all of the memorandums that were prepared. In every case, however, the Executive Director did give verbal approval for initiation or continuation of all of the investigations. Each of the panel members also indicated approval.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>5. MPD should develop written Standard Operating Procedures for requesting and authorizing the use of undercover officers that clearly document approval to use undercover officers in the investigation.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch has consistently gone far beyond what is required by the Act. The law has a number of points where decisions can be made by a single person. In addition, the law does not restrict the ability to authorize case continuations in periods less than 90 or 120 days. The Branch exceeded these requirements and followed a consistent procedure where all decisions regarding the authorization to open or continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers if needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the use of undercover officers. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets.</p> <p>Although each meeting at which the panels considered requests to initiate or continue such investigations was documented in a memorandum, the Executive Director of the Intelligence Fusion Division did not personally sign all of the memorandums that were prepared. In every case, however, the Executive Director did give verbal approval for initiation or continuation of all of the investigations. Each of the panel members also indicated approval.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>6. MPD should develop Standard Operating Procedures that require MPD to provide MPD staff members who investigate First Amendment activities initial and refresher training regarding:</p> <ul style="list-style-type: none"> a) authorizing, conducting, monitoring and terminating investigations and preliminary inquiries; and b) the procedures or rules for conducting investigations and preliminary inquiries and the maintenance, dissemination, and purging of records, files and information in connection with First Amendment investigations. 	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that all Intelligence Branch members have been trained regarding the Act and implementing rules and unit standard operating procedures. At the time of each training session, the members were issued a copy of the Act and rules as well as the standard operating procedures. In the draft report the Auditor cites the PowerPoint and SiTELMS training that all members of the department must complete. However, members assigned to the Criminal Intelligence Branch are regularly trained in all aspects of the Act, Municipal Regulations and our standard operating procedures. This training takes about 60-90 minutes to conduct after which the members who attended the training sign for a copy of the Act as well as the Municipal Regulations. Signature rosters have been provided to the Auditor.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>7. MPD should develop a curriculum, training agenda, and attendance documentation that would allow MPD and the Auditor to be able to determine: (1) what First Amendment training MPD provided, (2) the dates when MPD provided the First Amendment training, and (3) the names of MPD members that attended the First Amendment training.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that all Intelligence Branch members have been trained regarding the Act and implementing rules and unit standard operating procedures. At the time of each training session, the members were issued a copy of the Act and rules as well as the standard operating procedures. In the draft report the Auditor cites the PowerPoint and SiTELMS training that all members of the department must complete. However, members assigned to the Criminal Intelligence Branch are regularly trained in all aspects of the Act, Municipal Regulations and our standard operating procedures. This training takes about 60-90 minutes to conduct after which the members who attended the training sign for a copy of the Act as well as the Municipal Regulations. Signature rosters have been provided to the Auditor.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>8. MPD should develop Standard Operating Procedures for First Amendment investigation file reviews. At a minimum, the Standard Operating Procedures should provide: (1) the name, title, and signature of the person performing the investigative file review; (2) the dates MPD conducted the investigative file review; and (3) a narrative description of the results of the investigative file review.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch goes above and beyond what the Act and rules require. No information was entered into the file unless it had been determined to be accurate, reliable, relevant, and timely. The draft report refers to file reviews in a number of areas. The MPD exceeded these requirements and followed a consistent procedure where all open cases were reviewed and authorization to continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers if needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the use of undercover officers. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets.</p> <p>However, that the statement regarding corroboration was not noted in or on the case jacket.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>9. MPD should develop Standard Operating Procedures that require MPD to review First Amendment investigations prior to filing and include within the investigative file a statement that MPD has corroborated the reliability, validity, and accuracy of the investigative information.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that the Intelligence Branch goes above and beyond what the Act and rules require. No information was entered into the file unless it had been determined to be accurate, reliable, relevant, and timely. The draft report refers to file reviews in a number of areas. The MPD exceeded these requirements and followed a consistent procedure where all open cases were reviewed and authorization to continue the cases was done every two months by a panel of 3 MPD members, including the General Counsel (or his representative in case of absence). The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers if needed. The panel discussed the case merits and voted as to whether each case was warranted. In each case the Executive Director of the Intelligence Fusion Division verbally approved the use of undercover officers. This meeting, its participants and the subsequent approvals were memorialized as well as noted in the case jackets.</p> <p>However, that the statement regarding corroboration was not noted in or on the case jacket.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>10. MPD should develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations at least every 90 days. At a minimum, these Standard Operating Procedures should provide for required attendance, review requirements, review results, and the documenting of attendance and approval.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that in each of the three cases identified by the Auditor the panel consisted of 3 MPD members, including the General Counsel (or his representative in case of absence) and met approximately every 60 days instead of 90. The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. Included in the requests was the use of undercover officers where warranted. The panel discussed the case merits and voted as to whether each case was approved to be continued. In each case the Executive Director of the Intelligence Fusion Division and all other panel members verbally approved the extensions of the investigations. This meeting, its participants and the subsequent approvals of extensions were memorialized on the memos as well as noted in the case jackets.</p> <p>Additionally, the report states that they found that the General Counsel was not always present during the panel reviews. We went through the files and there was always a General Counsel member at all of the reviews.</p> <p>However, on three of the case reviews there were only two commanding officers, a supervisor and the General Counsel in attendance.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>11. MPD should develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations that exceed 120 days. At a minimum, these Standard Operating Procedures should provide for required attendance, review requirements, and the documenting of attendance and review results.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that in the two cases identified by the Auditor the panel consisted of 3 MPD members, including the General Counsel (or his representative in case of absence) and met approximately every 60 days instead of 90. The panel was convened to consider facts and circumstances related the reasonable suspicion that a criminal act has been, is being or will be committed; it was also provided with an explanation about how that activity had relevance to First Amendment activities. The panel discussed the case merits and voted as to whether each case was approved to be continued. In each case the Executive Director of the Intelligence Fusion Division and all other panel members verbally approved the extensions of the investigations. This meeting, its participants and the subsequent approvals of extensions were memorialized on the memos as well as noted in the case jackets. However, the memorandums did not specifically state that they were for a 120 day renewal.</p>	

Recommendation	Agency Agrees Date Agency will Implement Recommendation	Agency Disagrees Alternative Recommendation
<p>12. MPD should develop Standard Operating Procedures that require undercover officers to provide regular, routine and periodic status reports on the details of undercover activities conducted while performing First Amendment investigations.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD attempted to resolve this issue with the audit team through redacted emails. More recently MPD offered to permit review of the email messages that would be less heavily redacted in light of the removal of the dishonest audit team member. However, the audit team declined to review them in this fashion. In light of the Auditor's own admission that an audit team member had filed a false statement regarding their independence, MPD would have been unable to protect the undercover officer's identities had they allowed the audit team access to un-redacted emails.</p> <p>Additionally, MPD asserts that under the supervision of MPD officials, at no time did an undercover officer act in any manner inconsistent with the law. If such an infraction had occurred, the officer would have been disciplined and a copy of such discipline would have been included in the case jacket.</p>	
<p>13. MPD should revise the record keeping and record purging policies of the Metropolitan Police Department to allow the Auditor access to pertinent and relevant documents and records so that the Auditor can determine whether MPD complied with applicable laws when conducting First Amendment investigations.</p>	<p>Although MPD disagrees with the Auditors finding in this area, MPD agrees to implement the recommendation by 11/30/12</p> <p>MPD contends that at the conclusion of each case, the case jacket is purged of all documentation except for case initiations, reviews, close outs and criminal information. Keeping any additional information would not be in compliance with the act as once the case is closed the information is no longer relevant or timely.</p>	

Auditor's Response to MPD's Comments

The Auditor appreciates the comments provided by the Metropolitan Police Department on the draft report.

Specifically, the Auditor requested that the Chief of Police, Metropolitan Police Department:

- address each recommendation included in the report;
- indicate whether MPD agreed or disagreed with each recommendation;
- if MPD agreed with the recommendation, provide a timeframe for the implementation of the recommendation; and
- if MPD disagreed with the recommendation, suggest an alternative recommendation to address the audit finding.

MPD's comments were not consistent with the required format. As a result, it was difficult to determine whether MPD agreed or disagreed with the audit recommendations. However, the attached September 24, 2012, letter from the MPD Chief of Police, Cathy Lanier, includes the statement that "We are prepared to adopt each of the recommendations in the draft report ..." In addition to the September 24, 2012, letter from the Chief of Police, the September 26 response of the D.C. Auditor is also attached.

MPD accepted the audit recommendations but disagreed with the audit findings. Generally Accepted Government Auditing Standards (GAGAS) 7.28 provides that:

Auditors should recommend actions to correct deficiencies and other findings identified during the audit and to improve programs and operations when the potential for improvement in programs, operations, and performance is substantiated by the reported findings and conclusions. Auditors should make recommendations that flow logically from the findings and conclusions, are directed at resolving the cause of identified deficiencies and findings, and clearly state the actions recommended.

Our recommendations are a logical flow from the findings and conclusions directed at resolving the cause of identified deficiencies and findings, and clearly state the actions recommended. We are pleased that MPD agreed to accept all 13-audit recommendations.



Office of the District of Columbia Auditor

12:379:YB:cm

September 26, 2012

Ms. Cathy Lanier
Chief of Police
Metropolitan Police Department
300 Indiana Avenue, NW
Washington, D.C. 20001

Dear Chief Lanier:

This is in response to your letter of September 24, 2012, presenting the written comments of the Metropolitan Police Department (MPD) on the Office of the District of Columbia Auditor's (ODCA) draft report titled *Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities*, dated August 24, 2012. As you know, the review of MPD's investigations and preliminary inquiries involving First Amendment activities is a mandated, annual audit. Your letter presents issues pertaining to audit standards, ODCA independence and ODCA's review of emails that must be addressed.

Generally Accepted Government Auditing Standards

The September 24 letter includes the statement:

MPD believes that it acted in good faith in order to meet the requirements of the law and has satisfied those standards. However, it appears that MPD may not have done so to the satisfaction of the **standards utilized by the D.C. Auditor**.

The letter further states:

[MPD] is unnecessarily being held to a higher **standard based solely on criteria utilized** by the Auditor...

The audit objectives were to determine whether MPD complied with the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004 (the Act) and developed and implemented adequate internal controls to ensure compliance with provisions of the Act. ODCA conducted the audit in compliance with Generally Accepted Government Auditing Standards (GAGAS). GAGAS was developed by the United States Government Accountability Office. GAGAS is the generally accepted standard for auditors of government entities. GAGAS contains requirements and guidance dealing with ethics, independence, auditors' professional judgment and competence, quality control, performance of the audit and reporting. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our

audit objectives. ODCA used GAGAS standards during the First Amendment investigations audit and not ODCA generated standards which your letter implies. Therefore, your assertion that MPD was held to “a higher standard based solely on criteria utilized by the Auditor” is incorrect.

For example, we found that MPD did not obtain written approval and authorization for the use of undercover officers in 17 First Amendment investigations. The criteria for this finding was D.C. Code Section 5-333.07(e) (2011), which provides that undercover officers may be used in “an authorized investigation involving First Amendment activities, after written approval and authorization is obtained from the Chief of Police or [her] designee.” For the 17 full investigations for which MPD used undercover officers, the corresponding 17 investigative files did not include documentation that the Chief of Police or her designee provided written approval and authorization for the use of undercover officers as required. In compliance with GAGAS, ODCA obtained sufficient, appropriate evidence to provide a reasonable basis for this finding and conclusions based on the audit objectives.

Additionally, the September 24 MPD letter states:

[i]f the audits had been initiated each year as required by the Act, MPD would have been notified of the perceived deficiencies from an audit standpoint as far back as 2006, and would have corrected the problems immediately. . .

It is agreed that if the required audits had been conducted each year since 2006, many of the deficiencies could have been addressed earlier. However, the delay in conducting the audit does not mitigate the fact that it is the responsibility of the management of MPD to implement internal controls and processes to comply with applicable laws and regulations for conducting First Amendment investigations. MPD has an Office of the General Counsel, an Office of Risk Management, and various managers to assist with the implementation of the appropriate internal controls to ensure that MPD complies with applicable laws and regulations. The sole legislatively mandated responsibility of ODCA is to determine whether MPD complied with applicable laws and regulations for conducting First Amendment investigations.

In the September 24 letter, MPD further states, “. . .we are prepared to adopt each of the [13] recommendations in the draft report.” The audit recommendations address weaknesses in MPD’s internal controls and processes for conducting and documenting First Amendment investigations. The recommendations are also designed to bring MPD into full compliance with the requirements of the law. We are pleased that MPD agreed to accept the audit recommendations.

Independence of the Office of the District of Columbia Auditor

Regarding the potential threat to the independence of ODCA in conducting the audit, on October 20, 2011, ODCA began the MPD First Amendment investigations audit. Our audits follow three basic phases: survey, fieldwork, and reporting. During the fieldwork phase, auditors work to obtain an in-depth understanding of the issues. At the end of fieldwork, auditors meet with agency management to discuss findings. When fieldwork is completed the audit team prepares the draft audit report.

On June 5, 2012, ODCA auditors met with MPD to discuss the findings. On June 8, 2012, at the request of MPD a second meeting was held. At this second meeting, MPD stated that a member of the ODCA audit team held preconceived ideas and bias against MPD and this bias impaired the objectivity of the audit.

While ODCA was concerned that MPD waited until the conclusion of the fieldwork phase of the audit to advise ODCA of this issue, ODCA immediately conducted an inquiry to determine whether:

1. the member of the audit team in question, engaged in activity that would in fact impair their independence or give a third party the perception that their independence had been compromised;
2. the audit team member's contribution was significant enough to warrant an actual declaration of independence impairment; and
3. the Auditor had implemented reasonable safeguards to address threats to independence.

At the inception of an audit, ODCA requires all auditors working on the engagement to complete an Independence Form. The purpose of the Independence Form is to determine and document whether an auditor has engaged in any activity that would compromise the auditors' independence while performing the engagement. This practice of determining independence occurs in most local, state and federal audit organizations.

As a result of the inquiry, the Auditor determined that the member of the audit team had in fact executed a false independence statement for the MPD First Amendment investigations audit. The statement was false because the audit team member in question was not free from personal impairments to independence and did not avoid the appearance of impairments to independence. As a result, the audit team member was immediately removed from the engagement. In addition, the audit team member was disciplined to the full extent of District personnel rules and regulations.

ODCA had no knowledge that an actual or perceived impediment to independence existed when the member of the audit team submitted the inaccurate Independence Form.

The audit team consisted of an experienced audit manager, an auditor-in-charge, a financial analyst, and the junior auditor in question. The audit manager and auditor-in-charge were responsible for managing the audit and reviewing all audit documentation for adherence to GAGAS and ODCA audit policies.

The Auditor concluded that the audit team member in question did not develop any findings or recommendations. Additionally, the audit team member was not involved in writing the audit report. As such, the contribution of the audit team member in question did not have a significant impact on the audit fieldwork, findings, or recommendations.

The Auditor believes reasonable and prudent actions were taken to address the concerns of MPD. In addition, these actions were consistent with GAGAS. Accordingly, the Auditor firmly maintains that the independence and integrity of ODCA were not compromised during the audit. Further, our findings and recommendations are fairly and objectively presented and free from prejudice and bias.

ODCA Review of Emails

The September 24, 2012, letter concludes with an offer from MPD to allow ODCA to review copies of emails sent from undercover officers to their superior officers. The purpose of the ODCA request to review copies of emails sent from undercover officers to their superior officers was to determine whether the emails contained a written description of the undercover officer's actions during First Amendment investigations. On September 14, 2012, MPD made a similar offer to ODCA.

It is important to note that on January 19, 2012, ODCA first requested that MPD provide copies of emails sent from undercover officers to their superior officers. On February 22, 2012, MPD's General Counsel sent ODCA a letter denying full access to the emails. The letter from MPD's General Counsel did not include a statement that MPD denied ODCA access to the emails due to the "independence issue". In fact, the first time that MPD linked the "independence issue" and the denial of access to the emails was on September 14, 2012.

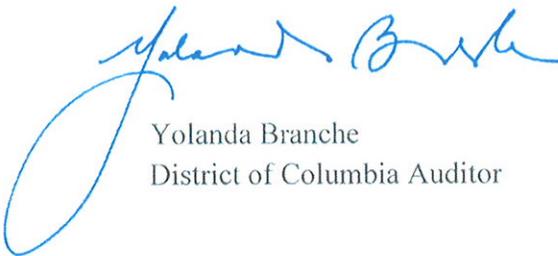
Seven months passed between MPD's February 22, 2012, denial of the ODCA request to review emails and the September 14, 2012, MPD offer to allow ODCA to review the emails. During this period, ODCA completed the First Amendment investigations audit. ODCA provided MPD with the draft audit report on August 24, 2012.

It is unfortunate that MPD's offer to review copies of emails sent from undercover officers to their superior officers was made after the conclusion of the Fiscal Year 2012 MPD First Amendment investigations audit. As we repeatedly stated during the course of the audit, full access to the emails was necessary for compliance with GAGAS. According to GAGAS, auditors must obtain sufficient and appropriate evidence to make determinations and conclusions. As such, we were required to review emails regarding the activities of undercover officers to determine whether the activities complied with the provisions of the Act.

Given the importance of the review of emails to the audit process, we accept your offer to review the emails sent from undercover officers to their superior officers during the Fiscal Year 2013 MPD First Amendment audit.

I look forward to continuing to work with you and your staff.

Sincerely,

A handwritten signature in blue ink, appearing to read "Yolanda Branche". The signature is fluid and cursive, with a large loop at the end of the first name.

Yolanda Branche
District of Columbia Auditor