

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

NATIONAL SECURITY AND LOCAL POLICE

How Local Counterterrorism Programs Risk Our Civil Liberties and Safety

By Michael Price

The September 11, 2001 attacks prompted a national effort to improve how federal, state, and local law enforcement agencies share information. Federal money poured into police departments so they could fulfill their new, unfamiliar role as the “eyes and ears” of the intelligence community. These funds helped create a network of special intelligence and counterterrorism units, including Joint Terrorism Task Forces (JTTFs), which investigate terrorism cases, and data “fusion centers.”

To learn how state and local agencies are operating in this new intelligence architecture, the Brennan Center surveyed 16 major police departments, 19 affiliated fusion centers, and 14 JTTFs in a new report, *National Security and Local Police*. What we found was organized chaos: A sprawling, federally subsidized, and loosely coordinated system to share information that is collected according to varying standards with little rigor and oversight.

The 2013 Boston Marathon bombing illustrates how critical information might get lost in this din of data, showing the need to better tune intelligence operations and fix gaps in oversight. Prior to the attack, the FBI investigated bombing suspect Tamerlan Tsarnaev based on a tip from Russian authorities that he planned to join an “underground group.” They put his name on a travel watch list. Just a few months later, Tamerlan was implicated in a triple homicide on the anniversary of 9/11. Did the FBI and Boston police make the link between these investigations? When Tamerlan travelled to Russia four months later, federal officials in the Boston JTTF received alerts. Should the FBI have questioned Tamerlan when he returned? Did the Boston police even have access to the FBI’s information? These questions have not yet been satisfactorily answered.

We do know, however, that the information sharing system built in the last decade has serious flaws. And these flaws may jeopardize both our safety and our civil liberties.

The Brennan Center has identified three major reasons the system is ineffective:

1. Information sharing among agencies is governed by inconsistent rules and procedures that encourage gathering useless or inaccurate information. This poorly organized system wastes resources and also risks masking crucial intelligence.

2. As an increasing number of agencies collect and share personal data on federal networks, inaccurate or useless information travels more widely. Independent oversight of fusion centers is virtually non-existent, compounding these risks.
3. Oversight has not kept pace, increasing the likelihood that intelligence operations violate civil liberties and harm critical police-community relations.

According to a 2013 report by the Government Accountability Office, more than 95 percent of suspicious activity reports are not even investigated by FBI. This is unsurprising. In the past, police departments shared information only when there was ‘reasonable suspicion’ of criminal activity. This time-tested standard ensured that police were focused on real threats and not acting on their own biases or preconceptions. But with this crucial filter removed after the attacks of 9/11, almost any behavior — from photographing a landmark to stretching in the park — can be viewed as potentially suspicious, reported, and shared with thousands of other government agencies. It is impractical to sift through and follow up on every report, so important information can easily fall through the cracks. In some instances, the practice has also undermined community trust in the police, which is an essential element of domestic counterterrorism.

Efforts by the federal government to address this oversight gap have been half-hearted. The system is not under federal government control. Federal funds simply flow to state legislatures, which then allocate them as they see fit — no questions asked. State and local governments have rarely stepped into the breach, allowing intelligence activities to go unchecked and unsupervised.

RECOMMENDATIONS

To improve the current system, the Brennan Center calls for a fundamental overhaul of the standards for collecting and sharing intelligence and an oversight upgrade.

1. **Better Standards to Protect Civil Liberties and Ensure Quality Information:** We need a consistent, transparent standard for state and local intelligence activities. The reasonable suspicion standard is consistent with our nation’s core constitutional values and flexible enough to allow law enforcement to do its job. State and local governments should require police to have reasonable suspicion of criminal activity before collecting, maintaining, or disseminating personal information for intelligence purposes. The same rules should apply for data shared on federal networks and databases.
2. **Stronger Oversight:** State and local intelligence activities require greater supervision and oversight. Elected officials should consider establishing an independent police monitor, such as an inspector general. Fusion centers should be subject to regular, independent audits as a condition of future federal funding.

In national security crises, the tendency is to take all measures to keep the country safe. But the response is not always well calibrated and eventually requires adjustment. A searching scrutiny of the information sharing structure we have built shows we can do better. It’s time to make the state and local role in national security more effective, rational, efficient, and fair. It’s time to get smart on surveillance.

To read the full report, visit www.brennancenter.org/smartonsurveillance