

## **GUIDELINES FOR FIRST AMENDMENT ACTIVITIES**

### **I. STATEMENT OF PRINCIPLES**

- A. **GENERAL POLICY.** It is the policy of the San Francisco Police Department to ensure that the First Amendment rights guaranteed by the United States Constitution are protected for all individuals and to permit police involvement in the exercise of those rights only to the extent necessary to provide for the legitimate needs of law enforcement in investigating criminal activity.
- B. **WHEN A CRIMINAL INVESTIGATION THAT INVOLVES FIRST AMENDMENT ACTIVITIES IS PERMITTED.** The Department may conduct a criminal investigation that involves the First Amendment activities of persons, groups or organizations when there is an articulable and reasonable suspicion to believe that:
1. They are planning or are engaged in criminal activity
    - a. which could reasonably be expected to result in bodily injury and/or property damage in excess of \$2500
    - b. or which constitutes a felony or misdemeanor hate crime, and
  2. The First Amendment activities are relevant to the criminal investigation.

### **C. WHEN THESE GUIDELINES APPLY**

1. The Department must follow these guidelines in every criminal investigation that involves the First Amendment activities of a person, group, or organization. These guidelines do not apply to criminal investigations that do not involve First Amendment activities.
2. These guidelines are intended to regulate the conduct of criminal investigations that involve First Amendment activities by requiring (1) written justification for the investigation and (2) written approval by the Commanding Officer of the Special Investigations Division, Deputy Chief of Investigations, and the Chief of Police.
3. These guidelines, however, are not intended to interfere with investigations into criminal activity. Investigations of criminal activities that involve First Amendment activities are permitted provided that the investigation is justified and documented as required by these guidelines.

## **II. DEFINITIONS**

- A. **First Amendment Activity:** All speech, associations and/or conduct protected by the First Amendment and/or California Constitution Article I, section 2 (Freedom of Speech) and/or Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief.)
  - 1. **Examples.** First Amendment activity includes speaking, meeting, writing, marching, picketing or other expressive conduct protected by the First Amendment.
  
- B. **Articulate and Reasonable Suspicion:** The standard of reasonable suspicion is lower than probable cause. This standard requires members to be able to articulate specific facts or circumstances indicating a past, current, or impending violation, and there must be an objective basis for initiating the investigation. A mere hunch is insufficient.
  - 1. **Demonstrations.** The Department shall not conduct an investigation in connection with a planned political demonstration, march, rally or other public event, including an act of civil disobedience, unless the prerequisites of Section I.B, supra, are met. Nothing shall preclude the Department, however, from openly contacting organizations or persons knowledgeable about a public event to facilitate traffic control, crowd management, or other safety measures at the event.
  
- C. **Infiltrator:** An undercover officer or civilian acting under the direction of the Department who attends a meeting, joins an organization, develops a relationship with an individual or organization or eavesdrops for the purpose of obtaining information about an individual or organization for transmittal to the San Francisco Police Department.
  
- D. **Informant:** A person who provides information to the San Francisco Police Department motivated by the expectation of receiving compensation or benefit, but is not acting under the direction of the Department.
  
- E. **Source:** A person who provides information to the San Francisco Police Department with no expectation of compensation or benefit and is not acting under the direction of the Department.

## **III. AUTHORIZATION REQUIRED FOR AN INVESTIGATION**

- A. A member of the Department may undertake an investigation that comes within these guidelines only after receiving prior written authorization by the Commanding Officer of the Special Investigations Division (SID), the Deputy Chief of the Investigations Bureau, and the Chief of Police. However, neither the Commanding Officer of SID, the Deputy Chief of the Investigations Bureau, nor the Chief of Police is authorized to approve an investigation and/or the gathering or maintenance of information in violation of the terms of this General Order.

- B. To obtain written authorization, a member must submit a memorandum through their chain of command to the Commanding Officer of the SID containing the following:
  - 1. The identity of the subject of the proposed investigation, if known.
  - 2. The facts and circumstances that create an articulable and reasonable suspicion of criminal activity as defined in Section I. B.
  - 3. The relevance of the First Amendment activities to the investigation.
- C. When an investigation is authorized by the Commanding Officer of SID and after review by the Deputy Chief of the Investigations Bureau, a copy of the memorandum shall be sent to the Chief of Police, who shall indicate his/her approval or disapproval.
- D. Time limits. Written approval of an investigation is in effect for 120 days. If the Department continues an investigation past 120 days, a new memorandum and approval must be obtained. The new memorandum must describe the information already collected and demonstrate, based on that information, that an extension is reasonably necessary to pursue the investigation.
- E. Emergencies. If there is an immediate threat of criminal activity, an investigation may begin before a memorandum is prepared and approved, but verbal permission must be received from the Commanding Officer of SID or designee. The required memorandum must be written and approved by the Commanding Officer of SID, reviewed by the Deputy Chief of the Investigations Bureau and Chief of Police within five days of the occurrence of the emergency.
- F. Although it is expected that most investigations conducted under these guidelines will be initiated by the SID, if any member of the Department becomes aware of a criminal investigation that involves First Amendment activities as defined in these guidelines, the member shall refer the case to SID for a determination as to how the investigation should be conducted. These guidelines do not preclude investigations that impact on First Amendment activities by divisions other than SID, but those investigations must be conducted in consultation with SID and must be conducted pursuant to these guidelines.

#### **IV. USE OF INVESTIGATIVE TECHNIQUES**

- A. Principles. The investigative techniques used in a particular case shall be dictated by the gravity of the crime under investigation, the evidence of criminal activity and the need for a particular investigative technique.
- B. The Department shall use techniques such as numbers 1-5 listed below before employing the more intrusive techniques listed in Section C.

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1. Examination of public records and other sources of information available to the general public.
  2. Examination of San Francisco Police Department files and records.
  3. Examination of records and files of the government or law enforcement agencies.
  4. Interviews with persons connected with the complaint or subject of the investigation, including information received from sources.
  5. Physical surveillance from places open to the public.
- C. If the techniques listed in Section B are inadequate or obviously would be futile under the circumstances, the Department may use techniques such as the following:
1. Electronic surveillance such as the use of videotape, body wire, or audiotape.
  2. The use of undercover officers, infiltrators, informants, or mail covers.
- D. A member may undertake use of techniques listed in Section C only after submission of a memorandum setting forth the justification for the request and receiving prior written authorization by the Commanding Officer of SID, the Deputy Chief of the Investigations Bureau, and the Chief of Police. If there is an immediate threat of criminal activity, verbal approval by the Commanding Officer of SID or designee is sufficient until a written memorandum can be prepared and approved by the Commanding Officer of SID, the Deputy Chief of the Investigations Bureau, and the Chief of Police. The required memorandum must be written and approved within five days of the occurrence of the emergency.

**V. RULES OF CONDUCT FOR INFILTRATORS, INFORMANTS AND UNDERCOVER OFFICERS**

- A. The officer-in-charge shall specifically direct the undercover officer, infiltrator, or informant:
1. Not to participate in unlawful acts of violence.
  2. Not to use unlawful techniques to obtain information.
  3. Not to initiate, propose, or suggest a plan to commit criminal acts.
  4. Not to be present during criminal activity unless it has been determined to be necessary for the prosecution.
  5. Not to live with or engage in sexual relations with members of the organization (unless a civilian infiltrator was so involved before becoming an infiltrator).

6. Not to assume a leadership position or intentionally cause dissention within the organization.
  7. Not to attend meetings or engage in other activities for the purpose of obtaining legally-privileged information, such as confidential sources of reporters, attorney-client communications, or physician-patient communications.
  8. Not to record or maintain a record concerning an individual who is not a target unless the information is relevant for the investigation or the information would itself justify an investigation under these guidelines.
- B. The Commanding Officer of the SID shall monitor the compliance of undercover officers and infiltrators with these guidelines.
- C. The policies and procedures set forth in the memorandum on Informant Management and Control shall apply; except those exclusively applicable to narcotics informants.

## **VI. POLICE COMMISSION REVIEW**

- A. The President of the Police Commission shall designate a member of the Commission to be responsible for monitoring compliance with these guidelines.
- B. Every month, the designated Police Commission member shall review the written requests and authorizations for the initiation or continuance of an investigation that is required by these guidelines.
- C. On an annual basis, the Director of the Office of Citizen Complaints or his/her designee shall conduct an audit of the Department's files, records and documents and shall prepare a report to the Commission regarding the Department's compliance with the guidelines. In addition, the Police Commission may conduct or direct the OCC to conduct such an audit unannounced at any time.
1. In conducting the yearly audit, the Office of Citizen Complaints shall review the following:
    - a. All current guidelines, regulations, rules and memoranda interpreting the guidelines;
    - b. All documents relating to investigations subject to Section III. and undercover techniques subject to Section IV.C. of these guidelines.
    - c. All Agency Assisted Forms or other documentation relating to the transmittal of documents to other criminal justice agencies as described in Section IX. B.
  2. The Office of Citizen Complaints shall prepare a written report to the Police Commission concerning its annual audit, which shall include but not be limited to:

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- a. The number of investigations authorized during the prior year.
- b. The number of authorizations sought, but denied.
- c. The number of times that undercover officers or infiltrators were approved.
- d. The number and types of unlawful activities investigated.
- e. The number and types of arrests and prosecutions that were the direct and proximate cause of investigations conducted under the guidelines.
- f. The number of requests by members of the public made expressly pursuant to these guidelines for access to records, including:
  - (i) The number of such requests where documents or information was produced,
  - (ii) The number of such requests where the documents or information did not exist,
  - (iii) The number of requests denied.
- g. The number of requests from outside agencies, as documented by an Agency Assist Form, for access to records of investigations conducted pursuant to these guidelines, including:
  - (i) The number of such requests granted and
  - (ii) The number of such requests denied.
- h. A complete description of violations of the guidelines, including information about:
  - (i) The nature and causes of the violation and the sections of the guidelines that were violated.
  - (ii) Actions taken as a result of discovery of the violations, including whether any officer has been disciplined as a result of the violation.
  - (iii) Recommendations of how to prevent recurrence of violations of the guidelines that were discovered during the prior year.
  - (iv) The report shall not contain data or information regarding investigations that are on-going at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.

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  - (i) The nature and causes of the violation and the sections of the guidelines that were violated.
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  - (iv) The report shall not contain data or information regarding investigations that are on-going at the time of the report's creation. The data and information, however, shall be included in the first report submitted after the completion of the investigation.
  
- D. By the end of each calendar year, the Director of the Office of Citizen Complaints shall deliver to the Police Commission a report containing the information in Section C(2) (a) through (g).

## **VII. VIOLATIONS OF THE GUIDELINES**

- A. If the Chief of Police, the designated Commission member or any member of the Department becomes aware of information that a possible violation of these guidelines has occurred, the Chief or designated member shall immediately inform the Police Commission and the member shall immediately inform his/her commanding officer who shall inform the Chief.
  
- B. If the Police Commission, determines that a possible violation of these guidelines has occurred, it shall:
  1. Commence an immediate investigation of the possible violation.
  2. Ensure that any activities in violation of these guidelines immediately cease.
  
- C. If the Police Commission determines that an actual violation of these guidelines and/or the First Amendment (as defined in Section IIA above) has occurred, the Commission shall:
  1. Notify the parties about whom information was gathered or maintained in violation of the guidelines pursuant to the following:
    - a. When information is released to individuals or organizations, the names and identifying information concerning private citizens other than the individual notified shall be excised to preserve their privacy.

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- b. There shall be no disclosure if the disclosure of the information is reasonably likely to endanger the life, property or physical safety of any particular person. However, unless the San Francisco Police Commission reasonably concludes that notice itself would be reasonably likely to endanger the life or physical safety of any particular person, the party about whom information was gathered in violation of these guidelines and/or First Amendment (as defined above) shall be notified that information regarding such person or their protected activities, expressions, associations and/or beliefs has been obtained in violation of these guidelines or First Amendment and that the information is not being disclosed because the Police Commission has concluded that such disclosure is reasonably likely to endanger the life or physical safety of a person. Furthermore, if the information may be segregated, such that a portion of the information can be disclosed without endangering the life or physical safety of one particular person, that portion of the information that the Police Commission concludes can be disclosed without endangering the life or physical safety of any particular person will be disclosed.
  - c. There shall be no disclosure if disclosure is prohibited by local, state, or federal law.
  - d. The Commission may deny disclosure if disclosure is exempt under San Francisco's Sunshine Ordinance, Chapter 67 Admin. Code, Section 67.24(d) (Law Enforcement Information), with the following exceptions:
    - (i) The Sunshine Ordinance Exemption for personal and otherwise private information shall not be applied unless that information would reveal the identity of an individual other than the requesting party.
    - (ii) The Sunshine Ordinance provision that exempts disclosure of "secret investigative techniques or procedures" shall not be applied to the fact that a particular procedure occurred, but only to a description of how that procedure was executed, and shall apply only if the information would jeopardize future law enforcement efforts by a local, state, or federal agency.
  - e. No disclosure is required if an investigation is ongoing, but disclosure may be made during an ongoing investigation within the discretion of the Commission.
2. Refer the violation to the Chief of Police for a recommendation concerning discipline of the members involved.
- D. The Commanding Officer of SID shall ensure that all members of the Department assigned to SID attend a training session of these guidelines before beginning work at SID. All members assigned to SID and members engaged in investigations involving the First Amendment activities of persons (as defined above) shall sign an acknowledgement that they have received, read, understand and will maintain a copy of these guidelines.
- E. All members of the Department shall be advised that a willful or negligent violation of these guidelines shall subject the offending member to disciplinary action which may include suspension or termination.

## **VIII. ACCESS BY CIVILIANS**

- A. All requests for information by civilians shall specifically request information created pursuant to these guidelines and shall be governed by the criteria set forth in Section VII.C(1)(a) through (e) above, unless state or local law require greater disclosure. Any denial of access to information shall specifically state the reasons for the denial.
- B. If access is denied, an appeal may be made to the designated Police Commissioner (c/o Police Commission, Hall of Justice, Room 505, 850 Bryant St., San Francisco, CA 94103) and shall include copies of all written correspondence relating to the request.
- C. No right to a hearing on denial of access to information is created by these rules.

## **IX. FILES AND RECORDS**

### **A. Information Quality Control**

- 1. The collection, maintenance, and use of information pursuant to an authorization shall be limited to the scope stated in that investigative memorandum and authorization.
- 2. The Department shall not collect or maintain information of a personal nature that does not relate to a criminal investigation. In the absence of a specific investigation authorized under these guidelines, the Department shall not collect or maintain information such as names for political petitions, mailing lists, organizational memberships or writings espousing a particular view which is protected by the First Amendment.
- 3. Information to be retained in a criminal intelligence file shall be evaluated for source reliability and content validity prior to filing. The file shall state whether reliability or accuracy have been corroborated.

### **B. File Dissemination**

- 1. Dissemination of intelligence information is limited to criminal justice agencies with a specific need-to-know as well as right to know.
- 2. All requests for information shall be evaluated and approved prior to dissemination by the Commanding Officer or designee for the Special Investigations Division. The commanding officer or designee shall determine whether the requesting agency is reliable in treating the information with the requisite care and sensitivity and shall deny the request if the requesting agency is not considered sufficiently reliable.
- 3. All dissemination of information shall be done by written transmittal or recorded on an Agency Assist Form that describes the documents or information transmitted. A copy of the transmittal letter or Agency Assist Form shall be kept in the file from which the information was disseminated.

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4. The first page of any information document transmitted to a recipient agency shall contain a notice limiting dissemination to the specific purpose for which the document was transmitted.
5. A master list of all written transmittals and Agency Assist Forms recording the dissemination of records governed by these guidelines to outside agencies shall be maintained in a binder by SID.

C. File Purge

1. Records shall be purged according to the current San Francisco Police Department Records Retention and Destruction Schedule which calls for destruction of intelligence files every two years from the last date of entry with the following exceptions:
  - a. Information may be maintained if it is part of an ongoing investigation.
  - b. All written memoranda requesting authorization to commence an investigation and subsequent authorizations shall be maintained for not less than five years after termination of the investigation.
  - c. Records showing violation of these guidelines shall not be destroyed or recollected for the purpose of avoiding disclosure.
2. The chain of custody for destroyed files shall be established and documented to provide a record establishing that the files have been destroyed.

D. File Security

1. A copy of the initiating memoranda and authorizations created pursuant to these guidelines shall be kept by the Commanding Officer of SID.
2. All documents created pursuant to these guidelines shall be locked and kept separate from other Department files. Access shall be limited to personnel working on an authorized investigation, command personnel, the Chief, the designated Commission member, and the OCC for the limited purpose of conducting the annual audit.
3. All files, whether kept in SID or another unit, shall be prominently marked with a notice that the material contained in the file is subject to these guidelines.

E. Use of Computers

The use of Department computers shall be governed by the San Francisco Police Department computer security policy.

**X. FUNCTIONAL RESPONSIBILITY FOR EVENT PLANNING INVOLVING FIRST AMENDMENT ACTIVITIES**

- A. Certain types of public gatherings require the Department to collect a limited amount of information in order to preserve the peace, assess the need to deploy members for crowd control purposes, facilitate traffic control, address public safety concerns at the event, and protect the rights of free expression and assembly. This information may only be collected openly and non-covertly as part of an Event Planning Inquiry.
- B. The responsibility for conducting Event Planning Inquiries shall rest solely with the Event Commander or his/her designee. The Permit Unit may collect information about public gatherings only to the extent legally required and necessary in processing permit applications designated by city ordinance.
- C. Unless invited, Departmental contacts with event organizers or participants should be made by telephone during normal business hours without officer(s) attending an organization's meetings. In the course of such contacts it should be made clear that communications are voluntary.
- D. See Field Operations Bureau General Order 91-01 for details.

**XI. VIDEO OR PHOTOGRAPHIC RECORDING**

- A. Authorization.

It is the policy of the Department to videotape and photograph in a manner that minimizes interference with people lawfully participating in First Amendment events. Video or photographic equipment shall not be brought or used without the written authorization of the Event Commander.

- B. Purpose

The Department shall videotape or photograph only for crowd control training or evidentiary purposes. Evidentiary purposes shall include only:

1. Evidence that is reasonably likely to be used in administrative, civil, or criminal proceeding or investigations.
2. Evidence related to allegations against members of the Department.

**XII. GUIDELINES LIMITED TO PROMOTION OF GENERAL WELFARE**

In undertaking the adoption and enforcement of these guidelines, the San Francisco Police Department is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on the City, Police Commission, Department officials, or employees, a duty or obligation to any person for equitable relief, money damages, or any other relief based on a claim that a breach will cause or has proximately caused injury.