



LONDON BREED
MAYOR

CITY AND COUNTY OF SAN FRANCISCO
Department of Police Accountability

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PAUL DAVID HENDERSON
EXECUTIVE DIRECTOR

February 12, 2020

Honorable Robert Hirsch, President of the San Francisco Police Commission
Members, Police Commission

**Re: 2019 FIRST AMENDMENT COMPLIANCE AUDIT OF SFPD RECORDS PURSUANT
TO DEPARTMENT GENERAL ORDER 8.10**

Dear President Hirsch and Commissioners:

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

1. Introduction

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

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

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

DGO 8.10 (II) (A) defines First Amendment Activity as "[a]ll speech, associations, and/or conduct protected by the First Amendments and/or California Constitution Article I, section 2 (Freedom of Speech) and Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief.)."

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

An officer's written authorization must include:

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

Only after obtaining prior written approval by the Commanding Officer of the Special Investigations Division, Deputy Chief of Investigations, and the Chief of Police may the investigation commence. Written approval is in effect for 120 days. Investigations past 120 days require a new memorandum and approval. (See DGO 8.10 (III) (A)-(F)). Department General Order 8.10 (III) (F) also states that "if any member of the Department becomes aware of a criminal investigation that involves First Amendment activities as defined in these guidelines, the member shall refer the case to SID for a determination as to how the investigation should be conducted."

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

On January 17, 2020, Chief of Investigations Erick Baltazar and Acting Senior Nicole Armstrong met with Lieutenant David O'Connor, Officer-in-Charge of the Special Investigations Division, to conduct the Department of Police Accountability's 2019 annual audit of SFPD records pursuant to Department General Order 8.10.

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

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

- Department General Order 8.10 (Guidelines For First Amendment Activities)
- Department General Order 5.17 (Policy Prohibiting Biased Policing)
- SFPD's officer training video on DGO 8.10

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

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

4. Audit Results

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

- a. There were no records of investigations authorized during 2019.
- b. There were no records of any request for investigation that was denied.
- c. There were no records of undercover officers or infiltrators being used during the prior year.
- d. There were no records of unlawful activities within the scope of this order investigated.
- e. There were no records of arrests or prosecutions that were the direct result and proximate cause of investigations conducted under the guidelines.
- f. According to Police Legal, there were two (2) public records request made expressly pursuant to DGO 8.10 guidelines. Of the two requests, one (1) request was denied. SFPD indicated that the denial was pursuant to California Government Code Section 6254(f), which exempts from disclosure records of complaints to, investigations conducted by, intelligence information or security procedures of, and investigatory or security files compiled by local police agencies, including, but not limited to, provisions of the Evidence Code §1040(a) relating to privilege. SFPD partially produced records for

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the other request, citing California Government Code Section 6254(f) for withholding certain records.

- g. There were no records of requests from outside law enforcement agencies, as documented by the Agency Assist Forms, for access to records of investigations conducted pursuant to DGO 8.10.
- h. No violations of these guidelines were discovered during this audit.

5. Training

Lieutenant O'Connor provided documentation that four (4) new members of the Special Investigations Division (SID) participated in DGO 8.10 training.

6. Areas of Concern

See DPA recommendations below.

7. Police Commission Log

An examination of the Police Commission log indicated a Police Commissioner had reviewed written requests and authorizations for the initiation or continuance of an investigation as required by DGO 8.10.

8. Recommendations

The DPA's recommendations include:

1. Convening a Working Group to review and update DGO 8.10.
2. SFPD updating its DGO 8.10 training to address the standards for conducting an investigation that involves First Amendment activities, including the range of activities protected by the First Amendment, the reasonable suspicion standard, written documentation and supervisory approvals and training scenarios in which officers have an opportunity to test their understanding of DGO 8.10's application and requirements.

Sincerely,



Paul D. Henderson
Executive Director