



John Carroll  
Assistant Clerk of the Board  
San Francisco Government Audit and Oversight Committee  
City Hall  
1 Dr. Carlton B Goodlett Place  
San Francisco, CA 94102

October 2, 2019

*Via Email Only*

**Re: Information to Include in File Number 19079: Hearing on “Joint Terrorism Task Force: Balancing Public Safety with Civil Rights”**

Dear Mr. Carroll,

We are writing to request that you include the following the documents in file number 19079 for the hearing on the civil grand jury’s report titled “Joint Terrorism Task Force: Balancing Public Safety with Civil Rights,” scheduled for October 3, 2019.

As civil rights organizations we are concerned with the inaccuracy and incompleteness of the information in the report. We are therefore requesting that you add the following documents to to supplement the civil grand jury’s report and to aid in the public’s understanding of the issue.

1. A history of SFPD’s intelligence gathering practices from the 1970s to 2011;
2. A history of SFPD’s JTTF reforms from 2012 to 2019;
3. September 9, 2019 Letter to Mayor Breed from Asian Americans Advancing Justice - Asian Law Caucus (ALC), the Council on American-Islamic Relations – San Francisco Bay Area (CAIR-SFBA), and the American Civil Liberties Union of Northern California (ACLU-NC);
4. Articles highlighting problematic FBI tactics in recent years;
5. Testimony of Michael German before the Black Congressional Caucus on the FBI’s “Black Identity Extremism” designation;

6. Testimony of Michael German before the Portland City Council on Portland's participation in the JTTF;
7. 2017 Letter to Police Commission from ALC, CAIR-SFBA, and ACLU-NC on SFPDs participation in the JTTF;
8. 2018 Letter to Acting Mayor Breed on SFPD's possible involvement with the JTTF; and
9. 2017 Letter from LGBT Leaders to the Police Commission on SFPD's participation in the JTTF.

Please do not hesitate to contact us if you have any questions or concerns.

Sincerely,

Javeria Jamil, Asian Americans Advancing Justice – Asian Law Caucus  
Jeffrey Wang, Council on American-Islamic Relations – San Francisco Bay Area  
Vasudha Talla, American Civil Liberties Union – Northern California

CC: Daisy Quan, Legislative Assistant to Supervisor Mar

## SFPD INTELLIGENCE-GATHERING PRACTICES AND REFORMS:

### AN ABBREVIATED HISTORY

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#### MID-1970's

- SFPD Intelligence Unit says it still has files on 100,000 individuals – some dating back to the 1930's. They include “actors and actresses who were questioned during the McCarthy era, members of the Wobblies, civil rights demonstrators, anti-war activists. . . protestors from San Francisco State . . . as well as the department's entire `red file.’” By 1975, the Unit says it has culled the files down to 50,000 individuals with further reductions expected to leave files on 25,000 people. (San Francisco Examiner, April 23, 1975.)

#### MID-1980's

- A number of examples of abusive or overbroad SFPD intelligence practices aimed at groups peacefully exercising their First Amendment rights are exposed. These include posing as a television news cameraperson to tape a lawful protest, infiltrating planning meetings for events, recording identities of participants and sharing the political intelligence gathered with the FBI and other agencies.

#### 1989

- Human Rights Commission (HRC) recommends, after an extensive public hearing, that SFPD intelligence policies be overhauled to reflect “best practices” in other cities. Board of Supervisors vote 9 – 1 to endorse the recommendations.
- SFPD abandons five-year effort to keep their intelligence guidelines secret when the Court of Appeals declares in an ACLU lawsuit that they are a public record.

#### 1990

- Police Commission appoints a committee including HRC staff, ACLU and others to work with SFPD command staff to draft a new intelligence policy. After six months of meetings, the committee's consensus recommendations are adopted by the Police Commission. (The main policy is now known as DGO 8.10.)
- Chief Willis Casey (who led the committee effort) announces he is disbanding the old Intelligence Unit and replacing it with a new Special Investigations Division commenting – “Whatever may or may not have been appropriate in the '50s just isn't appropriate now. This is a police department, not the CIA.” (San Francisco Examiner, December 19, 1991.)

#### 1993

- A wide-ranging scandal unfolds involving SFPD intelligence officer (and ex-CIA agent) Tom Gerard. Among other things, the scandal includes: the admission by Chief Tony Ribera that files on non-criminal political activity had *not* been destroyed as required by the 1990 reforms; the published allegation by a police source that several SFPD intelligence officers had transferred files to their home computers to evade the policy reforms; the selling of confidential intelligence material to foreign governments and the sharing of this information with non-law enforcement, private entities; Gerard's entanglement with the FBI (swapping intelligence information, sharing an informant, etc.); and, a published threat from Gerard (who had fled to the Philippines) that he would expose CIA involvement in Central American death squad activity if he is aggressively prosecuted.

## **1994**

- In response to Gerard scandal and the prior failure to fully implement the 1990 reforms, the Police Commission strengthens the civilian auditing requirements in DGO 8.10.
- Having voluntarily returned from exile, Gerard pleads “no contest” to one count of illegally accessing police computer records. He is sentenced to 45 days and fined \$2,500.

## **1997**

- Reacting to strong opposition from Mayor Willie Brown and public outrage, the Police Commission kills a proposal that it grant for waivers from the requirements of 8.10 so SFPD officers could join the new FBI Bay Area Counterterrorism Task Force (later renamed the Joint Terrorism Task Force - JTTF)

## **1999**

- San Francisco settles lawsuit brought by National Lawyers Guild over the Gerard scandal by agreeing to make DGO 8.10 enforceable through a court decree.

## **2002**

- SFPD now joins JTTF but under a publicly-released MOU with specific guarantees that local officers will follow stricter local policies, including 8.10.

## **2004**

- Police Commission publicly questions SFPD command staff about JTTF activities and whether SFPD JTTF officers are complying with 8.10. SFPD assures them and the public that strict compliance with 8.10 continues.

## **2005**

- Local FBI Special Agent in Charge assures civil rights groups that local JTTF officers are still following stronger local policies and the standards the California constitution’s right to privacy in their work with the FBI.

## **2007**

- SFPD signs a new JTTF MOU with the FBI eliminating application of 8.10 and local policies and sharply reducing local control of SFPD’s JTTF officers. (The MOU is kept secret at the insistence of the FBI for more than four years.)

## **2010**

- Human Rights Commission holds hearing on community surveillance concerns.
- SFPD tells civil rights groups they can no longer discuss JTTF arrangements without the permission of the FBI

## **2011**

- Human Rights Commission issues report calling for renewed transparency in the SFPD-FBI JTTF relationship and steps to ensure SFPD compliance with local policy. Board of Supervisors vote unanimously to call on the SFPD and Police Commission to address the recommendations
- The previously-secret SFPD-FBI JTTF MOU is released. Local FBI Special Agent in Charge tells civil rights group the MOU prohibits application of 8.10 requirements that SFPD officers receive written authorizations from their supervisors for participating in investigations and intelligence gathering involving First Amendment activity based on reasonable suspicion of criminal activity.

## SFPD JOINT TERRORISM TASK FORCE REFORMS: AN ABBREVIATED HISTORY

(2012 - 2019)

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### 2012

- The Board of Supervisors unanimously passes and Mayor Ed Lee signs into law the Safe San Francisco Civil Rights Ordinance. The Ordinance prohibits secret agreements between the FBI and SFPD regarding JTTF participation and requires SFPD officers participating in the JTTF to follow stronger local laws and policies rather than weaker federal standards. Annual public compliance reports are also required.

### 2014

- An SFPD officer assigned to the JTTF joins the FBI in making an unannounced visit to Google's San Francisco headquarters and questions an employee about First Amendment protected activity, without the required, documented "reasonable suspicion" of criminal activity mandated by DGO 8.10.
- In SFPD's 2014 Ordinance compliance report, SFPD reports SFPD officers were assigned by the FBI to work on 30 JTTF cases based on tips. The annual OCC DGO 8.10 compliance audit reports that none of the cases were authorized in writing as being based on "reasonable suspicion."

### 2015

- Having been previously encouraged to do so by the Police Commission upon the discovery of any specific incidents of JTTF-related non-compliance with SFPD policies, Asian Americans Advancing Justice-Asian Law Caucus (AAAJ-ALC) and the Council on American Islamic Relations-San Francisco Bay Area (CAIR-SFBA) file a complaint with the Office of Citizen Complaints (OCC) regarding the 2014 incident.
- The SFPD's 2015 compliance report claims "the FBI has not placed SFPD members in any position of risk of any policy violations" and that its JTTF members have been "trained to be intimately familiar" with DGO 8.10. SFPD reports working on 35 JTTF cases based on tips. The OCC DGO 8.10 audit again reports that none of them were based on "reasonable suspicion" authorizations.

### 2016

- The SFPD 2016 compliance report shows 54 JTTF cases assigned to SFPD officers. OCC 2016 audit again finds zero written "reasonable suspicion" authorizations required for this work. The SFPD report uses the language of the FBI's weaker policy standard, not the SFPD's, in stating that its JTTF officers did not gather information "regarding **solely** constitutionally protected activities." SFPD DGO 8.10 requires "reasonable suspicion" authorizations for any JTTF activity "**involving**" First Amendment activities.
- In its official finding on the 2014 Google incident, the OCC concludes that, while the SFPD's JTTF officer freely acknowledged the matter involved information on First Amendment activity, he violated the policy due to inadequate training on SFPD's stronger DGO 8.10 standards.
- Over the course of the year, AAAJ-ALC, CAIR-SFBA, ACLU-NC and their subject-matter expert meet six times with the SFPD Chief, Acting Chief and members of the command staff to discuss longstanding Ordinance compliance problems. In light of the OCC's finding and a joint review of very minimal DGO

8.10 training materials, SFPD agrees that more extensive DGO 8.10 training is needed for any officers assigned to the JTTF. The civil rights groups agree to collaborate with SFPD in developing and possibly providing that training. SFPD asks the group's subject matter expert to meet directly with the FBI to discuss whether (as they'd promised in 2011) they would still use the MOU to block the SFPD's standards from being applied to its JTTF work.

- In an extensive discussion, the FBI's Assistant Special Agent in Charge (ASAC) acknowledges to the civil rights groups' expert that because, by its nature, the motivation for terrorism is political or religious, virtually all of the JTTF's work partially involves gathering information about First Amendment protected activities. The FBI ASAC does not dispute that an internal FBI document shows that the FBI routinely requires all its JTTF members to make "US person" status inquiries that can result in the creation of new records about undocumented individuals in federal databases accessible to ICE. This activity, if performed by SFPD, violates local sanctuary law and policy. The FBI ASAC promises to seek direction from FBI headquarters about how these conflicts between local and federal standards could be addressed in the SFPD's JTTF activities and subsequently provides updates reporting that internal FBI discussions were underway.

## **2017**

- January — With the presidential inauguration of Donald Trump imminent and no substantive response yet from the FBI, the civil rights groups and prominent LGBT elected and appointed officials write the Police Commission asking them to require the SFPD to take various specific steps to finally ensure full compliance with the Ordinance in its JTTF activities.
- February - With the compliance issues unresolved and the 2007 MOU automatically expiring March 1st, SFPD withdraws its officers from their full-time assignment to the JTTF.
- June - SFPD Chief meets with the FBI to discuss the prior JTTF participation and the application of the Ordinance and DGO 8.10 to the SFPD's task force activities.
- July - FBI provides SFPD with a copy of a white paper describing the FBI's understanding of the expired 2007 JTTF MOU and the application San Francisco laws and policies to SFPD officers assigned to the JTTF.
- August - SFPOA begins a campaign to pressure San Francisco to rejoin the JTTF based on fear-mongering and factually inaccurate paid radio advertising. The SFPOA fails to mention any community concerns or official findings about non-compliance with local civil rights laws.

## **2018**

- January - With their ads and fear mongering continuing, the head of the SFPOA is challenged about the inaccuracy of their claims. He responds that the information in the ads and in the SFPOA's on-going political attacks on San Francisco public officials over this issue came from the FBI.
- October - In response to an open records request from civil right groups seeking any updated JTTF information, SFPD discloses that the Chief met with the FBI in June 2017 but refuses to provide the FBI white paper on San Francisco's law and policies.

## 2019

- January — The FBI's local Special Agent in Charge writes the San Francisco Mayor and other public officials (copying the SFPOA). The letter does not mention the specific conflicts between local and federal standards his ASAC had reported in 2017 were under discussion at FBI headquarters nor the white paper on those same issues provided to the Chief of Police. Ignoring the OCC's 2016 finding and the larger compliance problems discussed at length with the FBI, the letter falsely claims SFPD officers previously assigned to the JTTF had complied with the Ordinance and local policies.
- March — AAAAJ-ALC, CAIR-SFBA and ACLU-NC file a complaint with the Sunshine Ordinance Task Force to compel the release of the white paper.
- April – At a jurisdictional hearing of the Sunshine Ordinance Task Force, SFPD states that even if the Task Force rules that withholding the white paper violates local law, it will not release the white paper at the request of the federal government.
- June – AAAJ-ALC, CAIR-SFPB and ACLU-NC file a lawsuit in Superior Court seeking public disclosure of the white paper under state and local open records laws.
- July – The Sunshine Ordinance Task Force rules that SFPD's refusal to disclose the white paper in their possession violates local law.
- July – The San Francisco Civil Grand Jury publishes a report on SFPD's participation in the JTTF, titled, "Joint Terrorism Task Force: Balancing Public Safety and Civil Rights," dismissing and mischaracterizing the conflicts between federal and local policies and recommending, among other things, that public officials decide whether SFPD should rejoin the JTTF *before* learning whether the FBI will agree to a new MOU designed to address the prior non-compliance issues and that the Police Commission eliminate the DGO 8.10 OCC (now DPA) audit provisions as "extraneous."
- August – AAAJ-ALC, CAIR-SFBA and ACLU-NC request a meeting with the SFPD Chief to discuss the Civil Grand Jury report. His office declines the request characterizing the topic to be the same "subject matter of (the) pending lawsuit" about public access to the white paper.
- August – The FBI writes the Chief claiming that all copies of the white paper discussing their views of San Francisco law and policy are the property of the FBI and demanding they be returned to the FBI but agreeing to wait for the conclusion of the litigation. Having filed a statement of interest in the lawsuit, the federal government tells a San Francisco judge that he cannot apply state or local open records laws to a document about San Francisco law and policy in the possession of the SFPD. The judge initially rules that the document must be sought instead under the more restrictive and time-consuming federal Freedom of Information Act. The litigation continues.



*Via Email and U.S. Mail*

Honorable London Breed, Mayor  
City Hall, Room 200  
1 Dr Carlton B Goodlett Place  
San Francisco, CA 94102  
Email: [MayorLondonBreed@sfgov.org](mailto:MayorLondonBreed@sfgov.org)  
Fax: (415) 554-6160

September 09, 2019

**RE: Civil Grand Jury Report on San Francisco Police Department's Participation in the FBI's Joint Terrorism Task Force**

Dear Mayor Breed:

We are writing regarding the San Francisco Civil Grand Jury's July 17, 2019 report titled "Joint Terrorism Task Force: Balancing Public Safety and Civil Rights" ("the Report"). Riddled with errors, inaccuracies, and misleading information, the Report reframes the issue of the San Francisco Police Department's ("SFPD") participation in the Federal Bureau of Investigation's ("FBI") Joint Terrorism Task Force ("JTTF") in terms that prioritize the FBI's narrative and desires over local legal, policy, civil rights and community concerns. The Civil Grand Jury's adoption of the FBI's rhetoric is especially troubling in light of the fact that the FBI under Donald Trump increasingly reflects the political priorities of this administration – priorities that are in so many ways an anathema to most San Franciscans.

In the past, our groups have worked collaboratively with the City of San Francisco ("S.F.") to protect vulnerable San Franciscans from the overreaches of the federal government, especially S.F.'s Arab, Middle Eastern, Muslim, and South Asian ("AMEMSA") communities. In the spirit of that partnership, we wish to bring attention to the Report's incorrect assumptions and factual errors and briefly share with you the considerable history and context our organizations shared with the Civil Grand Jury in detail, but which the Civil Grand Jury omitted in its findings and recommendations. We also welcome the opportunity to discuss this issue with you in person.



## **THE IMPORTANCE OF THE ISSUE FOR AMEMSA COMMUNITIES**

For more than 20 years, the SFPD's relationship with the JTTF and preceding task forces has been the subject of considerable public controversy. As far back as 1997, Mayor Brown rejected the FBI's proposal to have the SFPD assign officers to the JTTF with a waiver that would allow officers to ignore stronger local policies. Years later, after S.F. joined the JTTF, San Franciscans discovered that the SFPD had secretly signed a revised Memorandum of Understanding ("MOU") with the FBI that eliminated prior provisions that had explicitly applied state and local civil rights laws and policies to the conduct of SFPD officers assigned to the Task Force as deputized federal agents.

This issue was of particular concern to AMEMSA communities who have been subjected to pervasive discrimination, hate crimes, and surveillance. In response, 79 community and civil rights organizations formed the Coalition for a Safe San Francisco to address these issues. Years of work, including holding rallies and meetings with city officials, resulted in a historic hearing before the Human Rights Commission and the introduction of the Safe Civil Rights Ordinance ("the Ordinance"). The Ordinance required the SFPD to comply with local laws when working with the FBI and the JTTF. Mayor Lee signed the Ordinance after it passed with a unanimous vote by the Board of Supervisors.

For nearly five years after the Ordinance was enacted, our organizations worked diligently and collaboratively with the SFPD and the Police Commission — through public hearings, meetings, correspondence and an official complaint we were encouraged by officials to file with the Department of Police Accountability ("DPA") — to try to address the SFPD's failures to comply with the Ordinance and the absence of training on the key differences between FBI policies and practices and local standards. The long-standing concerns about the tactics used by the JTTF became more urgent with the FBI coming under the direction of President Trump. Immediately prior to the February 2017 Ordinance compliance hearing,<sup>1</sup> the SFPD announced that they were suspending their participation in the JTTF, and our discussions regarding compliance and training issues were put on hold.

## **THE REPORT PRESENTS A FALSE DISCHOTOMY BETWEEN CIVIL RIGHTS AND PUBLIC SAFETY**

As an initial matter, the Report's title, "Balancing Pubic Safety with Civil Rights," sets up a false choice between public safety and civil rights. However, as San Franciscans well know, it is not a balance at all. Fully protecting civil rights is always a threshold requirement for achieving public safety. When communities are not assured that there are strong safeguards and standards in place for police accountability, oversight, and transparency, community trust and confidence in law enforcement suffers, and public safety becomes deeply compromised. This is especially true on issues where prior abuses by law enforcement have left deep scars that continue to threaten police-community relations. This is why, in 2012, Mayor Lee asserted the primacy of San Francisco values by signing into law the Ordinance, which permitted SFPD participation in federal

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<sup>1</sup> Per the Ordinance, the Police Commission held annual public hearings on the SFPD's compliance with local laws and policies from 2013 to 2016.

task forces as long as stronger state and local policies and laws, reflecting San Francisco values rather than the federal government's, were not violated.

The Report shows a complete disregard for S.F. values and the City's legal obligations that reflect S.F.'s public safety priorities by recommending that you and Chief Scott decide within the next five months whether it is in the "best interests of the residents of the City" for the SFPD to rejoin the JTTF. However, it is difficult to see how a decision about the interests of San Franciscans can be made without first consulting with them. Thus, before you or Chief Scott make any decision to rejoin the JTTF, we urge you to first publicly address the current lack of transparency and unaddressed past violations of local law by the SFPD (detailed below).

The recommendation also presupposes that the FBI will offer a new MOU that unequivocally guarantees that SFPD officers participating in the JTTF will fully apply our state and local sanctuary laws, our stronger intelligence-gathering standards, our strict anti-profiling policies, and our ban on use of facial recognition technology. However, as long as the FBI chooses to needlessly keep its views about these issues secret and takes extraordinary steps to hide those views from the public (see below), San Francisco must assume they will take other steps to interfere with other state and local laws should the SFPD re-enter the JTTF. Thus, until the FBI proposes a new public MOU that meets S.F.'s values and strict legal needs, a decision from you or Chief Scott about what is or is not in the City's "best interests" is premature.

### **THE REPORT INACCURATELY REFLECTS CONTEXT AND PAST VIOLATIONS**

Moreover, the findings and recommendations in the Report are deeply troubling because they obfuscate the history and key issues involved in the SFPD's past participation and violations of local law and policy, even after we shared this well-documented history with the Civil Grand Jury. Instead, the Report consistently adopts the FBI's narrative on this issue and often repeats the agency's false claims.

For instance, we provided voluminous written materials and in-person interviews with our longtime advisors and subject-matter experts on this issue, one of whom is Mike German,<sup>2</sup> a former FBI counterterrorism agent and the author of *Disrupt, Discredit and Divide – How the New FBI Damages Democracy*. Congresswoman Karen Bass, the chair of the Congressional Black Caucus, says "Mike German's critical insight into the initiatives taken up by the FBI in the aftermath of 9/11 is akin to none. His reputable expertise has time and again provided my office with insight not only as a witness testifying before Congress, but also from an advisory position on legislative matters." Yet, despite his considerable expertise on this issue, the Report refers to Mr. German only as a "fellow with the Brennan Center for Justice," and dismisses the concerns articulated by Mr. German and civil rights groups as mere "speculation" allegedly caused by a lack of public access to classified material.

The Report also fails to acknowledge that, upon request, the SFPD is currently able to assign officers to any JTTF investigation at any time as long as the SFPD officers comply with state and local laws and policies. To do that, they do not need to be embedded full-time in the

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<sup>2</sup> Michael German, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/expert/mike-german>. (last visited Sept. 8, 2019).

JTTF working under direct FBI supervision and a new MOU. In fact, the vast majority of local law enforcement agencies do not assign officers to work with the FBI in a JTTF under a MOU. Although Oakland still has one JTTF officer covered by a MOU, it recently publicly reported that its officer works only “minimally” — once or twice a month — with the JTTF. Portland recently removed its officers from the JTTF over concerns about its inability to apply state and local standards. Atlanta has removed its officers from all federal task forces because of the inability to comply with local policy standards on use of body cameras. None of this critical contextual information is included in the Report.

Furthermore, the Report ignores the role of the regional intelligence fusion center, Northern California Regional Intelligence Center (“NCRIC”), as the “FBI’s JTTF...intelligence and information sharing point of contact”<sup>3</sup> and fails to acknowledge that the SFPD’s participation in NCRIC and Chief Scott’s membership on the NCRIC board are wholly unaffected by whether or not the SFPD assigns officers full-time to the JTTF. The report therefore exaggerates the impact of any perceived, highly vague concern over communication “clunkiness.” The reality is there is no reason the SFPD cannot be immediately notified about — and, indeed participate in the investigation of — any “imminent terroristic threats or when immediate action is required.” To suggest otherwise — especially without evidence — is gratuitously alarmist. As NCRIC documents we provided to the Grand Jury make clear, the JTTFs perform investigative and intelligence-gathering functions for the FBI rather than regular communications or information-sharing functions between the FBI and local agencies. NCRIC, not the JTTF, performs the latter function. The SFPD’s direct supervisor overseeing the officers assigned to the JTTF previously told the DPA that his supervision was limited to quarterly reviews of general synopses of matters the JTTF officers had been working on over the prior three months.<sup>4</sup> If the SFPD and Mayor truly have “less timely information about potential risks and dangers to San Francisco” as the Grand Jury report claims, it’s not because the SFPD no longer assigns officers full-time to the JTTF — unless the FBI, NCRIC and/or Trump administration is retaliating against San Francisco for insisting on enforcing its civil rights laws.

In a remarkably inaccurate finding, the Report states that the Civil Grand Jury’s “investigation did not detect any instances of non-compliance” with local policies by SFPD officers who had previously participated in the JTTF. However, this finding directly contradicts the extensive materials our organizations provided to the Civil Grand Jury on the SFPD’s past violations of local laws and policies. The DPA’s August 12, 2016 finding in case #168-15 is an example of one such contradiction.<sup>5</sup> The DPA’s finding was the culmination of a complaint our organizations filed when in 2014 a SFPD officer assigned to the JTTF went to Google’s offices in San Francisco to question a Google employee about First Amendment protected activity and did so without the required documented “reasonable suspicion” of criminal activity mandated by local

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<sup>3</sup> See *NCHIDTA & NCRIC Executive Board*, NORTHERN CALIFORNIA REGIONAL INTELLIGENCE CENTER (NCRIC), <https://ncric.ca.gov/default.aspx?MenuItemID=122&MenuGroup=NCRIC+Public+Home>.

<sup>4</sup> Office of Citizen Complaints, OCC Complaint Summary Report, #168-15, March 25, 2016.

<sup>5</sup> See Office of Citizen Complaints, *Report to Police Commission Regarding “2016 First Amendment Compliance Audit of SFPD Records Pursuant to Department General Order 8.10”*, Feb. 1, 2017, <https://www.sanfranciscopolice.org/sites/default/files/Documents/PoliceCommission/PoliceCommission020117-DPA2016FirstAmendmentComplianceAuditDGO810.pdf>.

S.F. policies. The DPA concluded that the officer had failed to comply with local policy due to inadequate training on the SFPD's policies and procedures, specifically Department General Order 8.10. Despite the DPA's conclusion, the Civil Grand Jury Report repeats the same patently untrue claim the FBI has made to you and other public officials — that SFPD officers fully abided by the SFPD's general orders while participating in the JTTF.<sup>6</sup>

### **ATTEMPTS TO GUT LOCAL CIVIL RIGHTS PROTECTIONS**

Alarming, the Report's findings and recommendations aimed at revising Department General Order ("DGO") 8.10 would gut key civil rights protections and civilian oversight over the SFPD. The recommended revisions would also remove provisions in DGO 8.10 that the FBI has objected to in the past.

Once again, the Report overlooks the SFPD's past violations of local law and policy and the resulting DPA findings and audit, and instead recommends that DGO 8.10 be revised for clarity. However, when the DPA publicly presented its compliance audit of SFPD records pursuant to DGO 8.10 in 2017 and discussed its findings in the aforementioned JTTF complaint, the DPA did not conclude that DGO 8.10 was ambiguous or confusing. Instead, after lengthy investigation, the DPA found that there was a training failure on the SFPD's part. The DPA recommended that the SFPD "immediately update 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 numerous scenarios in which officers have an opportunity to test their understanding of DGO 8.10 application and requirements."<sup>7</sup>

The Report also states that SFPD officers told the Civil Grand Jury that the officers believed they could collect First Amendment information for the FBI JTTF databases as long as information was provided voluntarily. These inaccurate claims track federal policies that allow the FBI to collect intelligence information in ostensibly "voluntary" but often very coercive and intimidating "interviews" without any suspicion of criminality under a category of activity the FBI calls "assessments" rather than "investigations". However, they do not reflect S.F.'s stronger local policies that require a documented "reasonable suspicion" of criminal activity.

Finally, the Report ignores the materials showing discussions were underway in late 2016 and early 2017 for the SFPD to implement the DPA's DGO 8.10 training recommendations. Instead, the Report recommends that DGO 8.10 be changed in ways that would legalize the SFPD's prior unauthorized activities and address the FBI's previously expressed objections about the application of local standards in the JTTF. DGO 8.10 covers the law enforcement activity — the collection of sensitive First Amendment information — regardless of the label attached to it ("assessment" or "investigation"). The Grand Jury recommends narrowing the policy by applying it only to a newly defined category of "criminal investigations" and thereby permitting local participation in federal national security intelligence gathering during FBI JTTF "assessments" when there is no suspicion or threat of criminal activity at all. The Grand Jury further recommends

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<sup>6</sup> Letter from John F. Bennett, Federal Bureau of Investigation Special Agent in Charge, to Mayor London Breed, Jan. 29, 2019.

<sup>7</sup> Office of Citizen Complaints Report, *supra* note 5.

that all the critical provisions requiring local DPA audits and Police Commission oversight of the DGO 8.10 standards be eliminated as allegedly “extraneous.” These are provisions that the FBI has objected to in the past.

### **THE REPORT MISREPRESENTS S.F.’S SANCTUARY OBLIGATIONS**

The Report erroneously reframes the sanctuary concerns raised by our organizations as though they are limited only to matters where the SFPD became entangled in direct immigration enforcement. By doing so, it ignores the evidence we provided based on an internal FBI document that shows that as a matter of routine, local officers who participate in the FBI JTTF are expected to determine whether any subject of a JTTF assessment or investigation is an undocumented non-U.S. person. That information is then entered into federal databases that can be accessed and used by Immigration and Customs Enforcement (“ICE”) and the Department of Homeland Security (“DHS”) for immigration enforcement at any time. Conducting the U.S. person status checks in that manner and with that effect violates S.F.’s sanctuary law and policy. Furthermore, in a public briefing before the Portland city council, the local FBI Special Agent in Charge admitted that while the role of the FBI and its JTTF is not to enforce immigration laws, they sometimes use immigration violations in the absence of other options.

ICE and DHS are active members of the JTTFs. The SFPD cannot become entangled with their activities, enforcement or otherwise, especially not under the current presidential administration whose dangerous policies and actions were not even acknowledged in the Report. The Civil Grand Jury downplays what they call an “area of contention between the federal government, the state of California, and CCSF” with the claim that the FBI understands state and local restrictions and expects SFPD officers to follow them. Yet, in the first year of mandatory reporting under the California Values Act, SB 54, the state and local members of the S.F.-based JTTF did not comply with their new duty to provide the State Attorney General with a list of their fellow agencies involved in the JTTF.<sup>8</sup>

### **THE FBI’S ATTEMPTS TO BLOCK A COMPLETE AND FULLY TRANSPARENT DISCUSSION**

Finally, the Report fails to mention the FBI’s on-going role in preventing public access to highly relevant information they have shared with the SFPD about their positions on the very same important public policy issues covered by the Report.

As the Grand Jury was informed but did not report, Chief Scott met with the FBI in mid-2017 to discuss SFPD’s prior participation in the JTTF and “the interaction between the Joint Terrorism Task Force’s work and various San Francisco laws and policies, including SFPD General Order 8.10” and the Ordinance.<sup>9</sup> Shortly after that meeting, the FBI provided Chief Scott with an FBI “white paper” they had referred to during the meeting that discussed those same topics

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<sup>8</sup> Values Act: Task Force Participation” forms submitted to and released by the California Department of Justice for “Reporting Year: 2018.”

<sup>9</sup> Declaration of Chief Scott in *Asian Americans Advancing Justice – Asian Law Caucus v. City and County of San Francisco* (AAAJ-ALC v. City and County of San Francisco), San Francisco Superior Court Case No. CPF-19-516706 at 2, Aug. 6, 2019.

as well as the MOU. In October of last year, we learned of this meeting and the existence of this written document on the very same subjects covered by the Report as a result of a general public records request we filed with the SFPD to get information on any JTTF developments.

*At the insistence of the FBI*, the SFPD declined to provide this white paper. In January 2019, we wrote to the SFPD, trying to convince them to, as they had in the past, choose to be transparent about their interactions with the FBI on these subjects. We shared this letter with the Civil Grand Jury as well, emphasizing to them the need for full transparency.<sup>10</sup> However, the SFPD persisted in withholding the white paper. We then filed a complaint with the Sunshine Ordinance Task Force. At the initial Task Force hearing, the SFPD indicated that even if ordered to do so by a ruling of the Task Force, it would follow the request of the FBI to keep its views secret rather than comply with an order of the local body established by local law to enforce local legal rights of access to public information.<sup>11</sup> Consequently, we filed a lawsuit seeking access to the white paper. With the lawsuit pending and the Civil Grand Jury having issued its public recommendations, on August 6th the FBI claimed an “ownership” interest in the document they sent to Chief Scott more than two years ago, for the sole purpose of preventing it from being publicly disclosed and considered by local public officials they actively misled on these issues earlier this year.<sup>12</sup> Now, the FBI is asking for the return of this document upon the conclusion of the litigation. In the meantime, because of the position taken by the FBI and to our great surprise, Chief Scott has refused to meet with us to discuss the Grand Jury recommendations as long as we are seeking access to the FBI white paper under state and local open records laws.<sup>13</sup>

The SFPD’s sudden lack of transparency is a stark reversal from the Department’s well-established past practices. In the past, they have always been willing to meet and collaborate with us about these issues. On at least two prior occasions, the FBI initially claimed “ownership” over non-classified JTTF-related FBI documents in the SFPD’s possession with implications for SFPD policies and activities that the FBI preferred to keep confidential. On both occasions, the SFPD simply produced the records pursuant to state and local open records laws without the need for litigation.

Simultaneously, the current federal administration has taken a remarkably extreme and extraordinary position just weeks after the release of the Report, which specifically calls for discussion and decision-making about possible SFPD participation in the JTTF. The federal government filed in San Francisco Superior Court for “real party in interest” status in the local public records litigation and made some truly sweeping legal arguments to a local judge in an August 27 hearing on our case. They acknowledged the white paper was not classified, yet declined to describe its contents at all beyond the fact that it had been labelled a document about the Safe San Francisco Civil Rights Ordinance, the JTTF MOU and SFPD policies, all of which

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<sup>10</sup> Email from John Crew to San Francisco Civil Grand Jury, Jan. 31, 2019.

<sup>11</sup> On July 16, 2019, the Task Force ruled that SFPD had violated the Sunshine Ordinance and ordered SFPD to release the white paper. As they previously indicated, they did not do so.

<sup>12</sup> FBI Letter, *supra* note 6.

<sup>13</sup> Email from Asja Steeves, Special Assistant to the Chief of Police, William Scott, to *AAAJ-AJC v. City and County of San Francisco* petitioners, stating, “Chief Scott declines to discuss the subject of a pending lawsuit your organization has brought against the Department.”

are public documents. Most incredulously, however, the current U.S. Department of Justice (“DOJ”) claimed that a federal law that allows the federal government to reclaim possession of criminal history, rap sheet and specific criminal investigative records they share with local agencies applied to this FBI document about Trump-era FBI views on San Francisco laws and policies. Furthermore, the DOJ attorney argued that even if that law did not apply, *no* written communication to local officials labelled “federal property” seeking to exert federal influence over local policy and legislative decisions could *ever* be disclosed under state and local open records laws without federal consent.<sup>14</sup> In other words, while written submissions from literally anyone else lobbying local officials about local issues would be subject to state and local transparency laws, the federal government is claiming a different set of standards for itself: the right to force the public to use the far more restrictive and far more time-consuming federal FOIA to try to learn how the federal government is lobbying local officials.

The FBI is insisting that the degree of transparency expected and legally required of everyone else involved in or who tries to influence the decision-making process regarding the JTTF recommendations does not apply to them. They claim they can and will block the public disclosure of written materials they used to lobby the SFPD on these issues. However, as the 2012 Ordinance made clear, decisions to join the JTTF under an MOU can no longer be secret, private agreements between just the SFPD and the FBI. The public, public bodies and non-SFPD public officials have roles to play in evaluating the potential risks and rewards of any new formal partnership between the SFPD and the FBI. But, when the current federal administration is actively thwarting public access to critical information that would inform that decision it is, in effect, interfering with the public decision-making mandated by the Ordinance after the 2007 secret MOU was finally exposed. A potential partner who refuses to be fully transparent — especially after maximum transparency has been legally mandated — is a partner than cannot be trusted to fully respect and honor other local legal and policy mandates based on local values and local civil rights priorities.

Confronted with the federal government’s argument that he lacked the legal authority to order the document’s production to the court for independent review of the claims being made about it, the judge ruled against us at this hearing. However, while the courts will eventually resolve yet another new and novel legal argument from a federal government that now seems determined on interfering with the application of S.F. and California laws they do not like, the point is that the federal government is *choosing* to take these extraordinary steps to try to keep this document from being seen. The federal government’s argument would preclude the document from being reviewed by the public or by public officials with policy, legislative and oversight authority over the SFPD and who will all play roles in deciding how to react to the Grand Jury’s recommendations. As long as the current administration continues to pursue that choice rather than to be fully transparent with its would-be local partners, this lack of basic transparency must inform San Francisco’s decisions about how to proceed.

The FBI’s highly aggressive posture in seeking to block public access to the white paper is extremely suspect. Their lack of transparency has already created a barrier to continuing the open discussion and collaboration between the SFPD and our organizations that has always been sought

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<sup>14</sup> Transcript of Record at 22-24, *AAAJ-ALC v. City and County of San Francisco*, San Francisco Superior Court Case No. CPF-19-516706 (Aug. 27, 2019).

and actively pursued by all concerned over many years — through multiple local mayoral and SFPD administrations. We do not know if this new posture from the FBI is attributable to changes in the White House and U.S. Department of Justice in recent years. We do not know if the FBI is trying to preserve its ability to say one thing to you, to the Civil Grand Jury and to the press, and another thing entirely to the SFPD. We *do* know that immediately after the Report was released, the FBI began taking extraordinary steps to keep from the public information about the FBI's views and positions about the very same subject matters covered by the Report — how S.F.'s civil rights protections should apply to any SFPD activities within the JTTF.

## **CLOSING**

The FBI claimed in their letter to you earlier this year that “it is essential you have an accurate and complete understanding of how the FBI and the JTTF work to protect the citizens of the City and County of San Francisco,” and that “it is essential the FBI maintains a robust relationship with our local partners, both inside and outside of law enforcement, based on a common and accurate understanding of what we do and how we do it.”

We agree. Unfortunately, the Civil Grand Jury's Report is neither accurate nor complete. Moreover, the SFPD and the FBI are currently trying to withhold from the public information that would provide an accurate and complete understanding that is necessary to productively discuss commonly recognized facts about possible SFPD participation in the JTTF and motivations for public changes to SFPD policies.

We therefore ask that you reject the findings and recommendations in the Report as inaccurate, incomplete and highly misleading. We are of course happy to meet with you, Chief Scott, and members of the Police Commission to discuss these matters more fully or provide additional information. We ask only that any discussions on this issue pick up from where things left on in 2017 when the SFPD withdrew from the JTTF.

Sincerely,

Javeria Jamil, Asian Americans Advancing Justice – Asian Law Caucus  
Jeffrey Wang, Council on American-Islamic Relations of the San Francisco Bay Area  
Vasudha Talla, American Civil Liberties Union of Northern California

Cc: Police Chief William Scott  
Members, San Francisco Board of Supervisors  
Members, San Francisco Police Commission  
Director Paul Henderson, Department of Police Accountability  
Members, Human Rights Commission  
Commissioner Hala Hijazi, Human Rights Commission



## PROBLEMATIC FBI TACTICS:

### SELECTED CLIPS 2017-2019

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#### 2019

- “FBI monitoring immigration activists as violent “extremists” — though there’s been no violence” — *Salon*, September 6, 2019  
<https://www.salon.com/2019/09/06/fbi-monitoring-immigration-activists-as-violent-extremists-though-theres-been-no-violence/>
- “Lodi terror case show injustice when fear rules” — *Orange County Register*, August 16, 2019  
<https://www.ocregister.com/2019/08/16/lo-di-terror-case-shows-injustice-results-when-fear-rules/>
- “Leaked documents show FBI targeted post-Ferguson “black identity extremists” over white supremacists” — *Salon*, August 14, 2019  
<https://www.salon.com/2019/08/14/leaked-documents-show-fbi-targeted-post-ferguson-black-identity-extremists-over-white-supremacists/>
- “REVEALED: FBI investigated civil rights group as ‘terrorism’ threat and viewed KKK as victims” — *Guardian*, February 1, 2019  
<https://www.theguardian.com/us-news/2019/feb/01/sacramento-rally-fbi-kkk-domestic-terrorism-california>
- “The FBI could fight far right violence if they wanted to -- but they don’t,” — *Guardian*, August 16, 2019  
<https://www.theguardian.com/commentisfree/2019/aug/15/far-right-violence-fbi-terrorism-hate-crime>
- “A Former FBI Whistleblower Explains Why the Federal Government Is Failing on Domestic Terrorism—And How to Fix It” — *Mother Jones*, August 7, 2019  
<https://www.motherjones.com/politics/2019/08/a-former-fbi-whistleblower-explains-why-the-federal-government-is-failing-on-domestic-terrorism-and-how-to-fix-it/>
- “FBI faces skepticism over its efforts against domestic terrorism” — *Washington Post*, August 5, 2019  
[https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39\\_story.html](https://www.washingtonpost.com/national-security/fbi-faces-skepticism-over-its-anti-domestic-terror-efforts/2019/08/04/c9c928bc-b6e0-11e9-b3b4-2bb69e8c4e39_story.html)

#### 2018

- “REVEALED: FBI kept files on peaceful climate change protesters” — *Guardian*, December 13, 2018  
<https://www.theguardian.com/us-news/2018/dec/13/fbi-climate-change-protesters-iowa-files-monitoring-surveillance->
- “Black activist jailed for his Facebook posts speaks out about secret FBI surveillance” — *Guardian*, May 11, 2018  
<https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance>

- “Trump says white supremacist terror is fake news” — *Mother Jones*, July 11, 2018  
<https://www.motherjones.com/crime-justice/2018/07/donald-trump-white-supremacists-terrorism/>

## 2017

- “The FBI’s dangerous crackdown on ‘Black Identity Extremists’” — *New York Times*, November 15, 2017  
<https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html>
- “FBI’s new US terrorist threat: ‘Black Identity Extremists’” — *Foreign Policy*, October 6, 2017  
<https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>
- “FBI’s leniency towards border vigilante contrasts with harsh treatment of ‘Black Identity Extremist’” — *The Intercept*, July 7, 2019  
<https://theintercept.com/2019/07/07/fbi-border-vigilante-black-identity-extremist/>

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**Testimony of Michael German, Fellow,  
Brennan Center for Justice at New York University Law School;  
Former Special Agent, Federal Bureau of Investigation**

**Before the  
Congressional Black Caucus**

**March 20, 2018**

Chairman Richmond and members of the Congressional Black Caucus, thank you for inviting me to speak to you today about the FBI's August 2017 intelligence assessment describing a purported threat posed to law enforcement officers by "Black Identity Extremists" (BIE).<sup>1</sup> The assessment is of such poor analytic quality that it raises serious questions about the FBI's purpose in producing it. What is most troubling about the BIE assessment is its potential to incite irrational police fear of black political activists. Irrational fear, unfortunately, too often in the past translated into unnecessary police violence against unarmed and unthreatening black men and women.<sup>2</sup>

As a former FBI agent, civil rights advocate at the ACLU, and now fellow at the Brennan Center for Justice, I have reviewed hundreds of terrorism intelligence products like the BIE report, and I am sorry to say it isn't unusual. In 2011, the ACLU exposed bigoted FBI training materials that demonstrated bias against Arabs, Muslims, and Asians. In 2012, I wrote articles criticizing FBI intelligence materials on "Black Separatist Extremists," "American Islamic Extremists," "Animal Rights Extremists," and "The Chinese," which I provided to CBC staff. Since the BIE report came out, I have seen training materials produced by state and local law enforcement agencies adopting its language. The problem is much bigger than one report.

The FBI's BIE assessment never mentions Black Lives Matter, but as the most prominent group protesting police violence, it certainly seems to be in the crosshairs. Understanding how the FBI's investigative authorities work may provide insight into the purpose of this report. The FBI's investigative authorities are governed by the Attorney General Guidelines for Domestic FBI Operations (AGG), which prohibit investigations based *solely* on First Amendment activities. This is an extremely low standard, and the BIE assessment may be intended to provide

the additional element necessary to justify monitoring, questioning, investigating BLM or other African American protest groups.

Last modified by Attorney General Michael Mukasey in December 2008, the AGG authorizes a new type of investigation called an “assessment,” not to be confused with an “intelligence assessment” like the BIE report or the “threat assessment” authorized under a previous version of the AGG for national security investigations.<sup>3</sup> The AGG authorizes FBI agents to open assessments without a factual basis to believe someone has violated the law or poses a threat. Instead, agents simply certify that their purpose is to investigate violations of federal criminal laws or threats to national security, identify the individuals or organizations involved, or collect foreign intelligence to authorize their inquiry. Assessments are intrusive. They can involve physical surveillance, recruiting and tasking informants, trash covers, overt and covert interviews, commercial database searches, and grand jury subpoenas for telephone and email subscriber information.<sup>4</sup> Under the AGG, assessments can be opened for the purpose of recruiting, or coercing, a person to become an informant. Again, no factual predicate suggesting wrongdoing is required. The FBI has claimed the AGG authorize it to collect and map racial and ethnic demographic information and track “ethnic behaviors,” which is basically neighborhood profiling.<sup>5</sup> The reason the FBI draws these maps is so it can treat people on one side of the line differently from those on the other.

The Department of Justice Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity, issued by Attorney General Eric Holder in 2014 likewise fails to protect African American activists from inappropriate scrutiny.<sup>6</sup> It states that the Constitution only requires that the listed characteristics cannot be *sole* basis for law enforcement action. It allows federal law enforcement officers to use these characteristics whenever there is “trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.” Under the FBI’s rules, the BIE assessment may provide the necessary “trustworthy information” about a purported scheme, organization, or threat that can justify using race or ethnicity to target a particular group or individual.

In addition to these lax rules, the lack of diversity within the FBI remains a significant problem. Every director since William Sessions has identified this lack of diversity as one of the FBI’s major weaknesses. The bureau made slow but steady progress against this problem throughout the 1990s, but those gains were lost under directors Robert Mueller and James Comey. By August 2016, African Americans made up only 4.46% of special agents, a smaller percentage than in 1992. At the same time, the percentage of Latino agents fell to 6.57%, the lowest since 1996, and remarkable considering Latino Americans grew to make up 17.6% of the U.S.

population over this period.<sup>7</sup> The percentage of Asian agents increased to 4.53% over this time, but they remain underrepresented as compared to their proportion in the general population. Women account for only about 20% of FBI agents, but their representation in senior management decreased by 3% from 2013 to 2016.<sup>8</sup> The FBI refused to provide *ProPublica* reporter Topher Sanders with current racial and ethnic demographics for an article published last Friday.<sup>9</sup> I imagine this refusal means the FBI isn't making progress on this issue.

### **Policy Recommendations**

- Require the FBI to withdraw and denounce BIE report and any other intelligence assessments or training materials referencing BIE as a category of domestic terrorists.
- Require independent review of FBI intelligence and training materials regarding investigation, surveillance, and intelligence gathering that targets protected classes, modeled after its review of anti-Muslim training materials in 2012.
- Establish a peer review system to oversee the production of intelligence reports and training materials that include the FBI Office of General Counsel, DOJ Privacy Officer, and DOJ Civil Rights Division prior to publication (DHS already does this).
- Require all intelligence and training products to be available for congressional review, with all personally identifiable information (PII) properly redacted.
- End the FBI's racial and ethnic mapping program.
- Pass the Ending Racial Profiling Act.
- According to 2016 data, the FBI is 83.4% white and 80% male.<sup>10</sup> Congress should order an independent study to determine why diversity gains throughout the 1990s have fallen over the last 18 years. It should examine bias in hiring, promotion, and disciplinary processes.

Thank you for the opportunity to speak with you today.

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<sup>1</sup> Federal Bureau of Investigation, "(U//FOUO) Black Identity Extremists Likely Motivated to Target Law Enforcement Officers," Intelligence Assessment, August 3, 2017.

<sup>2</sup> Dara Lind, "The FBI is trying to get better data on police killings. Here's what we know now," Vox.com, April 10, 2015, <https://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black>.

<sup>3</sup> Department of Justice, *The Attorney General's Guidelines for Domestic FBI Operations*, September 29, 2008, <https://www.justice.gov/archive/opa/docs/guidelines.pdf>. See also, Emily Berman, "Domestic Intelligence: New Powers, New Risks," *Brennan Center for Justice at New York University Law School*, January 18, 2011, <https://www.brennancenter.org/publication/domestic-intelligence-new-powers-new-risks>.

<sup>4</sup> Ibid.

<sup>5</sup> Federal Bureau of Investigation, *Domestic Investigations and Operations Guide (DIOG)*, December 16, 2008.

<sup>6</sup> The Department of Justice, *Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation*, December 2014, <https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>

<sup>7</sup> U.S. Census Bureau, “Facts for Features: Hispanic Heritage Month 2016,” October 12, 2016, <http://www.census.gov/newsroom/facts-for-features/2016/cb16-ff16.html>.

<sup>8</sup> Adam Goldman, “Where Are the Women in F.B.I.’s Top Ranks?,” *The New York Times*, October 22, 2016, <https://www.nytimes.com/2016/10/23/us/fbi-women.html>.

<sup>9</sup> Topher Sanders, “The FBI – ‘Fidelity, Bravery, Integrity’ – Still Waiting on the Diversity,” ProPublica, March 16, 2018, <https://www.propublica.org/article/the-fbi-fidelity-bravery-integrity-still-working-on-diversity>

<sup>10</sup> Kaitlyn D’Onofrio, “Why Is FBI Even Less Diverse Than 20 Years Ago? Director Doesn’t Know,” DiversityInc, July 15, 2016, <http://www.diversityinc.com/news/fbi-james-comey-diversity/>.

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**Testimony of Michael German, Fellow,  
Brennan Center for Justice at New York University School of Law,  
Liberty and National Security Program;  
Former Special Agent, Federal Bureau of Investigation**

**Before the  
Portland City Council  
April 18, 2018**

Mayor Wheeler and Council Members,

It is my pleasure today to testify on behalf of the Brennan Center for Justice's Liberty and National Security Program. We believe that national security policies and practices are most effective when they respect constitutional values and the rule of law, are subjected to stringent oversight, and public accountability. My 16 years as an FBI special agent taught me this was true. I worked undercover on domestic terrorism investigations overseen by Joint Terrorism Task Forces (JTTF) in Los Angeles and Seattle in the 1990s. In those cases, I operated under Attorney General's Guidelines that required me to have a reasonable indication that each person I investigated was engaging in or likely to engage in a violation of federal law. This standard was essentially the same as that imposed by Oregon's criminal intelligence statute.<sup>1</sup> Both were enacted for the same purpose: to protect the privacy and civil liberties of innocent persons and ensure law enforcement activities are based on evidence of wrongdoing rather than bias. As a working agent, I also found this reasonable standard made my investigations more effective, by focusing my efforts and resources where the evidence directed.

Unfortunately, after the 9/11 attacks, the Justice Department and Congress altered the FBI's authorities significantly, giving it power to conduct electronic surveillance, gather intelligence, and investigate people and organizations it does not suspect of engaging in criminal activity. As a result, Portland police officers assigned to the JTTF would find it extremely difficult, if not impossible to comply with Oregon law while conducting routine operations under the FBI's current counterterrorism authorities and practices. Moreover, the FBI exercises these expanded powers in nearly complete secrecy, giving overseers, the public, and victims of abuse few opportunities to challenge them for legality or effectiveness.

Congress passed the USA PATRIOT Act weeks after the attacks, easing the use of secret foreign intelligence powers to amass enormous databases containing information about persons two and three degrees separated from individuals who are merely "relevant" to an authorized inquiry.<sup>2</sup>

Congress continued reauthorizing its most problematic provisions even after Justice Department Inspector General audits began revealing widespread abuse in 2007, including the use of illegal “exigent letters” to gather telephone toll records of journalists based on faked emergencies.<sup>3</sup> It wasn’t until National Security Agency (NSA) whistleblower Edward Snowden provided journalists with documents revealing the government’s secret interpretation of the PATRIOT Act that allowed the FBI to gather the phone records of virtually all Americans that even members of Congress realized how expansively the bureau was using these authorities.<sup>4</sup> The FBI also claims the authority to sift through the NSA’s vast trove of intercepted international communications without warrants to seek evidence for use in routine criminal investigations against Americans, though it won’t say how often it conducts these backdoor searches.<sup>5</sup> Portland police officers assigned to the JTTF have routine access to most of these data bases when conducting counterterrorism investigations or intelligence gathering activities.

The Justice Department also amended the Attorney General’s Guidelines that govern the FBI’s investigative authorities several times after 9/11, lastly and most significantly by Attorney General Michael Mukasey in December 2008.<sup>6</sup> The Mukasey guidelines created a new type of investigation called an “assessment,” and expanded the scope of preliminary investigations, neither of which require reasonable suspicion in order to initiate. Assessments permit physical surveillance, commercial and government database searches, overt and covert interviews, racial and ethnic mapping, and the recruitment and tasking of informants without any factual predicate, that is, without any objective basis to suspect the target of the investigation has violated any law or is likely to in the future.<sup>7</sup>

Agents open assessments by claiming they have an “authorized purpose,” like preventing crime or terrorism, but such subjective criteria allow agents immense discretion. Over 82,325 assessments of individuals and organizations that the FBI opened from 2009 to 2011, only 3,315 found information that warranted opening preliminary or full investigations, according to data the FBI released to *The New York Times*.<sup>8</sup> Assessments can be opened for the purpose of finding information to coerce a person to become an FBI informant. Again, no factual predicate suggesting wrongdoing is required.

Preliminary investigations can last up to 18 months and require only “information or an allegation.” A 2010 Inspector General inquiry regarding FBI investigations of domestic advocacy groups like the Thomas Merton Center for Peace and Justice, Greenpeace, Catholic Worker, and People for the Ethical Treatment of Animals found FBI agents often make the required allegations, based on the agents’ speculation that the subjects might commit a crime in the future.<sup>9</sup> Importantly, though the Inspector General found these investigations problematic, he determined they would be authorized under the Mukasey guidelines. Only full investigations, which allow electronic wiretaps and search warrants, require the reasonable suspicion of criminal activity that Oregon law requires.<sup>10</sup>

The abuse that results from these low standards is not hypothetical. Despite the excessive secrecy shrouding most JTTF activities, substantial public evidence shows the FBI has repeatedly used its post-9/11 powers to harass political dissidents, immigrants, and minority communities. The Portland Police can be proud of the fact they led resistance to this federal overreach when Attorney General Ashcroft ordered FBI agents to conduct “voluntary” interviews of thousands of



Middle Eastern immigrants based on nothing but their national origin. This broad racial and ethnic profiling has not stopped. In 2009 the FBI initiated a nationwide program of mapping American communities by race and ethnicity, and tracking so-called “ethnic behaviors,” which the Justice Department specifically authorized in 2014.<sup>11</sup> FBI documents obtained by *The Intercept* reveal agents regularly exploit immigration records, scour Facebook and infiltrate Muslim Students Associations or local mosques to recruit informants.<sup>12</sup> On the eve of the 2016 presidential elections FBI agents conducted at least 109 interviews of American Muslims across the nation, asking generalized questions about potential threats to polling places, and potentially suppressing voter turnout from these communities.<sup>13</sup>

In August 2017, the FBI circulated an intelligence assessment to its local networks, including thousands of local police officers assigned to the JTTF. The document warned of the threat posed to law enforcement by so-called “Black Identity Extremists,” a movement it describes as responding to “*perceptions* of police brutality against African Americans.”<sup>14</sup> Local law enforcement has adopted this thinly veiled allusion to the Black Lives Matter movement as a threat to be prioritized in investigations.<sup>15</sup> Indeed, the FBI has previously targeted Black Lives Matter activists with intimidating visits to their homes and workplaces, as they have done with environmental activists across the country and here in Portland.<sup>16</sup> These harassing activities do not make us safer.

Portland is the first city to refuse to participate in the JTTF in 2005, but others have now followed this lead. In 2012, the San Francisco City Council passed an ordinance requiring the SFPD to submit annual public reports about its work with the FBI, a process modeled on the Portland ordinance passed in 2011.<sup>17</sup> As in Portland, the JTTF resisted efforts to fully comply with the public reporting requirements. Instead of submitting its report in 2017 as required, the SFPD suspended its participation in the JTTF.<sup>18</sup> Following this action, the Oakland City Council unanimously passed an ordinance requiring that Oakland Police Department officers assigned to the JTTF follow state and local law, submit annual public reports, and obtain approval from the city’s Privacy Advisory Committee before signing any Memoranda of Understanding with the FBI JTTF.<sup>19</sup>

These ordinances imposed reasonable and necessary measures to ensure that local police comply with state and local laws and protect their constituents from federal overreach and abuse. JTTF officials’ failure to fully comply with them reveals such measures are insufficient, however. By withdrawing from the JTTF, the City of Portland would rejoin the frontlines of a movement to uphold the constitutional rights of its constituents and hold federal agencies accountable to the law. Ensuing public safety includes protecting against unwarranted government interference with the free exercise of our civil rights and liberties.

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<sup>1</sup> Or. Rev. Stat. § 181A.250, [https://www.oregonlegislature.gov/bills\\_laws/ors/ors181a.html](https://www.oregonlegislature.gov/bills_laws/ors/ors181a.html).

<sup>2</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 107 P.L. 56, 115 Stat. 272.

<sup>3</sup> OFFICE OF INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>

<sup>4</sup> Glenn Greenwald, "NSA collecting phone records of millions of Verizon customers daily," *The Guardian*, June 5, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>5</sup> Louise Matsakis, "Congress Renews Warrantless Surveillance – And Makes It Even Worse," *Wired Magazine*, Jan. 11, 2018, at: <https://www.wired.com/story/fisa-section-702-renewal-congress/>.

<sup>6</sup> See Emily Berman, "Domestic Intelligence: New Powers, New Risks," *Brennan Center for Justice at New York University Law School*, January 18, 2011, <https://www.brennancenter.org/publication/domestic-intelligence-new-powers-new-risks>.

<sup>7</sup> U.S. Department of Justice, Office of the Attorney General, *The Attorney General's Guidelines for Domestic FBI Operations* (2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

<sup>8</sup> Charlie Savage, "F.B.I. Focusing on Security Over Ordinary Crime," *The New York Times*, August 23, 2011, sec. U.S., <https://www.nytimes.com/2011/08/24/us/24fbi.html>.

<sup>9</sup> OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010), <http://www.justice.gov/oig/special/s1009r.pdf>

<sup>10</sup> Or. Rev. Stat. § 181A.250.

<sup>11</sup> The Department of Justice, *Guidance for Federal Law Enforcement Regarding Their Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation*, December 2014,

<https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>. See also, Federal Bureau of Investigation, *Domestic Investigations and Operations Guide (DIOG)*, December 16, 2008.

<sup>12</sup> Cora Currier, "The FBI Wanted to Target Yemenis Through Student Groups and Mosques," *The Intercept*, September 29, 2016, <https://theintercept.com/2016/09/29/the-fbi-wanted-to-target-yemenis-through-student-groups-and-mosques/>; and Cora Currier, "Revealed: The FBI's Secret Methods for Recruiting Informants at the Border," *The Intercept*, Oct. 5, 2016, <https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/>.

<sup>13</sup> Mazin Sidahmed, "FBI Pre-election Sweep of Muslim Americans Raises Surveillance Fears," *The Guardian*, Jan. 16, 2017, <https://www.theguardian.com/us-news/2017/jan/16/fbi-muslim-americans-visits-surveillance-cair>.

<sup>14</sup> Jana Winter and Sharon Weinberger, "The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'" *Foreign Policy*, October 6, 2017, <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.

<sup>15</sup> Martin De Bourmont, "Is a Court Case in Texas the First Prosecution of a 'Black Identity Extremist'?", *Foreign Policy*, January 30, 2018, <https://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/>; Will Parrish, "Documents: Police Targeted Leftists Before 'Unite The Right' Rally," *Shadowproof*, March 7, 2018, <https://shadowproof.com/2018/03/07/documents-reveal-police-targeting-anti-racists-charlottesville/>.

<sup>16</sup> Adam Federman, "Lawyer for Environmental Group 'interrogated Repeatedly' at US Border," *the Guardian*, July 6, 2015, <http://www.theguardian.com/us-news/2015/jul/06/environmental-group-lawyer-interrogated>.

<sup>17</sup> San Francisco, Calif., Admin. Code § 2A.74 (2012); Brandon E. Patterson, "Are Police Targeting Black Lives Matter Activists Ahead of the GOP Convention?", *Mother Jones*, June 30, 2016, <https://www.motherjones.com/politics/2016/06/cleveland-protesters-rnc-police-fbi-visits/>

<sup>18</sup> "SFPD Suspends Participation with the Joint Terrorism Task Force," news release, February 1, 2017, <http://sanfranciscopolice.org/article/sfpd-suspends-participation-joint-terrorism-task-force>.

<sup>19</sup> Oakland, Calif., City Council Ord. 13457, § 2 (October 3, 2017), [https://library.municode.com/ca/oakland/codes/code\\_of\\_ordinances?nodeId=TIT9PUPEMOWE](https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT9PUPEMOWE).



San Francisco Police Commission  
Police Commission Office  
1245 3<sup>rd</sup> Street  
San Francisco, California 94158  
sfpd.commission@sfgov.org

January 05, 2017

**RE: Update on SFPD's Participation in FBI's Joint Terrorism Task Force**

Dear Commissioners:

We write to you to provide an update on the San Francisco Police Department's ("SFPD") compliance with the Safe San Francisco Civil Rights Ordinance<sup>1</sup> ("the Ordinance"), which legally requires our local police to adhere to our strong local and state civil rights protections – rather than the Federal Bureau of Investigation's ("FBI") exceedingly lax guidelines – when they participate in the FBI's Joint Terrorism Task Force ("JTTF").

As leaders of the Coalition for a Safe San Francisco,<sup>2</sup> our organizations worked with the SFPD, Police Commission, Human Rights Commission, Board of Supervisors, and the Mayor's Office to enact the ordinance in 2012. As most of you know, since that time, we have worked to ensure that the SFPD provide adequate and accurate information about the scope of its work in the JTTF during the annual reports mandated by the Ordinance. We have been both diligent and patient in our efforts to rectify a number of long-standing and very troubling problems. We have documented our concerns in writing; provided detailed public testimony; filed an Office of Citizen Complaints ("OCC") complaint, as suggested by the Commission; saw the complaint through to its long-delayed conclusion; and met repeatedly with SFPD command staff, Commissioners, OCC staff, and the FBI.

While we are continuing collaborative efforts aimed at fixing the serious problems that have now been identified and conceded by all involved, **the election of Donald Trump and his imminent inauguration renders these issues extremely urgent. Through this letter, we hope to not only thoroughly update you on the status of these issues, but also provide you with a preview of the necessary steps that must occur in the next few weeks.**

**THE URGENCY: THE FBI UNDER DONALD TRUMP**

Mr. Trump's election was due in large part to his troubling, but obviously effective, use of Islamophobia to stir up fear in parts of the electorate (but, thankfully, not in San Francisco, where more than 90% of the votes cast were against his candidacy). Indeed, during his campaign, he promised to ban Muslims from entering the country; stated he would subject Muslims to "extreme

<sup>1</sup> S.F. Admin. Code § 2A.74, Ord. 83-12, File No. 120351, App. 5/9/2012, Eff. 6/8/2012.

<sup>2</sup> The Coalition for a Safe San Francisco worked for three years to pass the Ordinance. It was comprised of 79 community and civil rights groups, and coordinated the participation of thousands of community members.

vetting;” promised to create a special “Muslim registry;” endorsed widespread and suspicionless surveillance of Muslim prayer spaces; and even claimed that Muslims in New Jersey were seen cheering as the World Trade Center fell on September 11<sup>th</sup>, which is of course patently false. Since the election, the Muslim community’s alarm has only intensified with the announcement of one appointment after another of high level administration officials known for holding deeply Islamophobic views.

All signs indicate that the Trump administration will greatly increase the sort of discredited, counterproductive, and racist surveillance of Muslim communities that the New York Police Department (“NYPD”) became notorious for. Indeed, about three weeks ago, Representative Peter King (R-NY) met with Mr. Trump and others to support precisely this proposition.<sup>3</sup> As you may remember, even the Special Agent in Charge of the FBI’s Newark Office publicly criticized the NYPD program and blamed it for alienating Muslim communities from law enforcement. The Third Circuit Court of Appeals was even more specific, stating that the NYPD’s mass surveillance approach evoked the government’s mistreatment of “Jewish Americans during the Red Scare, African-Americans during the civil rights movement, and Japanese-Americans during World War II.” Despite this, not only did Mr. Trump fail to push back on Mr. King’s proposals, Mr. King reported that Mr. Trump agreed with the view that the country should be “more aggressive on terrorism and less concerned with political correctness.”<sup>4</sup>

This is a frightening state of affairs, and if this or similar proposals are implemented once Mr. Trump takes office – which is all but a certainty at this point – the FBI’s JTTFs will be tasked with conducting these domestic counterterrorism activities. **This means that local police officers cross-designated as JTTF agents will be carrying out a lot of this activity.** Furthermore, because the rules governing the FBI<sup>5</sup> set few meaningful limits on their intelligence gathering practices, even significant changes in the scope of JTTF activities will not necessarily be announced or immediately detectable to the public.

We remember well Commissioner Mazucco reacting with skepticism in 2011 to our concerns then about the SFPD’s activities in the JTTF because, as he told us, he could not imagine there would be abusive or inappropriate FBI practices during the Obama presidency. However, it is about to become the Trump administration, and we trust the entire Commission fully understands the great, urgently-felt alarm in many communities about what havoc Mr. Trump’s FBI – and our local officers working with Mr. Trump’s FBI in the JTTFs – could wreak on our civil rights, safety, and confidence in local law enforcement.

## **2016 COLLABORATIVE EFFORTS**

As you may recall, the January 2016 hearing on the SFPD’s 2015 JTTF ordinance annual compliance report, once again, raised many more questions than it answered. The SFPD’s report contained inaccurate and incomplete information and inexplicably quoted FBI standards, rather than the much stronger local standards that are required by the Ordinance. As detailed below, our local law states that all SFPD activity **involving** First Amendment activity – a deliberately broad and protective

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<sup>3</sup> Ngo, Emily, “Peter King Presses Donald Trump on Muslim Surveillance,” Dec. 15, 2016, *Newsday*, available at <https://www.newsday.com/news/nation/peter-king-presses-donald-trump-on-muslim-surveillance-1.12761336>.

<sup>4</sup> *Id.*

<sup>5</sup> These include the 2008 Attorney General’s Guidelines for Domestic FBI Operations, available at <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

standard – be supported by articulable and reasonable suspicion, and requires that simple, written supervisory approvals be obtained and retained. By contrast, the FBI’s standards do not require a factual predicate, which is far below reasonable suspicion. Since the January 2016 report, because of the concerns we and members of the Commission expressed, we have held six meetings with SFPD command staff, including the chief, interim chief, deputy chief, and the commander and lieutenant in charge of the Special Investigation Division (“SID”).<sup>6</sup>

In turn, the SFPD has met with and discussed these issues with the FBI. Additionally, at the request of the FBI and the SFPD, former ACLU police practices attorney John Crew has met in person and by phone for more than three hours with the FBI’s supervisor of the San Francisco JTTF, Assistant Special Agent in Charge (“ASAC”) Craig Fair, to discuss these problems and seek solutions. Mr. Crew, whom we continue to work very closely with, is intimately familiar with these issues. He collaborated with the SFPD and Commission in the drafting and enactment of the principal local policy at issue, Department General Order 8.10, “Guidelines for First Amendment Activities” (“DGO 8.10”), which controls all SFPD intelligence gathering whenever any First Amendment information is “involved.”<sup>7</sup> Mr. Crew was also the Coalition’s partner in drafting and advocating for the enactment of the ordinance and represented Asian Americans Advancing Justice-Asian Law Caucus (“Asian Law Caucus”) in the latter stages of the OCC complaint we filed in March 2015 about the SFPD’s JTTF activities.<sup>8</sup> To ensure that our understanding of FBI JTTF policies and practices is fully accurate and that our solutions are practical, we have also consulted extensively with Michael German of the Brennan Center for Justice’s Liberty and National Security Program. Mr. German was an FBI agent for 16 years, where he specialized in domestic terrorism and covert operations.<sup>9</sup>

We are happy to report that we – our groups and the SFPD – now have a much clearer and consensus understanding of the source, nature, and scope of the SFPD’s compliance problems with the Ordinance and DGO 8.10. The bad news is that, while we are poised and ready to implement jointly-crafted solutions, the FBI has not yet indicated their position on those solutions. The SFPD’s legal obligations under the Ordinance are unambiguous; SFPD officers may participate in FBI JTTF activities “only in a manner that is fully consistent with the laws of the State of California, including but not limited to the inalienable right to privacy guaranteed by Article I, Section 1 of the California Constitution, as well as the laws and policies of the City and County of San Francisco and, as applicable to the Police Department, that Department’s policies, procedures and orders.”<sup>10</sup> In short, nothing the FBI will or could say can interfere with the SFPD’s need at all times to comply with local intelligence gathering standards and protocols in DGO 8.10, as well as with the state constitutional right to privacy’s requirement not to create intelligence records absent reasonable suspicion (it is important to note that JTTF activities routinely involve activities where there is no reasonable suspicion).<sup>11</sup> **The need to follow our own state and local laws and policies — which were**

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<sup>6</sup> These meetings were delayed at one point by a five-month wait in getting a meeting scheduled with Acting Chief Chaplin after Chief Suhr’s departure. A progress report was on the Commission calendar for June, but the item was removed due of this delay.

<sup>7</sup> Available at <http://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/24722-DGO%208.10%20100108%20police%20commission%20members.pdf>.

<sup>8</sup> Available at <http://ww2.kqed.org/news/2015/03/26/complaint-alleges-sfpd-officer-brokecity-law-while-investigating-with-fbi/>. See also <http://archives.sfexaminer.com/sanfrancisco/sf-police-could-be-violating-city-law-in-work-with-fbis-joint-terrorism-task-force/Content?oid=2922163>; <http://www.sfexaminer.com/sf-cops-work-with-the-fbi-jointterrorism-task-force-prompts-citizen-complaint/>.

<sup>9</sup> Mr. German’s biography is available at <https://www.brennancenter.org/expert/mike-german>.

<sup>10</sup> San Francisco Administrative Code Section 2A.74(b) (emphasis added).

<sup>11</sup> See “California Attorney General’s Model Standards and Procedures for Maintaining Criminal

**enacted to reflect our values and priorities — rather than the federal government’s was never more important that it will be under President Trump.**

## **WHAT WE NOW KNOW**

We appreciate the candor and openness of the SFPD and FBI during our recent discussions.<sup>12</sup> This collaborative approach has allowed us all to much more clearly understand the nature of past compliance problems with the Ordinance and work together towards practical solutions that are now so very urgently needed given the possible intentions of the Trump administration. For your convenience, we have provided a summary of the major, recent developments in this issue.

- **JTTF STAFFING:** In preparation for the Super Bowl in 2016, SFPD doubled the number of officers it assigned full-time to the JTTF from one to two. That expanded staffing continues.
- **UNCONTESTED TRAINING FAILURES:** In its annual compliance reports, SFPD has consistently claimed that officers assigned to the JTTF are “trained to be intimately familiar with the guidelines and restrictions contained in DGO 8.10, Bureau Order 2011-07, and the Ordinance.”<sup>13</sup> The reports have also claimed that “[t]he FBI understands the restrictions placed on members of the SFPD and they have been cooperative in efforts to ensure the officers assigned to the JTTF adhere to SFPD policy;” they have additionally stated that “[t]he FBI has not placed SFPD members in any position at risk of any policy violations.”<sup>14</sup>

Those statements and assumptions are now demonstrably false:

- **OCC Finding:** On August 12th, the OCC ruled that a “training failure” had occurred in our complaint (#168-15) about an SFPD JTTF officer’s failure to comply with DGO 8.10 and the Ordinance when seeking to interview a Google employee after showing up unannounced at his workplace. Specifically, according to the OCC: the officer “stated that although the investigation *did* contain elements of First Amendment activity, that was not the reason for the investigation;” the “officer was unaware that any time his investigation **involves** any element of First Amendment activity, he must first obtain SFPD supervisory approval for the activity, which must be justified and documented;” and “**the evidence proved that the actions complained of were the result of inadequate or inappropriate training[,] or an absence of training when viewed in light of Departmental policy and procedure.**”<sup>15</sup>
- **SFPD’s Current JTTF Training Materials:** In response to our request for the training materials used to educate SID officers assigned to the JTTF about the key differences between stricter local legal and policy obligations and the far broader standards used by the FBI, the SFPD informed us that ***no specialized materials existed***. The materials used to train JTTF officers merely consists of unannotated copies of the text of the Ordinance and some Departmental orders, as well as a very old, brief, simple training video, which was apparently created well before the SFPD joined the JTTF. The video is a simple roll call training approach aimed at patrol

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Intelligence Files and Criminal Intelligence Operational Activities,” Nov. 2007.

<sup>12</sup> We especially thank former Chief Suhr, Acting Chief Chaplin, Deputy Chief Redmond, Commander McEachern, and Lieutenant O’Connor for the time they have devoted to this topic this past year.

<sup>13</sup> See e.g. 2015 SFPD “Annual Report on Involvement in the FBI Joint Terrorism Task Force.” See also 2012 SFPD Annual Compliance report: “Each of the officers assigned to the JTTF have received training in the SFPD’s Guidelines for First Amendment Activities, DGO 8.10, ... [t]hese officers are intimately familiar with these department policies.”

<sup>14</sup> See 2015 SFPD JTTF report.

<sup>15</sup> OCC Complaint Summary (“openness”) Report at 3, Aug. 12, 2016 (emphasis added).

officers reminding them, per DGO 8.10, to notify SID if they come across evidence of religiously- or politically-motivated hate crime activity.<sup>16</sup> SFPD now recognizes the need for more detailed training about when DGO 8.10 applies, how it should be used to properly document and authorize investigative activity in JTTF contexts, and how local regulations differ from the FBI's standards.

- **The FBI's Understanding of the Ordinance:** When Mr. Crew met with the FBI on December 14<sup>th</sup>, he asked ASAC Fair for his understanding of the major differences between local San Francisco laws and policies and the broader standards of the FBI. ASAC Fair replied initially that he was not aware of any, but after Mr. Crew walked him through DGO 8.10, ASAC Fair readily acknowledged the various differences. They have had subsequent conversations involving, in part, discussion of various hypothetical scenarios to illustrate how the DGO 8.10 **"involves First Amendment activity"** standard must be applied; how it guides officers to properly investigate terrorism concerns if reasonable suspicion is present and simple supervisory approvals are obtained and retained; and how the FBI's simple ban on targeting groups or individuals based **"solely" on their First Amendment activity** is far more permissive in terms of intelligence gathering activities than SFPD standards. ASAC Fair reported that, now that these policy differences have been understood, there are discussions taking place internally within the local FBI office, as well as at the deputy director level at FBI headquarters. ASAC Fair stated that he understands both the urgency of the community's concerns given Mr. Trump's looming inauguration and the great frustration that these basic differences were not fully understood and incorporated into local JTTF supervision of SFPD officers years ago when the Ordinance was enacted.<sup>17</sup>
- **FAILURE TO CREATE AND RETAIN WRITTEN AUTHORIZATIONS:** For years, we have been told that DGO 8.10 written authorizations in the JTTF context did not exist because the SFPD was not participating in activities that require such authorizations. We have repeatedly taken issue with those unlikely statements. Given the full-time assignment of SFPD officers to the JTTF, and given that terrorism, by its nature, involves politically- and religiously-motivated activity, it was simply not credible to think *none* of the SFPD's work for the FBI had "involved" First Amendment activities. The SFPD's prior explanation for this has been that if DGO 8.10 was potentially implicated, the FBI either did not assign SFPD JTTF officers to those assignments or the officers did not accept those assignments. **We now know that this was based on a fundamental failure on the SFPD's and FBI's part to correctly apply the "involves First Amendment activity" standard**, as shown by the OCC finding, the FBI's recent statements, and the SFPD's recent acknowledgments that the training needs to be improved (*supra*). While we all remain committed to trying to fix the problem going forward, it is important to recognize that **this misunderstanding and misapplication has likely led to dozens of violations of the Ordinance and DGO 8.10 in recent years**. While our OCC complaint is a clear and unequivocal example of such a violation, there is additional information that the Commission will no doubt be interested in:

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<sup>16</sup> The video depicted an explosive device left outside a synagogue combined with anti-Semitic writings, suggesting a connection to a politically-motivated hate group. It was not aimed at SID's obligations under DGO 8.10 to document the "reasonable suspicion" and supervisory approvals for the investigative activity that would follow.

<sup>17</sup> Mr. Crew reports that he strongly encouraged the FBI to attend the upcoming Police Commission hearing on the 2016 compliance report since their failure to do so in prior years – notwithstanding invitations from SFPD – sends a message that fixing these problems is not a concern for the FBI. ASAC Fair promised to think about it.

- The 2015 SFPD compliance report revealed that in that year alone, “SFPD members detailed to the JTTF were assigned a combined total of thirty-five cases from tips -- either from the phone line, private sector partners or other law enforcement agencies.” It went on to state that all tips submitted to the FBI with a credible nexus to terrorism are forwarded to the JTTF for further action. Again, given the nature of terrorism investigations, it is simply not credible to assert that none of these 35 cases involved First Amendment activity.
- The “nexus” referred to in the FBI’s standards is a theoretical connection requiring “no particular factual predicate,” meaning no facts indicating any wrongdoing whatsoever.<sup>18</sup> This is well short of the “reasonable suspicion” standard required by DGO 8.10 whenever any SFPD activity – including JTTF activity – “involves” First Amendment information. On his own, **ASAC Fair volunteered that nearly everything the FBI JTTFs do “involves” (but does not target) First Amendment information**, given the role of political and religious motives for crimes of terrorism.
- The “cases” or investigations handled by the FBI are broken down into three categories by their Guidelines: assessments, preliminary investigations, and full investigations. According to ASAC Fair, San Francisco’s JTTF handles about 1,000 assessments each year. They nearly always involve voluntary interviews of the type attempted with the Google employee in our complaint. These assessments are tips and other information that the FBI feels are worth looking into, but which are nearly always closed without action beyond entering whatever information is obtained into federal intelligence databases. In addition to interviews, the FBI Guidelines (contrary to local standards) permit these assessments to include the use of surveillance, informants, and other intrusive techniques — all in the absence of “reasonable suspicion” of criminal activity. Part of what SFPD officers — and other local officers — do for the FBI in the JTTF is handle many of these assessments, presumably at least dozens of them each year by SFPD personnel.
- Per ASAC Fair’s statement that nearly all of the JTTF’s investigative activity “involves” First Amendment information (and therefore implicates DGO 8.10), SFPD officers can legally **only** handle JTTF matters that involve reasonable suspicion of criminal activity; these must be approved by written SFPD supervisory authorizations, retained by the SFPD, and subjected to the annual OCC audit and oversight by the Commission. Instead, the SFPD has seemingly been handling tips and other assessments that very likely lack reasonable suspicion. Moreover, they have done so without ever obtaining the required written authorizations, which is a clear violation of local law.
- Like the best practices models upon which it was based, DGO 8.10’s various components are designed to work in concert with one another: the “reasonable suspicion” investigative standard is reinforced by the “pause and think” need (absent an emergency) to briefly articulate that suspicion in writing; that, in turn, serves to facilitate active supervision in this sensitive area by requiring written approvals from SFPD supervisors; these written approvals then facilitate routine audits and oversight that can help spot any problems and boost public confidence in the SFPD’s activities. The policy fails if officers do not understand it and follow it due to a lack of training.

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<sup>18</sup> See e.g. Berman, Emily, “FBI: Fact or Fiction?,” July 27, 2011, available at <https://www.brennancenter.org/analysis/fbi-fact-or-fiction>.



- **SANCTUARY ORDINANCE:** Mr. German recently provided us with a document that details the FBI’s “Baseline Collection Plan,” which seeks to standardize the information collected during JTTF and other counterterrorism assessments and investigations.<sup>19</sup> It is also intended to “establish a foundation of intelligence upon which the FBI may base the decision to continue or close an Assessment or investigation.”<sup>20</sup> Inter alia, **this document instructs JTTF officers to use federal databases to inquire about the “US person status” (citizenship or legal residency) of all people who are the subject of an “assessment,”** even if it is based on nothing more than a tip. This information is recorded in the case files and in federal databases accessible to, among others, Immigration and Customs Enforcement (“ICE”) and other Department of Homeland Security agencies. ASAC Fair could not confirm whether an updated Baseline Collection Plan has been promulgated since 2009, but **he did not dispute that this sort of information is sought and retained in federal databases as a result of JTTF-conducted assessments.**
  - **This standard JTTF activity, if performed for the FBI by SFPD officers, violates the intent of the San Francisco City and County of Refuge law, and directly violates SFPD’s Department General Order 5.15, which states that SFPD officers “shall not inquire into an individual’s immigration status or release or threaten to release information to [ICE] regarding an individual’s identity or immigration status.”**<sup>21</sup> It does not matter if that information is sought from federal databases or from individuals. It does not matter if the SFPD officer makes use of the information during the JTTF assessment or investigation. The outcome of the search (whether a person is found to be with or without legal status) is irrelevant. **SFPD’s own policy prohibits the inquiry from being made at all.** If the person is undocumented, a new record will have been created in a federal database identifying him or her as such for the first time. SFPD should not participate in that activity.
  - We have not yet had an opportunity to share or discuss this new information with SFPD command staff. Given the threats posed to immigrants by the Trump administration, it is critical that SFPD become fully disentangled from this sort of activity in the JTTFs immediately.

## **THE COLLABORATIVE PATH FORWARD**

We greatly appreciate the SFPD’s shared commitment to addressing these issues as quickly and effectively as possible. Our joint plan had been to work collaboratively on new training for SID (including JTTF) officers, to be conducted in the very near future, but in any event in advance of Inauguration Day. We temporarily put those efforts on hold to allow Mr. Crew and ASAC Fair to meet, in case anything gleaned during those sessions might improve the quality and specificity of the training. Understanding the urgency, ASAC Fair has committed to trying to get answers from FBI headquarters as soon as he can, while freely acknowledging the FBI sometimes moves more slowly than he would prefer. He has been providing regular updates on his efforts to Mr. Crew, and his last commitment was to try to get an FBI conference call scheduled no later than January 6<sup>th</sup>, with the hope that decisions would be made and could be communicated immediately thereafter. However, given the passage of time and threats posed by Mr. Trump, our view is that we should wait no longer,

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<sup>19</sup> “Counterterrorism Program Guidance Baseline Collection Plan: Administrative and Operational Guidance,” Sept. 24, 2009, available at <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM004887.pdf>.

<sup>20</sup> *Id.* at 3, Category A.2.

<sup>21</sup> San Francisco Administrative Code Sec. 12.H.2; San Francisco Police Department General Order 5.15, Enforcement of Immigration Laws.

especially since the SFPD's obligations under the Ordinance will be unaffected by whatever the FBI decides. We therefore suggest the following:

- **TRAINING:** We hope to reconvene with SFPD command staff as soon as possible and carry out our mutual plan to train all SID officers, with special emphasis placed on the need for SFPD's JTTF officers to recognize the conflicts between FBI standards and various local legal and policy obligations. The training will address the Ordinance, DGO 8.10, the stronger local prohibition against Bias-Based Policing in DGO 5.17, and sanctuary obligations. Samara Marion has been assigned by the OCC to follow-up on their "training failure" finding on our complaint. We are keeping her posted on our progress and look forward to her assistance in developing an effective training.
- **WRITTEN AUTHORIZATIONS:** The SFPD and FBI now recognize these authorizations have been and will continue to be necessary, per DGO 8.10, in any JTTF activities involving First Amendment information which, per ASAC Fair, will include the vast majority of their investigative activities. The FBI is concerned about the release of classified information, but much of what the FBI JTTF does during assessments – like trying to conduct an interview in the public lobby of a Google office building – is not classified. In any event, we believe that in all situations, a brief description of the factual basis for the "reasonable suspicion" can be provided in a written authorization (which is kept confidential by SFPD) without revealing any classified information. If that is not possible for any reason, then the Ordinance is clear – our officers may not participate in that activity. During their meeting, Mr. Crew pointed out to ASAC Fair that the FBI's Memorandum of Understanding ("MOU") with the SFPD prohibits the unauthorized release of classified information, but **permits** FBI supervisors to authorize appropriate and necessary sharing of **non-classified** information with local JTTF agency partners, such as the SFPD.<sup>22</sup> As we understand it, among the options the FBI is discussing is whether or not to provide that sort of approval for SFPD under the existing MOU or to possibly modify the MOU. Rather than wait any further, we believe a template for the authorizations can be created, with sample information inserted to illustrate what is necessary to comply with DGO 8.10. **In any event, SFPD JTTF activities involving First Amendment information cannot continue without those authorizations.**
- **SANCTUARY ORDINANCE:** Given the FBI's Baseline Operation Plan, SFPD JTTF officers should be immediately instructed to not participate in US person status checks for citizenship or residency status. Moreover, if any SFPD officer participates in an assessment or investigation where other JTTF squad members learn of the undocumented status of someone, we believe the spirit of the City and County of Refuge Ordinance demands that the SFPD JTTF officer immediately recuse him- or herself from further participation, since their investigative work product will lead to the creation of records in a federal database that could be of assistance in attempted deportations of individuals. Given the special dangers now involved, we trust you will agree that erring on the side of caution and preventing unintentional aid to the Trump administration's efforts to target undocumented immigrants is the position most reflective of San Francisco's values and priorities.
- **OCC AUDIT:** The required DGO 8.10 audit for 2016 will be conducted soon by the OCC. DGO 8.10 requires the OCC to do more than simply peer into the "DGO 8.10 book" and report if any authorizations are present. In the event of any violations, section VI.C.2.h. requires that their audit report specifically address a number of additional factors. In addition

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<sup>22</sup> "Joint Terrorism Task Force Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the San Francisco Police Department," signed 2006/2007, available at <https://www.brennancenter.org/sites/default/files/analysis/SFPD%20MOU-JTTF.pdf>.

to the policy violation inherent in their “training failure” finding on our complaint, this letter has detailed a number of other apparent violations. We would be happy to discuss these issues with OCC staff before they complete their report and prepare their own required recommendations.

- **VIOLATIONS PROTOCOL:** In similar fashion, Section VII of DGO 8.10 details a number of obligations the Chief and Commission must undertake if they “become aware of information that a possible violation of these guidelines has occurred.” Our organizations remain focused on finally fixing these problems so they are not repeated, but note the policy’s intent to fully document past mistakes.
- **2016 ANNUAL JTTF ORDINANCE COMPLIANCE REPORT:** The SFPD’s JTTF report is due by January 31, 2017, and must, in addition to reporting on its JTTF work this past year, address “any issues related to compliance” with the Ordinance. For the sake of efficiency, one approach to the reporting obligation on compliance issues would be to simply attach this letter with any updates or commentary from the SFPD’s perspective. We also encourage the Commission to echo the invitations from the SFPD the last several years and independently invite the FBI to attend the hearing on this year’s report once it is scheduled. The FBI’s response – or lack thereof – to a Commission invitation would be an important early indicator of their commitment to addressing our communities’ concerns.

## CLOSING

Our organizations – and the thousands of community members we serve – have spent years and countless hours working with community organizations, public officials, and the SFPD to ensure the protections guaranteed by a community-sponsored and SFPD-endorsed ordinance enacted almost five years ago would actually be fully respected in the SFPD’s JTTF work with the FBI. It has been a long and very frustrating process, but we are finally encouraged by the recent signs of progress in the face of the unprecedented threats from the Trump administration that we all fully recognize, and which Mayor Lee and the entire San Francisco government has thoughtfully expressed at numerous public events. We have brought these concerns to this Commission year after year and followed through on them in the exact manners you requested. Those efforts have now fully clarified the issues, defined the problems, and revealed the obvious and necessary solutions. We now look forward to your active support of the solutions we have collaboratively crafted.

Please do not hesitate to let us know if you have any questions or concerns. We look forward to the Commission’s session on these topics in the weeks ahead.

Sincerely,

Christina Sinha, Asian Americans Advancing Justice-Asian Law Caucus  
Brittney Rezaei, Council on American-Islamic Relations of the San Francisco Bay Area  
Alan Schlosser, American Civil Liberties Union of Northern California

CC: Mayor Ed Lee  
Members, Board of Supervisors  
Members, Human Rights Commission  
Acting Chief Toney Chaplin  
Deputy Chief Michael Redmond

Commander Greg McEachern  
Lieutenant Dave O'Connor, SID  
FBI Assistant Special Agent in Charge Craig Fair  
OCC Director Joyce Hicks  
OCC Policy Analyst Samara Marion  
Michael German, Brennan Center for Justice's Liberty and National Security Program  
John Crew



Honorable London Breed, Acting Mayor  
City Hall, Room 200  
1 Dr Carlton B Goodlett Place  
San Francisco, CA 94102  
Email: London.Breed@sfgov.org;  
MayorEdwinLee@sfgov.org  
Fax: 415.554.6160

January 08, 2018

**RE: San Francisco Police Department Involvement with the FBI's Joint  
Terrorism Task Force**

Dear Acting Mayor Breed:

We are writing regarding your comments to KPIX on December 26, 2017, which indicated that you may be re-examining the San Francisco Police Department's ("SFPD's") involvement with the Federal Bureau of Investigation's ("FBI") Joint Terrorism Task Force ("JTTF"). As you are aware, the SFPD's relationship with the JTTF and preceding task forces has been the subject of considerable controversy off and on for more than 20 years. Since it has come under the direction of Attorney General Jeff Sessions and President Donald Trump, long-standing concerns about the tactics employed by the FBI and JTTF have become even more pronounced.

Our groups have worked collaboratively with the City of San Francisco to resist many troubling Trump Administration policies and protect vulnerable San Franciscans targeted by this Administration, especially San Francisco's Arab, Middle Eastern, Muslim, and South Asian ("AMEMSA") communities.<sup>1</sup> In the spirit of that partnership, we wish to briefly summarize the major concerns civil rights and AMEMSA advocacy groups have with the JTTF and provide some background on the City's participation in the JTTF. We would also welcome the opportunity to discuss this issue with you in person.

**CONSISTENTLY ASSERTING LOCAL CONTROL OVER OUR LOCAL OFFICERS**

Concern over SFPD involvement with FBI task forces, including the JTTF, is not a recent phenomenon. As far back as 1997, Mayor Willie Brown rejected the FBI's proposal to have the SFPD assign officers to its Task Force. Mayor Brown's major concern was that the arrangement would have allowed SFPD officers working on the Task Force to follow FBI rules and regulations, instead of stronger California and San Francisco laws and policies. He defended San Francisco values by insisting that San Francisco police officers abide by local policies designed

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<sup>1</sup> We have *inter alia* worked with City leaders to combat the Muslim Ban and resist any attempts to use City resources for a Muslim registry.

to reflect those values, and San Francisco did not join the task force at that time. This of course did not mean that the SFPD was unable to work with the FBI; rather, it simply meant that their collaboration did not take the form of this particular Task Force.

Years later, after the City joined the JTTF, San Franciscans discovered that that the SFPD had secretly signed a Memorandum of Understanding (“MOU”) with the FBI that not only assigned SFPD officers to the JTTF (with no financial reimbursement), but also deputized those local officers as federal agents, thus placing them beyond the reach of the legally-required local civilian oversight and various local and state civil rights laws.<sup>2</sup>

After considerable public discussion and hearings before the Police and Human Rights Commissions, in May 2012, Mayor Ed Lee again asserted the primacy of San Francisco values by signing into law the Safe San Francisco Civil Rights Ordinance<sup>3</sup> (“the Ordinance”). As leaders of the Coalition for a Safe San Francisco,<sup>4</sup> the coalition that spearheaded the Ordinance, our groups worked collaboratively with the Mayor’s Office, the SFPD, Police Commission, Human Rights Commission, and the Board of Supervisors to pass this law, which was unanimously passed by the Board of Supervisors.

Since that time, we have repeatedly expressed concerns about SFPD compliance with that law to both the Police Commission and to the SFPD’s Chiefs of Police and command staff. We were repeatedly assured that the FBI would never assign SFPD officers to JTTF tasks that would violate SFPD policies. We were skeptical of these claims and unfortunately, those fears were proven correct in 2014, when a SFPD officer assigned to the JTTF went to Google’s offices in San Francisco to question a Google employee about a Freedom of Information Act (“FOIA”) request he filed due to repeated delays and harassment while traveling. In other words, the officer questioned the Google employee about First Amendment protected activity, and did so without the required, documented “reasonable suspicion” of criminal activity mandated by our local San Francisco policies. We filed a complaint regarding that incident and the Department of Police Accountability (formerly the Office of Citizen Complaints) ruled that SFPD policies had indeed been violated. *The DPA held that the reason for this troubling failure was a lack of training for SFPD officers on our local policies, an issue that has not yet been addressed.*

Throughout 2016, we had several meetings with Police Chief Greg Suhr, Acting Police Chief Toney Chaplin, and key members of the SFPD command staff regarding these issues. Those meetings were still ongoing when Donald Trump was elected President and the need to ensure that SFPD officers were not violating our laws, policies, and values while working for the new administration’s Justice Department and FBI became all the more urgent and readily apparent. The stakes were further increased a few weeks later when we discovered that standard JTTF procedures require local officers working in the JTTF to document the immigration status of

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<sup>2</sup> An abbreviated history of the SFPD’s Intelligence-Gathering Practices and Reforms is available at [https://www.aclunc.org/sites/default/files/asset\\_upload\\_file806\\_10599.pdf](https://www.aclunc.org/sites/default/files/asset_upload_file806_10599.pdf); our groups shared this document with City leadership, including the Board of Supervisors, years ago when we were working to pass the Safe San Francisco Civil Rights Ordinance.

<sup>3</sup> Administrative Code Section 2A.74.

<sup>4</sup> The Coalition for a Safe San Francisco worked for three years to pass the Ordinance. It was comprised of 79 community and civil rights groups, and coordinated the participation of thousands of community members.

anyone they target for scrutiny (again, without any suspicion of criminal activity) and enter that information into databases that Immigration and Customs Enforcement has ready access to.<sup>5</sup> This would of course be a violation of San Francisco’s sanctuary law and policies.

We detailed our concerns in a January 2017 letter<sup>6</sup> to the Police Commission, in advance of their annual hearing on compliance with the JTTF ordinance, which was to take place on February 1, 2017. Several other organizations and community leaders joined our urgent request that these issues finally be resolved, given the threats of the incoming Trump administration to target Muslims, immigrants, and organizations protesting police abuse. One letter from prominent LGBTQ leaders (including former and current state senators Mark Leno and Scott Weiner, and current and former supervisors Jeff Sheehy, Tom Ammiano, David Campos, and LGBTQ ally Angela Alioto) noted that “... if this ordinance is not effectively enforced, and if SFPD officers are not fully trained to understand and follow its requirements, those local officers will become entangled in the implementation of Trump’s policies, which our city’s leadership and residents have unequivocally rejected.”<sup>7</sup> Immediately prior to the February hearing, the SFPD announced they were suspending their participation in the JTTF, and our discussions were put on hold.

#### THE PATTERN OF PROBLEMATIC JTTF STING OPERATIONS TARGETING MUSLIMS

We do not mean to imply there were no civil rights concerns with JTTF activities under prior presidential administrations. Indeed, the FBI and JTTF have a long-established pattern of targeting isolated, disaffected, and often mentally troubled individuals who have no connection with terrorist groups and no apparent ability to plan or carry out any “plots” on their own, and painstakingly manipulating them or leading them on until they say or do enough to form the basis for an arrest and prosecution. The fact that the courts have said these very aggressive sting operations fall just short of the ban on illegal entrapment makes them no less problematic, especially when they target hyper-vulnerable communities.

In their 2014 report, “The Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions,” Human Rights Watch and the Columbia Law School’s Human Rights Institute found that many of these sting operations would violate international human rights standards because they regularly involve “(d)iscriminatory investigations, often targeting particularly vulnerable individuals (including people with intellectual and mental disabilities and the indigent), in which the government – often acting through informants – is actively involved in developing the plot, persuading and sometimes pressuring the target to participate, and providing the resources to carry it out.”<sup>8</sup> As the report notes, Muslim defendants ensnared by these stings often struggle to get fair trials on terrorism-related charges, “where inflammatory stereotypes and

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<sup>5</sup> See “Counterterrorism Program Guidance: Baseline Collection Plan,” *available at* <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM004887.pdf>.

<sup>6</sup> Asian Law Caucus, CAIR-SFBA, and ACLU-NC, Letter to San Francisco Police Commission re Update on SFPD’s Participation in FBI’s Joint Terrorism Task Force, Jan. 05, 2017, *available at* [https://ca.cair.com/sfba/wp-content/uploads/2017/01/2017.01.05\\_ALC-CAIR-ACLU-NC-Ltr-re-SFPD-Participation-in-JTTF.pdf](https://ca.cair.com/sfba/wp-content/uploads/2017/01/2017.01.05_ALC-CAIR-ACLU-NC-Ltr-re-SFPD-Participation-in-JTTF.pdf).

<sup>7</sup> See Matthew Bajko, “Concerns Grow over SF Police Working with FBI,” Bay Area Reporter, Feb. 2, 2017, *available at* <http://ebar.com/news/article.php?sec=news&article=72291>. The Transgender Law Center also sent a similar letter, *available at* <http://transgenderlawcenter.org/wp-content/uploads/2017/01/SF-Police-Comm-Letter-FINAL.pdf>.

<sup>8</sup> *Available at* [https://www.hrw.org/sites/default/files/reports/usterrorism0714\\_ForUpload\\_1\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_1_0.pdf) (“Human Rights Watch” report).

highly charged characterizations of Islam and foreigners often prevail.”<sup>9</sup> The findings from this report were updated and expanded upon last year by investigative journalists, which shows that these same concerning practices remain in use today.<sup>10</sup>

The report further concludes that these operations “have alienated the very communities the government relies on most to report possible terrorist threats and diverted resources from other, more effective ways, of responding...”<sup>11</sup> These stings continue to target vulnerable people of one religion and represent a great bulk of all arrests made by the JTTFs, but rarely, if ever, do such operations target violent white supremacists who are active online. This was all made possible because, when the FBI transformed itself from a criminal justice agency into a national security, intelligence-driven organization after 9/11, it “substantially changed its approach, loosening regulations and standards governing the conduct of terrorism investigations.”<sup>12</sup>

By contrast, neither San Francisco nor the State of California has loosened their standards, nor have we compromised our values by weakening our civil rights laws. Quite the contrary, in the wake of Donald Trump’s election, both the State and the City have re-enforced and strengthened the protections against possible federal abuses in a number of key areas. It would be very odd indeed if San Francisco buckled now in the face of pressure from the FBI. There are serious, longstanding problems with San Francisco’s participation in the JTTF that remain unresolved; Police Chief William Scott wisely chose to disengage from a formal partnership with the JTTF because of those unresolved concerns, and his Department remained able to work with the FBI and the JTTF in a manner that respected local laws and policies. We urge you not to let San Francisco retreat from its commitment to standing as a bulwark against federal abuses, simply because of yet another arrest from a questionable sting operation.

### FBI TARGETING OF BLACK ACTIVISTS

Sadly, the predictions about the increased dangers inherent in entangling local officers with the FBI’s JTTF during the Trump years – absent the strict application and enforcement of local standards enforced by local oversight – have already borne out. At the request of the SFPD, a month after Donald Trump was elected, our representative met with the FBI’s Bay Area Assistant Special Agent in Charge (“ASAC”). During the meeting, the FBI’s ASAC tried to reassure us that there were strict controls in place that would prevent any president from interfering with FBI operations; however, when our representative asked the ASAC if he really believed

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<sup>9</sup> *Id.*

<sup>10</sup> Last year, *The Intercept* updated and expanded upon the Human Rights Watch findings with their meticulously-reported “Trial and Terror” series of stories, which thoroughly documented these abusive practices. *Inter alia*, It concluded that the federal government’s own behavior towards those caught up in these stings demonstrates they know “many of these so-called terrorists weren’t particularly dangerous in the first place.” Trevor Aaronson, “The Released: More Than 400 People Convicted of Terrorism in the U.S. Have Been Released Since 9/11,” Apr. 20, 2017, available at <https://theintercept.com/2017/04/20/more-than-400-people-convicted-of-terrorism-in-the-u-s-have-been-released-since-911/>. The full “Trial and Terror” series is available at <https://theintercept.com/series/trial-and-terror/>. In January 2018, the *East Bay Express* similarly concluded that JTTF cases in the Bay Area display this same disturbing pattern. See Darwin BondGraham, “Terror or Entrapment,” *East Bay Express*, Jan. 3, 2018, available at [www.eastbayexpress.com/oakland/terror-or-entrapment/Content?oid=12242075&showFullText=true](http://www.eastbayexpress.com/oakland/terror-or-entrapment/Content?oid=12242075&showFullText=true).

<sup>11</sup> Human Rights Watch report, *supra* note 8.

<sup>12</sup> *Id.*



Donald Trump would respect those controls and norms, the ASAC quickly dropped the point. Sure enough, within just four months of taking office, President Trump fired FBI Director James Comey for not pledging his loyalty to Trump, refusing his requests to drop the investigation of Michael Flynn (now a confessed felon), and refusing to end the larger Russia investigation.<sup>13</sup> While we all hope the FBI agents working with Special Counsel Robert Mueller will be protected from political interference, the reality is that the FBI itself – aside from the Special Counsel’s investigators – is now under the full control of a Trump-appointed director who reports to Trump’s Attorney General Jeff Sessions on all matters except the Russia investigation.

Over time, it is inevitable that the priorities of the FBI JTTFs will increasingly reflect the political priorities of this administration – priorities that are in so many ways an anathema to most San Franciscans. That reality has been painfully evident in the administration’s response to the shocking news that in August 2017, the FBI issued an intelligence assessment<sup>14</sup> calling for special scrutiny of individuals and organizations aligned with a wholly imagined “Black Identity Extremist” movement that it simultaneously announced and dubbed a threat.

According to *Foreign Policy*, which first obtained and published the document:

Some experts and former government officials said the FBI seemed to be trying to paint disparate groups and individuals as sharing a radical, defined ideology. And in the phrase “black identity extremist” they hear echoes of the FBI’s decades-long targeting of black activists as potential radicals, a legacy that only recently began to change....

The FBI is linking the people discussed in the report based only on them being black, rather than on any sort of larger ideological connection, the official said. “The race card is being played here deliberately.”

Michael German, a former FBI agent and now a fellow with the Brennan Center for Justice’s liberty and national security program, said manufacturing this type of threat was not new.... The use of terms like “black identity extremists” is part of a long-standing FBI attempt to define a movement where none exists. “Basically, it’s black people who scare them,” German said.<sup>15</sup>

The “Black Identity Extremist” document was circulated to law enforcement nationwide, creating a real danger that Black Lives Matter and other lawful activists and movements would once again be targeted for the same type of surveillance Black activists suffered during the

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<sup>13</sup> Michael Schmidt, “Comey Memo Says Trump Asked Him to End Flynn Investigation,” N.Y. Times, May 16, 2017, available at <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

<sup>14</sup> “Black Identity Extremists Likely Motivated to Target Law Enforcement Officers,” Aug. 3, 2017, available at <https://www.documentcloud.org/documents/4067711-BIE-Redacted.html>.

<sup>15</sup> Jana Winter & Sharon Weinberger, “The FBI’s New U.S. Terrorist Threat: ‘Black Identity Extremists,’” *Foreign Policy*, Oct. 06, 2017, available at <http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>. Michael German is a long-time colleague whose expertise and history infiltrating white supremacist groups for the FBI have been invaluable to our efforts to fully understand FBI operations and policies and to craft effective and practical solutions for the problems they raise.

COINTELPRO years.<sup>16</sup> The Congressional Black Caucus has repeatedly challenged the FBI to explain and justify its position that a non-existent movement in the African American community is now a threat. In three separate hearings over the last two months, former California Assembly Speaker and current House Judiciary Member Karen Bass took the lead in grilling Attorney General Jeff Sessions, Deputy Attorney General Ron Rosenstein, and FBI Director Christopher Wray, seeking answers regarding the shoddy, racist, and dangerously vague and inaccurate intelligence assessment. None were forthcoming. Her calls for the document to be retracted have, to date, been ignored by the Trump Administration.<sup>17</sup>

The JTTFs are the principal consumers of these sorts of FBI documents. Consequently, FBI agents and local police officers assigned to staff the JTTFs are now the most likely to be looking for activists and organizations they believe might be “Black identity extremists.” This situation is deeply troubling and – aside from the numerous other concerns noted above – San Francisco should not even *start* to consider renewing its partnership with the JTTF unless and until the Trump Administration adequately addresses the concerns of the Congressional Black Caucus, the National Organization of Black Law Enforcement Executives (“NOBLE”), the National Association for the Advancement of Colored People (“NAACP”), and so many others who have spoken out on this important topic. Even then, the SFPD must not assign officers to the JTTF until the well-documented compliance problems with local policies and laws designed to protect the public and keep our officers from being entangled in FBI activities that violate our laws, our standards, and our values have been fully, finally, and at long last resolved in a credible fashion.

We are of course happy to meet with you, Chief Scott, and members of the Police Commission to discuss these matters more fully or provide additional information.

Sincerely,

Christina Sinha, Asian Americans Advancing Justice-Asian Law Caucus  
Brittney Rezaei, Council on American-Islamic Relations of the San Francisco Bay Area  
Alan Schlosser, American Civil Liberties Union of Northern California

Cc: Police Chief William Scott  
Members, San Francisco Police Commission  
Michael German, Brennan Center for Justice’s Liberty and National Security Program

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<sup>16</sup> Khaled A. Beydoun & Justin Hansford, “The F.B.I.’s Dangerous Crackdown on ‘Black Identity Extremists,’” N.Y. Times, Nov. 15, 2017, *available at* <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html>. *See also* Julia Craven, “Surveillance of Black Lives Matter Movement Recalls COINTELPRO,” Huff. Post, Aug. 20, 2015, *available at* [https://www.huffingtonpost.com/entry/surveillance-black-lives-matter-cointelpro\\_us\\_55d49dc6e4b055a6dab24008](https://www.huffingtonpost.com/entry/surveillance-black-lives-matter-cointelpro_us_55d49dc6e4b055a6dab24008).

<sup>17</sup> *See* Adam Goldman & Nicholas Fandos, “Lawmakers Confront F.B.I. Director Over Report on Black Extremists,” N.Y. Times, Nov. 29, 2017, *available at* [https://www.nytimes.com/2017/11/29/us/politics/fbi-black-identity-extremist-report.html?\\_r=1](https://www.nytimes.com/2017/11/29/us/politics/fbi-black-identity-extremist-report.html?_r=1). *See also* video of Representative Bass’ questioning of these three Trump administration officials: Attorney General Sessions, <https://www.youtube.com/watch?v=gc4E2qAXYII>; FBI Director Wray, <https://www.youtube.com/watch?v=E3b7zSFeSMw>; and Deputy Attorney General Rosenstein, [https://www.washingtonpost.com/video/politics/bass-questions-rosenstein-on-black-identity-extremism-report/2017/12/14/662bbf68-e112-11e7-b2e9-8c636f076c76\\_video.html?utm\\_term=.e89d217cda15](https://www.washingtonpost.com/video/politics/bass-questions-rosenstein-on-black-identity-extremism-report/2017/12/14/662bbf68-e112-11e7-b2e9-8c636f076c76_video.html?utm_term=.e89d217cda15).

January 27, 2017

BY EMAIL AND U.S. MAIL

San Francisco Police Commission  
Police Commission Office  
1245 3<sup>rd</sup> Street  
San Francisco, California 94158  
sfpd.commission@sfgov.org

Dear Commissioners:

We, the undersigned, are leaders, members, and allies of the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community of San Francisco. The LGBTQ community is a vibrant patchwork of many communities, including people who are Arab, Middle Eastern, Muslim, South Asian (AMEMSA), and people who are undocumented. People in the AMEMSA community and undocumented people are our friends, neighbors, partners, and colleagues.

In that spirit, we write to join our colleagues at the Asian Law Caucus, ACLU of Northern California, and Council on American-Islamic Relations San Francisco Bay Area Office in urging you to fully implement the 2012 Safe San Francisco Civil Rights Ordinance and to protect the integrity of our Sanctuary City law.<sup>1</sup>

The Safe San Francisco Civil Rights Ordinance forbids any SFPD officers working with the FBI on the Joint Terrorism Task Force from participating in any work that targets people—without reasonable suspicion of criminal behavior—based solely or partially on their religion or national origin. Our Sanctuary City law prohibits SFPD officers from participating in efforts to identify undocumented people in our City.

President Donald J. Trump campaigned on the promise that he would target members of the AMEMSA community and people who are undocumented. If this Ordinance is not effectively enforced, and if SFPD officers are not fully trained to understand and follow its requirements, those local officers will become entangled in the implementation of Trump's policies, which our City's leadership and residents have unequivocally rejected. Our City put the Ordinance in place to make sure that this doesn't happen. Similarly, the Sanctuary City law was put in place to prevent our local law enforcement officers from being used by federal agencies to target undocumented people.

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<sup>1</sup> See ALC, CAIR, and ACLU Letter to Police Commission, Jan. 05, 2017, *available at* [https://ca.cair.com/sfba/wp-content/uploads/2017/01/2017.01.05\\_ALC-CAIR-ACLU-NC-Ltr-re-SFPD-Participation-in-JTTF.pdf](https://ca.cair.com/sfba/wp-content/uploads/2017/01/2017.01.05_ALC-CAIR-ACLU-NC-Ltr-re-SFPD-Participation-in-JTTF.pdf).

We respect and value the important role of law enforcement—local, state, and federal—in protecting residents from crime, including terrorism. But fighting crime should never mean targeting a community as if all of its members were criminals. As members and leaders of communities who have historically been subject to monitoring, surveillance, and intelligence-gathering due to our First Amendment activities, we refuse to forget our history and our struggle for freedom in this country.

Before the Ordinance passed, SFPD officers on FBI-led cases could answer only to Washington—not to California and San Francisco laws and leaders. In a 2010 Human Rights Commission hearing, Asian Law Caucus attorney Veena Dubal reported:

“I have clients who are small business owners, American citizens who are regularly visited by the FBI at their place of work, in San Francisco. I have clients who are university students who are visited by FBI right outside of campus; I know an educator who is regularly visited by FBI agents. What do all these people have in common? Nothing, except that they are all innocent Americans who pay taxes, contribute to their community and the economy and who have immaculate criminal records, no criminal records --- they just happen to be Muslims.”<sup>2</sup>

Other attorneys at the hearing warned that without additional backing, SFPD officers would face “pressure” to not comply with San Francisco laws protecting First Amendment activity. The hearing’s findings were published in a 2011 report,<sup>3</sup> and the Board of Supervisors passed a unanimous resolution urging action.<sup>4</sup>

The Ordinance was supposed to answer to these concerns, but now—nearly five years later—the work remains unfinished. The Office of Citizen Complaints held in August 2016 that there had been a training failure, and that SFPD officers were not aware of their obligations. In the five years of the Ordinance being in effect, not one authorization has been sought or retained (despite the fact that SFPD

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<sup>2</sup> San Francisco Human Rights Commission, “Community Concerns of Surveillance, Racial and Religious Profiling of Arab, Middle Eastern, Muslim, and South Asian Communities,” (report adopted February 24, 2011) (“SF HRC Report”), at p. 18.

<sup>3</sup> *Id.*

<sup>4</sup> Resolution No. 160-11, “Endorsing Community Concerns of Surveillance, Racial, and Religious Profiling,” (April 5, 2011).

officers have been involved in dozens of Joint Terrorism Task Force operations). In addition, we have reason to believe that SFPD Joint Terrorism Task Force officers, in conjunction with the FBI, conducted "U.S. person checks" regarding some of the targets of these operations, in violation of the Sanctuary City Law.

To this end, we request the following:

- 1) That the SFPD provides its officers working with the FBI's Joint Terrorism Task Force clear instruction and specific training on the requirements of the Ordinance as soon as possible;
- 2) That all SFPD officers assigned to the Joint Terrorism Task Force refrain from making database inquiries about any individual's "U.S. person status" during their JTTF activities so they will be in compliance at all times with our Sanctuary City law; and
- 3) That SFPD officers obtain the necessary written supervisory approvals, that the approvals are documented and retained, and that "reasonable suspicion" is properly shown before SFPD officers participate in any Joint Terrorism Task Force work, going forward.

Mayor George Moscone and Supervisor Harvey Milk fought hard for our San Francisco values. Moscone led the fight to enshrine the right to privacy in our state constitution. Milk made community oversight of police a top priority and pushed hard to get an LGBT person appointed to the Police Commission.

Good police work doesn't require racial profiling and unaccountability. To maintain a city that prides itself on welcoming people of all sexual orientations, gender identities, races, religions, and nationalities, we'd do well to remember George Moscone and Harvey Milk's legacy and enforce the Safe San Francisco Civil Rights Ordinance.

Respectfully,

Senator Scott Wiener

Supervisor Jeff Sheehy

Fmr. Senator Mark Leno

Fmr. Supervisor Tom Ammiano

San Francisco Police Commission  
January 27, 2017  
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Fmr. Supervisor David Campos

Fmr. Supervisor Angela Alioto

Hon. Peter Keane  
Fmr. Commissioner  
San Francisco Police Commission

Hon. Tom Temprano  
Board of Trustees  
City College of San Francisco

Hon. Tom Nolan  
Fmr. Chairperson  
SFMTA Board of Directors

Hon. Rafael Mandelman  
Board of Trustees  
City College of San Francisco

Hon. Gwenn Craig  
Fmr. Commissioner  
San Francisco Police Commission

Hon. Michael G. Pappas  
Commissioner  
Human Rights Commission

Kate Kendell  
Executive Director  
National Center for Lesbian Rights

Bay Area Lawyers for Individual  
Freedom (BALIF)

Pride Law Fund

Rebecca Prozan  
Fmr. Prosecutor  
San Francisco District Attorney's Office

San Francisco Police Commission  
January 27, 2017  
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Daniel Redman  
Attorney

CC: Mayor Edwin M. Lee  
Supervisor Sandra Lee Fewer  
Supervisor Mark Farrell  
Supervisor Aaron Peskin  
Supervisor Katy Tang  
Supervisor London Breed, President of the Board  
Supervisor Jane Kim  
Supervisor Norman Yee  
Supervisor Jeff Sheehy  
Supervisor Hillary Ronen  
Supervisor Malia Cohen  
Supervisor Ahsha Safai  
San Francisco Chief of Police William Scott  
Joyce Hicks, Executive Director, Department of Police Accountability