File No. 120046 Committee Item No. 1
Board Item No. 19

COMMITTEE/BOARD OF SUPERVISORS

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Completed by: Gail Johnson Date 2/24/12
Completed by: GJ Date 3/8/12

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[Administrative Code - Establish Policy Regarding Participation in Federal Counterterrorism Activities]

Ordinance amending the San Francisco Administrative Code by adding Section 2A.84 to: 1) set City policy regarding participation in federal counterterrorism activities; and 2) set parameters for Police Department participation in the activities of the Federal Bureau of Investigation's Joint Terrorism Task Force and other counterterrorism activities; 3) urging the Chief of Police to amend or terminate the current agreement between the Police Department and the Federal Bureau of Investigation regarding the Joint Terrorism Task Force; and 4)urging the Police Commission to direct the Chief to amend or terminate that agreement.

NOTE: Additions are *single-underline italics Times New Roman*; deletions are ~~*strike-through italics Times New Roman*~~. Board amendment additions are double-underlined; Board amendment deletions are ~~strikethrough normal~~.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings.

(a) It is the responsibility of the Federal Bureau of Investigation ("FBI") to prevent, investigate, and respond to terrorism in the United States. To assist in this mission, the FBI has established local Joint Terrorism Task Forces ("JTTF") to share resources and coordinate among federal, state, tribal and local governments.

(b) The San Francisco Police Department's ("SFPD") participation in the FBI's JTTF must be consistent with state and local law, as well as policies established by the Police Commission and Chief of Police to ensure the protection of civil liberties and civil rights, avoid profiling, avoid use of City staff and resources in federal immigration enforcement, uphold supervision and accountability procedures to provide for consistent

application of SFPD's standards, guarantee civilian oversight, provide transparency consistent with the nature of the SFPD's mission, and enhance public confidence. The SFPD's prior JTTF arrangements with the FBI addressed these important local interests. The current arrangements – entered without public review – do not.

(c) In 1996, the FBI first proposed that the SFPD join the FBI and the Immigration and Customs Enforcement (then known as the Immigration and Naturalization Service) in the local JTTF (then known as the Bay Area Counterterrorism Task Force). The FBI proposed that SFPD participate under a Memorandum of Understanding ("MOU") that the SFPD determined would require exemptions from certain Police Department General Orders ("DGOs") that the Police Commission had adopted to regulate and ensure civilian oversight of intelligence activities and to facilitate compliance with the City of Refuge ordinance. In early 1997, with the question of SFPD's participation in the JTTF pending before the Police Commission for further discussion, Mayor Willie Brown's office announced he "would not go along with or support any attempt to circumvent local policy." Shortly thereafter, the item was removed from the Police Commission's agenda and the SFPD did not enter the proposed MOU or join the JTTF.

(d) In 2002, the SFPD entered into a revised version of the JTTF MOU with the FBI ("2002 MOU"). The 2002 MOU contained six specific clauses guaranteeing local policies would fully apply to the SFPD's activities in the JTTF and ensuring local control and oversight of local resources. In 2004, SFPD command staff confirmed publicly to the Police Commission that, consistent with that 2002 MOU, SFPD officers were still operating in strict compliance with local policies during their JTTF assignments.

(e) In 2003, the Board of Supervisors passed by a 9 – 1 vote a Resolution Opposing the USA PATRIOT Act and related Executive Orders, which resolved in part that "the City of San Francisco affirms its strong opposition to terrorism, but also affirms

that any efforts to end terrorism not be waged at the expense of the fundamental civil rights and liberties of the people of San Francisco...." It further resolved that "to the extent legally possible, no City employee or department shall officially assist or voluntarily cooperate with investigations, interrogations or arrest procedures, public or clandestine, that are in violation of people's civil rights or civil liberties...."

(f) In 2007, the SFPD and FBI entered into another revised MOU governing SFPD participation in the JTTF ("2007 MOU"). For the first time the FBI claimed that the MOU itself was "the property of the FBI" and "neither it nor its contents may be released without authorization by FBI Headquarters." State and local public records laws define a public record to include any writing containing information relating to the conduct of the public's business that is used or retained by a local agency. These laws permit local agencies to claim relevant exemptions to disclosure, but they do not permit a local agency to deny requests for access to documents it uses and retains based solely on the claim the document allegedly "belongs to" an outside agency like the FBI. Nonetheless, the SFPD signed the FBI's drastically revised 2007 MOU without informing the Police Commission or the public. The SFPD publicly released the 2007 MOU in April 2011. That 2007 MOU remains in effect.

(g) The previously-undisclosed 2007 MOU eliminated all provisions in the 2002 MOU that ensured the full application of local policies to SFPD officers, including those that required "close coordination" with SFPD supervisors and allowed SFPD to retain responsibility for the conduct of its officers. Instead, the 2007 MOU places SFPD members under the control of the FBI and holds them accountable only to federal policies, which the 2007 MOU lists as the exclusive "controlling documents." Further, the 2007 MOU states that SFPD members may obtain guidance on investigative activities only from the FBI and U.S. Department of Justice and expressly prohibits them from

discussing their activities with their own SFPD supervisors without the specific approval of a FBI supervisor.

(h) The primary "controlling document" under the 2007 MOU is the Attorney General's Guidelines for Domestic FBI Operations ("Guidelines"), as last revised by then-Attorney General Mukasey. Those Guidelines now authorize a variety of intelligence gathering and surveillance activities in circumstances that are not permitted under California law and San Francisco standards. For example, they authorize use of surveillance and informants without suspicion of criminal activity or any factual criminal predicate. Effective October 2011, the FBI revised its Domestic Investigations and Operations Guide, which is based on the Guidelines, to authorize activities such as searching people's trash without suspicion of wrongdoing and infiltrating up to five meetings of a lawful organization before rules governing this so-called "undisclosed participation" would apply.

(i) The State of California has a strong "right to privacy" that conflicts with many of the intelligence activities that the Guidelines authorize for federal law enforcement officials. In 1972 California voters passed a measure establishing "privacy" as an inalienable right under Article I, Section 1 of the California Constitution. The official ballot argument in favor of the proposition, co-authored by then-State Senator George Moscone, stated in part – "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom to associate with people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us...."

(j) Citing rulings of the California Supreme Court, the California Department of Justice has confirmed to law enforcement agencies in the State that this right to privacy

provides greater protection than federal law against unwarranted intelligence gathering. The California Attorney General's Model Standards and Procedures for Maintaining Criminal Intelligence Files and Criminal Intelligence Operational Activities (2007) warns local law enforcement that gathering intelligence without a factual criminal predicate based on reasonable suspicion of criminal activity violates California's inalienable right to privacy.

(k) A SFPD DGO on intelligence gathering forbids San Francisco police officers from engaging in many of the activities that federal law allows. In 1990, in the wake of several controversies over SFPD's intelligence gathering practices and acting on recommendations from the Human Rights Commission and Board of Supervisors, the Police Commission appointed a special committee to draft new intelligence gathering policies and protocols. That committee, made up of SFPD command staff, Human Rights Commission staff and civil rights organizations, crafted a consensus package of policy proposals that the Police Commission adopted unanimously. The primary policy, "Guidelines for First Amendment Activities," remains in effect as DGO 8.10.

(l) DGO 8.10 states that "(i)nvestigations of criminal activities involving First Amendment activities are permitted provided that the investigation is justified and documented as required by these guidelines." Those investigations must be based on reasonable suspicion of criminal activity, authorized in writing by members of the SFPD command staff including the Chief of Police, and subject to specific civilian oversight protocols involving a designated member of the Police Commission and the Office of Citizen Complaints ("OCC"). The OCC performs annual audits and submits a written report on that audit to the Police Commission.

(m) In 2003, the Police Commission adopted DGO 5.17, "Policy Prohibiting Biased Policing," which states that prohibited "biased policing is the use, *to any extent or degree*,

of race, color, ethnicity, national origin, gender, age, sexual orientation, or gender identity in determining whether to initiate any law enforcement action in the absence of a specific suspect description." (Emphasis added.)

(n) The San Francisco Charter establishes dual systems for civilian oversight and review of the SFPD and its personnel. SFPD operates at all times under the oversight of the civilian Police Commission. The Chief of Police reports to the Police Commission. The Police Commission has the authority to adopt and amend the Police Department's most authoritative directives - DGOs - and the power to discipline members for violating those DGOs based on charges filed by the Chief of Police or OCC Director. In addition to the Police Commission's oversight of the SFPD, in 1982 the voters established the OCC, a civilian agency also under the oversight of the Police Commission. Under the Charter, the OCC investigates "all complaints of police misconduct, or that a member of the Police Department has not properly performed a duty, except those complaints which on their face clearly indicate that the acts complained of were proper and those complaints lodged by other members of the Police Department." In addition to its investigative role, under the Charter OCC must submit recommendations for improvements in SFPD policies and practices, and the OCC Director may independently file disciplinary charges on sustained OCC complaints if the Chief fails to do so. The Charter requires all City departments, officers and employees, including the SFPD and its members, to provide prompt and full cooperation to the OCC.

(o) The terms of the current JTTF 2007 MOU compromise the ability of the Police Commission and SFPD to effectively assure the public they are: (1) complying with the inalienable state constitutional right to privacy, (2) following their own policies including DGO 8.10 "Guidelines for First Amendment Activities" and DGO 5.17 "Policy Prohibiting

Biased Policing," and (3) remaining fully under the required systems of civilian oversight and review.

(p) San Francisco is home to various immigrant communities that contribute to the social, political, economic and cultural richness of the City. These include Arab, Middle Eastern, Muslim and South Asian ("AMEMSA") communities. On September 23, 2010, in response to comments from the Chief of Police and concerns surrounding the SFPD's and FBI's possible racial and religious profiling and surveillance of AMEMSA communities, the Human Rights Commission held a hearing to document the community's concerns and make recommendations to address them. On February 24, 2011, the Human Rights Commission voted unanimously to adopt and publish a report entitled Community Concerns of Surveillance, Racial and Religious Profiling of Arab, Middle Eastern, Muslim and South Asian Communities and Possible Reactivation of SFPD Intelligence Gathering ("Report"), which contained 31 findings and recommendations.

(q) After initially claiming only the FBI had the authority to do so, on April 4, 2011, the SFPD released the previously-undisclosed 2007 MOU with the FBI in response to a public records request from the ACLU of Northern California and Asian Law Caucus.

(r) On April, 5, 2011, the Board of Supervisors adopted unanimously a resolution endorsing the Human Rights Commission's Report, commending the AMEMSA community and Human Rights Commission for bringing forth the concerns, and encouraging "the relevant agencies to consider implementing the recommendations."

(s) The Human Rights Commission's Report recommended, among other things, that the Board of Supervisors:

(1) "evaluate the need to pass more comprehensive protective ordinances that would ensure SFPD's compliance with the California Constitution and other state privacy protections. . . ."

(2) and Police Commission "ensure that all SFPD officers, including those deputized to the Joint Terrorism Task Force, follow and comply with local and state privacy laws, including DGO 8.10."

(3) "require the SFPD to provide transparency regarding SFPD's involvement and collaboration with outside agencies, such as the Federal Bureau of Investigation...."

(t) On May 18, 2011 the Police Commission held a joint hearing with the Human Rights Commission, but has otherwise taken no specific action on these recommendations. The Chief of Police issued an internal Bureau Order on May 16, 2011, generally indicating officers assigned to the JTTF must comply with state law and the DGOs, but providing no guidance on how they are to do that in the face of their conflicting federal obligations under the revised 2007 MOU. Members of the SFPD assigned to the FBI's JTTF may face a variety of serious federal consequences if they violate their clearances and non-disclosure agreements tied to the terms of the 2007 MOU. They are subject to internal discipline if they violate SFPD policies. The Police Commission and Chief have not responded to requests that they explain publicly how officers should handle these conflicting obligations.

(u) With the active assistance and explicit endorsement of the federal government, the City of Portland, Oregon, enacted legislation on April 28, 2011 that permits local police involvement in JTTF activities, but requires strict adherence to state and local standards and provides for local supervisory control and accountability, civilian oversight and transparency. The legislation allows for local JTTF participation without an MOU with

the FBI, but permits local law enforcement and civilian officials to seek federal security clearances and enter into any required non-disclosure agreements.

(v) In public testimony to the Portland City Council, high-ranking federal officials provided a variety of specific assurances and representations that this form of non-MOU, locally-controlled JTTF participation would be acceptable from a federal perspective. For example, the U.S. Attorney for Oregon, Dwight Holton, told the Council, "[w]e're prepared to make sure that local authorities get – that you, and that any civilian oversight board gets – the information it needs to take any oversight action." The FBI's national General Counsel, Valerie Caproni, testified that "[w]e've had no problems with providing local police departments and local oversight mechanisms the information they need in order to provide appropriate oversight for their employees consistent with the need to keep classified information classified." While the City of Portland initially hoped the FBI would be willing to enter into an MOU containing provisions addressing local concerns, U.S. Attorney Holton testified that the FBI suggested they proceed without an MOU and that other unspecified cities are also participating in their local JTTF without an MOU. Immediately prior to the unanimous vote enacting the legislation, U.S. Attorney Holton testified in support and told the Council it would put the Portland Police "back on the [JTTF] team" and into the "daily fabric" of the JTTF, "get them involved in long-term investigations from the ground up," get them "working cases" with the JTTF "whether it's the early stages of a case, the middle ground or when cases develop further" and participating in all JTTF briefings whether they involved local, national or international issues. In his testimony, U.S. Attorney Holton, the top federal law enforcement official in Oregon at the time, also lauded on behalf of the federal government the "sensible and effective civil rights protections" contained in the Portland legislation.

(w) The Portland legislation represents a federally-approved method of local police JTTF participation that does not require adherence to MOU conditions that the FBI imposed unilaterally and secretly that are inconsistent with state and local standards. Therefore, this ordinance, modeled on Portland's legislation, will allow the SFPD to continue to participate fully in FBI JTTF activities and assist the FBI locally in counterterrorism efforts where appropriate, while ensuring local control, supervisory accountability, civilian oversight and some degree of transparency.

Section 2. The San Francisco Administrative Code is hereby amended by adding Section 2A.84, to read as follows:

SEC. 2A.84. SAFE SAN FRANCISCO CIVIL RIGHTS ORDINANCE.

*(a) **Title**. This Ordinance shall be known as the "Safe San Francisco Civil Rights Ordinance."*

*(b) **Policy**.*

(1) It is the policy of the City and County of San Francisco to assist federal agencies in preventing and investigating possible acts of terrorism and other criminal activity only in a manner that is fully consistent with the laws of the State of California and the laws and policies of the City and County of San Francisco. These laws and policies include but are not limited to: the inalienable right to privacy guaranteed by Article 1, Section 1 of the California Constitution; Section 4.127 of the Charter of the City and County of San Francisco regarding the role and jurisdiction of the Office of Citizen Complaints ("OCC") and the duty of City and County departments, officers and employees to provide prompt and full cooperation to the OCC; the "City of Refuge" ordinance contained in Administrative Code Chapter 12.H; and the San Francisco Police Department's "Guidelines for First Amendment Activities" contained in Department General Order 8.10 or any successor policy or policies adopted by the Police Commission.

(2) Except where preemptive state or federal law requires, departments, agencies, commissions, officers and employees of the City and County of San Francisco may not enter into or otherwise engage in any arrangement, agreement, memorandum of understanding, contract, assignment, task force, or joint operation or enforcement activity with any federal, state, local or other entity that is inconsistent with this policy. Officers and employees of the City and County of San Francisco shall not be cross-designated or deputized as federal or state agents if the terms of the designation purport to authorize violations of this policy.

(3) Except where preemptive state or federal law requires, departments, agencies, commissions, officers and employees of the City and County of San Francisco may not use any City funds or resources in a manner that is inconsistent with this policy.

(c) ***Agreements regarding Counterterrorism Activities****. The Police Department shall submit any proposed agreement between the Police Department and the Federal Bureau of Investigation ("FBI") regarding the FBI's Joint Terrorism Task Force or any successor task force or joint operation (collectively hereinafter, "JTTF") or other counterterrorism activities, or any amendment to an existing agreement with the FBI regarding the JTTF or other counterterrorism activities, to the Police Commission for approval at an open public meeting. The Police Commission may approve the agreement or amendment only if its terms are fully consistent with subsections (b) and (d) of this Section.*

(d) ***Conditions for JTTF Participation.*** *The Police Department and its personnel may participate in the activities of the JTTF, with or without a written agreement regarding that participation, subject to the following conditions:*

(1) Members of the Police Department may engage in JTTF investigative, assessment, intelligence, interviewing and information-gathering activities only when those activities are based on suspected terrorism that has an articulable criminal predicate; and

(2) Members of the Police Department may participate in JTTF investigative,

assessment, intelligence, interviewing and information-gathering activities that involve First Amendment activities only under the following conditions:

(A) the members have an articulable and reasonable suspicion of criminal activity;

(B) the First Amendment activities are relevant to the criminal investigation;

(C) the Police Department member seeking to participate in the activity has submitted a written request for authorization and the Chief of Police has authorized the activity in writing;

(D) the Police Department retains the request for authorization and any authorization;

(E) on a monthly basis, the Police Department makes available all requests for authorization and authorizations to at least one member of the Police Commission for review;

(F) on a annual basis, by not later than each January 10, the Police Department makes available all requests for authorization and authorizations from the prior calendar year to the OCC for review and auditing; and,

(G) the activity is consistent with the Police Commission's "Rules of Conduct for Infiltrators, Informants and Undercover Officers" under Department General Order 8.10 or any successor policy established by the Commission.

(e) ***Other Policies and Procedures.*** *The Police Commission and the Chief of Police may establish or maintain policies and procedures applying to the Police Department's and its members' participation and activities with the JTTF, but only so long as the policies and procedures are consistent with the terms of this Section.*

(f) ***Federal Security Clearance****. If necessary and consistent with subsections (b) and (d) of this Section, members of the Police Department, Police Commission and OCC may seek or*

retain federal security clearances and may enter into or remain parties to federal non-disclosure agreements to facilitate JTTF participation or to supervise or oversee the JTTF participation and activities of others.

*(g) **Reporting Requirement.***

(1) By January 31 of each year, the Police Department shall provide a public report with appropriate public information to the Board of Supervisors on the Police Department's work with the JTTF in the prior calendar year, including any issues related to compliance with this Section.

(2) By January 31 of each year, the Police Commission shall announce at a public meeting appropriate public information about all requests for authorization and authorizations that the Police Department made available in the prior calendar year under subsection (d)(2)(E) above.

(3) The OCC shall conduct and complete an annual audit of all requests for authorization and authorizations that the Police Department made available under subsection (d)(2)(F) above, and shall provide a public report on its audit, with appropriate public information including statistical analysis, to the Police Commission and the Board of Supervisors.

*(h) **City Undertaking Limited to Promotion of General Welfare.** In undertaking the adoption and enforcement of this Chapter, the City is assuming an undertaking only to promote the general welfare. This Section is not intended to create any new rights for breach of which the City is liable in money damages to any person who claims that such breach proximately caused injury. This section shall not be construed to limit or proscribe any other existing rights or remedies possessed by such person.*

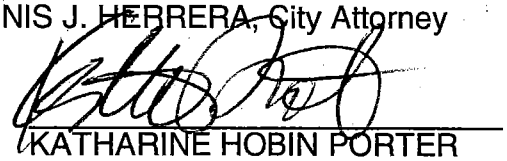
*(i) **Severability.** If any part of this ordinance, or the application thereof, is held to be invalid, the remainder of this ordinance shall not be affected thereby, and this ordinance shall otherwise continue in full force and effect. To this end, the provisions of this ordinance, and each*

of them, are severable.

Section 3. Joint Terrorism Task Force Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the San Francisco Police Department signed by the Chief of Police on March 1, 2007 ("MOU"). The Board of Supervisors urges the Chief of Police to either promptly amend the MOU to comply with this ordinance or terminate the MOU pursuant to its termination provision, and urges the Police Commission to direct the Chief of Police to do the same.

Section 4. Effective Date. This ordinance shall become effective 30 days from the date of passage.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: 
KATHARINE HOBIN PORTER
Deputy City Attorney

FILE NO. 120046

LEGISLATIVE DIGEST

[Administrative Code – Establish Policy Regarding Participation in Federal Counterterrorism Activities]

Ordinance amending the San Francisco Administrative Code by adding Section 2A.84 to: 1) set City policy regarding participation in federal counterterrorism activities; and 2) set parameters for Police Department participation in the activities of the Federal Bureau of Investigation's Joint Terrorism Task Force and other counterterrorism activities; and urging the Chief of Police to amend or terminate the current agreement between the Police Department and the Federal Bureau of Investigation regarding the Joint Terrorism Task Force and urging the Police Commission to direct the Chief to amend or terminate that agreement.

Existing Law

Currently, the City Codes do not address participation by City departments, officers and employees in federal counterterrorism activities.

Amendments to Current Law

The proposed ordinance would establish a policy to assist federal agencies in preventing and investigating possible acts of terrorism and other criminal activity only in a manner that is fully consistent with the laws of the State of California and the laws and policies of the City and County of San Francisco. The proposed ordinance would prohibit City departments, officers and employees from entering into agreements or using City funds or resources in a manner inconsistent with that policy, and would prohibit City employees from being cross-designated or deputized as federal or state agents if the designation was inconsistent with the policy.

The proposed ordinance would require the San Francisco Police Department ("SFPD") to obtain Police Commission approval for any (1) agreement with the Federal Bureau of Investigation ("FBI") regarding SFPD participation in the FBI's Joint Terrorism Task Force or any successor task force or joint operation (collectively, "JTTF") and (2) amendment to an existing SFPD agreement regarding JTTF participation. The proposed ordinance would also set minimum requirements for SFPD participation in JTTF investigative, assessment, intelligence, interviewing and information-gathering activities.

In addition, the proposed ordinance would (1) authorize the Police Commission and Chief of Police to establish or maintain policies and procedures regarding JTTF participation and activities as long as those policies and procedures at a minimum provide the protections set in the ordinance, (2) permit members of the SFPD, Police Commission and Office of Citizen Complaints to seek or retain federal security clearances and enter into or remain parties to federal non-disclosure agreements, and (3) set audit and reporting requirements.

Finally, the proposed ordinance would urge the Chief of Police to either amend the SFPD's existing agreement with the FBI regarding JTTF participation to ensure compliance with the ordinance or to terminate that agreement, and would urge the Police Commission to direct the Chief of Police to amend or terminate that agreement.

Background Information

The ordinance includes proposed findings of fact that describe the history of the SFPD's participation with the FBI's JTTF; applicable California, City and Police Commission laws and policies; and legislation passed by the City of Portland, Oregon, regarding Portland's participation on its local JTTF.