



Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

February 5, 2009

Richard Rosenthal  
Office of the Independent Monitor  
Wellington Webb Municipal Office Building  
201 W. Colfax Ave., Dept. 1201  
Denver, CO 80202  
SENT VIA EMAIL to Richard.Rosenthal@denvergov.org

Re: Request for Internal Affairs Bureau investigation regarding August 25, 2008 mass arrests during the Democratic National Convention

Dear Rich:

Thank you for your response on December 22, 2008, to the ACLU of Colorado's letters of October 30, November 6, and November 10, 2008. In those letters, the ACLU requested an investigation by the Denver Police Department Internal Affairs Bureau ("IAB") of specific allegations of officer misconduct in connection with mass arrests made at 15<sup>th</sup> and Court on August 25, 2008, during the Democratic National Convention. I appreciate the time and consideration your office gave to our complaints, and your thoughtful explanation regarding your conclusions. Your response, however, raised a number of additional questions.

As discussed below, the ACLU's primary concern is not whether we agree or disagree with the findings made by the Office of the Independent Monitor ("OIM"). Rather, we are troubled by the fact that OIM appears to have denied the ACLU's request for an internal affairs investigation itself, shielding the Denver Police Department ("DPD") from having to conduct any internal investigation. Such a practice not only contravenes OIM and DPD's own policies and procedures, but also deprives Denver taxpayers of "fair and objective oversight"<sup>1</sup> of police department internal investigations.

We raise the following questions regarding the manner in which OIM handled the ACLU's October 30, November 6, and November 10 complaints (hereinafter collectively the "ACLU's complaints"):

1. Did the OIM relieve the Denver Police Department from the need to conduct an internal investigation regarding the ACLU's complaints?

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<sup>1</sup> OIM Mission & Responsibilities statement.

2. Why did numerous arresting officers universally swear under oath that arrestees had refused to comply with a dispersal order, when in fact no such order was ever given?
3. Is OIM refusing to take complaints regarding out-of-jurisdiction officers, contrary to commitments made prior to the DNC that OIM would accept such complaints?
4. What good-faith attempts did OIM make to identify the officers involved in the search and seizure of Mr. Cecil Bethea?

Each of these concerns is discussed in more detail below.

1. Did the OIM relieve the Denver Police Department from the need to conduct an internal investigation regarding the ACLU's complaints?

Pursuant to IAB and OIM rules and regulations, misconduct complaints are initially evaluated and investigated by the internal affairs bureau.<sup>2</sup> When the complainant alleges “serious misconduct” by an officer, that allegation must be “formally investigated” by the internal affairs bureau.<sup>3</sup> “Serious misconduct” is defined as:

[P]otential violations of policies, procedures, rules, or regulations that have an adverse impact on the operation or integrity of the Department, and that, if proven, would likely result in formal disciplinary action against a named employee . . . examples of serious misconduct include but are not limited to: commission of a deceptive act . . . inappropriate force . . . and conduct prohibited by law.<sup>4</sup>

During an internal affairs inquiry, investigators are empowered to question and take statements from officers and witnesses, and gather and review evidence. Importantly, at the end of a formal investigation “an official disposition must be reached,” which is reviewed up the chain of command.<sup>5</sup> OIM has authority to monitor and participate in DPD internal investigations, but has little independent

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<sup>2</sup> OIM Complaint Monitoring Guidelines §2 ¶ 2 (“When a complaint is received by IAB, the complainant will be subject to an intake investigation by an IAB investigator. At the conclusion of the intake investigation (which will often include a telephonic or in-person interview with the complainant and a review of police reports and dispatch information), the IAB Commander makes a screening decision that determines how each of the allegations made will be handled”).

<sup>3</sup> DPD Operations and Procedures Manual § 503.01 (2)(d)(4)(“Investigations involving allegations of serious misconduct or law violation *shall* be conducted by the Internal Affairs Bureau”)(emphasis added); see *also* § (5)(b)(“Allegations of general, pattern or serious misconduct (including conduct prohibited by law) will result in a Formal Investigation); see *also* § (2)(i).

<sup>4</sup> DPD Operations and Procedures Manual § 503.01(2)(d)(4).

<sup>5</sup> DPD Operations and Procedures Manual § 503.01 (2)(i).

investigative authority of its own. For each investigation that it monitors, OIM “shall review the investigation to ensure that it is thorough and complete.”<sup>6</sup>

There is no doubt that under Denver’s current system, only internal affairs investigators have the authority to conduct a “complete investigation of allegations of misconduct by officers.”<sup>7</sup> For example, internal investigators are empowered to command every officer who has any direct or indirect knowledge of alleged police misconduct to provide a written statement.<sup>8</sup> IAB investigators may directly question involved officers under oath and advisement.<sup>9</sup> IAB investigators are also authorized and directed to take statements from witnesses and complainants.<sup>10</sup> Officers are required to cooperate in all internal investigations and answer “all questions fully and truthfully and shall not omit any material facts.”<sup>11</sup> Internal affairs investigators must reach a “final disposition” on allegations of serious misconduct, and their conclusions must be reviewed all the way up the chain of command.<sup>12</sup> If the investigation proves that officers were involved in misconduct, those officers are subject to disciplinary penalties.

In contrast, OIM’s role under the current system is limited to monitoring and participating in investigations initiated, directed and conducted by internal affairs. OIM has little independent investigative powers of its own. For example, OIM’s ability to question officers or witnesses is extremely limited. OIM can “suggest questions for the IAB interviewers to ask of the witnesses, but the IAB interviewer retains the discretion to determine the subject matter and form of the questions to be asked.”<sup>13</sup> OIM is to be provided access to some evidentiary items, but has no role in collecting actual evidence and is prohibited from viewing certain categories of evidence.<sup>14</sup> At the conclusion of an investigation, OIM can make suggestions regarding potential discipline, but has no independent authority to impose penalties for officer misconduct.

It is our understanding that OIM can acquire some limited independent investigative powers, but only *after* IAB has completed its entire internal investigation. If OIM determines that the investigation was incomplete, it must first recommend additional investigation. If IAB refuses, contrary to OIM’s recommendation, to conduct additional investigation, only then does OIM have some independent investigatory authority.<sup>15</sup> By law, however, if OIM decides to conduct any investigation on its own at the conclusion of an IAB investigation, it

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<sup>6</sup> DPD Operations and Procedures Manual § 503.01 (3)(d)(7).

<sup>7</sup> DPD Operations and Procedures Manual § 503.01 (3)(c)(4).

<sup>8</sup> DPD Operations and Procedures Manual § 503.01 (5)(b)(7).

<sup>9</sup> DPD Operations and Procedures Manual § 503.01 (5)(b)(8).

<sup>10</sup> DPD Operations and Procedures Manual § 503.01 (5)(b)(9).

<sup>11</sup> DPD Operations and Procedures Manual § 503.01 (3)(a)(3).

<sup>12</sup> DPD Operations and Procedures Manual § 503.01 (5)(b)(13).

<sup>13</sup> DPD Operations and Procedures Manual § 503.01 (3)(d)(4).

<sup>14</sup> DPD Operations and Procedures Manual § 503.01 (3)(d)(5).

<sup>15</sup> D.R.M.C. § 2-388; DPD Operations and Procedures Manual § 503.01 (3)(d)(7).

must notify the Manager of Safety, the Citizen Oversight Board, and the Chief of Police to explain why there is a need for an independent OIM investigation.<sup>16</sup>

The ACLU of Colorado explicitly requested an investigation by the Internal Affairs Bureau<sup>17</sup> regarding allegations of serious misconduct, including allegations of misconduct prohibited by law, perjury,<sup>18</sup> inappropriate and excessive force, and serious and widespread violations of department policy. Under Denver law, within three days of receiving the ACLU's complaints, OIM was required to provide copies to the DPD, the Citizen Oversight Board, and the Manager of Safety.<sup>19</sup> It is our understanding that once DPD received the ACLU's complaints alleging serious misconduct, the DPD was mandated to conduct a formal investigation that would then be monitored by OIM.

In this case, however, OIM has undertaken an entirely a role that does not appear to be authorized by Denver laws or regulations.<sup>20</sup> For reasons not explained in your letter, it appears that the ACLU's complaints were not investigated by internal affairs. Instead, OIM evaluated the ACLU's complaints itself and rejected them without any internal affairs investigation. It seems extraordinary that OIM would intervene directly into the complaint process in a manner that would shield DPD from the complaint allegations, and relieve DPD from having to conduct any internal investigation.

In your December 22, 2008 letter, you explained that OIM reached its conclusions after it reviewed the ACLU's "complaint letters, listened to testimony provided by DPD Command Staff [at a criminal trial], watched video relating to the incident, and discussed [the ACLU's] concerns with the DPD Command Staff and the lead attorney of the City Attorney's Office Prosecution Unit." While these efforts are not negligible, they are not close to the formal investigation of serious misconduct required by Denver's laws and regulations. Informally discussing the ACLU's concerns with DPD supervisors who are not under oath, and observing criminal trials where officers and prosecutors are endeavoring to convict the accused, are steps that may be helpful to gain general background information, but are far from an independent or adequate formal investigation.

For example, it appears that not a single arresting officer was questioned in the OIM's investigation of the ACLU's complaints. No witnesses were questioned.

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<sup>16</sup> D.R.M.C. § 2-388(e).

<sup>17</sup> *E.g.* October 30, 2008 letter ("We respectfully request an Internal Affairs Bureau investigation..."); November 6, 2008 letter ("Re: Request for Internal Affairs Bureau investigation").

<sup>18</sup> Perjury committed in a sworn affidavit is a felony under Colorado law. See C.R.S. § 24-12-106; C.R.S. § 18-8-502.

<sup>19</sup> D.R.M.C. § 2-386(b) ("Whenever a citizen files a complaint with the monitor's office . . . the agency . . . shall, within three (3) business days, advise all of the other agencies . . . that it has received the complaint and provide a copy of the complaint to each of them").

<sup>20</sup> OIM's Standards of Professional Conduct, Rule 2 states: "OIM staff shall not violate any law or any office policy, rule or procedure."

No complainants were questioned. No written statements were taken from officers. No written statements were taken from complainants. No written statements were taken from witnesses. No additional evidence was gathered. No official disposition was ever reached. OIM's conclusions that the ACLU's complaints of serious misconduct did not "state any provable misconduct" were made by solely by OIM and were final and unreviewable, in contrast to DPD internal investigations which would have been examined numerous times up the chain of command. In undertaking its own investigation, OIM knew that it had no power to impose discipline on officers, regardless of the findings. It is unclear whether the ACLU's complaints were referred to DPD as required by law. It is also unclear whether DPD refused to conduct any investigation, prompting OIM to notify the Citizen Oversight Board, the Chief of Police, and the Manager of Safety of the reasons that OIM was undertaking its own investigation independent from internal affairs.<sup>21</sup>

Furthermore, OIM's actions raise serious questions about OIM's role as a semi-autonomous body that independently and objectively monitor complaints of police misconduct. Certainly, OIM cannot effectively monitor internal investigations if it is simultaneously insulating DPD from having to conduct the very investigations that OIM is supposed to monitor.

Denver taxpayers certainly do not expect to agree with the result of every internal investigation performed by the Denver Police Department, including those ratified and approved by OIM. There can be no doubt, however, that at the very least Denver taxpayers demand a thorough and complete investigation when there are allegations of serious misconduct. While we commend OIM's investigative efforts, it is clear that the OIM's inquiry falls far short of a formal investigation.

The people of Denver have the right to expect a thorough and complete evaluation and investigation in each and every case where there are serious allegations of misconduct, and no less so in the context of an encounter between hundreds of officers and members of the public in Denver's city streets and sidewalks that resulted in nearly one hundred arrests during one of the most highly-publicized events in Denver's recent history. We again respectfully request a formal internal affairs investigation regarding the ACLU's complaints.

2. Why did arresting officers universally state that arrestees had refused to comply with a dispersal order, when in fact no such order was ever given?

In the ACLU's complaints regarding officer misconduct on August 25, 2008, we requested an internal investigation regarding officers' sworn statements in their arrest affidavits that a "dispersal order" was given and disobeyed by arrestees at 15<sup>th</sup> and Court when, in fact, DPD's own supervisory officers later testified in criminal trials that no such "dispersal order" was ever given. In your December 22, 2008, letter, you report that OIM determined that there was "no *intentional*

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<sup>21</sup> D.R.M.C. §§ 2-386(b); 2-388(e).

misconduct” on part of those officers who included undisputedly false material information in their sworn arrest affidavits, and thus “no further internal affairs inquiry would be necessary or appropriate on this allegation.”

As a threshold matter, we do not understand how OIM concluded that there was no “intentional misconduct.” There were dozens and dozens of officers who falsely swore, under oath, that an arrestee’s failure to comply with dispersal orders constituted probable cause for a warrantless arrest. Even if some portion of those officers actually believed in the accuracy of their statements, it is certainly possible that some of the officers knew that the dispersal order had never been given but swore to the accuracy of the information nevertheless.

Did OIM question any of the involved officers? Did OIM require these officers to provide written statements explaining why they put this false information into their affidavits? How could OIM know whether or not the false statements were knowingly false without questioning a single one of the involved officers or at least getting written statements from those officers?

Furthermore, I respectfully disagree with your conclusion that officers’ erroneous but good faith belief in the accuracy of the false information would obviate the need for an internal affairs inquiry. Even *if* every single officer actually believed that the false information in their affidavits was accurate, that would hardly seem to be the end of the inquiry. In fact, that conclusion only heightens the need for an investigation to determine why all arresting officers swore to identical false information in dozens of different affidavits.

Contrary to what might be inferred from your December 22, 2008, letter, the erroneous statements in the affidavits and video probable cause statements were not the result of a few independent and isolated mistakes by a small number of confused officers. In fact, dozens upon dozens of Denver’s DPD and DSD officers universally and falsely swore, often in verbatim language, that the arrestee disobeyed three dispersal orders given by Sgt. Anthony Foster, and many swore further that the orders were given by loudspeaker. It is undisputed that no dispersal order of any kind was ever given by any officer.

Even *if* it were true that all the false statements by the arresting officers were unknowing mistakes, that only raises a larger question of why they all included the same false statements in the probable cause affidavits and videos. Did a supervisory officer or officers instruct subordinate officers to swear to information that the supervisors knew was false? Did Sgt. Foster know that dozens of officers were putting false information in their affidavits about his purported actions? When did he find out? What did he do (or not do) in response? Did OIM question under oath any supervisory officers, or obtain any written statements from supervisory officers, directed at answering these questions? If dozens of identical false affidavits are actually “attributable to errors or omissions in communication” as you suggest, how and why did such an utter breakdown

among all the officers (who were present at the scene talking with each other, with arresting officers, and with their supervisors) occur, and why weren't those mistakes corrected?

It would appear that there are a limited number of ways that the same false information could have universally populated the probable cause affidavits for nearly one hundred arrestees on August 25, 2008 : 1) officers knowingly put false information in their affidavits; 2) a supervisory officer(s) knowingly gave subordinates false information to put in their affidavits without the subordinate officers knowing that it was false; or 3) dozens and dozens of officers all included the same false information in their affidavits due to a total communication lapse where inaccurate information was conveyed among these officers without ever being corrected during the several hours it took to complete arrest processing. Whether the false information in the affidavits occurred from only one of these possibilities or some combination thereof, we fail to see how a thorough internal affairs inquiry would not be necessary and appropriate in this situation.

3. Is OIM refusing to take complaints regarding out-of-jurisdiction officers, contrary to commitments made prior to the DNC that OIM would accept such complaints?

Prior to the DNC, Denver stated that it would contract with more than 40 jurisdictions to provide up to 2,500 additional law enforcement officers to work in Denver during the DNC (referred to by you, and in this letter, as "out-of-jurisdiction" officers). The prospect of having so many officers from dozens of different jurisdictions raised serious concerns regarding what policies would govern those officers' conduct while they policed Denver's streets.

In addition, the presence of thousands of additional officers from outside jurisdictions raised important questions regarding how Denver would ensure a proper investigation of any complaints about the conduct of out-of-jurisdiction officers. The ACLU was concerned that without a mechanism for oversight applicable to out-of-jurisdiction officers, those officers might believe that there would be no inquiry or discipline if they violated DPD policies and procedures.

In an August 19, 2008, meeting, DPD Deputy Chief John Lamb assured the ACLU that all officers working in Denver during the DNC, regardless of their jurisdiction, would be expected to follow the "home team rules." In other words, all out-of-jurisdiction officers would be required to follow DPD policies and procedures while policing in Denver. That discussion was memorialized in an August 25, 2008, letter that was copied to OIM.

On August 12, 2008, the ACLU followed up with your office by email to inquire whether OIM would take complaints regarding out-of-jurisdiction officers (email attached). In that email, I asked you the following question:

“[W]hether OIM will take complaints about the conduct of officers who Denver has hired from other jurisdictions and will be operating in Denver during the DNC?”

On that same day, you responded to me by email as follows:

“[Y]es, the OIM and IAB will be taking complaints against out-of-jurisdiction officers regarding their conduct in Denver during the DNC.”

We do not understand how the assurance given in the email above is consistent with the statements in your December 22, 2008, letter, which suggest that OIM is *not* taking complaints regarding officers from other jurisdictions. For example, you state, “Given that case [involving an out-of-jurisdiction deputy] does not involve a Denver police officer or Sheriff’s deputy, it is not within the jurisdiction of the Monitor’s Officer or the Internal Affairs Bureau.”

Can you please clarify OIM’s position regarding complaints against out-of-jurisdiction officers working in Denver during the DNC?

4. What good faith attempts did OIM make to identify the officers involved in Mr. Cecil Bethea’s search and seizure?

In your December 22, 2008, letter, you report that OIM declined to investigate the ACLU’s complaint made on behalf of Cecil Bethea, an 80-year old retiree who alleges that he was subject to excessive force and improperly searched during the mass arrests on August 25, 2008. As grounds for declining to investigate, you stated, “[T]here appears to be no way to identify the officers involved. Unless you can provide additional information in this regard, no further investigation can take place.”

According to the guidelines of your office, uncertainty about the identity of an officer accused of misconduct is grounds for dismissing a complaint only “if, after a *good faith effort*, the involved employee cannot be identified” (emphasis added).<sup>22</sup> Because OIM stated it could not identify the officers involved in Mr. Bethea’s search and seizure, can you please describe the “good faith efforts” that you made to identify the officers?

In our experience, DPD internal affairs investigators customarily interview the complainant to try to gather information regarding the allegation of misconduct. My client has information about the identity of the officers who contacted him. No one from OIM, however, ever contacted the ACLU to arrange an interview with our client to see what information he might be able provide.

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<sup>22</sup> OIM Complaint Monitoring Guidelines § (5)(a)(10), p.14 (“Unable to Identify Officer”). See also DPD Operations and Procedure Manual § 503.01(4)(b)(4)(j) (“The complaint may be dismissed if, after a good faith effort, the involved employee cannot be identified and it would be unlikely that the employee would be identified”).

Furthermore, photographs of my client's search and seizure were published on the internet and in the press. Did OIM review these photographs or contact photographers in order to determine if the officers could be identified? For example, police officers holding my client can be seen with the badge numbers #05134 and #05123 on their helmets, and an officer witnessing the arrest has the badge number #92045 on his helmet. Were these badge numbers not sufficient to enable you to identify the arresting or witnessing officers? Or did OIM never attempt to use photographs to identify the officers?

In addition, it seems very likely that the officers who seized and searched my client would definitely remember doing so, because of his distinctive age (80) relative to the much-younger crowd with whom he was seized. Did OIM ask for all officers who remembered the search and seizure of an 80-year-old man during the mass arrests at 15<sup>th</sup> and Court on August 25, 2008, to come forward?

If OIM did not make any of the above efforts, what "good faith efforts" did OIM make before concluding that the officers involved in Mr. Bethea's search and seizure could simply not be identified?

#### Conclusion

As stated above, the gravamen of this letter is not about whether the ACLU agrees or disagrees with OIM's conclusions regarding the conduct of Denver's officers during the DNC. Instead, we hope to gain a clearer understanding of why the ACLU's complaints did not result in a formal internal affairs investigation, and what steps OIM took in conducting its own investigation.

We again request an investigation by the Denver Police Department Internal Affairs Bureau regarding the issues raised in the ACLU's complaints.

I look forward to hearing from you at your earliest convenience.

Sincerely,



Taylor Pendergrass  
Staff Attorney, ACLU of Colorado

cc. Citizen Oversight Board, via email to: [cob@ci.denver.co.us](mailto:cob@ci.denver.co.us)  
Commander John Burbach, via email to: [john.burbach@denvergov.org](mailto:john.burbach@denvergov.org)

enc. 8/12/08 Email exchange ACLU and Rosenthal

**From:** [Taylor Pendergrass](#)  
**To:** [Rosenthal, Richard - OIM;](#)  
**Subject:** Re: OIM during the DNC  
**Date:** Tuesday, August 12, 2008 6:50:21 PM

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Thanks Rich.

On Aug 12, 2008, at 5:55 PM, "Rosenthal, Richard - OIM" <Richard.Rosenthal@denvergov.org

> wrote:

> Taylor: yes, the OIM and IAB will be taking complaints against out-of-jurisdiction officers regarding their conduct in Denver during the DNC. In addition, I have been informed that out-of-jurisdiction officers will have identifying information on their uniforms.

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> -----Original Message-----

> From: Taylor Pendergrass <tpendergrass@aclu-co.org>

> To: Rosenthal, Richard - OIM

> CC: Mark Silverstein (E-mail) <msilver2@att.net>

> Sent: Tue Aug 12 15:10:00 2008

> Subject: OIM during the DNC

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> Hi Rich-

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> I hope all is well.

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> I noticed that OIM has put up some info on DNC-related monitoring on its website, which looks great.

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> In addition to the info on there, we were wondering whether OIM will take complaints about the conduct of officers who Denver has hired from other jurisdictions and will be operating in Denver during the DNC? We've been wondering, relevant to the previous question, whether OIM has confirmed or requested that all officers (from Denver and any other jurisdiction) will have a name, badge number, jurisdiction visible at all times, even when wearing body armor, so citizens will know how to identify the officer they wish to commend or complain about? Are those issues you guys have been mulling over as well?

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> Look forward to hearing from you,

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