AMERICAN CIVIL LIBERTIES UNION OF COLORADO

MARK SILVERSTEIN, LEGAL DIRECTOR

May 17, 2002

Justice Dubofsky, Judge Cisneros, and Judge Meyer:

On May 14, you conducted a hearing where members of the public were invited to comment on a proposed Denver Police Department policy titled "118.03 Criminal Intelligence Information."

After I spoke, you invited me to provide my comments in writing by May 17. Because of that short time frame, I am unable to provide you with a full critique of the draft policy. Nevertheless, I will provide at least some comments in this letter.

The proposed policy, and your work as consultants to the City Attorney's office, is prompted by the ACLU's release of documents on March 11 that demonstrate that the Denver police department's intelligence unit has been monitoring and keeping files on the peaceful protest activities of Denver-area individuals and the expressive activities of law-abiding advocacy groups. The documents also demonstrate that the intelligence unit has been falsely labeling law-abiding organizations, including a winner of the Nobel Peace Prize, as "criminal extremist." The Denver police have been disseminating the files -- containing these false and derogatory labels as well as additional false information -- to third parties.

On March 13, Mayor Webb acknowledged that the ACLU had identified a significant problem. He revealed that the intelligence unit had current files on 3200 individuals and 208 organizations, and he indicated that a good portion of those files violated a written city policy on intelligence gathering.

The policy, which incorporates strong language from 28 C.F.R. Part 23, clearly prohibits gathering and maintenance of intelligence information about First Amendment activities unless it is directly relevant to criminal activity. The document, titled "Denver Police Department Intelligence Systems Information," states as follows:

> The Denver Police Department shall not collect or maintain criminal intelligence information about the political, religious, or social views, associations or activities of any individual or any group, association, corporation, business, partnership, or other organization, unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.

As this quotation makes clear, the City already had and still has a clearly written policy in

place that prohibits precisely the sort of intelligence gathering that the Mayor has asked you to address.

While the current policy can be improved, and it is always preferable to have an even better written policy in place, the intelligence unit's flagrant disregard of the already-existing policy demonstrates that written policies alone are not sufficient to address the problem. Instead of proposing a new draft policy at this time, I urge you to conduct an inquiry into how and why the existing policy was violated so blatantly and so regularly. After such an investigation, you can then suggest measures - including but certainly not limited to a new written policy - that can address the problem more fully. Such additional measures might well include a public report to address heretofore unaddressed questions, such as the full nature of the political intelligence gathering, the reasons for it, and who is responsible. Additional measures might also include disciplinary action, transfer, and/or termination of the officers and supervisors who are responsible for defying a clearly-written policy directive designed to protect privacy and constitutional rights.

In addition, the City should notify individuals and organizations who were the targets of inappropriate political spying and permit them to inspect and copy their files. The City should also provide each individual and organization with a full accounting of how the files have been used, along with information about each occasion when the files were shared with other agencies or individuals. Private inspection of the files, however, is not sufficient to vindicate the strong public interest in a full public accounting of the systematic police misconduct evidenced by the collection and maintenance of the Spy Files. Consistent with the privacy rights of specific named individuals, the City should disclose as much of the Spy Files as possible to the public (not just to the subjects of the files). When necessary to protect the privacy of specific individuals, names can be redacted, but the City cannot address the problem satisfactorily without recognizing the critical importance of the *public's* right to know.

With that said, I will review some of the points I raised when I spoke to you on May 14.

Any new policy must, at a minimum, incorporate the standards and requirements of 28 C.F.R. Part 23. The City's existing written policy draws on this federal regulation and explicitly demands "continued compliance" with it. The proposed draft policy, however, fails to incorporate or otherwise require compliance with critical terms of the federal regulation.

For example, the proposed policy fails to specify that Denver police officers are prohibited from inputting information that has been obtained in violation of the law.

The current policy as well as 28 C.F.R. Part 23 clearly state that individuals will not be entered into the database unless they are reasonably suspected of crime. The proposed policy defeats this critical safeguard by creating a category of record called "temporary status" for information that does not otherwise meet the entry requirements. (This is discussed in more detail below.)

The proposed policy fails to specify sufficient safeguards regarding the sharing of information. Although it states that information will be shared only on a "need to know" and "right to know" basis, it does not specify, as does the federal regulation, that the need or right to know must be connected with the performance of a legitimate law enforcement

function. The proposed policy fails to prohibit Denver police officers from disseminating information to law enforcement agencies that lack specified safeguards regarding the handling of the shared information. It also fails to require some of the protections required in 28 C.F.R. Part 23, such as requiring a record of who was given information; the release for the release of information; and the date of dissemination. The proposed policy fails to require the audit trail required by 23 C.F.R. Part 23.

When a record has been purged because its information is determined to be either unreliable, obsolete or undermined by information subsequently received, the police should ensure that other law enforcement agencies that had received the now-purged information are notified and required to take steps to purge the information from *their* records. The proposed policy fails to require this important safeguard.

The proposed policy appears to permit Denver police officers to accept information from other criminal justice agencies at face value and to store the information in the intelligence database. It fails to require independent verification that the donating agency adheres rigorously to the standard of reasonable suspicion.

Any new policy should make it unmistakably clear that reasonable suspicion is the standard for including information in a criminal intelligence database. The proposed policy's use of the term "criminal predicate" is unnecessary. With the vague, confusing, and poorly-written definition in the current draft, the use of the term "criminal predicate" poses a risk that officers will regard it as a standard that is more lenient than the standard of reasonable suspicion.

The explanation of the "reasonable suspicion" standard should be strengthened. Any written policy should remind officers that the standard of reasonable suspicion is met only when the officer is aware of specific, articulable, objective facts that warrant an objectively reasonable belief that the individual is connected to definable criminal activity.

The limitation on collecting information on First Amendment activity can and should be strengthened by the addition of the word that in the final phrase. I would suggest the following:

> . . . unless such information directly relates to criminal conduct or activity and there is a criminal predicate reasonable suspicion that the subject of the information is or may be involved in that criminal conduct or activity.

With regard to information identified as "non-criminal identifying information," the proposed policy omits important safeguards that are required by 28 C.F.R. Part 23. When the name of a non-suspect is incorporated into a database solely because that name functions to assist in identifying an individual whom the police reasonably suspect of crime, there should be no record or file that is retrievable by inputting the name of the non-suspect. Information about the non-suspect should be accessible only in connection with the file or record of the individual who is reasonably suspected; there should be no independently retrievable record. The proposed policy fails to include this critical safeguard, thus permitting independently retrievable records on individuals who are not suspected of crime.

The proposed policy defines a criminal intelligence file as storing information not only on the activities of an individual, but also on the associations of an individual. This definition is overly broad. It suggests erroneously that information about associations is just as

important as information about criminal activities. This is especially dangerous in light of the point made in the previous paragraph.

The portion of the proposed policy titled "Mission Statement" is poorly drafted. When mentioning civil rights and civil liberties, it suggests, erroneously, that only the civil liberties of citizens are worthy of respect. In contrast, both the existing policy and 28 C.F.R. Part 23 declare an interest in safeguarding the rights of *individuals*. The current policy states that one goal is to safeguard the privacy of individuals. The proposed policy is inferior because it omits any mention of a goal of protecting privacy. Both the current written policy and 28 C.F.R. Part 23 state that they contain safeguards designed to ensure that intelligence gathering is conducted in *conformance with* individuals' privacy and constitutional rights. That is superior to the "equitable balance" wording in the draft policy, which suggests, erroneously, that the interests of law enforcement are somehow compromised by safeguards designed to protect civil liberties.

A criminal intelligence database should be limited to information about serious criminal activity that is ongoing and systematic. Limiting the scope of the database to a list of specific crimes is a good idea. It appears that section (7)a of the proposed policy may be an attempt to limit the scope of the database to specific crimes, but if so, that intent is not sufficiently clear. (It is also confusing, because that section provides for records to have "permanent status" when other portions of the policy contemplate a maximum retention of five years.) In addition, the proposed policy's allowance of information entered on "temporary status" appears to provide a large loophole to whatever restrictions are intended to be imposed by the list of specific crimes. The proposed policy permits information to be entered on "temporary status" whenever the information "does not meet the criteria for permanent storage."

This vaguely-worded provision about "temporary status" appears not only to permit the entry of information about individuals who are suspected of crimes that do not appear on the specific list; it also permits entry of information when the critical criterion of reasonable suspicion is not met. Moreover, the provision regarding "temporary status" permits the police to continue retaining the information beyond the one-year period whenever police determine have a reason that they deem "compelling," a term that is not defined.

I thank you for your invitation to submit my comments in writing, and I appreciate your consideration of what I have provided here. I want to emphasize that this letter is not intended to serve as a comprehensive critique of the proposed policy. If you are able to take additional time before making your recommendations to the City Attorney's office, and if you are interested in additional input from or dialog with the ACLU about the proposed policy or other issues raised by the controversy regarding the Denver police Spy Files, please let me know. I would be happy to communicate with you further and provide whatever you need.

Sincerely,

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