



**AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO**

CATHRYN L. HAZOURI EXECUTIVE DIRECTOR, MARK SILVERSTEIN, LEGAL DIRECTOR

May 18, 2005

John W. Hickenlooper, Mayor  
City and County of Denver

Rick Garcia,  
Denver City Council

Elbra Wedgeworth, President  
Denver City Council

Jeanne Faatz,  
Denver City Council

Judy H. Montero,  
Denver City Council

Rosemary E. Rodriguez,  
Denver City Council

Jeanne Robb,  
Denver City Council

Peggy Lehmann  
Denver City Council

Michael B. Hancock,  
Denver City Council

Marcia Johnson,  
Denver City Council

Carol Boigon,  
Denver City Council

Charlie Brown,  
Denver City Council

Doug Linkart,  
Denver City Council

Kathleen MacKenzie,  
Denver City Council

Dear Mayor Hickenlooper, Council President Wedgeworth, and Members of the City Council:

I write to follow up on my letter to you dated December 30, 2004,<sup>1</sup> and to ask that you take action to resolve an unsettled issue regarding Denver's compliance with the Settlement Agreement in American Friends Service Committee v. City and County of Denver, the lawsuit that is commonly known as the "Spy Files" case.

As part of the Settlement Agreement, the Denver Police Department (DPD) adopted Policy 118.03, which governs the collection, maintenance, and dissemination of intelligence

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<sup>1</sup> The text of that letter is available at <http://www.aclu-co.org/spyfiles/Documents/JTTF.Mayor.citycouncil.electronic.12-30-04.pdf>.

information. The new Intelligence Policy prohibits collection of information about how individuals exercise their First Amendment rights, unless two conditions are met. First, the information about First Amendment activity must be directly relevant to criminal activity. Second, there must be objective facts that justify a reasonable suspicion that the individual or organization is involved in that criminal activity. The Settlement Agreement and Policy 118.03 require periodic audits by an independent agency to evaluate Denver's compliance. To conduct the first audits, Denver hired former Colorado Court of Appeals Judge Steve C. Briggs of the Judicial Arbitrator Group, Inc.

The problem that prompts this letter is caused by the participation of the Denver Police Department in the FBI's Joint Terrorism Task Force (JTTF). Two detectives from the DPD's Intelligence Unit, Tom Fisher and Stephen MacKenna, are assigned to work full-time for the JTTF. The JTTF is not bound by the Settlement Agreement in the Spy Files case. Indeed, under the Attorney General Guidelines that govern FBI investigations, as relaxed by Attorney General Ashcroft in 2002, FBI agents have much more freedom to collect, maintain, and disseminate intelligence information about First Amendment activities.

Denver Chief of Police Gerry Whitman correctly maintains that the two Denver detectives assigned to JTTF are bound by Policy 118.03 and the Settlement Agreement. Thus, even though they are working for and are supervised by the FBI, these detectives are bound by the more restrictive Denver regulations. Because of FBI secrecy, however, neither Chief Whitman nor Denver's independent auditor is able to determine whether these detectives in fact have been complying with the Spy Files Settlement Agreement and Policy 118.03. Judge Briggs devoted several pages to this problem in his Third Audit Report, dated October 27, 2004.<sup>2</sup> According to Judge Briggs, DPD Deputy Chief Battista confirmed that the Police Department "has no way of actually knowing whether the two detectives [assigned to JTTF] are performing their duties in compliance with the policy."<sup>3</sup>

The Settlement Agreement in the Spy Files case represents Denver's commitment to end the prior practice of monitoring and keeping files on the opinions and peaceful political activities of Colorado residents who do not pose any threat. The FBI, however, continues to collect the same kind of information about peaceful political activities that Denver police are now prohibited from gathering.

Indeed, pursuant to the Freedom of Information Act (FOIA), the ACLU of Colorado recently obtained new documents that confirm that the Denver JTTF is targeting peaceful political activists and creating files on constitutionally-protected political activities and associations that have nothing to do with terrorism. These documents raise serious questions about the degree to

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<sup>2</sup> Steve C. Briggs, Third Audit Report, Denver Police Intelligence Bureau, October 27, 2004 (hereinafter "Third Audit Report"). This report is available on the ACLU of Colorado website at <http://www.aclu-co.org/spyfiles/Documents/3rd%20Audit.Report.10-27-04.pdf>.

<sup>3</sup> Third Audit Report, at 12.

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which Denver police officers, including the two JTTF-assigned detectives, are participating in the collection of this political surveillance information.<sup>4</sup>

The City of Portland has been grappling with a similar problem of accountability. An Oregon statute prohibits state law enforcement agents from creating files about First Amendment activities. Indeed, the Oregon statute contains provisions that are similar to the standards Denver adopted when it settled the Spy Files litigation. Portland police officers assigned to the JTTF were obligated to follow the Oregon statute, but FBI secrecy prevented Portland's civilian leadership from confirming that Portland officers were following the more restrictive Oregon rules rather than the more permissive FBI guidelines.

Last month, Portland became the first city to withdraw its law enforcement officers from their assignment to an FBI Joint Terrorism Task Force. The Portland City Council voted to take that measure because of the same unresolved issues of accountability that Denver faces.

In order to fulfill the commitment it made when it signed the Settlement Agreement, Denver must ensure that an independent agency conducts periodic audits of Denver's compliance. At minimum, the audit must evaluate the activities of all DPD detectives who carry out intelligence functions, including the two Intelligence Unit detectives who are assigned to the FBI's Joint Terrorism Task Force.<sup>5</sup>

Denver is not relieved of its responsibilities under the Settlement Agreement simply because the FBI refuses to grant Denver's auditor sufficient access to necessary information. If Denver's participation in the JTTF prevents Denver from carrying out the independent audit that is required by the Settlement Agreement, then Denver must follow Portland's example. Given the FBI's policy of secrecy, the accountability that Denver promised in the Settlement Agreement can be achieved only if Denver withdraws from the JTTF.

Sincerely,

Mark Silverstein,  
Legal Director, ACLU of Colorado

Cc: Cole Finegan, Denver City Attorney

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<sup>4</sup> The ACLU of Colorado expects to receive additional similar documents in the coming months, as the FBI continues to process documents that are responsive to the ACLU's FOIA request filed last December on behalf of 16 organizations and 10 individuals.

<sup>5</sup> Even without regard to issues regarding the scope of the independent audit, Denver is already failing to fulfill its commitment regarding the frequency of the audits. According to the Settlement Agreement, another audit should have been completed in April, 2005. Because Judge Briggs indicated that he will no longer be available, a new auditor must be selected. At the request of the Denver City Attorney, I provided information about potential candidates in February, 2005. I have not heard anything further.