

THIRD AUDIT REPORT

DENVER POLICE INTELLIGENCE BUREAU

FROM: Steve C. Briggs
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TO: Lt. Kelly Quinones, Commanding Officer
Chief Gerry Whitman
City Attorney Cole Finegan
Public Safety Review Commission

RE: Third Denver Police Intelligence Bureau Audit Report

DATE: October 27, 2004

I. Introduction

Revised Policy 118.03 (the Policy) applies to all Denver Police Department (Department) criminal intelligence systems. The Policy establishes internal controls and proper oversight for the collection, retention, dissemination, and disposition of criminal intelligence to conform to privacy interests and constitutional rights.

Paragraph 11 of the Policy requires that the City and County of Denver (the City) conduct audits of its criminal intelligence files. The audit is to include a review of data collection, categorization, maintenance, dissemination, and Intelligence Bureau (DPIB) practices, as well as training procedures, to verify compliance with established rules and policies. The individual who conducts the audit is to prepare a written report that is to be provided to the DPIB Commanding Office, the Chief of Police, the City Attorney, and the Public Safety Review Commission.

This audit report is the third under the policy. It is for the period from the second audit, April 9, 2004, until the conclusion of the third audit interviews, September 24, 2004.

The auditor has used different consultants with each audit to vary the approach and focus. The first two audits disclosed a relatively insubstantial amount of actual criminal intelligence work being conducted by DPIB. A primary focus of the third audit was to determine whether that pattern was continuing and, if so, why. To assist with the process, the auditor retained Oren Root, Deputy Director of the Police Assessment Resource Center. This is a nationally recognized nonprofit organization that operates to strengthen police oversight, so as to advance effective, respectful, and publicly accountable policing.

II. The Audit Process

The audit included discussions and interviews with Chief of Police Gerald Whitman; Deputy Chief of Operations Michael Battista; former DPIB Commanding Officer Capt. Judith Will, who is now the Aid to Deputy Chief Battista; recently appointed DPIB Commanding Officer Lt. Kelly Quinones; Leslie Minor, the civilian intelligence analyst who assists DPIB but is still assigned to Research and Development Bureau; and the five detectives assigned to DPIB: Detectives Ronald Mayoral, William Phillips, David Pontarelli, Thomas Fisher, and Stephen MacKenna. In addition, Leslie Minor, assisted by Capt. Will and Lt. Quinones, provided a demonstration of the Orion computer system and the information currently contained in the system. The discussions, interviews, and

demonstration took place on September 22, 23, and 24, 2004. The auditor separately interviewed by phone Robert Goffi of the Federal Bureau of Investigation and Police Chief Whitman.

The audit also included an inspection of the DPIB offices and a review of selected hard copy permanent, temporary, working files, and other Department documents; independent research; and a review of additional documents produced for inspection on October 25, 2004.

A. The Initial Interviews

The interview portion of the audit process began on September 22, with a meeting between the auditors and Deputy Chief Battista, Capt. Will, and Lt. Quinones. The initial questioning confirmed that members of DPIB were still engaging in only limited criminal intelligence work. They were instead pursuing other projects, such as Operation NEXUS, a program for developing relationships with businesses to educate them about terrorism and encourage them to report suspicious persons to the police. The other two major activities are providing “mayor and VIP” protection and running background checks on those seeking special permits.

The recommended “over-the-shoulder” training on Orion has not taken place or been scheduled. No steps have been taken to encourage other bureaus within the Department to submit criminal intelligence information to DPIB.

It appears that at least for the foreseeable future the members of DPIB will continue to have a limited role in actual criminal intelligence work. This raised

the question whether police intelligence systems are operating elsewhere in the Department and, if so, where.

At the meeting on September 22, the auditors presented a list of categories of documents requested for audit inspection. The categories were not necessarily limited to documents located in the DPIB offices or created by DPIB personnel. For example, one request was for documents anywhere in the Department concerning implementation of the Policy.

Another document request was for outlines of any criminal intelligence training that members of DPIB had attended or taught since the last audit. The auditors were informed that Detective Fisher had conducted a training relating to terrorism. It was acknowledged that those receiving the training were not cleared to receive classified information. Nevertheless, the auditors were told that they could not review any documents related to the training because they were "FBI materials."

B. The September 23 Meetings and the Dilemmas

The following morning the auditors arrived as scheduled for a meeting with Leslie Minor to review the Orion computer system and entered data. Instead, a meeting took place with Chief Whitman and Deputy Chief Battista. They raised concerns with the request for any document that was not located in the DPIB offices or created by DPIB personnel. They informed the auditors that the audit could not proceed before a meeting with City Attorney Cole Finegan and private counsel Thomas Rice. The subject would be the scope of the audit. In the interim,

the auditors could have Leslie Minor demonstrate the Orion computer, but no questions could be asked about any activities outside of DPIB.

In the afternoon the auditors met with City Attorney Cole Finegan, private counsel Thomas Rice, Police Chief Whitman, and Deputy Chief Battista. The City Attorney stated that the Department could not share information about the activities of DPIB assigned to the Denver Joint Terrorism Task Force (“DJTTF”). Further, it was the Department’s position that, pursuant to ¶11.a. of the Policy, the auditors had no authority to examine or inquire about any information, databases, documents, personnel, or practices in the Department outside DPIB.

The auditor acknowledged that the Department’s positions represented a good faith interpretation of the Policy as written. However, the positions created two primary dilemmas for the auditors. The first concerned the activities of the two detectives assigned to DJTTF. The other more broadly concerned the intended scope of the Policy and the audits.

1. DJTTF Activities

Two members of DPIB are assigned to DJTTF. Police Chief Whitman has taken the position that they are subject to the Policy, even while working with DJTTF. However, in the two previous audits the two detectives assigned to DJTTF had refused to discuss their activities, other than to say their duties involve the investigation of terrorism. They have asserted that they are prohibited by applicable federal guidelines from revealing anything about their work.

The auditor stated that it was understandable that DPIB could not disclose information that the FBI would not permit it to disclose. The dilemma was that, without information about the activities of DPIB personnel assigned to DJTTF, no meaningful audit could be conducted.

The City Attorney responded that the Department would like to share with the auditors information about the activities of the two detectives assigned to DJTTF, but it was not the Department's decision. It was his understanding that the federal government would not permit any such disclosure. As a result, the Department would not provide information to the auditors concerning the activities of DPIB members assigned to DJTTF.

2. Scope of the Policy and Audit

The second and broader dilemma concerns the scope of the Policy and the audit. The auditor acknowledged that if the scope of the Policy and audit included any possible criminal intelligence systems in bureaus other than DPIB, the auditing process could involve a wide scope of police activity in operating bureaus located in multiple locations. It could also substantially increase the costs of the audits. However, in light of the size of the Department, the scope and nature of its activities, the length of time DPIB has now been operating under the Policy, and information obtained during the audits, "criminal intelligence" activities may well be taking place outside DPIB. The dilemma presented is that, to the extent criminal intelligence information was being collected, retained, disseminated, and disposed of in bureaus other than DPIB, audits of DPIB were accomplishing little.

The auditor explained that the Policy itself helps create the dilemma. Pursuant to ¶2.a, the Policy applies not just to DPIB, but to all Department “intelligence systems.” However, that term is not defined. Likewise, the Policy in ¶5 broadly defines “criminal intelligence.” At the same time, ¶2.c. expressly excludes from the requirements of the Policy “criminal investigatory case files.” That term is also not defined.

The auditor further explained that, aside from the difficulties in determining the scope of the Policy’s application and of exclusions from its application, a separate difficulty is presented in determining the intended scope of the audit itself. Pursuant to ¶11 of the Policy, the audit is for the review of “data collection, categorization, maintenance, dissemination and Intelligence Bureau practices, as well as training procedures, to verify compliance with established rules and policies.” This leaves unclear whether the audit is limited to the review of DPIB practices, even though the Policy itself expressly applies to the entire Department. If the audit is so limited, then once again little could be accomplished with periodic audits.

The auditor concluded by suggesting that the Department and auditors are therefore facing dilemmas not of their making. It was understandable that the Department would not want to grant permission for the auditors to conduct any auditing activities outside of DPIB. Nevertheless, the auditors’ obligations required that they request permission to inspect at least some other bureaus to

determine if they were engaged in criminal intelligence activities and, if so, whether they were complying with the Policy.

The City Attorney responded that the Department understood the dilemmas. These matters would be the subject of further discussions. However, until further notice, the auditors would not be permitted to conduct any auditing activities outside of DPIB, nor could the auditors ask DPIB personnel about their knowledge of criminal intelligence activities in any other bureaus.

The City's private counsel addressed the requests for documents. He reiterated the position that the Department could not produce documents created by the FBI or pertaining to its activities. This included the training conducted by Detective Fisher. After discussing the other pending document requests, the City Attorney indicated that, to the extent such records existed, the Department would produce them.

The following afternoon, as the audit process was concluding, Deputy Chief Battista sent word to the auditors that the Department would not produce documents that dealt with the planning and implementation of the Policy unless the audit team sent a letter "clarifying" what it needed. An October 4 "clarifying" letter was sent and is attached.

C. The Interviews

On the morning of September 23, after it was determined that the meeting with attorneys could not be scheduled for several hours, the auditors were permitted to have Leslie Minor demonstrate the functioning of the Orion database

and to interview her, but only about DPIB activities. Capt. Will and Lt. Quinones attended the computer demonstration and interview.

Seven new permanent files have been opened since the last audit, creating a total of sixteen files. The files are being maintained in conformance with the Policy. During one period of four months no new permanent file was opened. Temporary file data is still not being put onto the computer system because the volume does not justify the expense of reconfiguring the computer software.

Limited training on, and use of, the complex computer program has resulted in DPIB personnel having an incomplete understanding of all facets of its operation. For example, an automatic numbering system for entries could not be explained. Nor could an explanation be provided for why half the files have an entry for "intelligence" in a field, with the other half blank in that field. While the Orion program is intended as a data manipulation system, not information storage, no data has been manipulated since the program was installed. All agreed more training on Orion is needed. In particular it would be beneficial to provide additional training to Leslie Minor as the analyst who enters data and to Lt. Quinones as the new commanding officer. However, in light of the minimal data being entered, any other additional training may not be immediately necessary.

Interviews with the five detectives, Lt. Quinones, Capt. Will, and Deputy Chief Battista took place on the afternoon of September 23 and on September 24. No Policy violations were disclosed, with three possible exceptions to be discussed.

The interviews confirmed the limited amount of actual criminal intelligence operations being performed. Any information received that pertains to a subject addressed by an operating bureau, such as gangs or drugs, is immediately sent on to that bureau. Most of the information that DPIB retains concerns matters that fall outside the jurisdiction of the operating bureaus. DPIB detectives also have not retrieved any criminal intelligence from other criminal intelligence databases, such as the growing number of regional and state databases, and none has been placed in any such systems. Some frustration exists with the continuing limited nature of DPIB activities.

Two of the non-DJTTF detectives and one of the DJTTF detectives are scheduled to retire in the next 11 months. A replacement has been identified for only one of the positions. As previously reported, replacements need to be identified and trained before filling a vacancy.

Both DPIB members assigned to DJTTF once again stated that they were prohibited from sharing information about any of their activities while assigned to DJTTF. Detective Fisher, assigned to domestic terrorism, does share information with Chief Whitman, Deputy Chief Battista, and Capt. Will. He will in turn share that information with Lt. Quinones as soon as she completes the process for obtaining security clearance to receive classified information. Detective MacKenna, assigned to international terrorism, does not regularly share information with anyone in the Department.

Both stated their understanding that when they are working with DJTTF they are subject only to federal guidelines, such as the United States Attorney General (AG) guidelines. The Policy does not apply. This is contrary to the understanding of Chief Whitman, as expressed to the Public Safety Review Commission at its meeting on May 15, 2003:

“To clarify one other question that came up about JTTF I have already told the two detectives who work there: they are under this Policy. Their activity is controlled by the Denver Police Department, not the FBI. And that’s clear with them. And I will certainly make it clear with the SAC [Special Agent in Charge] of the FBI over there. Now I know that I have a more restrictive policy to some degree than the JTTF operates under, under CFR. But my two detectives are bound by this policy—their activity, their collection of information, their sharing of information is controlled by the Police Department, not the FBI.”

The understanding of the two detectives also appears to be contrary to the controlling Memorandum of Understanding, the agreement that established the relationship between the Department and DJTTF. It provides in relevant part:

“In addition, it is understood that personnel of member agencies shall be required to utilize only those investigative techniques consistent with their given standards and procedures.”

“Specific control over their DJTTF resources and the continued dedication of these resources to the DJTTF shall be retained by the participating agency heads who will be kept fully apprised of all investigative developments by their respective subordinates.”

“Responsibility for the conduct of the DJTTF members shall remain with the respective agency heads. All DJTTF personnel will keep their respective supervisors completely informed of pertinent developments.”

Lt. Quinones acknowledged in her interview that she has no knowledge of the daily activities of the two members of DPIB assigned to DJTTF. When she is periodically required to fill out their officer performance forms, she speaks to their FBI supervisors.

Deputy Chief Battista agreed that the two detectives are subject to the Policy while assigned to DJTTF. He confirmed that DPIB has no way of actually knowing whether the two detectives are performing their duties in compliance with the Policy.

On September 30, 2004, the auditor interviewed Robert Goffi of the FBI by telephone. His name had been provided as the person to contact about the restriction on disclosure of the activities of Detectives Thomas Fisher and Stephen MacKenna while assigned to the DJTTF. Mr. Goffi declined to share any information about their activities, relying on restrictions set forth in 28 CFR §§16.21 – 16.28. He did provide the auditors with copies of some documents, including the CFR restriction on sharing information.

On October 18, 2004, the auditor conducted a follow-up interview with Chief Whitman. He confirmed his position that DPIB detectives are subject to the Policy, even when assigned to DJTTF. When asked why the two detectives assigned to DJTTF would have a different understanding, he had no explanation and said he would be checking on it. Chief Whitman later called back to say he had talked with the two detectives, and they understood that both the Policy and the AG guidelines apply to their activities with DJTTF. Chief Whitman stated that

he knew of no express or implied policy to have criminal intelligence work performed outside of DPIB.

D. Document Review

During the limited time available at the conclusion of the interviews, the auditors reviewed some documents, including weekly activity summaries. (“Daily activity logs” had been requested, and the auditors were told none existed. Further questioning was required to determine that weekly rather than daily activity reports existed.)

As earlier discussed, the auditor provided an October 4 letter of clarification about additional documents being requested that concerned planning for and implementation of the Policy. On October 25 the auditor met with Deputy Chief Battista to review documents produced in response to the auditor’s letter. At that time Deputy Chief Battista provided the auditor with an October 8 letter from Police Chief Whitman. A copy is attached.

Most of the documents produced on October 25 were in a grouping that Deputy Chief Battista stated pertained to training. A memo was produced in a separate group from the Research and Development Bureau to Chief Whitman. It contains the new Policy and instructs the recipient to replace the old pages with the new. The memo itself gives no indication of further distribution. In his October 8 letter Chief Whitman states that the memo was distributed throughout the Department.

No documentation was produced indicating what steps, if any, were taken outside DPIB to explain or comply with the Policy or what problems, if any, were encountered in implementing the Policy. One of the categories of documents listed in the auditor's letter was: "Documents pertaining to the creation of criminal intelligence systems or the assignment or performance of criminal intelligence work outside the Intelligence Bureau." In Chief Whitman's response of October 8, he states, "We believe this to be outside the scope of the audit."

III. Compliance

DPIB is generally in compliance with the Policy in performing its limited criminal intelligence activities. Since the last audit DPIB personnel have not monitored any protests, conducted any undercover operations, taken any photographs, recorded the license tags of protesters, or run any credit checks. However, three possible Policy violations were noted.

A. Dissemination of Information to DJTTF

Since the last audit a DPIB detective disseminated information to another DPIB detective who is assigned to international terrorism with DJTTF. The information concerned a Denver Public Schools bus driver of Middle Eastern origin. He had made threats to school personnel after he failed a background check for not possessing a valid social security number.

The restrictions on information dissemination in Paragraph 7 of the Policy do not appear to be limited to information that has been entered into a file. The

restrictions therefore apply even to information personally known to a DPIB member and transmitted orally.

On the one hand, the information about the bus driver was transmitted from one DPIB member to another. On the other hand, the information was being transmitted to the other DPIB member in his capacity with DJTTF. Nothing appears to prevent the FBI from placing such information on its own computer systems. The Policy does not address whether the dissemination of information in these circumstances falls within the requirement of ¶7 that the requesting officer or agency agree in writing to be bound by the Policy.

B. Dissemination of Information Based on Ethnic Origin

To the extent that sharing information with a DPIB detective assigned to DJTTF is deemed dissemination of information to an outside agency, the communication about the bus driver who threatened school personnel raises a separate concern. The Policy lists in ¶6.c. categories of information that must be specifically excluded from criminal intelligence files, including the following:

- (2) Information on an individual or group merely on the basis of race, gender, age, or ethnic background.

Section 118.02(3)a., while not part of the Policy in question, also makes clear that officers may not consider ethnicity or national origin in establishing reasonable suspicion.

Paragraph 5.a.(2)(k) of the Policy defines criminal intelligence as including information about an individual reasonably suspected of being

involved in threats of violence. Suspected involvement in terrorism is not required. Hence, the information about the bus driver constituted criminal intelligence information that satisfied the requirement of reasonable suspicion.

However, the two DPIB detectives assigned to DJTTF have confirmed that their activities are limited to investigation of terrorism. Without additional information, such as the nature of the threat, it is not clear how a bus driver who threatened school personnel in anger after he failed a background check for not possessing a valid social security number creates a reasonable suspicion of involvement in terrorism.

The auditors were told that the information was transmitted because the applicant was of Middle Eastern origin. This one additional element still leaves concern about reasonable suspicion of involvement in terrorism. Even without a Policy violation, sensitivity to the requirements of ¶6.c.(2) is required.

C. The July 22 Interviews

On July 22, 2004, two teams of FBI agents, acting in concert with the DJTTF and Denver police officers, arrived simultaneously at two private residences in Denver. Each team had half a dozen law enforcement officers, including METRO/SWAT officers. The FBI agents interrogated the occupants of the residences, young political activists, about their possible knowledge of

planning for criminal conduct at the Democratic and Republican national conventions.

Detective MacKenna, the DPIB member assigned to international terrorism with DJTTF, took part at one of the residences. The FBI reportedly had the name of at least one of the residents of the house and photos of several of them in advance of the operation. Two of those questioned there were arrested on traffic warrants. They were removed from the scene by uniformed Denver police officers. Detective MacKenna stated that at one point he entered the residence, to escort an occupant while he complied with a request that he produce his identification. The stated purpose for Detective MacKenna entering the residence was to ensure that the young man did not obtain any weapons from inside the house.

One of the occupants asserted that an FBI agent removed the young man's wallet without his consent. The officers also allegedly refused a resident's request that they leave the premises, upon the asserted ground that another resident had consented to their presence.

Those interviewed at the other location reported in a newspaper story that when the six officers and agents arrived they refused to identify themselves. At least one was outfitted in SWAT gear. According to a newspaper report of an interview with the Legal Director of the American Civil Liberties of Colorado, the officers told the young people that they were visiting "protesters and anarchists." When the people interviewed likewise refused to give their names, an officer

allegedly responded that this was viewed as “noncooperation” and that he would have to use “more intrusive efforts to get his job done.” One of those interrogated was reported to have been an intern with the American Friends Service Committee, a plaintiff in the lawsuit that led to the settlement agreement and the revision of the Policy.

During the week before the July 22 operation, Detective Fisher had briefed Deputy Chief Battista and Capt. Will about the upcoming operation. On the day of the operation, Detective Fisher was not in his office. An FBI agent therefore requested that Detective MacKenna assist by providing security for the FBI agents. The agent also asked Detective MacKenna to obtain additional Denver police officers to provide security for the operation and to take into custody any of those questioned who were found to have outstanding warrants.

Detective MacKenna then contacted Lt. Quinones and asked for the assignment of additional police officers. She in turn contacted the METRO/SWAT Bureau and obtained three SWAT officers for the operation.

Lt. Quinones also notified Chief Whitman of the operation by telephone. Chief Whitman in his interview declined to discuss the July 22 operation on the basis that it was outside the scope of the audit.

The members of the Department interviewed during the audit about the July 22 operations expressed the opinion that reasonable cause existed to suspect the occupants of criminal activity. However, Detective MacKenna stated in his interview that he did not know what the FBI intended to question the young people

about and that he did not pay attention to or hear the questions and answers that did occur.

Detective MacKenna acknowledged in his interview that the information relating to this operation was not classified, and he had discussed the FBI's basis for the operation with Lt. Quinones on the day of the operation. As noted, she does not currently have security clearance. Nevertheless, Detective MacKenna would not disclose any information about the operation to the auditors.

Capt. Will had been provided information before and after the operations. She declined to disclose any information that she had received.

The auditors asked Deputy Chief Battista to produce any police paperwork of the Department officers who took the two men into custody. This would not have been FBI materials and presumably would not even be part of DPIB criminal intelligence information. Deputy Chief Battista declined to provide the documentation.

In his interview, Deputy Chief Battista asserted that Lt. Quinones had informed him of the asserted reasonable suspicion for the operations, but he declined to discuss that information. His position is that the July 22 operation was outside the scope of the audit.

Lt. Quinones likewise declined to disclose information about the July 22 operation. At the auditor's request, Lt. Quinones checked to see if any information could be disclosed by anyone. She reported back that, while the

information was not “classified,” it was “law enforcement—sensitive” and none could be disclosed to the auditors.

An FBI spokesman disclosed the basis for the operation in an e-mail to the Rocky Mountain News, which was published on July 29, 2004: “JTTFs in several states were asked to conduct interviews of persons who reasonably could be expected to have specific details about people or groups planning criminal acts during a number of upcoming national events.” Several weeks later, on August 16, 2004, The New York Times reported that the same FBI spokesman had provided the following explanation: “The individuals visited in recent weeks ‘are people that we identified that could reasonably be expected to have knowledge of such plans and plots if they existed.” (Emphasis added.) The FBI’s reported explanations do not satisfy the Policy’s requirement of reasonable suspicion that the person investigated is involved in criminal activity.

The July 22 operation was part of an FBI effort in at least six states, which received national attention - and criticism. For example, the day after reporting the FBI explanation of August 16, The New York Times in an editorial criticized the operation as heavy-handed inquiries that were intimidating and threatened to chill freedom of expression:

When protesters are made to feel like criminal suspects, the chilling effect is potentially quite serious. And the chances of gaining any information that would be useful in stopping violence are quite small. The knock on the door from government investigators asking about political activities is the stuff of totalitarian regimes. It is intimidating to be visited by the Federal Bureau of Investigation,

particularly by investigators who warn that withholding information about anyone with plans to create a disruption is a crime.

In sum, the operation in Denver consisted of two teams of FBI agents and Department personnel, each with half a dozen law enforcement officers, some in SWAT gear, arriving unannounced at two private residences to interrogate the occupants. No member of DPIB or the Department would provide the auditors with information that established a reasonable suspicion that anyone at either residence was involved in any criminal activity as defined by the Policy. The information made public by the FBI does not establish reasonable suspicion.

One suggestion made during the audit interviews is that the Policy be interpreted to apply only when members of the Department are directly part of the investigation and information gathering, such as conducting actual interrogations. The Policy contains no such exception. Further, pursuant to Denver Police Department Operations Manual RR-103 (REV. 10-95), officers may not aid or abet another in the violation of the rules, duties, orders, or procedures of the Department. Finally, the chilling effect on constitutional rights is the same.

IV. Additional Observations

Previous audits have noted areas where the Policy needs to be clarified. This audit has highlighted the need for even more fundamental clarification of the scope of the Policy, as well as the scope of the audit.

A dilemma created by application of the Policy and audit to the activities of DPIB personnel assigned to DJTTF is that some means for providing a meaningful

audit of those activities must be devised. The resolution of this dilemma may require, for example, an amendment to the Memorandum of Understanding to permit the auditor to have access to federal criminal intelligence. It may also require that the auditor receive security clearance to review classified information. The Department must also devise a means of fulfilling its own responsibility under the Policy and Memorandum of Understanding to ensure that the detectives assigned to the DJTTF are complying with the Policy.

A second dilemma is presented by the application of the Policy and audit to the activities of DPIB detectives assigned to DJTTF, as well as to Department personnel assisting in FBI operations. The Policy is more stringent than the applicable AG guidelines. For example, the Policy permits the collection of criminal intelligence information only from those reasonably suspected of being involved in criminal activity. Federal guidelines are not so limited. See generally “The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations” (May 20, 2002); “The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection” (October 31, 2003). Thus, DPIB detectives assigned to DJTTF may be asked to take part in FBI or other federal operations that comply with AG guidelines but not the Policy. Other Department personnel asked to assist in such operations are also placed in a difficult predicament. The resolution of this dilemma may require, for example, an understanding with federal

authorities that permits compliance with the Policy without having to refuse a federal supervisor's direction.

This issue does raise a separate question whether the Policy is intended to be so stringent in one respect. Reasonable suspicion may not exist that an individual is engaged in criminal activity but may exist that the same individual has information about others engaged in criminal activity. It can be argued that the Policy does not permit Department personnel even to approach and ask whether such an individual will voluntarily provide criminal intelligence information. The Policy needs to be clarified as to whether the actual intent is to prevent any attempt to gather such information. If not, reasonable restrictions may be needed, such as restrictions on a showing of force at private residences of innocent citizens.

On a more fundamental level, the Policy does not define what constitutes "criminal intelligence systems" subject to the audit. While it defines "criminal intelligence" in broad terms, it does not define the exception to the application of the Policy for "criminal investigatory case files."

During interviews, the auditors inquired about the distinction between activities and information covered by the Policy because they constitute "criminal intelligence" and activities and information excluded from the Policy because they are part of "criminal investigatory case files." One response was that the difference is determined by whether DPIB maintains the information or instead passes it along to an operating bureau.

Under this approach, all information transferred to an operating unit is thereafter necessarily part of “criminal investigatory case files.” Thus, DPIB is in control of determining what constitutes criminal intelligence information: it is limited to that information DPIB chooses to maintain rather than transmitting to an operating bureau. No information collected, maintained, disseminated, or disposed of by an operating bureau would be considered criminal intelligence. It would not matter whether any specific crime had been committed or was being investigated. As earlier noted, the current practice of DPIB is to immediately transmit information about certain subjects to the operating bureau addressing that subject. Thus, under this approach no information about these subjects could ever be considered criminal intelligence information.

A different approach would be to define information that is part of a “criminal investigatory case file,” and therefore excluded from the application of the Policy, by the status of the information itself. For example, “case investigatory case file” information could be defined as pertaining to the actual preparation for or commission of a specific crime. All other information would be considered criminal intelligence information to which the Policy applies.

Under this approach neither the subject matter of the information nor the bureau conducting the analysis is controlling. For example, information gathered about gang members to determine whether a pattern of criminal activity exists or can be predicted would be considered criminal intelligence information. Likewise, information that reasonably indicates criminal activity may occur in the future, but

does not indicate a current substantive or preparatory crime, would constitute criminal intelligence information. All such information would be subject to the application of the Policy.

However defined, the distinction must be clarified between activities and information to which the Policy applies and activities and information excluded as part of a “criminal investigatory case file.” Absent a clarification, the Department has a good faith basis for its position that the Policy only to the activities of DPIB, even though it may engage in only limited criminal intelligence activities, while other bureaus may be actively engaged in criminal intelligence activities.

The Policy is also unclear as to the scope of the audit itself. As noted, ¶11 of the Policy leaves unclear whether the audit is limited to the review of DPIB practices, even though the Policy itself applies to the entire Department. Absent clarification, the Department has a good faith basis for its position that, regardless of the scope of the Policy, the audit is limited to the activities of DPIB.

A rationale supporting this interpretation would be that the purpose of the audit is to provide protection to the privacy and constitutional rights of individuals and groups, such as activists and protesters, who are politically vulnerable. It is less likely that any bureau other than DPIB would be involved in inappropriate activities that would have a chilling effect on First Amendment rights. The Department itself can still monitor compliance with the Policy in operating bureaus.

A rationale against this interpretation would be that the purpose of the Policy and audit are not so limited in scope. The Policy expressly states that it applies to all Department intelligence systems. The Department should not be permitted to avoid the audit of criminal intelligence information simply by having the same functions that were or should be in DPIB performed in other locations, such as operating bureaus. Further, by placing intelligence systems in separate operating bureaus, the Department loses the advantage of having centralized collection, storage, and manipulation of criminal intelligence that does not always fit within neat categories.

However defined, the Policy needs to be clarified as to the scope of the audit. The lack of clarity currently places the auditor and the Department in a conflict not of their making.

If the audit itself is not to be limited to DPIB, additional provisions will be needed to define the scope of the audit. The time and cost of an audit of all bureaus within the Department at all the various locations will be significantly greater than the time and cost of the audits to date.

The Policy also needs to be amended to clarify whether it is a Policy violation for DPIB personnel to share criminal intelligence information with other DPIB personnel who are assigned to DJTTF. The current practice is to share information. Neither DJTTF nor the FBI has agreed to abide by the Policy, and it appears that in fact they do not, at least in their methods of collecting information.

The Policy provides for four audits in the first year after it takes effect. Due to reasons not the fault of the DPIB or the Department, such as audit contract negotiations and scheduling conflicts, three have been conducted. Because the audits are currently limited to DPIB activities, and because DPIB is engaged in limited criminal intelligence activity, it is recommended that the requirements for the year be deemed satisfied. The next audit would then be scheduled at the six-month interval provided in the Policy for audits in the second year. Consideration should be given to whether the costs of further audits under current restrictions are justified.

V. Conclusion

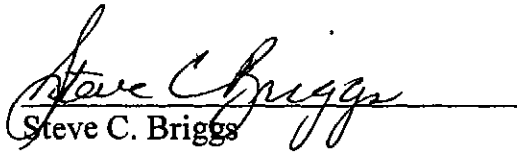
DPIB continues to operate in general compliance with the Policy. Its operations continue to involve relatively little in the way of collecting, maintaining, disseminating, or disposing of criminal intelligence information. This is not expected to change in the foreseeable future.

The Policy produces two primary dilemmas that must be resolved if future audits are to be meaningful. First, it may be understandable why the Department takes the position that information concerning DJTTF operations cannot be disclosed. However, the result is that the activities of DPIB personnel assigned to DJTTF cannot be audited for compliance with the Policy. Second, it may be understandable why the Department takes the position that the scope of the Policy and audit are limited to the activities of DPIB. However, the result is that any

criminal intelligence activities being conducted outside DPIB cannot be audited for compliance with the Policy.

Among the needed Policy clarifications, one should be addressed as soon as possible. The Policy appears to apply to DPIB detectives assigned to DJTTF. They should not be placed in the dilemma of either refusing to follow an FBI supervisor's direction that complies with AG guidelines or instead aiding and abetting violations of the Policy, which provides additional breathing space for fundamental constitutional rights.

Dated this 27th day of October, 2004.


Steve C. Briggs
Judicial Arbiter Group, Inc.

CERTIFICATE OF CERTIFIED MAILING

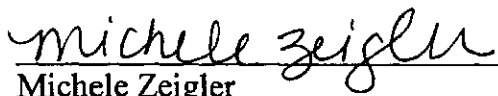
I hereby certify that on this 27th day of October, 2004, I deposited in the United States mail, certified first class, postage prepaid, a true and correct copy of the foregoing Third Audit Report to the following:

Lt. Kelly Quinones, DPIB Commander
Intelligence Bureau
Denver Police Department
1331 Cherokee St., Room 406
Denver, CO 80204

Police Chief Gerald Whitman
Denver Police Department
1331 Cherokee St., Room 406
Denver, CO 80204

City Attorney Cole Finegan
1437 Bannock St., Room 353
Denver, CO 80202

Public Safety Review Commission
Wellington E. Webb Municipal Building
201 West Colfax, Dept. 1102
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Michele Zeigler
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