



June 27, 2006

Richard Wilson  
City Manager  
City of Santa Cruz  
809 Center Street, Room 10  
Santa Cruz, CA 95060

Re: Police Department Surveillance Policy

Dear City Manager Wilson,

I received your June 21, 2006 letter and "proposed final draft" of the General Order regulating undercover operations. While the latest draft is – in some ways – an improvement over the previous incarnation, there are still several areas that I believe should be changed and improved. I urge further discussion and consideration of many of the suggestions we have previously made.

Since the revelation at the beginning of the year that the Santa Cruz Police Department infiltrated planning meetings for the Last Night Do It Yourself ("DIY") parade, the ACLU of Northern California has been actively involved in seeking documents related to the incident and pushing for stronger regulations protecting the privacy of those engaging in protest activity.

We first weighed in on the policy issues in a letter to City Council March 28, 2006. In that letter, we pointed out several flaws in the policy at the time and urged strong regulations protecting those engaging in First Amendment protected activity along the lines of the policy developed in San Francisco in the 1990s. I fully concurred with Police Auditor Bob Aaronson that rather than focus on this particular violation, the focus should be on setting good policy and direction for the future. It was in this spirit that I welcomed the opportunity to work collaboratively with City officials to develop a new policy for the Santa Cruz Police Department.

Unfortunately, as this letter will detail, there are several areas where the current policy falls short. Further, while I appreciated the opportunity to meet with you, Chief Skerry, City Attorney Barisone, and Bob Aaronson, as well as the opportunity to review the first draft and provide comments, the process has not been the collaboration that I envisioned. I have had the opportunity to provide our position and comments on one draft policy, but there has not been a substantive exchange regarding several important issues. For the most part, I am left guessing as to why certain ACLU proposals were not included in the "proposed final draft."

M. QUINN DELANEY, CHAIRPERSON | ROBERT CAPISTRANO, SUSAN FREIWALD, LISA HONIG, ROBERTA SPIECKERMAN, VICE CHAIRPERSONS | NANCY PEMBERTON, SECRETARY/TREASURER  
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STEPHEN V. BOMSE, GENERAL COUNSEL



In your June 21 letter, you indicate that you are “still open to minor changes” in the policy, but that “the final version will be very close to the current product.” Below are a number of suggested changes. All of these I previously suggested either in our March 28, 2006 letter to City Council; in the draft policy I submitted on May 9, or in my markup of the City’s first draft sent June 5. Since, for the most part, I never received a substantive response indicating any reason they are unacceptable to the City from a policy perspective, I can only assume that they would be considered minor.

1. Expand Policy to Include All Criminal Investigations, Not Just Undercover Operations: In your letter, you express “total surprise” at our suggestion that the policy cover not just undercover investigations, but all criminal investigations effecting First Amendment Protected Activity. This, to me, is a “total surprise,” as every letter and draft policy we have submitted covered criminal investigations. In our initial letter to the City Council, we recommended using San Francisco’s Policy – which covers all criminal investigations – as a model and explicitly recommended language stating covering the circumstances under which police “may conduct a *criminal investigation* that involves the First Amendment activities of persons, groups, or organizations.” We also used similar language in our May 9 draft policy and the June 5 comments on the City’s first draft.

It is important that free speech and privacy rights be protected in all types of investigations – not just those involving undercover officers. It would, for example, be inappropriate – and a violation of California law – for the Police Department to conduct interviews, review public source material, and engage in public surveillance on the members of the Santa Cruz chapter of the ACLU, yet such activity does not appear to be prohibited by the current policy. In his detailed report, Bob Aaronson highlighted the need to have clear policy addressing issues stemming from California’s constitutional right to privacy. It makes little sense to limit the policy only to undercover operations but not the decision to monitor or surveil an organization generally.

2. No Definition of First Amendment Protected Activity: Part of the problem that gave rise to the infiltration of DIY planning meetings was the failure of department officials to recognize that there was political content to the DIY website and planned protest, a fact highlighted by Aaronson in his report. In light of this apparent confusion, we recommended the inclusion of a definition of First Amendment Protected Activity.
3. Modified Standard: We have consistently recommended that standards be put in place to ensure that potential minor or technical violations do not result in criminal investigations of First Amendment protected activity. San Francisco, for example, prohibits investigations when the planned criminal activity may result in property damage of less than \$2500. In our meeting Chief Skerry raised the issue that the policy should also cover property loss – not just damage – and suggested that there not be a specific dollar minimum. I suggested using the language “significant” property damage or loss and do not recall any objection, yet this is not included in the policy.
4. Approval Process More Lax: We have previously recommended that the Chief be required to approve all investigations involving First Amendment protected activity. This is important from an accountability standpoint and, considering that the DIY case stemmed from approval given by a Deputy Chief, it is important that the Chief be involved. Again, I have not heard any reason why the decision to investigate a group engaging in protected activity should be made by anyone other than the Chief of Police.

5. No Language Specifying Policy Applies to Santa-Cruz Officers Working on Multi-Agency Taskforces: California law has greater privacy protections than federal law and Santa Cruz policy needs to be clear that officers who work with federal agents – whether as formal members of task-forces or simply on a per-case basis – must follow Santa Cruz policy regulating surveillance of First Amendment protected activity. Information sharing should also be regulated to ensure records are not inappropriately held or disseminated by other agencies when they are no longer relevant to a criminal investigation.
6. Audit Section Restricts Disclosure of Information Beyond What is Required by State Law: Public disclosure and transparency around potential surveillance of political activity is critical to engendering public trust. If there are possible violations, they should be publicly disclosed and the organization that has been inappropriately monitored should be notified. In your letter, you raise concerns about the privacy of peace officer records. Basic information can and should be disclosed, however, without violating the rights of officers subject to disciplinary investigations.

Finally, in your letter you indicate that the policy will become final on July 5, suggesting that this process has run its course and that “we need to bring this effort to conclusion.” While I share your desire to finalize policy in a timely manner, it should not be done at the cost creating an inadequate policy. The length of time this process has taken has not been due to delay on the part of the ACLU – our initial meeting to discuss the policy was twice delayed due to cancellations by City staff. Following receipt of a draft from John Barisone on May 22, I sent a redlined version with a number of suggested changes on June 5, including those listed above. I did not receive a response until your June 21 letter that contained the “proposed final draft.”

Santa Cruz has a genuine opportunity to move forward in a positive direction and create a model policy that everyone can be proud of. There is no reason to rush to finalize this policy without adequate discussion. I urge you to reconsider the policy, delay implementation, and work to create stronger protections for Santa Cruz residents. I would be interested to hear if the City has substantive objections to any of our proposed changes.

Thank you for your consideration. As always I can be reached at 415-621-2493 ext. 316.

Sincerely,



Mark Schlosberg  
Police Practices Policy Director  
ACLU of Northern California

cc: City Council  
Bob Aaronson