



The San Francisco Police Department and the Police Commission Can Improve Policies and Practices Around Investigations Related to First Amendment Activities

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Department of Police Accountability

Executive Director Paul Henderson

Why We Did This Audit

Peace officers must ensure that rights guaranteed by the First Amendment of the U.S. Constitution are protected by allowing people to speak freely, exercise their religious beliefs, and peaceably assemble. San Francisco Police Department (SFPD) Department General Order 8.10 (DGO 8.10), *Guidelines for First Amendment Activities*, permits SFPD

to conduct criminal investigations involving First Amendment activities when there is an *articulable and reasonable suspicion* that persons or groups are planning or are engaged in *criminal activity*, and that the *First Amendment activities are relevant to the criminal investigation*. DGO 8.10 also limits how SFPD collects information on First Amendment events and disseminates information governed by this order. DGO 8.10 requires the Department of Police Accountability (DPA) to annually audit SFPD's compliance with these guidelines. This report fulfills that requirement for calendar year 2020.

Audit Objective

To determine whether SFPD complied with the requirements of DGO 8.10. Specifically, did SFPD:

- ◆ Ensure members received required training?
- ◆ Follow record destruction requirements?
- ◆ Notify the Police Commission of investigations requested and authorized under DGO 8.10?
- ◆ Collect information on First Amendment events within the constraints established by the order?

What We Found

Although SFPD stated that no investigations were subject to DGO 8.10 in 2020, we identified areas where SFPD and the Police Commission could improve policies and practices around investigations related to First Amendment activities.



DGO 8.10's guidance on when the order applies to investigations is limited and not specific



2 officers did not receive required training prior to starting work in the Special Investigations Division



SFPD did not destroy records as required



SFPD did not provide the Police Commission with timely confirmation that there were no requests for DGO 8.10 investigations



Operations plans do not consistently reference the source of First Amendment event information

This report also includes a section to bring to the attention of the Police Commission and SFPD other matters we noted during the audit. These matters include SFPD's use of social media as a source for First Amendment event information, and changes in technology that warrant the Police Commission and SFPD revisiting DGO 8.10's requirements on video and photographic recording at First Amendment events.

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BACKGROUND

Peace officers are required to ensure that rights guaranteed by the First Amendment of the U.S. Constitution are protected by allowing people to speak freely, exercise their religious beliefs, and peaceably assemble.

According to a Federal Bureau of Investigation (FBI) Law Enforcement Bulletin, while the First Amendment permits a significant amount of freedom to express ideas, and the forming of groups to support and communicate those ideas, these rights are not absolute.¹ Under certain circumstances, protected First Amendment activity may generate legitimate law enforcement attention. The FBI notes that the challenge for law enforcement is in finding the proper balance between using investigative techniques to protect the public from harm while not unlawfully interfering with the exercise of constitutionally protected rights.

Persons engaging in First Amendment activities have the right to:

- ◆ Organize and participate in peaceful gatherings, including demonstrations, rallies, parades, marches, picket lines, or other similar gatherings.
- ◆ Conduct gatherings in public areas.
- ◆ Express their political, social, or religious views.
- ◆ Freely associate with others and collectively express, pursue, promote, and defend common interests.

Department General Order 8.10 governs SFPD's First Amendment activity-related investigations.

In October 2008, SFPD issued its revised DGO 8.10 *Guidelines for First Amendment Activities*. This general order permits SFPD to conduct criminal investigations involving First Amendment activities when there is an articulable and reasonable suspicion that persons, groups, or organizations are planning or are engaged in criminal activity, and that the First Amendment activities are relevant to the criminal investigation. DGO 8.10 requires that the Police Commission monitor SFPD's compliance with the guidelines and review requests and authorizations for investigations governed by the order.

DGO 8.10 also limits the collection of information on First Amendment events.

The improper collection of information by law enforcement can have a negative impact on communities, including a chilling effect on the constitutional right of freedom of speech. DGO 8.10 allows SFPD to collect a limited amount of information when planning for First Amendment events to preserve the peace, assess the need to deploy members for crowd and traffic control purposes, address public safety concerns at the event, and protect the rights of free expression and assembly. DGO 8.10 prohibits SFPD from using covert tactics to obtain this information.

¹ FBI Law Enforcement Bulletin, *Picketers, Protesters, and Police – The First Amendment and Investigative Activity*, August 2012.

The guidelines expect that the Special Investigations Division will initiate most investigations involving First Amendment activities.

DGO 8.10 places the Special Investigations Division (SID) at the center of investigations involving First Amendment activities. Approximately 30 members are assigned to SID, nearly half of whom are sergeants. Although the order does not prevent other SFPD divisions from investigating such crimes, it does require that they conduct them in consultation with SID.

The officer-in-charge² of SID reports directly to the Deputy Chief of the Investigations Bureau. The Investigations Bureau is under the Assistant Chief of Operations, who reports to the Chief of Police. SID includes the Arson, Bomb Investigations, and Hate Crimes units. In addition, SID members provide security for the Mayor of San Francisco and coordinate security for city officials, consulate officers, and visiting dignitaries.

The guidelines require DPA to report on SFPD activities governed by the guidelines.

DGO 8.10 requires that DPA annually audit SFPD's files, records, and documents, and prepare a report to the Police Commission on SFPD's compliance with this general order. As part of this report, DPA must provide the Police Commission with information concerning SFPD activities governed by DGO 8.10.

SFPD reported to DPA that:

- ◆ It did not authorize or deny any investigations that involved First Amendment activities in 2020; therefore, it did not approve undercover officers to infiltrate or investigate such activities, there were no unlawful activities investigated, and there were no arrests or prosecutions resulting from investigations conducted under the guidelines.
- ◆ There were no requests by members of the public for records governed by these guidelines.
- ◆ There were no requests by outside agencies for access to records of investigations conducted pursuant to these guidelines.
- ◆ There were no violations of the guidelines.

² In the absence of a commanding officer, an officer-in-charge is the senior-ranking officer present for duty in a unit.

CONCLUSIONS

Finding 1 – DGO 8.10’s guidance to help members decide when the order applies to criminal investigations is limited.

DGO 8.10 addresses when the order applies to criminal investigations, but the direction it provides is nonspecific. It states that “the department must follow these guidelines in every criminal investigation that involves the First Amendment activities of a person, group, or organization” and that “these guidelines do not apply to criminal investigations that do not involve First Amendment activities.” However, DGO 8.10 does not contain any guidance or illustrative examples beyond these statements to help members determine when the order applies. Further, although one SFPD official stated that the word “*involves*” is subjective and complicates the interpretation of the guidelines, SFPD does not have a department bulletin that amends DGO 8.10 to help members interpret and apply the order.

DPA reviewed First Amendment activity-related investigation policies from three other jurisdictions (see Appendix B). The Chicago Police Department’s policy addresses investigations *directed at* First Amendment-related information, and explains the types of investigations that do, and do not, require authorization to investigate.³ The Chicago Police Department’s policy includes examples of permissible and impermissible First Amendment-related investigations. Examples, like those contained in Chicago’s policy, can help clarify complex concepts, and good examples can substitute for long explanations.⁴ **Exhibit 1** shows examples that the Chicago Police Department uses to illustrate permissible and impermissible First Amendment-related investigations.

Without specific, objective guidance on when the order applies, members may be hindered in their ability to comply with DGO 8.10’s requirements. The U.S. Government Accountability Office (GAO) states that management should define objectives in measurable terms so that performance toward achieving those objectives can be assessed. Measurable objectives are generally free of bias and do not require subjective judgments. Measurable objectives are also stated in a quantitative or qualitative form that permits reasonably consistent measurement.⁵

³ Chicago Police Department, General Order G02-02-01, *Investigations Directed at First Amendment-Related Information*.

⁴ Plain Language Action and Information Network (PLAIN), *Federal Plain Language Guidelines*, March 2011. PLAIN is a community of federal employees dedicated to the idea that citizens deserve clear communications from government.

⁵ GAO, *Standards for Internal Control in the Federal Government*, 2014.

Exhibit 1: The Chicago Police Department provides its members with examples of permissible and impermissible First Amendment-related investigations.

Determination	Example of Investigation
<p>Unallowable <i>Violates the First Amendment</i></p>	<p>A police officer undertakes an investigation of a crime allegedly committed by a member of a race-based hate group. During the course of the investigation, the <i>officer decides to interview the employer of a member of the group, even though there is no indication the employer has any knowledge of the crime.</i> The officer conducts the interview because he feels that the employer should be aware that one of his employees is a member of this type of organization. Although the investigation into the crime is permissible, <i>there is no appropriate law enforcement justification for the interview with the employer, and therefore, it violates the First Amendment.</i></p>
<p>Permitted <i>No special authorization needed</i></p>	<p>A police officer <i>begins an investigation in response to a report that music is being played too loudly</i> at a tavern. In addition, the tavern is known for playing music whose lyrics offend some members of the population. This investigation <i>requires no special authorization</i> under this directive, even though music is generally protected by the First Amendment, <i>because the investigation is undertaken to determine if there has been a violation of an applicable anti-noise ordinance rather than based upon the musical lyrics.</i></p>
<p>Permitted <i>Requires special authorization</i></p>	<p><i>A public rally is planned.</i> One of the groups urging its members to attend is also speaking about the need to target and destroy certain symbols of corporate America. Although the <i>investigation is based upon the speech</i> of the group, <i>sending an undercover officer to the meeting of this group to determine if any and what criminal activity is planned</i> for the rally is a reasonable law enforcement purpose and therefore is <i>permissible under this directive if special authorization is received.</i></p>

Note: Only one example for each category is shown, but the order contains additional examples.

Source: Chicago Police Department, General Order G02-02-01, *Investigations Directed at First Amendment-Related Information.*

RECOMMENDATION

1. The San Francisco Police Department should work with the Police Commission to clarify and provide examples on when DGO 8.10 applies to criminal investigations.

Finding 2 – Two officers did not receive required DGO 8.10 training until after starting at the Special Investigations Division.

Two members did not receive DGO 8.10 training until after starting their assignment at SID, contrary to the order’s requirements. Both members started at SID in June 2020; however, one member received the training in August, while the other received the training in September 2020. SFPD stated that the training did not happen when the members started with SID because both members are in SID’s Mayor’s Security Detail unit and do not conduct investigations. However, DGO 8.10 does not allow for exemptions based on specific duty assignment.

RECOMMENDATION

2. The San Francisco Police Department should ensure that members receive DGO 8.10 training before beginning work at the Special Investigations Division.

Finding 3 – SFPD did not purge records as required by DGO 8.10.

DPA inspected the file cabinet where SFPD stores records related to First Amendment activities and observed 13 investigation files, dated between 2008 and 2010, and video and audio tapes that, based on their labels, concern 2003 anti-war demonstrations. SFPD stated that none of these records are for open, ongoing investigations.

DGO 8.10 requires the purge of records according to SFPD's records retention and destruction schedule. This schedule allows the retention of closed investigation case files for six years, and permits the retention of intelligence audio and video tape recordings for two years. DGO 8.10 does not assign responsibility for the destruction of records to a group or individual within the department.

SFPD stated that, due to an absence of new investigations, they do not regularly review the contents the DGO 8.10 file cabinet. Law enforcement agencies that do not destroy records timely risk creating the perception that they maintain files on groups or persons who engage in First Amendment protected activities.⁶

RECOMMENDATIONS

The San Francisco Police Department should:

3. Assign responsibility for the destruction of records and media governed by DGO 8.10.
4. Review the DGO 8.10 file cabinet and destroy any records and media as required by the records destruction schedule.
5. Create a written chain of custody to document the destruction of DGO 8.10 records and media.

Finding 4 – SFPD did not provide the Police Commission with timely confirmation that there were no requests for DGO 8.10 investigations.

The Police Commission stated that September 2020 was the first time it received the DGO 8.10 review log from SFPD that year.⁷ Although not required by the order, it is SFPD's practice, and a best practice, to send the log to the Police Commission for review even in months when there are no requests for investigations. However, SFPD did not provide the log to the Police Commission to confirm that there were no requests for investigations governed by DGO 8.10 at any point in the first

⁶ Although SFPD did not destroy the records, DPA verified that the file cabinet was locked. SFPD stated that SID's officer-in-charge is the only individual with the key to unlock this cabinet.

⁷ This log allows for a commissioner to sign and date their review of DGO 8.10 investigation requests.

eight months of the year, potentially hindering the Police Commission's ability to provide oversight of SFPD's compliance with the order.

SFPD stated that it was their process to hand deliver the log to the Police Commission, and that restrictions on in-person meetings due to COVID-19 caused a delay in 2020.⁸ SFPD did not adapt its process to deliver a digital version of the log during these months, despite adapting digital solutions for other interactions with the commission, like Police Commission meetings via video conference.

Oversight bodies—like the Police Commission—need quality information for effective oversight. The information must be current, appropriate, complete, accurate, accessible, and provided on a timely basis.⁹ Without this information, the Police Commission cannot effectively monitor SFPD's compliance with DGO 8.10.

RECOMMENDATION

6. The San Francisco Police Department should ensure that the Police Commission receives the DGO 8.10 investigations log monthly.

Finding 5 – SFPD's file dissemination form does not align with DGO 8.10's compliance requirements.

SFPD's agency assist form, which is required by DGO 8.10 to describe the documents or information transmitted to criminal justice agencies, does not include fields needed to show compliance with the order's file dissemination requirements. This is shown in **Exhibit 2**.

In the event a dissemination is reviewed or challenged, documentation provides the facts and circumstances for the law enforcement agency's decision. Because the agency assist form does not align with DGO 8.10, SFPD may not be able to easily or clearly show that information release decisions complied with the order.

⁸ The audit also found that the designated commissioner signed the November 2020 log in February 2021. The Police Department stated that they do not have any documentation to show when they sent the November log to the Police Commission.

⁹ GAO, *Standards for Internal Control in the Federal Government*, 2014.

Exhibit 2: SFPD’s agency assist form does not include fields for DGO 8.10’s information dissemination requirements.

AGENCY ASSIST # _____	COMPLAINT # _____
TIME SPENT _____	
SAN FRANCISCO POLICE DEPARTMENT SPECIAL INVESTIGATIONS DIVISION	
TO: _____	DATE: _____
Received By: _____	
Assigned to: _____	
Name, Address and Phone of Contact: _____	
Synopsis: _____	

Suspect(s) Unknown _____	

Brief Summary of Action Taken: _____	

Reviewed and Assigned by: _____	

SFPD’s agency assist form does not include fields needed to show compliance with DGO 8.10’s file dissemination requirements, including:

- ◆ The requesting agency’s right-to-know and specific need-to-know.
- ◆ A description of the documents or information transmitted.
- ◆ Determination if the requesting agency is reliable in treating the information with the requisite care and sensitivity.
- ◆ Whether the request was approved or denied by the Commanding Officer of SID.

Sources: SFPD’s Agency Assist Form; DGO 8.10.

RECOMMENDATIONS

7. The San Francisco Police Department should update the agency assist form to include fields for DGO 8.10’s information request evaluation requirements.

Finding 6 – Operations plans do not consistently reference the source of First Amendment event information to show compliance with DGO 8.10.

SFPD members do not consistently reference the source of First Amendment event information in operations plans.¹⁰ The audit reviewed operations plans for 92 First Amendment events that occurred in 2020 and found examples of operations plans that:

- ◆ Reference the **specific source** of the event information, like a website address or notification from the event organizer.
- ◆ Reference **general sources** of information like “flyers and intel,” an “open source,” or “numerous websites and social media platforms.”
- ◆ **Do not reference any source** for event information.

¹⁰ The Police Department’s event management manual states that, as part of pre-event planning, members should draft operations plans that include all pertinent information needed to successfully manage an event.

Operations plans that do not reference the specific source of event information prevent the department from showing that it collected the information in compliance with DGO 8.10's requirements, and may impair the ability of operations plan reviewers and approvers to evaluate the reliability of the information before it is used for a law enforcement purpose, like allocating resources for public safety.

DGO 8.10 allows for open and non-covert information collection for event planning involving First Amendment activities. A November 2016 department bulletin¹¹ on First Amendment activities limited event planning inquiries to "openly contacting organizations or persons knowledgeable about a public event, accessing open source information such as public domain websites, etc., and examining public records."

Guidance published by the U.S. Department of Justice's Global Justice Information Sharing Initiative recommends that law enforcement agencies properly reference the source of all publicly available information obtained for pre-event assessments.¹² The Santa Clara Police Department is an example of a law enforcement agency that, as part of its information gathering and assessment for planned First Amendment assemblies, requires its members to document the sources of event information in operations plans.¹³

RECOMMENDATION

- 8.** The San Francisco Police Department should require members to reference the source of information collected for First Amendment event planning.

¹¹ Department Bulletin 16-199, *First Amendment Activities: Pre-Event Planning*, November 2016.

¹² Global Justice Information Sharing Initiative, *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies*, December 2011. The Global Justice Sharing Initiative (Global) serves as a Federal Advisory Committee to the U.S. Attorney General on critical justice information sharing initiatives. The U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance administers Global.

¹³ Santa Clara Police Department, Policy 430, *First Amendment Assemblies*.

OTHER MATTERS

During the audit, we identified other matters that warrant the attention of the Police Commission and SFPD. These matters concern the Police Commission's monitoring of SFPD's compliance with DGO 8.10, SFPD's use of social media for First Amendment event planning, and changes in technology that warrant revisiting of DGO 8.10's requirements on video and photographic equipment at First Amendment events.

The Police Commission did not have a member designated to monitor SFPD's compliance with DGO 8.10 from May through August 2020.

The previously designated member's term on the Police Commission ended in April 2020, and the Police Commission did not choose a successor until September 2020. The GAO states that succession and contingency plans for key roles can help an entity continue achieving its objectives.¹⁴ Succession plans for key roles include choosing and training succession candidates to assume these duties. Without a designated member to monitor SFPD's monthly reporting of First Amendment activity, the commission foregoes active oversight and may miss the absence of SFPD reporting, such as what occurred in 2020 (see Finding 4).

Without specific guidance on gathering information from social media, SFPD members may be unaware of the civil liberty implications of accessing and using information from such sites.

Approximately half (48 of 92, or 52%) of the operations plans DPA reviewed (see Finding 6) reference social media networks as the source of the First Amendment event information. Although Department Bulletin 16-199, *First Amendment Activities: Pre-Event Planning*, allowed for members to access information from "public domain websites" it did not specifically address social media sites or the collection of information from these sources.

Guidance published by the U.S. Department of Justice's Global Justice Information Sharing Initiative states that social media sites can serve as a platform to enable persons and groups to express their First Amendment rights, including their political ideals, religious beliefs, or views on government and government agencies.¹⁵ This guidance recommends that law enforcement agencies have a social media policy that communicates how information from social media sites can be used by law enforcement, as social media sites have varying and differing levels of access and engagement, and

¹⁴ Succession plans address an entity's need to replace competent personnel over the long term, while contingency plans address the entity's need to respond to sudden personnel changes that could compromise the internal control system.

¹⁵ Global Justice Information Sharing Initiative, *Developing a Policy on the Use of Social Media in Intelligence and Investigative Activities: Guidance and Recommendations*, February 2013.

that “friending,” “following,” or setting up a user account are actions comparable to traditional covert techniques like using undercover officers.

Changes in technology warrant the Police Commission and SFPD revisiting DGO 8.10’s requirements on video and photographic recording at First Amendment events.

DGO 8.10 states that SFPD will videotape and photograph in a manner that minimizes interference with people lawfully participating in First Amendment events, and that video or photographic equipment shall not be *brought or used* without the written authorization of an event commander.

However, these DGO 8.10 requirements are unchanged from the 1999 version of the order, and pre-date technology changes that include:

- ◆ **SFPD’s adoption of body worn cameras in 2016.** Although DGO 10.11, *Body Worn Cameras*, states that members should not activate these devices “in a manner that is specifically prohibited” by DGO 8.10, DGO 8.10 does not mention body worn cameras or specifically list any prohibited uses of this equipment. Further, DGO 10.11 does not exempt officers from obtaining authorization to use body worn cameras at First Amendment events.¹⁶
- ◆ **Smartphones with built-in cameras.** SFPD began issuing smartphones equipped with cameras to members in 2013.
- ◆ **The rise of internet-connected surveillance video cameras.** According to an FBI Law Enforcement Bulletin, video surveillance even of public places may implicate the First Amendment depending on what the surveillance is targeting.¹⁷ SFPD does not have policies that address the use of city department and non-city entity surveillance cameras.

The International Association of Chiefs of Police¹⁸ (IACP) developed a framework that provides principles for the development of policies for technologies that can, or have the potential to monitor, capture, store, transmit and/or share data, including audio, video, visual images, or other personally identifiable information which may include the time, date, and geographic location where the data were captured.¹⁹ The IACP states that developing and enforcing comprehensive agency policies regarding deployment and use of these technologies is essential in assuring the public that their privacy and civil liberties are recognized and protected.

Other jurisdictions explicitly address some of these technologies in their policies:

¹⁶ Only 19 of the 92 (21%) First Amendment event operations plans that DPA reviewed list body worn cameras as equipment or reference DGO 10.11.

¹⁷ FBI Law Enforcement Bulletin, *Pole Cameras and Surreptitious Surveillance*, November 2009.

¹⁸ The International Association of Chiefs of Police is a nonprofit organization with the mission to advance the policing profession through advocacy, research, outreach, and education.

¹⁹ International Association of Chiefs of Police, *IACP Technology Policy Framework*, January 2014.

- ◆ The **Metropolitan Police Department of the District of Columbia** addresses First Amendment assemblies in its *body worn camera* policy.²⁰ The department's policy provides parameters for the use of body worn cameras at these assemblies and prohibits members from recording the presence of individual participants who are not engaged in unlawful conduct.
- ◆ The **Chicago Police Department** has a *video surveillance technology* policy. One of the guiding principles is to ensure that members use video surveillance technology in a professional and ethical manner, and within accepted legal concepts regarding privacy. This policy requires its members to receive training concerning the First Amendment, the Fourth Amendment, consent-to-search issues, and the proper operation of the video surveillance equipment prior to being authorized to use any department-authorized video surveillance technology.

According to the GAO, management should periodically review policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks as technology changes.²¹



About the San Francisco Department of Police Accountability Audit Division

DPA is an oversight agency that investigates officer-involved shootings and complaints about SFPD officers, and audits SFPD practices. DPA recommends new policies and policy changes to the Police Commission and SFPD. DPA and SFPD are separate agencies that both report to the Police Commission. DPA's Audit Division is separate from its investigation and policy advisory functions.

San Francisco Charter (Section 4.136) mandates DPA to audit the San Francisco Police Department's use of force and handling of police misconduct every two years. The Charter also gives DPA the authority to conduct performance audits and reviews to check whether the SFPD has followed all laws, ordinances, and policies. DPA's executive director decides the frequency, topics, and scope of the audits and reviews. The Audit Division conducts audits and assessments in compliance with the U. S. Government Accountability Office's Generally Accepted Government Auditing Standards.

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²⁰ Metropolitan Police Department, GO-SPT-302.13, *Body-Worn Camera Program*.

²¹ GAO, *Standards for Internal Control in the Federal Government*, 2014.

Appendix A: Scope & Methodology

Statement of Auditing Standards

This audit was conducted in accordance with generally accepted government auditing standards. These standards require planning and performing the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for the findings and conclusions based on the audit objectives. DPA believes that the evidence obtained provides a reasonable basis for the findings and conclusions based on the audit objectives.

Scope

The audit considered data from and processes in use in calendar year 2020.

Methodology

To conduct the audit, DPA gathered evidence using a variety of procedures and from a range of sources, including those summarized below.

- ◆ Reviewed DGO 8.10 to understand its compliance requirements.
- ◆ Evaluated prior DPA audit reports to review previously identified issues with SFPD's DGO 8.10 compliance.
- ◆ Interviewed personnel from SFPD's Special Investigations Division, Field Operations Bureau, Special Operations Bureau, Professional Development Unit, and Written Directives Unit.
- ◆ Interviewed Police Commission personnel, including the commissioner designated to monitor SFPD's compliance with DGO 8.10.
- ◆ Examined the DGO 8.10 log that SFPD provides to the Police Commission for review.
- ◆ Inspected the cabinet where SFPD stores files and media governed by DGO 8.10.
- ◆ Reviewed training records for members assigned to the Special Investigations Division in 2020.
- ◆ Watched SFPD's DGO 8.10 roll call training video.
- ◆ Reviewed a random sample of 92 operations plans for First Amendment events tracked by the SFPD's Field Operations Bureau.

Appendix B: Other Jurisdictions’ First Amendment Policies

DPA reviewed the First Amendment activity-related investigation policies of the Chicago Police Department, the Santa Cruz (California) Police Department, and the Metropolitan Police Department of the District of Columbia. The Chicago Police Department’s policy addresses investigations *directed at* First Amendment-related information and allows for investigations even when there is no articulable suspicion to believe that a violation of law has occurred. The Santa Cruz Police Department’s policy *only applies to undercover investigations*. The Metropolitan Police Department’s standard is like DGO 8.10 but also addresses preliminary inquiries for information or allegations that require further scrutiny but do not establish reasonable suspicion of criminal activity.

	Chicago Police Department	Santa Cruz Police Department	Metropolitan Police Department
Standard	General Order G02-02-01, <i>Investigations Directed at First Amendment-Related Information</i>	Policy 606, <i>Undercover Operations – First Amendment Activity</i>	Code of the District of Columbia, Title 5, Chapter 3A, Subchapter II. Police Investigations (“Police Investigations Concerning First Amendment Activities Act of 2004”)
Notable Policy Elements	<p>This general order requires special authorization for <i>First Amendment information gathering investigations</i>. These investigations involve the gathering and analysis of written or oral speech or other expression which is undertaken: 1) due to or on the basis of the <i>content of the speech or other expression</i> and 2) for the purpose of <i>preventing crime or for the purpose of aiding likely future investigations, even in the absence of an articulable suspicion</i> to believe that a violation of law has occurred.</p> <p>This general order <i>includes examples</i> of permissible and impermissible First Amendment-related investigations (see Finding 1).</p>	<p>This policy <i>prohibits undercover criminal operations that involve the investigation of First Amendment activities</i> of persons, community groups, or organizations <i>unless there is there is articulable and reasonable suspicion</i> to believe that the subject of the investigation is planning criminal activity, or is engaged in criminal activity, that constitutes a hate crime or a crime that is reasonably likely to result in personal injury, property loss or property damage; <i>and the subject's First Amendment activities are relevant to the criminal investigation</i>.</p> <p>This policy requires that, <i>prior to approving</i> any such request, the police chief <i>consult with the city attorney's office</i>.</p>	<p>The Metropolitan Police Department of the District of the Columbia may conduct a <i>criminal investigation that involves the First Amendment activities</i> of persons, groups, or organizations only when there is reasonable suspicion to believe that the persons, groups, or organizations are <i>planning or engaged in criminal activity</i>, and the First Amendment activities are <i>relevant to the criminal investigation</i>.</p> <p><i>This act addresses the authorization needed for preliminary inquiries</i> involving First Amendment activities. Preliminary inquiries address <i>information or allegations that require further scrutiny</i> but do not establish reasonable suspicion that persons are planning or engaged in criminal activity.</p> <p><i>The act requires the Chief of Police to annually report</i> on investigations and preliminary inquiries involving First Amendment activities.</p>

Appendix C: SFPD Response



LONDON N. BREED
MAYOR

CITY AND COUNTY OF SAN FRANCISCO
POLICE DEPARTMENT
HEADQUARTERS
1245 3rd Street
San Francisco, California 94158



WILLIAM SCOTT
CHIEF OF POLICE

November 30, 2021

Director Paul Henderson
Department of Police Accountability
3161 South Van Ness, 8th Floor
San Francisco, CA 94102

Dear Director Henderson,

Re: Department General Order 8.10 Compliance Audit Report

Thank you for the opportunity to review the Department of Police Accountability's (DPA) audit on the San Francisco Police Department's (SFPD) General Order 8.10—Guidelines for First Amendment Activities.

Department General Order 8.10 sets forth requirements for when an SFPD member conducts a criminal investigation involving First Amendment activities of a person, group, or organization. Per this policy, DPA is mandated to conduct an annual compliance audit and report its findings in a report to the Police Commission.

In its assessment of DGO 8.10 compliance for calendar year 2020, DPA identified the following eight recommendations:

1. Work with the Police Commission to clarify and provide examples on when DGO 8.10 applies to criminal investigations.
2. Ensure that members receive DGO 8.10 training before beginning work at the Special Investigations Division.
3. Assign responsibility for the destruction of records and media governed by DGO 8.10.
4. Review the DGO 8.10 file cabinet and destroy any records and media as required by the records destruction schedule.
5. Create a written chain of custody to document the destruction of DGO 8.10 records and media.
6. Ensure that the Police Commission receives the DGO 8.10 investigations log monthly.
7. Update the agency assist form to include fields for DGO 8.10's information request evaluation requirements.
8. Require members to reference the source of information collected for First Amendment event planning.

The Department recognizes that First Amendment Activities are guaranteed by the United States Constitution and does not intend to infringe on those rights. Accordingly, SFPD created this policy to ensure the protection of those rights and define the situations where police involvement is permissible, with its corresponding tracking mechanisms to ensure full transparency and accountability. However, the Department does understand that DGO 8.10 has not been revised since 2008 and welcomes the feedback DPA has provided in its assessment of the Department's compliance with DGO 8.10.

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As such, the Department is in full agreement with the first seven recommendations posed by DPA's audit report. One of the recommendations—recommendation two, has been immediately addressed and implemented, and the other six have been internally addressed and scheduled for full implementation by the first quarter of 2022. It should be noted that recommendation one is dependent on the agreed upon schedule of the DGO's SFPD and the Police Commission prioritize for any calendar year. Therefore, DGO 8.10's revision timeline is dependent on when it is scheduled by the Police Commission, but the Department is in full agreement with the recommendation posed by DPA.

With respect to the final recommendation, SFPD is in partial agreement with the recommendation as there are investigative circumstances and protections that allow for the Department to refuse source disclosure of information. Specifically, federally protected information, confidential informant information and information connected to open and ongoing investigations are subject to nondisclosure by SFPD. Therefore, SFPD is committed to disclosing source information when appropriate and determined by the Department, so long as these three facets of policing and investigations are considered in the evaluation of source citing.

In 2016, SFPD voluntarily engaged the US Department of Justice in an in-depth assessment of the Department that led to 272 recommendations that address use of force, bias, accountability, community policing, and recruitment, hiring and personnel. Since 2016, the Department has completed 245 recommendations and continues the work in partnership with the California Department of Justice and Hillard Heintze, a leading global change management consultant. The Department continues to be open to forward-thinking engagement that promotes and strengthens SFPD, and appreciates the opportunities where external parties can assess and bring forth recommendations that support this effort.

I want to thank DPA for their work and partnership in the evaluation of SFPD's compliance with DGO 8.10. I look forward to the ongoing discussions on how we can work together to ensure the rights of our residents are protected while we police and uphold public safety for the City and County and San Francisco.

Sincerely,


WILLIAM SCOTT
Chief of Police

/lg
Attachment

Recommendations and Responses

For each recommendation, SFPD should indicate whether it concurs, does not concur, or partially concurs, and provide a brief explanation. **If SFPD concurs with the recommendation**, it should indicate the expected implementation date and implementation plan. **If SFPD does not concur or partially concurs**, it should provide an explanation and an alternate plan of action to address the identified issue.

Recommendation	SFPD Response	DPA Use Only Status Determination*
The San Francisco Police Department should:		
1. Work with the Police Commission to clarify and provide examples on when DGO 8.10 applies to criminal investigations.	<input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur The Department will work with the Police Commission and all other appropriate stakeholders in the revision of DGO 8.10. Clarity on the application of this DGO in relation to criminal investigations will be considered. The DGO has not been revised since 2008. Update scheduled to be determined by the Police Commission.	<input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested
2. Ensure that members receive DGO 8.10 training before beginning work at the Special Investigations Division.	<input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur The SID Commanding Officer will ensure that all sworn officers assigned to SID receive DGO 8.10 training prior to commencing SID related work. This has already been implemented.	<input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested
3. Assign responsibility for the destruction of records and media governed by DGO 8.10.	<input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur The Department will assign responsibility for the destruction of records and media governed by the DGO to the SID Commanding Officer. This will occur at the end of December 2021.	<input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested

* Status Determination based on the audit team’s review of SFPD’s response and the proposed corrective action.

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Recommendation	SFPD Response	DPA Use Only Status Determination*
<p>4. Review the DGO 8.10 file cabinet and destroy any records and media as required by the records destruction schedule.</p>	<p><input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur SID Commanding Officer will ensure the file cabinet is reviewed, appropriate records and media are destroyed, as required by the records destruction schedule. Expected timeline for completion by the first quarter of 2022.</p>	<p><input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested</p>
<p>5. Create a written chain of custody to document the destruction of DGO 8.10 records and media.</p>	<p><input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur SID Commanding Officer will ensure that a written chain of custody document is created of the destruction of records and media. Expected completion of this task is in line with recommendation #4, by the first quarter of 2022.</p>	<p><input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested</p>
<p>6. Ensure that the Police Commission receives the DGO 8.10 investigations log monthly.</p>	<p><input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur The Department and SID Commanding Officer will work with the Police Commission to create a process that is more efficient and effective in the delivery of the monthly logs. Although not required by the DGO to send the log to the Police Commission for review in months when there are no requests for investigations, SFPD will provide notice to the Police Commission moving forward. Expected implementation date is December 31, 2021, to begin in January 2022.</p>	<p><input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested</p>
<p>7. Update the agency assist form to include fields for DGO 8.10's information request evaluation requirements.</p>	<p><input checked="" type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input type="checkbox"/> Partially Concur The Department and SID Commanding Officer will ensure the agency assist form is updated so that it captures fields DGO 8.10's information request evaluation requires. Expected implementation is by the first quarter of 2022.</p>	<p><input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested</p>

* Status Determination based on the audit team's review of SFPD's response and the proposed corrective action.

Recommendation	SFPD Response	DPA Use Only Status Determination*
<p>8. Require members to reference the source of information collected for First Amendment event planning.</p>	<p><input type="checkbox"/> Concur <input type="checkbox"/> Do Not Concur <input checked="" type="checkbox"/> Partially Concur</p> <p>When appropriate and determined by the Department that sharing this information will not jeopardize ongoing investigations, divulge federally protected information or compromise confidential informants, the Department will cite the source of the information collected. Members will state if the information was collected through open domain means or otherwise.</p>	<p><input checked="" type="checkbox"/> Open <input type="checkbox"/> Closed <input type="checkbox"/> Contested</p>

* Status Determination based on the audit team’s review of SFPD’s response and the proposed corrective action.