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TO: RICHARD WILSON
CITY MANAGER
CITY OF SANTA CRUZ

FROM: ROBERT H. AARONSON
INDEPENDENT POLICE AUDITOR
CITY OF SANTA CRUZ

DATE: March 20, 2006

At your direction, I have now completed an investigation intended to supplement the one undertaken by Deputy Chief Vogel, into the circumstances under which the Santa Cruz Police Department assigned covert officers to surveil Last Night DIY Parade organization meetings. In order to remedy the defects I found in the first investigation, I conducted two interviews and did some legal research. The results of those efforts are presented here.

On Friday, February 10, 2006, I received a copy of Deputy Chief Kevin Vogel's investigation into the SCPD's undercover operation, mounted against the Last Night DIY Parade organizers. Over that weekend, I reviewed his work and prepared an audit report. (A copy of the audit report is attached hereto.) In essence, I was troubled by three shortcomings in Vogel's work: (1) in part, he was attempting to investigate an incident in which he had more than passing responsibility and therefore lacked the desirable impartiality; (2) as well, because he conducted the investigation, he had not been subject to a probative interview of his role; and (3) insufficient information was captured regarding how and on what basis the decision was reached to place undercover operatives into the DIY organizing meetings.

On Monday morning, I presented my audit report to you and Chief Skerry. We discussed my concerns at some length. Ultimately, you requested that I conduct whatever further investigation I deemed necessary to render the Vogel report more complete.

In the intervening time, I have provided you with two or three updates on my activities in this regard. Neither you nor any other City representative has made any effort to direct, slant or control my work.

I've elected to conduct a narrowly focused supplementary investigation, strictly intended only to remediate the deficiencies evident in the original investigation. For that reason, I have not interviewed either members of the public or the officers assigned to the

undercover activities. I am satisfied that, regarding the manner of the actual undercover operation, Deputy Chief Vogel's work well and fairly captures the desirable information. Given the identified deficiencies, I concluded that only two interviews were necessary (apart from some legal research concerning the constitutional limitations placed on undercover surveillance): Lt. Rudy Escalante, who conferred with Deputy Chief Vogel in the decision making and supervised the actual operation, and Deputy Chief Kevin Vogel, who made the decision and, as a member of administration, oversaw the undercover activities.

A modest amount of new information has now been elicited. Amongst other things, it seems evident that the decision to employ an undercover operation did not encompass any significant time in considering its advisability or the less intrusive alternatives. There was little overseeing interaction between the Deputy Chief who decided and the Lieutenant who ran the operation. What the circumstances suggest is that the undercover operation, during its inception and implementation, was not perceived to be 'a big deal'. Without question, had the Department anticipated the denouement, a far more nuanced consideration would have taken place.

With regard to the legal research, I was as surprised and disappointed in what I found as I suspect you will be: while the relevant caselaw is not absolutely conclusive, it appears more than likely that the Santa Cruz Police Department violated the civil rights of the parade organizers. Prior to conducting this research, I had gathered that, while perhaps ~~not~~ the best choice in hindsight, the Department's operation had not violated any laws.

Finally, it bears repeating that this has not been a personnel investigation. That is the case for two distinct reasons. First, it has consistently been my view that I did not believe there were any credible allegations of misconduct by any City employee. Nothing in my supplementary investigation has caused me to change my mind about that. Second, the City, in releasing Deputy Chief Vogel's report, clearly rendered his investigation something other than a personnel investigation; had it been a personnel investigation, its release would have violated the rights of the subject officers. Because my work builds on Deputy Chief Vogel's report and is only intended to supplement it, my investigation cannot be anything other than what his was. To, at this late date, change direction and attempt to employ the reports for personnel purposes would violate State law and the officers' rights.

The purpose of this exercise, quite correctly, has been to see what we, as a City, can learn from reflecting on the choices and actions that formed the basis of this undercover operation. There is an opportunity here, as a City and as a community, to move to a more sophisticated model of handling such situations. I hope we are successful in doing so.

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EXHIBITS

1. [Memorandum]; IA Investigation 2006-001 Cancellation; to Lt. Rudy Escalante, from Deputy Chief Vogel; dated January 19, 2006; one page;
 2. **Audit Review of Last Night DIY Internal Investigation**; by Robert H. Aaronson, Independent Police Auditor for the City of Santa Cruz; dated February 13, 2006; two pages;
 3. [Memorandum]; Additional Interview for DIY Parade Investigation; to Lieutenant Rudy Escalante, from IPA Robert H. Aaronson; dated February 28, 2006; one page;
 4. [Memorandum]; Additional Interview for DIY Parade Investigation; to Deputy Chief Kevin Vogel, from IPA Robert H. Aaronson; dated February 28, 2006; one page;
 5. [E-mails]; Three, between IPA Aaronson and ACLU of Northern California's Police Practices Policy Director Mark Schlosberg; two pages;
 - a. From Schlosberg to Aaronson, dated March 2, 2006, at 5:03 p.m.;
 - b. From Aaronson to Schlosberg, dated March 3, 2006, at 6:18 a.m.;
 - c. From Schlosberg to Aaronson, dated March 3, 2006, at 2:24 p.m.
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NOTE ON INTERVIEW SUMMARIES

Given the gravity of this exercise, I have erred on the side of including as much of the verbatim question and answer as was colorably relevant, rather than merely offer my own conclusions. I intend to provide enough of the raw information to allow reviewers to critically assess my conclusions. Therefore, I have tried to utilize the witnesses' own words, and the questions that prompted them, to convey what they said.

In order to assure accurate and complete interview summaries, I listened to and transcribed each of the recorded interviews. Rather than leave any portion of an interview 'unintelligible', I spent as much time as was required to discern the contents. Where a word or phrase was important, I spent extra time gaining the necessary degree of certainty before committing any particular wording to the summary.

Where the statements of the witnesses may be safely conveyed in a summarized fashion, I have done so. However, in instances where a witness's choice of particular words carries some importance, I have used his exact words, always in double quotation marks (""). Single quotation marks (') not within double quotation marks appear where I am paraphrasing a statement. Where a clear understanding of the import of his recollection requires a larger context, I have quoted whole sentences, verbatim and sometimes whole extended narratives or question and answer. Anything in double quotation marks represents an exact, literal transcription of their own words, with the following exception: where a witness used "umm", "uuh" and other incidental superfluous verbalizations, I have omitted them unless the hesitations were important to the context.

When I use an ellipsis (...), and I have only used them within quotations, it means that I have chosen to omit a portion of what was said at that exact point; I have only done this where it renders the statement more readable and does not alter the meaning or omit anything of importance.

When I use a dash (-), there are no words missing. Where it appears, the speaker, as we all do, changed thoughts in mid sentence and abandoned a sentence or a thought only half said; I have used the dash to mark that transition.

Interview of Lt. Rudy Escalante

March 03, 2006 at 10:10 a.m.

Professional Standards Unit

Santa Cruz Police Department

Recorded.

For purposes of the follow-up investigation, Lt. Rudy Escalante played a role in two relevant aspects of the DIY undercover activities. In deciding whether to employ an undercover officer, Deputy Chief Vogel sought Lt. Escalante's input. As well, Lt. Escalante was the direct supervisor for the instant undercover operation.

Pursuant to written notification (a copy of which appears as an attachment), Lt. Escalante appeared for his interview with his representative, Ms. Kate Canlis. They recorded his interview.

At their request, I stated on the record that "I am not here investigating allegations of misconduct." I explained that "I've been asked to ask some additional questions" in order to evaluate the process whereby an undercover operation was mounted against the DIY organizers.

Having asked for an opportunity to place some concerns on the record, Ms. Canlis was invited to do so at this point. She began by affirming that "Lt. Escalante is happy to cooperate." Ms. Canlis expressed a concern that the audio recording of the interview would be released to the public, "containing Lt. Escalante's voice." The worry was that an audio record "can be manipulated" in ways that a transcript could not. Next, she expressed an expectation that "should some unforeseeable event occur and this matter were to be changed into some kind of a review of the lieutenant's conduct, or a personnel action – that he would be given notification of that change in status of the investigation."

Finally, Ms. Canlis quoted a sentence from my February 13th audit report: "*I remain troubled by the fact that the Department made broad, untested assumptions (tantamount to categorical prejudices) about the Last Night DIY organizers as the basis for inserting an undercover team in their midst.*" She continued, "I had two concerns about that when I discussed it with the lieutenant. One, that this conclusion could have been reached in advance of the fact-finding; and secondly, that it is certainly not in accord with my understanding, from speaking to the lieutenant, of why they did this. My understanding was that they did this so that they could adequately gauge what kind of a presence might be required in light of prior violence, and it didn't make any difference who the organizers were and it was in no way based on the identity of the people who were arranging the event."

When I asked if there were any other questions or issues either of them wished to raise, they both replied in the negative.

I started by referring Lt. Escalante to Dep. Chief Vogel's January 25th summary of his interview of the lieutenant, in order to find out if Escalante had any reservations about its contents or accuracy. Because he had not yet reviewed it "in detail", we took a ten minute break for him to do so.

When we returned, Lt. Escalante affirmed that, based on his recollection, the January 25th summary was an accurate reflection of the actual interview. As well, he affirmed that the contents were an accurate depiction of the covered events.

Escalante first learned of the efforts to organize the DIY Last Night parade from the October 27, 2005 e-mail sent to him by Dep. Chief Vogel at 9:54 a.m. Through the first (October 29, 2005) organizers' meeting, Escalante's only communications with Dep. Chief Vogel regarding the organizers and their meetings were via e-mail; they did not discuss it orally. He stated that all the e-mails he is aware of are attached to the Vogel investigation.

Escalante's e-mail response to Vogel was time-stamped 1:35 p.m. that same day.

Question: "In the meantime, had you checked out the website?"

Escalante: "I don't think so, no."

Question: "Okay, so prior to making the statement, 'you agree' – it was just based the actual content of Kevin Vogel's e-mail to you?"

Escalante: "Yes."

Escalante understood Vogel's initial e-mail to be asking for his opinion, not giving him direction. The lieutenant did review the website prior to his undercover officers attending the October 29th meeting. Based on his recollection, Deputy Chief Vogel's only input regarding the formulation of the undercover operation was the single subsequent e-mail (also October 27th, at 1:50 p.m.) where Vogel ruled out using a CSO.

Escalante made the decision to send two officers instead of one. "It was my concern about sending one officer into an unknown location. And after reviewing the website regarding the event, I had concerns about that."

Question: "Prior to the first meeting of the organizing group, what were the factors– for you, in looking at the website, that led you to have enough of a concern that you wanted to send in undercover officers to the meeting?"

Escalante: "Based on my prior experiences, from the riot situation we had downtown, and prior larger events, from past years– where uncontrolled gathering events like this, it turned dangerous. And, reading some of the information in the website– and, actually, I've got copies of that ... [referring to documents] In my interview with Deputy Chief Vogel, I presented these as well, to describe– and I put

initials next to 'em. One of 'em is 'How do you make a parade without the help of professional organizers, without wranglers, scheduled bands and performers and ... money whatsoever?'

"To me, that indicated a large group of people. I felt it was important to find out how many people. 'We're not asking for permits or permission.' That was a concern. 'We're just gonna do it. We'll start at one end of the mall and march down Pacific. Extra bonus points if we can pull off a swell dance party to rollicking live music on the other end.' 'It's our city.' Capitalized O U R. 'Not nine semi-elected folks who meet now and then to tell us what we can and can't do. I don't expect them to approve, but we're not asking for their approval either.' 'No dare-' 'No guarantees, but we can definitely say it'll be fun trying. Instead of seeking permits from capricious and cautious City Managers, how about instead we focus on seeing who's willing to take the risk of truly living without limits.' [Pause.] 'Afterward, we're hoping for a rollicking drum dance party where-' 'We're hoping for an all-live Brazilian-Indonesian mariachi funk trash orchestra hoe-down at a surprise location.'"

I asked if I'd understood correctly that his concerns fell into two groups: the "general public safety issue" arising from a parade on public streets in the absence of any controls to separate the parade from normal vehicular traffic, and; the "extent to which there might be criminal conduct by the organizers or the attendees of the parade." Lt. Escalante responded, "It was the concern of the unorganized event, with lack of controls for the public safety and for the attendants, or for people who were just visiting downtown. The other concern is the people who follow such activity contribute to a much larger scale riotous event. So, not knowing what the event would do and how it would attract other problem areas is what contributed my concerns [sic]."

Question: "So, if I'm grasping it, those concerns were larger than the concern that to march without a permit was a violation of the law."

Escalante: "It was all a concern."

He did agree that the failure to obtain a parade permit, an infraction, was of a lesser magnitude of concern than the public safety issue.

Question: "At any time prior to that first meeting of the organizers, did you yourself give any consideration to whether or not there were other alternatives to getting the information you needed than utilizing undercover officers?"

Escalante: "Yes."

Question: "What other alternatives did you consider?"

Escalante: "One, not sending anybody at all. And two, how valuable would it be by trying

Question: "Did you make any effort to try to contact them yourself?"

Escalante: "No."

Question: "Did you reach a conclusion one way or another, based on the information in front of you, whether or not there would be any merit in your proceeding in that fashion– by trying to establish a voluntary contact?"

Escalante: "I felt it would create more of a potential problem than it would be beneficial."

Question: "How so?"

Escalante: "In several ways. Once– if we tried to make contact by sending an officer in there after that, we'd actually create a more dangerous situation for an undercover officer. And two, after reading the information on the website, it was clear they were not going to be cooperative with the police."

I asked the lieutenant to recall any prior instances of "big public events downtown that had adverse outcomes." He responded, "Last year's Halloween was just as difficult. There was not as many gang incidents, but there were incidents of violence. I am the downtown coordinator. That is my area of responsibility. So, most of the incidents that occur, I am usually involved. Past New Year's Eves, prior to the First Night event being implemented, where we had a riotous situation – and I had been part of New Year's Eve leading up to that event. And, I've been around planned, peaceful demonstrations that have been organized, that were non-violent as well."

Question: "Have you ever attended any training that discussed the gathering of intelligence information in the context of freedom of speech considerations, freedom of association or the right to privacy?"

Escalante: "Yes."

Question: "What have you attended?"

Escalante: "As an undercover officer, I was sent to a three day class put on by the Department of Justice, back in– I believe, 1990, regarding criminal intelligence investigation. And I've also attended an eighty hour course from the Department of Justice regarding undercover operations. I spent two and a half years as an undercover operator, specifically dealing with undercover narcotics."

Question: "And I understand that this just based on the training– What's your understanding of– as a law enforcement organization, how you determine where an undercover operation might or might not be appropriate in relation to political

groups, for example?"

Escalante: "If it's their intent to exercise their rights of freedom to speech [sic] regarding an issue that they, being a group, feels that they would like to exercise their rights to, then they are free to assemble and to do that. And I would not violate those rights by attending in a infiltrating capacity."

I asked what additional factors would, in his view, justify mounting an undercover operation against a political group engaged in free speech/free expression activities. "I don't know. I would have to-- probably have to wait and see what the situation was at that particular time."

Question: "Did you consider this a political group?"

Escalante: "I did not."

Question: "And the reason you did not consider it a political group was?"

Escalante: "There was no indication of a political movement. There was no support of a political movement. It was more of a support of having an event without a permit."

While he agreed with my characterization of the website as containing a "counter-culture, anti-authoritarian tone," he did not agree with my view that the website had political content "in a broader sense" of the word. "I didn't see it that way," Lt. Escalante stated.

Question: "Had you seen this as a political message, would your response have been different?"

Escalante: "Yes."

Question: "How would your response have been different if you had seen this as a political message?"

Escalante: "My experience with political messages is those groups usually contact us or we would attempt to make contact with them."

In that instance, Escalante would persist in attempting a voluntary contact even if his first efforts were rebuffed.

Question: "So, the information that you desired to obtain by sending undercover officers was what?"

Escalante: "Strictly to engage information [sic] about the event and what activities were underlying and associated with the event. ... Everything about the event

possible, because my responsibility was to orchestrate the officers from outside agencies who were gonna come in. How many people we were going to need to safely protect the downtown and the visitors. And for those people who even were part of the event themselves, we still have a responsibility for protecting them as well."

Lt. Escalante confirmed that, as a result of the first undercover insertion, he learned that the parade "would be a peaceful gathering and there was no intent to start a riot or create a violent situation downtown" (quoting from Deputy Chief Vogel's interview summary for the lieutenant).

I asked Escalante if, at the time, he was "comfortable" with the fact that no officers would be attending the second meeting, due to one officer's unavailability. "Not totally. I would have liked to have somebody else there." Lt. Escalante did not communicate this problem to Deputy Chief Vogel in the time leading up to the second meeting. The lieutenant remained interested in obtaining additional information through further undercover operations because "a lot of time had passed, ... we didn't know ... whether the plans had changed." This was rendered even more pressing when no officer attended the second meeting. "We were getting closer to New Year's Eve and I needed to know more information in order to plan and coordinate my outside efforts."

Question: "At any point prior to December 30th, did you evaluate the chance that the identities of the undercover officers might be discovered?"

Escalante: "Yes."

Question: "And when was it that you thought about this issue?"

Escalante: "Prior to sending them in the first time."

Question: "Is this an issue that you re-evaluated prior to sending them in for the third meeting?"

Escalante: "Yes."

I directed Escalante's attention to the December 12th Cynthia Matthews e-mail that D.C. Vogel forwarded to him and asked him if he'd considered "using that route instead of sending in the officers for the third meeting." Lt. Escalante replied, "No." I asked why not. "It was too close to New Year's Eve. We had already made several of the plans already. And, the officers had already-- I did not want to tip our hand in the fact that now, all of the sudden, we were sending somebody in to get information from them."

When asked about the circumstances under which he had generated the incident report (CR-1) for case # 06S-00171 (which covers the actual parade event), Lt. Escalante believed that he was directed to complete it, but he could not recall who gave him that

direction. Nevertheless, he had "an 8 millimeter videotape of the event, so I needed to start a report anyway to book that in."

Finally, I asked Lt. Escalante if he'd recognized any of the organizers names, as they appeared in the OIC report from the first meeting. He replied, "No."

We concluded at 11:07 a.m.

Interview of Deputy Chief Kevin Vogel

March 03, 2006 at 01:08 p.m.

Professional Standards Unit

Santa Cruz Police Department

Recorded.

In his investigation of the Last Night DIY undercover operation, Deputy Chief Vogel accepted responsibility for the decision to use an undercover officer. To the extent that anyone of the Department's management oversaw the operation, it was D.C. Vogel.

Pursuant to written notification (a copy of which appears as an attachment), Deputy Chief Kevin Vogel appeared for his interview. Although afforded the opportunity to be accompanied by a representative, Vogel appeared alone. He recorded the interview.

At the outset, I stated on the record that "As far as I am concerned, this is not an investigation into misconduct, and as far as I'm concerned, this is not an investigation that could lead to discipline to any City employee. It's my understanding as well that that's the City's understanding." D.C. Vogel had no questions in this regard.

He did offer the following "opening comment that I'd like to make, that I want to put on the record. I just want you to know, Bob, that I'm here on my own volition. I intend to fully cooperate with the investigation. I've got nothing to hide and I want you to know that you have my full cooperation on, you know, this whole entire incident." I expressed my appreciation and we began the interview.

I reminded Vogel of his investigation report statement that "I don't recall specifically how I learned about this group," and asked him "Do you have any information about how it was it came to your attention?"

He responded, "There were some e-mails that went back and forth, or actually that came to the police department. One of them was from somebody over in the redevelopment agency, just an FYI e-mail – something to the effect of, 'Have you heard of this group?' I don't know when I got that e-mail, so I'm not sure if that's the actual e-mail that

brought my attention to this whole thing. I really don't remember. I just remember that on or around October 27th, I became aware, through some communication that I'd gotten, either by e-mail or by somebody verbally, that there was a website posted where there were plans for a parade downtown and that's what brought my attention to this.

"And, I've actually looked through the e-mails that I've received on this and I don't think I got anything prior to— on or prior to October 27th, which would have drawn my attention to this— at least, nothing that I could find in my archive." I showed him the December 14th e-mails from Julie Hendee and Ceil Cirillo, forwarded to him by Chief Skerry on that same day. Vogel confirmed that Ms. Cirillo was the redevelopment director and that this was the communication he had been speaking of.

The Deputy Chief continued: "Yeah, that e-mail looks like it came in on December 14th, which was well after I had learned of this. You know, unfortunately, if I could recall, it would have been included in my report. I just don't exactly remember. And now that you show me that e-mail, I'm fairly certain that that's probably not the source for that information."

He was "certain" he learned "about the group" on October 27th "because I went to their website and I looked at it and I learned that they were having their first planning meeting on October 29th, which was two days later. And so therefore, I generated an e-mail to Lt. Escalante. And it was a very short period of time between when I learned about this and when I sent the e-mail to Rudy. So, I'm fairly certain that I learned about this on October 27th."

Question: "Approximately how much time do you think you spent looking at their website that day, that morning?"

Vogel: "Maybe fifteen, twenty minutes."

In sending the initial e-mail to Escalante, Vogel had not yet decided on mounting an undercover operation; his e-mail was intended to be "a suggestion to the lieutenant, who was in charge of our New Year's Eve event downtown— or one of our two lieutenants who was in charge of the New Year's Eve event, that perhaps we take a second look at whether we wanted to attend. As you can see by my e-mail, I think the second sentence in the first paragraph sort of lets you in on what my thought process was here, in that I'm asking the question: 'What do you think about having a UC attend the meeting?'"

I observed that his report, on page two, paragraph 3 of the *Summary of Findings*, frames it as having been his decision.

Question: "In your view, regardless of what that reads, who's decision was this?"

Vogel: "Well, I'm the ultimate authority in the Operations Division of the Police Department, so I guess in that respect, it was my decision."

Question: "My understanding from my interview with Lt. Escalante, as well as the text of your report, is that the only communication that you had with the lieutenant regarding this issue on the 27th was as is reflected in these e-mails."

Vogel: "That is correct. It was just by e-mail."

I stated to Deputy Chief Vogel that Escalante, during his interview, had informed me that, in between the time he'd received Vogel's first e-mail and he responded to it in the affirmative, Escalante had not looked at the website at all. I asked the Deputy Chief if he was aware of this. "I did not know that. In fact, I specifically provided him with the link to that website-- into my e-mail, believing that he would review the website."

I asked D.C. Vogel to, "in summary fashion," enumerate "the factors that led you to determine that the appropriate response to this website was to have an undercover officer attend the meeting."

He stated, "My primary reasons for it were based upon some of the statements that were actually made on the Last Night DIY website. And the statements indicated to me that the-- whomever was organizing this parade had no intention of cooperating with the City or the Police Department. And, I can read you verbatim some quotes from that website that led me to believe that. And I think that's probably important, for purposes of this interview."

"My concerns and my reasons for wanting-- or for having these undercover attend were based upon some of these-- or actually, all of these statements. The first statement is, 'This is not a paid gig. Not something well organized or well planned.' Second statement was, 'How do you make an event without the help of professional organizers?' Third statement, that's actually even a little bit more crucial, is 'We're not asking for permits or permission. We're just going to do it.' Next, 'It's our City, not nine semi elected folks who meet now and then to tell us what we can and cannot do.' 'I don't expect them to approve, but then we're not asking for their approval either.'"

"I mean, it was clear to me, based on that statement, that these-- whomever was responsible for putting these statements on the website, was gonna have this parade whether we wanted them to have it or not. 'In our City, we give ourselves permission to celebrate. We give ourselves the okay to bring music and dancing and art cars out into the streets downtown.' So, now we're talking about having people out in the street dancing, obviously in conflict with vehicular traffic, because there were no provisions made for street closures. 'Instead of seeking permits from capricious and cautious City Managers, how about we focus on seeing who's willing to take the risk of truly living without limits.' Obviously, another concerning statement."

"Afterward, we're hoping for a rollicking drum dance party. We're hoping for an all live Brazilian, Indonesian, mariachi, funk, trash orchestra hoe down, at a surprise location.' So, that's information that clearly wasn't communicated on the website that I thought we probably needed to know where that location was. 'Our government cannot, will

not keep us safe, happy and free. We make this country and we make this City and we make our communities— us, not a bunch of elected yahoos. This is our town, our celebration, our night. Let's do our own parade. A Last Night celebration. A Last Night of waiting for governments, institutions or anyone else to entertain us, satisfy us, bring us security, freedom or joy. We reclaim our streets and usher in the New Year with our own celebration.'

"So, many of my reasons were based upon those statements that were made. I also considered previous incidents that we'd had downtown during large scale gathering. Back in 1993, we had a mini riot downtown, in which several of our officers were injured by people who threw bottles and rocks at them. Halloween in 2004— the previous Halloween, we had two stabbings downtown. Basically, that's an unpermitted event downtown. I mean, it's just a big free-for-all, a large scale gathering of people.

"So, these past incidents of violence were of concern to me and I didn't want this particular incident to result in something like that, so I felt like we needed to go to these meetings and gather whatever information that we could, so we could better prepare and respond. And I think, you know— another thing that worthy of mentioning here is the fact that whomever was planning this event, was planning it illegally. I mean, the City of Santa Cruz municipal code requires that when you have a parade, you have to go through the special event process and obtain a permit from the City of Santa Cruz. And, none of that process was followed.

"In fact, I checked on that before I made the decision to send these officers to that meeting. These folks had not contacted us. We did not have a special event file on them. We had not issued a permit for their event. So, I had a number of reasons."

Vogel confirmed that the failure to obtain a permit constitutes an infraction. "It's a violation of the law. I mean, if you want to separate between infractions versus misdemeanors versus felonies— sure, it's an infraction. But nevertheless it's a violation of the law."

Question: "Other than the e-mails that I have, did you and Lt. Escalante confer about this in any other fashion prior to the first meeting occurring on October 29th?"

Vogel: "No, we did not. In fact, when Lt. Escalante set this up and arranged to have the two officers attend the meeting on the 29th, he responded to my e-mail, indicating that he had asked Officers Jones and Hansen to attend these meetings, he sent that e-mail to me, I believe it was on early Saturday morning. It was sometime shortly after midnight on that Friday night. And I did not return to work until Monday morning, when I read the e-mail. And at that point in time, the officers had already attended the first meeting. Therefore, Rudy and I had not had any other communication about this prior to them attending the meeting.

"And in the first real communication I had with Rudy in person about the meeting on the 29th, was— I believe it was the Department staff meeting on— it

would have been Wednesday, November 2nd. He mentioned, at the staff meeting, to the group, that we had had two of our officers attend this meeting. Again, we didn't have any real conversation about it. He just kind of briefed us at staff about the fact that these officers had gone to the meeting. And I don't even think he gave us any particular details about what they had learned at the meeting."

Question: "I gather, based on what you're saying, that you had no input into the determination of whether to send one or two undercover officers. Because the e-mails have it as singular, having 'a UC attend'. And then Rudy's response is to suggest Kayla or Northrup and then 'I'd rather it be a cop, not a CSO.'"

Vogel: "Yeah, you know, you're correct in that that's what I did suggest. Rudy's got far more experience in detailing with undercover police operations than I do. And, you know, I would be speculating if I were to tell you why Rudy decided to send two. So, I don't think I'll share that with you. But, my understanding of undercover operations is that you're always better having two people than one, because it makes a safer environment for the officers that are involved, as opposed to sending one officer in by themselves. So, operationally, Rudy made that decision and I was fine with that, because I think that that's probably the reason he made that decision. And, if it's the safest thing for our officers then I would wholeheartedly concur with his decision."

Question: "What's your understanding regarding the circumstances under which a law enforcement agency can insert an undercover officer into a situation that is basically a political activity?"

Vogel: "See, I disagree with that this was a political activity."

Question: "It's a hypothetical question."

Vogel: "I'm not gonna answer a hypothetical question. I think you needed to focus on the event that we were-- I think we need to focus on this event. I don't think we should focus on hypotheticals."

Question: "So, what you're telling me is that, in your view, reviewing the website, this was-- this did not have a political component?"

Vogel: "That--that, quite frankly, that thought never, ever crossed my mind. This appeared to me like it was just an illegal parade. It was a large gathering, large scale gathering of people downtown, for the purposes of having, in essence, a big street party. I didn't see anything on their website that would lead me to believe that there was any political message that these folks were trying to send-- who published the website."

Question: "Including a counter-culture message about that 'We don't need authority' or 'We don't need to go through official channels to do this'? You don't see that as having political content?"

Vogel: "I-- that didn't cross my mind at the time."

Question: "Okay, and now I'm asking in terms of hindsight."

Vogel: "Uhm-hmm."

Question: "Looking back on it now, do you still have the same view-- that this parade, the posting on the internet did not have a political component?"

Vogel: "I still don't think they do. I mean, I think that this was just-- these folks wanted to have a parade downtown and they-- it was an invitation-- it was a public invitation to a big party downtown. That's how I viewed the website, when I looked at it."

Question: "Cause, of course, there's obviously more content in the website than 'Let's just have a party downtown.' There's all the gratuitous statements--"

Vogel: "Uhm-hmm."

Question: "--some of which you've taken issue with."

Vogel: "Uhm-hmm. Yeah, I-- you know [stops]."

Question: "If this had political content, would you have responded differently?"

Vogel: "I-I-- see, again, Bob, I think we're speculating on--on that. Because that's not what I thought when we made the decision to send the officers to this. So, I-I don't really think that's even relevant for this discussion. You know, if this had been a political event, uhm-- and I believed it was a political event, I think that I would be agreeable to talk to you about those issues. But, I-I just don't think that this was what you're describing it as. At least, in-- not in my mind."

Question: "Well, I-- you know, ultimately I don't want to get into a posture where I wind up having to order you to respond to a question. The concern that I have, because this isn't about a misconduct issue. The issue, I think, has to do with whether or not there are already adequate controls in the agency, in order to assure, that in utilizing undercover operations, that people's civil rights aren't violated."

Vogel: "Uhm-hmm."

Question: "So, that's the reason why I'm asking what you're terming hypothetical questions."

Vogel: "Well, you termed it a hypothetical question, I thought."

Question: "The first time through."

Vogel: "Yeah. [Pause.] So, ask me the question again."

Question: "If we altered the fact scenario and you and I both assumed that the website had political content and that the purpose of the parade was, in part, a political one, would that have altered your response to the website?"

Vogel: "It may have."

Question: "Are you able to tell me in what way it might have?"

Vogel: "I may have been more inclined to reach out, in advance of this event and try and make contact with the organizers."

Question: "And, in terms of the view that it was or was not political– I mean, as we're having the discussion now, obviously it turns out that that's a pretty important fork in the road. Because, if it has no political content, in your view you have more latitude than you would if it had political content. And, I guess my question is: Did you talk to anyone before deciding about the issue of whether or not this could legitimately be considered to have political content?"

Vogel: "No, I didn't have any conversation with anybody about that. The only person that– Well, again, I don't remember where I got the information from, but I'm sure that there was– that discussion did not occur, even if I had gotten it in person from another individual. But, Rudy and I didn't have that conversation. So, no. I mean, I based my decisions on what I read on the website. And when I read the website– and I said I spent about fifteen or twenty minutes looking at it– and, as you can see, I mean, there is a lot of information on that website to review in fifteen or twenty minutes. So, I think I skimmed over a lot of it. I didn't see anything that looked to me to be political content."

Question: "You saw the OIC report from the first meeting?"

Vogel: "Yeah, but I didn't see the OIC report until after I delved into this investigation. Because the OIC reports are sent from the officers generally to a sergeant to a lieutenant and then they go to my administrative assistant, who files them in a file in her office. And sometimes I see 'em, sometimes I don't. I didn't happen to see these. ... I have since read these, but I didn't see them after they attended the meetings."

Question: "In between the first and the second meeting, did Lt. Escalante brief you regarding the status of the undercover operation? Or what information had been learned?"

Vogel: "I don't think so. I don't remember having a conversation with him."

I directed the Deputy Chief's attention to the OIC report from the first meeting and paraphrased the language from it to the effect that "all of the people, other than Wesley Modes, voiced the opinion of not— that they did not want to get arrested on New Year's Eve. The group as well agreed to abide by the police presence and extinguish their sources of fire if asked to by law enforcement. And then on the second page, the first full paragraph, the first sentence: The Last Night Santa Cruz event seemed like it will be a peaceful gathering at this point and the crowd specifically mentioned that they do not want to start a riot and are not looking for any type of violent reaction."

Question: "That aspect of what had been uncovered in the first meeting, when did that come to your attention?"

Vogel: "Uhm, well, again— I didn't look at this OIC reports until I started my investigation into this incident, which I think was on, like January 25th, 2006. It was the Wednesday following the Council meeting where they had the agenda item regarding the independent investigation. So, I think it was January 25th."

Question: "And, it's not so much when you saw this, but I guess it gets back to the question of when it came to your attention that the undercover officers had more or less gathered, as a result of attending the first meeting, that, for the most part, the organizers' objectives were peaceful and not intending to cause a confrontation with law enforcement?"

Vogel: "When did I first— when did I know that?"

Question: "Right."

Vogel: "Uhm, [pause] I probably knew that around the time that the operations order for this event was distributed to our personnel, because Rudy and I went over the operations order before he distributed it. And he had made some changes to our personnel deployment, based upon the information that was learned at the meetings. And so, generally speaking, these go out two weeks prior to the date itself, because we have to give our personnel two weeks notice by their MO— or, by our General Orders. So, I would think it would have been right around the middle of December."

According to Deputy Chief Vogel, those changes in the deployment centered on the start time for the majority of the overtime officers; instead of bringing them all in for a 9 p.m. deployment, some were started at 5 p.m. "The only changes that were really made to the

ops order were we just backed up the times on some of the people that we brought in.”

Question: “When did you become aware that no undercover officer attended meeting number two on November 19th?”

Vogel: “Uhm, it was during the course of my investigation. And it was probably the first person that I interviewed in this case was Rudy. And I think it came out in my interview with Rudy that the meeting on November 19th, one of the officers was not able to make it, because of an injury or something and therefore, we didn’t send any officers to that meeting. But I think the first I knew about that was on the date that I interviewed Rudy, which I think was Wednesday, January 25th.”

Question: “Correct me if I’m getting this wrong: I gather from the bits and pieces that I’m hearing that Lt. Escalante was pretty much given charge of the exercise and if he would have received additional supervisor prior to New Year’s Eve, it would have been because he came to you.”

Vogel: “Hmm, I’m a little confused. When you say, ‘receive additional supervision.’

Question: “Well, he was pretty much given the ball to run with.”

Vogel: “Correct.”

Question: “And he wasn’t having to report to you after each operation.”

Vogel: “Correct. No, he did not report back to me.”

Question: “You had indicated earlier that Lt. Escalante is pretty experienced in running undercover operations?”

Vogel: “Yes.”

Question: “Is he one of the most experienced members of the department in supervising undercover operations?”

Vogel: “I would say, probably yes. He’s spent a couple of years working for the County narcotics enforcement task force. He was a detective for a number of years. He’s participated in a lot of undercover operations. So, I would say the answer to that is yes.”

I asked Deputy Chief Vogel if he’d ever attended course in undercover operations where some aspect of the training addressed such activities in relation to “free speech and privacy issues”. He replied, “I’ve never worked in an undercover assignment at the Police Department. I’ve always— Well, I’ve worked as a detective, but I don’t really consider a

detective to be an undercover assignment. So, no. I don't think I've ever attended any training, outside of what I may have gotten in the basic police academy."

Question: "You understood, I gather, from your answer to the earlier question, that law enforcement doesn't have the same latitude with meetings that have a political component, that they might have with, for example, just a party."

Vogel: "Well, I mean, you've always got your First Amendment that you've got to fall back on. So, yeah. I understand that. But, I don't think I got that necessar- I didn't go to a training class to get that."

Question: "Has this issue come up at any time previously, that you're aware of, in the organization; i.e., an undercover operation is mounted on a group that has a political component, and then issues arise from that? Has that happened before, where there was a problem because of that?"

Vogel: "Not that I'm aware of."

Question: "So, if I've understood accurately- Until you saw the operation order, which came out about two weeks before New Year's Eve, you had not had any further communication with Lt. Escalante regarding the DIY organizers or the undercover operation."

Vogel: "Not that I remember. You know, the first I remember having any conversation with him at all was when we went over that operations order, before it was finalized and sent out."

Question: "What discussions, if you recall, did you have with him that pertained to the undercover operation, in connection with finalizing the operations order?"

Vogel: "[Nine second pause.] As far as I remember, he shared with me that we had determined the time that the parade was gonna start. We didn't know how many people were gonna be there. We had an idea of what types of participants there would be in the parade, based upon the officers' attendance at the meetings. We knew that the group didn't intend to get violent. [Seven second pause.] You know, that's basically about all I can recall at this point in time.

"I think if you look at the operations order itself, there's not a lot of information in there about the parade, because we just- it turns out, that it wasn't, you know- it was not a big deal. I mean we didn't even intervene in it on New Year's Eve. We just let it go. Now, it caused some traffic congestion for us. But aside from that, it didn't really cause us any problems."

Question: "Okay, so the operation plan gets finalized and then New Year's Eve comes. In between those two events, did the two of you have another discussion about the

Question: "Did the two of you have a discussion about Lt. Escalante being contact by a reporter on December 30th?"

Vogel: "He called me at home on that Friday night and he shared with me that he had gotten a phone call from Kathy Smith at the Sentinel. And, he told me what he had said to her and that was really about it."

Vogel was uncertain whether he'd worked that Friday or not. "That could have been my Friday off."

I next directed D.C. Vogel's attention to the December 12th, 2005 Cynthia Matthews e-mail and asked him if he'd considered "taking Cynthia Matthews up on her offer to be involved in maybe establishing a link of communication with the organizers." He replied, "No, I did not when that e-mail came in." When shown the document, he recalled having forwarded it to Lts. Escalante and McMahon.

"I didn't personally take the opportunity to contact her. I knew that we were already involved in this undercover operation, if you will, and I knew that we had at least attended the one meeting on October 29th. And I didn't even realize at that point that we had missed the meeting on November 17th."

"So, I forwarded this off to Rudy and that was about all I did with it. At that point, kind of from an operational standpoint, I really wasn't— I'd already sort of delegated this to Rudy."

Deputy Chief Vogel acknowledged that he had directed Lt. Escalante to prepare the incident report (CR-1) # 06S-00171. "Because I knew that we had taken videotape at the parade and we needed a place to store the videotape. ... Rudy just had it on a shelf somewhere. And I said, 'That's gotta get booked in. We gotta have a place to store that.' So, I had him generate that report." He recalled having given Lt. McMahon the case number Escalante had drawn to book the parade banner that had been left behind.

Question: "Dick Wilson has, I think, assured people publicly and he's assured people privately in my presence that the Department has not engaged in other undercover operations against groups with a political component. That's the way he put it. And all I want to do is ask a question: Are you aware of any operations currently— that are currently on-going, where the Department has placed an undercover operative in a political group?"

Vogel: "No."

I stated to Deputy Chief Vogel that I had asked all my questions and invited him to ask any of me that he might have. He asked if the interview or the audio recording of it was "going to become a public record."

I explained that it was not my decision "what gets released publicly. When I am finished with my report, the City Attorney is gonna review it and he is going to advise Dick Wilson regarding whether or not it can be released and whether or not portions of it, perhaps, will be held back." I suggested that he communicate his concern through his chain of command.

He next asked if this is "considered a personnel investigation." I replied: "I suppose the better question would be, *Do I consider it a personnel investigation?* And my answer to that is no, because it's not something that would lead to discipline and it's not something that would lead to an adverse comment in an evaluation, as far as I'm concerned." I affirmed that I had shared that view with the City Manager and the City Attorney. I continued, "But, in part, that perspective comes from the fact that your report was so deemed by the City. I don't know how I could be adding on to it without being subject to the same restriction. Because I'm using information that's in that report. And if that report was taken in violation of the rights of subject officers, then my investigation would as well."

We completed the interview at 1:55 p.m.

ANALYSIS

General Comments

Weighing the evidence: Unless I explicitly say otherwise, in every instance, my factual findings are made "by clear and convincing evidence." Given the seriousness of any law enforcement operations investigation, where the evidence will support it, I make findings by clear and convincing evidence. If, in a particular circumstance, the evidence will only justify the lesser level of evidentiary support, then my finding of fact will specify "by a preponderance of the evidence."

The nature of recollection: It has been my observation over years of studying it in a variety of contexts, that witnesses' recollections of the same incident always differ, even in the absence of any motive to deceive. Each person relates to an unfolding event in a unique manner and their memory of it is so marked by his/her unique perception. Compounding this, everyone has unique strengths and weaknesses in their abilities to accurately remember.

When the event to be recalled possessed strong emotional content, witness recollections become even more problematic. There are many blessings to our not resembling computers, but here we pay a price.

All this is articulated so that it is understood: just because I have chosen to believe or disbelieve one recollection or another does not necessarily mean that I have identified a 'lie'. An inaccurate statement, to my mind, can only become a lie with the conscious intent to be deceitful.

The Legal Framework

In a booklet propounded by the California Attorney General's Office, Division of Law Enforcement, entitled Criminal Intelligence Systems: A California Perspective, dated September 2003, it is stated (page 9):

"The best assurance for public acceptance of intelligence operations are clear guidelines that focus intelligence efforts on illegal activities, and do not encourage surveillance of people or groups engaged in acts of protest or civil disobedience. We do not mean to suggest that law enforcement should not be aware of disruptive events taking place in a community that may affect public safety, but it is one thing to ensure that law enforcement officers are aware of the potential for disruption, and quite another to focus intelligence operations on those participating in or organizing such events in the absence of credible information that they intend to engage in or encourage criminal acts. When policies and intelligence efforts focus on criminal wrongdoing and recognize the rights of people to engage in protest as a means of political expression, the public can be assured that law enforcement agencies have struck the right balance between public protection, associational freedom and individual privacy."

Law enforcement has an absolute obligation to protect from harm the communities they serve, subject only to the constraints imposed by law. The Santa Cruz Police Department had a duty to the community at large to attempt to insure the public peace and everyone's safety on New Year's Eve, whether they be participants, bystanders, passersby on foot, bike or car, or property owners. And they possessed that obligation even towards people who did not wish to be so protected.

In the first instance, that obligation required the Department to obtain and attempt to obtain, within relevant legal constraints, information regarding any activity that might reasonably pose a threat to the safety and peace of the community's members. The critical issue, for our purposes, is to distinguish between prohibited and permitted means for gathering that information.

The vast majority of the laws constraining law enforcement's gathering of information stem from caselaw interpreting the California and Federal Constitutions. Simply put, *freedom of assembly, freedom of speech, freedom from unwarranted search and seizure*

and the *right to privacy* all require law enforcement to balance how badly they legitimately need information against the extent to which the means of gathering it may impinge on the rights of the effected people.

The Santa Cruz Police Department was obliged to attempt to gain information about the Last Night DIY Parade. The real question is *To what lengths could they go in making those attempts?*

In starting this supplemental investigation, I hoped and expected that caselaw would provide fairly clear guidance. As is detailed in Part Two, I was disappointed to discover how modest is the applicable precedent. In an effort to survey the legal universe without unduly consuming time¹, in addition to the legal research I conducted first hand, I solicited both the Santa Cruz City Attorney's Office and the American Civil Liberties Union's local representative for any legal authorities they considered relevant.

The absence of concrete guidance means that, when we get to that point, we have to navigate by compass and bearings instead of street signs.

This difficulty does not deprive us, however, of the opportunity to advance our knowledge and learn from this incident. Some of that learning is strictly based upon a close review of the facts, as documented by Kevin Vogel's investigation and this supplement to it.

The Additional Facts

As a result of my additional investigation, new information is now available regarding how and on what basis the decision was reached to resort to undercover officers.

How the decision was made

In essence, Deputy Chief Vogel received information about the DIY Parade website from a now unknown source. He spent about fifteen to twenty minutes reviewing the website materials. During the interview, he stated,

¹ - For those lawyers out there, amongst the other items I surveyed were Witkin's Summary of California Law, various treatises focusing on California civil rights caselaw and a number of scholarly compilations of caselaw, including the following ALR articles:

- regulation of parades, 80 ALR5th 255;
- privilege from disclosing police surveillance, 67 ALR5th 149;
- free speech in shopping centers, 52 ALR5th 195;
- warrantless electronic surveillance, 27 ALR4th 449;
- right of privacy-eavesdropping, 11 ALR3rd 1296.

None of these resources shed any additional light on the question at hand.

"[A]s you can see, I mean, there is a lot of information on that website to review in fifteen or twenty minutes. So, I think I skimmed over a lot of it."

He checked to see if the organizers had already contacted the Department.

"These folks had not contacted us. We did not have a special event file on them. We had not issued a permit for their event."

He e-mailed Lt. Escalante, providing the website link, to solicit his opinion.

Lt. Escalante responded by e-mail a little over three and a half hours later, agreeing with the Deputy Chief's suggestion to mount an undercover operation. However, Escalante had not reviewed the website in reaching his concurrence; his input was based on the content of Vogel's e-mail and his experience with previous celebrations downtown. Vogel's initial e-mail provided only modest details regarding the times and locations of organizing meetings; it offered no information about the content of the website or the apparent intentions of the organizers. The lieutenant, therefore, was not in a position to weigh and consider whether the parade's organizers' intentions had any political content.

Fifteen minutes later, Vogel responded, expressing his preference that the assignment be given to an officer and not a CSO. This appears to have been the Deputy Chief's last guidance to Escalante concerning this assignment prior to their mid-December discussion about the New Year's Eve Operations Order.

Question: "[H]e was pretty much given the ball to run with."

Vogel: "Correct."

Question: "And he wasn't having to report to you after each operation."

Vogel: "Correct. No, he did not report back to me."

All the other specifics of the undercover operation were left entirely to Lt. Escalante. Amongst other decisions he made, Escalante directed two officers to attend the first meeting instead of the one contemplated by Vogel; he determined that missing the second meeting was not critical; he sent the officers back for a third and fourth meeting.

Ultimately, the actual parade did not present the enforcement challenges that some previous events downtown had. The Deputy Chief stated:

"[I]t turns out, that it wasn't, you know— it was not a big deal. I mean we didn't even intervene in it on New Year's Eve. We just let it go. Now, it caused some traffic congestion for us. But aside from that, it didn't really cause us any

Did the Department consider whether the organizers intended a political message?

Perhaps the single most surprising newly uncovered fact: both the lieutenant and the Deputy Chief stated during their interviews that they did not view the intentions of the organizers, as reflected on their website, as having any political content. Deputy Chief Vogel and Lt. Escalante acknowledged that, if they had perceived the organizers as engaging in political activity, they would not have rushed to an undercover surveillance. Escalante, the more experienced undercover supervisor, asserted he would have attempted to contact them overtly and would have persisted even in the face of an initial refusal.

Vogel admitted that he did not discuss the question of whether the website had political content, with Lt. Escalante or anyone else. In fact, it appears that that possibility was not part of his decision making process.

Question: "So, what you're telling me is that, in your view, reviewing the website, this was-- this did not have a political component?"

Vogel: "That--that, quite frankly, that thought never, ever crossed my mind. This appeared to me like it was just an illegal parade. It was a large gathering, large scale gathering of people downtown, for the purposes of having, in essence, a big street party. I didn't see anything on their website that would lead me to believe that there was any political message that these folks were trying to send-- who published the website."

Question: "Including a counter-culture message about that 'We don't need authority' or 'We don't need to go through official channels to do this'? You don't see that as having political content?"

Vogel: "I-- that didn't cross my mind at the time."

As I gathered, Lt. Escalante's threshold for what constituted protected 'political' activity was rather high; his view hinged on whether it was a "political movement" rather than whether there was any political purpose in their intended activity.

The very website statements offered by Vogel and Escalante in their interviews demonstrate that, at least in substantial part, the organizers had a political purpose in their efforts to arrange a DIY parade in contravention of local law, the City Council and the City Manager. I am hard-pressed to see any reasonable reading of the website that does not recognize its unabashed political expression as a core aspect of its message.

Another interesting fact, but one that was already apparent from Vogel's

investigation, is that the UCs reported and Escalante accepted the entirely peaceful intentions of the parade organizers. However, this did not prompt any re-evaluation of the surveillance or alter its course.

What to do differently in the future?

Just based upon the additional information collected (and without weighing in the legal discussion that follows), I can articulate the following things which, in hindsight, I'd rather were handled differently:

- No meaningful consideration was given to the ways in which the organizers might have been persuaded to willingly provide the information necessary to the police department;
 - No broader discussion took place regarding whether the planned activity constituted, to any meaningful extent, political expression;
 - The total time collectively consumed in reaching the decision to employ undercover agents was certainly less than twenty-five minutes and did not involve any sort of knowledgeable debate between informed participants;
 - No apparently meaningful re-evaluation of the propriety of undercover operation took place once the decision to go forward was reached;
 - There was no meaningful administrative oversight of the operation as it was on-going;
-

Did the Undercover Operation Violate the Law?

Apart from how we'd have the Department better manage sensitive undercover operations, the legality of the instant surveillance has been questioned. I assumed, as I think many people did, that there was some legal authority (caselaw) which clearly addressed this type of situation and could definitively answer the question of legality. Unfortunately, that is apparently not the case.

As articulated in the California and Federal Constitutions, our right to privacy, and freedoms of speech and assembly are affirmed in broad but not concrete terms. Those missing concrete terms are accreted, over decades and centuries, by court decisions. The limitations of such a legal process are that it is very slow and many specific questions may remain indefinitely unresolved. "[I]n this area, each case must be judged on its own particular

facts.” Lewis v. United States, 385 U.S. 206, 212; 17 L.Ed.2d 312, 316 (1966).

“Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech.”

United States v. United States District Court, 407 U.S. 297, 320; 32 L.Ed.2d 752, 768 (1972).

“Although the police unquestionably pursue a legitimate interest in gathering information to forestall future criminal acts, the identification of that legitimate interest is just the beginning point of analysis in this case, not, as defendant suggests, the conclusion. The inherent legitimacy of the police ‘intelligence gathering’ function does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the federal Bill of Rights and the comparable protections of our state Constitution.”

White v. Davis, 13 Cal.3d 757, 766; 120 Cal.Rptr. 94 (1975). This case, cited by the ACLU and parade organizers, is as close as any caselaw comes to the facts at hand. Because it represents the best articulation of the state of the relevant California and Federal law, and by the State’s Supreme Court, I will quote it at length.

In White, the California Supreme Court reviewed undercover operations mounted by the Los Angeles Police Department, where university classes taught at UCLA, as well as student organizations, were surveilled for intelligence purposes. A UCLA history professor filed a tax-payer lawsuit, asking the Superior Court to enjoin these activities.

The trial court dismissed his suit on the basis that he had failed to state a legally cognizable cause of action. Therefore, in reviewing that decision, the California Supreme Court was obligated, solely for purposes of ruling on the dismissal, to treat all the factual allegations in his complaint as true. One of those allegations was that the “ongoing surveillance operation” was directed at “‘matters which pertain to no illegal activity or acts’.” White, 13 Cal.3d at 765.

“The gist of defendant’s [LAPD] position, as we understand it, is that the gathering of intelligence information to enable the police to anticipate and perhaps prevent future criminal activity is a legitimate and important police function and consequently that under all circumstances the police may routinely utilize undercover agents to fulfill such a function.”

White, 13 Cal.3d at 765-6. As the first White quotation above suggests, the Court responded that such a legitimate interest is only the starting point for analysis and not the end.

The White court cited two of its previous decisions where it ruled that police

surveillance operations violated Constitutional protections: Wirin v. Parker, 48 Cal.2d 890 (1957) (warrantless surveillance of private residences by concealed microphones), and People v. Triggs, 8 Cal.3d 884 (1973) (routine and continual surveillance of public restrooms).

White continues by observing that a governmental intrusion that has a chilling effect on freedom of speech may be impermissible even though the intrusion is not a direct prohibition. Id., at 767. As well, the freedom of assembly may be impermissibly breached where the assembled participants are compelled to disclose their identities. White, at 768.

The White opinion next discusses, at some length, the heightened scrutiny due any surveillance in an academic setting. It then addresses two Federal District Court cases which weighed surveillance in other settings:

“In Local 309 v. Gates (N.D.Ind.1948) 75 F. Supp. 620, strike activity by a local union had been accompanied by occasional outbreaks of violence. The state police initiated a practice of sending several uniformed policemen to all union meetings to take notes of the discussions that there occurred; the police justified the practice as an attempt to obtain information relating to future incidents of violence. The union sought an injunction against the police surveillance practice on First Amendment grounds. After a full hearing, the trial court granted the injunction, finding first that the presence of police had in fact kept the union members from fully discussing their affairs, and second that the surveillance could not be justified as necessary to prevent violence because no evidence indicated that the union meetings had any connection with the sporadic incidents of violence.

“In Bee See Books Inc v. Leary (S.D.N.Y.1968) 291 F. Supp. 622, another federal court reached a similar conclusion in a different setting. In Bee See, the New York City Police Department had begun stationing uniformed police officers in ‘adult bookstores’ to oversee the bookstore’s operations and to detect sales of obscene material. Finding that the practical effect of the constant police surveillance substantially inhibited the sale of protected material, the court in Bee See enjoined the surveillance operations, concluding that the government could achieve the legitimate objective of controlling obscenity through alternative means less destructive of First Amendment rights.

“The First Amendment analysis undertaken by the courts in Gates and Bee See accords with the approach established by controlling United States Supreme Court precedent. Having found that the governmental activity in question (police surveillance) had a substantial inhibitory effect on the exercise of First Amendment rights, both courts carefully analyzed the proffered governmental explanation for the surveillance to determine whether it was sufficient to justify the resulting impingement on protected expression.”

White, at 771. At this point, the opinion cites, in a footnote, a case where police surveillance

of a public meeting was upheld by the reviewing court (United States v. McLeod, 385 F.2d 734 (5th Cir.1967)) on the basis of the locally “explosive situation prevailing”.

White, at 772, goes on to conclude this section with the following language:

“[T]he facts alleged in the instant complaint demonstrate police surveillance activity which is likely to pose a substantial restraint upon the exercise of First Amendment rights in university classes and organization meetings. In view of this significant potential chilling effect, the challenged surveillance activities can only be sustained if defendant can demonstrate a ‘compelling’ state interest which justifies the resultant deterrence of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights. [Citations omitted.] [¶] In the instant case, defendant’s burden of justification is very heavy indeed.”

The Court next discusses the then new California amendment to the State Constitution, protecting the right of privacy. The Court quotes at length from the arguments propounded for the amendment in the State election brochure and concludes that “the police surveillance operation challenged in the instant complaint epitomizes the kind of governmental conduct which the new constitutional amendment condemns.” *Ibid*, at 775.

Two fundamental distinctions must be drawn between the White factual scenario and the instant one: there was a violation of the law contemplated by the parade organizers, in that they intended to advocate for a parade without the permit required by municipal ordinance, and; this did not take place in an academic setting. Both of these factors, to at least some modest extent, lessen the gravity of the governmental intrusion.

Nevertheless, from the foregoing discussion, some general observations may be drawn. First of all, the fact that the parade organizing meetings were ‘public’ does not automatically render constitutionally permissible the undercover operation. The undercover surveillance of other public activities or public places has been held constitutionally prohibited even though they were public.² White v. Davis, People v. Triggs, and Bee See Books v. Leary, all *supra*.

As well, the mere possibility of some criminal activity will not necessarily insulate an undercover surveillance from running afoul of the constitution. People v. Triggs.

² - As an interesting aside: although the Department initially rested its defense of the undercover operation in the fact of the organizers’ ‘public’ meeting, the Department obviously understood that that the meetings were not intended to be entirely public because they assumed that police officers would not be welcomed there.

Factors in assessing the constitutional propriety of a surveillance include the gravity of the criminal conduct and whether less intrusive means to obtain the necessary information were available.

Finally, the level of judicial scrutiny would certainly be 'heightened' in a circumstance where the court viewed the surveilled activity as advocating a form of civil disobedience and/or there was a political message the activity was attempting to communicate. White. In my view, both those circumstances were present here. While the organizers apparently intended, as a result of their work, "a big party downtown", a core aspect of their intended message was a contempt for local civil political authority and a refusal to obey the municipal ordinances they viewed as placing an unreasonable burden on 'the community's right to celebrate'. While Thoreau might not agree with their choice of issues, he would certainly recognize their means as a traditional form of civil disobedience.

Two distinct claims were put forward by the Department in connection with the threatened 'criminal activity': that the parade itself, without the municipal permit, was a criminal act, and; that although the intent of the organizers was for a peaceful parade, troublemakers had previously been attracted to other downtown events in the past and the public's safety might be at risk.

As to the former, the violation is no more than an infraction. I suspect that no one gets a permit for the annual Halloween events either. No one was arrested on New Year's Eve for this infraction and I doubt whether anyone's ever been arrested on Halloween on that basis. Further, the undercover operation was not intended to identify the violators of this ordinance to insure their punishment, nor was it intended to prevent the crime from being committed. So, while a permitless parade is a violation of the law, it does not constitute much of a credible basis for intruding on anyone's civil rights.

The latter justification certainly carries more weight. Large numbers of inebriated revelers, crowded into a downtown district thoroughfare, lined with plate-glass windowed stores, will pose a major challenge to any law enforcement organization. It does not take more than a very small handful of bad actors in a large crowd to trigger havoc and harm. From my limited experience, I can say that the fact that no significant criminal activity occurred during the Last Night DIY Parade makes it the exception and not the rule; most such events downtown have resulted in a small numbers of stabbings, as well as lesser offenses and public nuisances. As I said from the outset, the Department was obligated to attempt to collect information about the planned event, not to prevent it but to be in a position to respond to it as it unfolded.³

³ - Bear in mind that the organizers could reasonably be anticipated to *not* be in possession of that much useful information about the parade. They could state the time and place they intended the parade to fill. They could identify the participating groups and individuals, to the extent they were in contact with them. But the nature of the event, as theorized in the website, obviously would not allow the organizers to accumulate a lot of useful specifics. Who could know who would show up? They would

The place where I stumble, however, is over the Department's failure to even attempt any less intrusive alternative before jumping to the undercover operation.

While it seems likely that a uniformed officer would have been turned away at the door, I do not believe that that was the only choice. Another alternative would have been to have a member of Administration, City government or the City Council show up in street clothes, but prepared to honestly identify him or herself. If questioned, that representative could have simply stated that *the City desired to respect the organizers' rights to engage in the civil disobedience they were advocating, but at the same time, the City had an obligation to the rest of the community, some of whom might be frightened or worried about their safety due to the inherent risk in the organizers' activities.* That representative could have continued that he/she was present *to gather information about the parade plans as well as to offer information to the organizers, if they wished.* This method also could have been utilized over the phone to one of the organizers, albeit less effectively.

I'd like to think that, had the right person undertaken this task and framed the explanation with the appropriate tone, this approach would have succeeded. But, it may not have. The salient point is that it may have, and it was never tried.

Deputy Chief Vogel and Lieutenant Escalante more or less conceded that if they had recognized any political content in the website, they would have taken this approach and even persisted in the face of an initial refusal. Whether I am right that the site had political content or they are that it didn't, they should have attempted this lesser alternative first rather than simply assume the organizers would be unamenable to any reasonable approach.⁴ Their failure to seriously consider⁵ or attempt any lesser alternative renders defective their choice of an undercover operation.

So, do I believe that the Department's actions violated the civil rights of the organizers? It would be dishonest of me to suggest that this is a settled area of the law. Nevertheless, the cited caselaw provides some real guidance.

For the foregoing reasons, in my opinion, the Santa Cruz Police Department violated the Last Night DIY Parade organizers' rights to privacy, freedom of speech and

never be able to predict how many people the internet-announced event would attract, nor could they say what groups might show up or whether splinter groups might gather elsewhere in the City.

⁴ - Indeed, this cavalier assumption that the PD could hope for no cooperation was at the heart of my audit report assertion that "the Department made broad, untested assumptions (tantamount to categorical prejudices) about the Last Night DIY organizers as the basis for inserting an undercover team into their midst."

⁵ - One of them reviewed the website for fifteen to twenty minutes, the other not at all, before the decision was made.

freedom of assembly in the manner in which they went about obtaining information about the organizers' activities. While the Department was obligated to collect information about the event, it was not free to choose the means without due consideration of the rights of the people involved. Less intrusive alternatives were available, but none were tried.

Further, in a circumstance involving political speech and civil disobedience, courts would require the Department to periodically re-assess the constitutional propriety of an undercover operation during its pendency. That was not done here.

Would a reviewing court agree with my view? I believe that the odds are in favor of a reviewing court concurring that the organizers' civil rights were violated. But, I cannot view that concurrence as a certainty. Therefore, I have provided all the materials on which I've reached my own determination, to allow each reader to draw his or her own conclusions.

Which brings us back to a critical point: given the apparent state of the law, the Department cannot reasonably be held to have *knowingly* violated the organizers' civil rights. From my brief survey of law enforcement training, it appears that this question is inadequately addressed, to the extent that it is addressed anywhere. As well, neither Santa Cruz nor the vast majority of other law enforcement agencies, large or small, have explicit policies which adequately deal with this issue.

This is why the question of *employee misconduct* is not apropos; establishing misconduct requires proving that the subject employee knew or should have known his/her conduct violated the applicable laws/rules. I believe that a clear and convincing percentage of all law enforcement officers in California would prove to be as unaware of the state of the law in this area as Department representatives and City officials have been. Indeed, as I have confessed, despite decades of experience in law enforcement and law school training, I was unaware of the contours of the law in this area.

CONCLUSION

The foregoing examination of the instant question is no more than my considered opinion. I specifically invite each reader to approach the question afresh and with an open mind.

As well, it bears repeating that decent, well-intended people are capable of making mistakes. The more telling question is how such a person responds when his/her error becomes manifest. I remain persuaded, now more than ever, that the Department and its

employees were entirely well-intended and acted within the constitutional line was. To belabor them for their mistakes, it would deprive the City, the community and the employees in these circumstances, to learn, grow and improve. It would be contrary to the best interests of all of us.

Dated: March 20, 2006

Signature
✓



MEMORANDUM
POLICE DEPARTMENT
"Your Police, Our Community"

DATE: January 19, 2006
TO: Lt. Rudy Escalante
FROM: Deputy Chief Vogel *[Signature]*
SUBJECT: IA Investigation 2006-001 Cancellation

On January 18, 2006 you were each advised that the captioned Internal Affairs investigation which had been initiated earlier that day pursuant to written notification to each of you had been cancelled. The cancellation notification was made after a review of the documentation generated in connection with the events and citizen complaints that prompted the IA notification. In reviewing those documents in consultation with the City Attorney, a determination was made that, as of this juncture, there is no reason to believe that any of you committed either a criminal offense or a violation of City or Departmental policies, rules, regulations, procedures or orders. Accordingly, pursuant to Departmental General Order C-7 there is no basis for proceeding with an Internal Affairs investigation.

Nonetheless, as each of you are aware, the Department, pursuant to direction received from the City Council by way of the City Manager, is being required to investigate, and report back on, the undercover operation that prompted the various citizen complaints. With this information, the Department may promulgate a new policy which addresses community concerns regarding this type of operation while simultaneously addressing legitimate law enforcement/public safety objectives that may from time to time require this type of operation.

Although there will be no Internal Affairs investigation, the Department, in connection with the fact-finding investigation that has been requested by the City Council and City Manager, will require your cooperation. Accordingly you will each be interviewed in connection with that fact-finding investigation. None of the information derived in the fact-finding investigation shall be used for purposes of disciplining any of you nor shall any of that information be placed in your personnel files. If during the course of the fact-finding investigation new information should come to light which would indicate to the Department that there was indeed a criminal offense committed or a violation of City or departmental policies, rules, regulations, procedures or orders, the fact-finding investigation will be immediately suspended, you will be promptly notified and an IA investigation may be initiated at that juncture. However, none of the information derived up to that point in time would be used in connection with that IA investigation.

We look forward to your cooperation. In the meantime I have directed that neither of the Department's two January 18, 2006 notices to you be placed in your personnel file

AUDIT REVIEW OF *LAST NIGHT DIY* INTERNAL INVESTIGATION

February 13, 2006

I regret to say that this Internal Investigation, for my purposes, is incomplete and flawed, for a very predictable reason. It violates one of the most basic investigative precepts by having been compiled and written by the very individual whose decisions are/should be under investigative scrutiny.

In my view, the heart of the underlying matter is how and why a unilateral decision was reached to place undercover officers in the Last Night DIY organizing meetings. Unfortunately, the person who made that decision is now the person who presents his investigation of his own actions.

In regards to the decision to insert undercover officers, the investigation is less an independent review of what took place than a rationalization to justify the decision. The first page and half of the investigation summary contain the discussion of that decision; rather than the product of investigation, these paragraphs are the investigator's confession of his central role as the initial instigator of all the events that followed. That page and half demonstrate, beyond any doubt, that the Deputy Chief was and should have been disqualified from conducting the investigation into the decision.

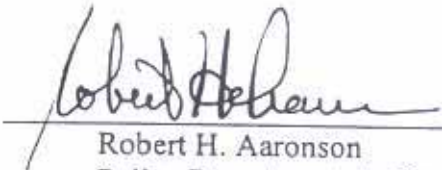
The Deputy Chief's decision to utilize undercover officers may or may not have been the most appropriate, but he is certainly unable to impartially investigate it. I am surprised and disappointed that he was assigned to that task.

None of the foregoing is meant to suggest that I have or am able to reach any firm conclusion regarding the propriety of using undercover officers in this instance. I remain troubled by the fact that the Department made broad, untested assumptions (tantamount to categorical prejudices) about the Last Night DIY organizers as the basis for inserting an undercover team into their midst. As I have maintained all along, I doubt that there has been any misconduct in those underlying actions; on the other hand, the choices made have damaged the Department's relationship with a portion of the City's community. That fact alone would justify a creditable, unbiased investigation of how and why those decisions were made.

In light of these concerns, I met with the Chief of Police and the City Manager this morning. After some discussion, the City Manager directed me to take those investigative steps I deemed necessary to supplement/revise the instant investigation.


Dated: _____

February 13, 2006


Robert H. Aaronson
Police Department Auditor



MEMORANDUM

DATE: February 13, 2006
TO: Mayor and City Council
FROM: City Manager 
SUBJECT: Internal Investigation

The City's Independent Police Auditor, Robert Aaronson, contacted and met with me this morning. Mr. Aaronson advised me of his concerns about the report that has been presented to the City Council's Public Safety Committee.

I accept Mr. Aaronson's concerns in full, and have therefore authorized Mr. Aaronson to conduct a supplementary investigation to remedy his concerns. This will have the unfortunate effect of delaying the completion of the investigation, but it will ensure that the final product is complete, fair, and independent.

The City Council, the public safety committee, and the public deserve no less.

Robert H. Aaronson
Independent Police Auditor
CITY OF SANTA CRUZ
(650) 565-8800



TO: Lt. Rudy Escalante
FROM: IPA Robert Aaronson
RE: Additional Interview for DIY Parade Investigation

Pursuant to direction from the City Manager, I have been tasked with completing some additional investigative steps in connection with the above matter. For that purpose, I will need to interview you on Friday, March 3rd, 2006 at 10:00 a.m. in the Administrative Conference Room, on the second floor of the Police Department. I anticipate that your interview will take no more than one to one and a half hours.

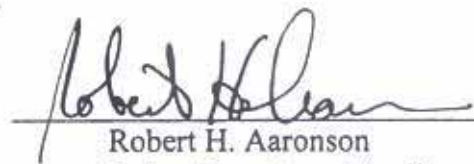
The City Manager is requiring your attendance at and cooperation in my interview of you. If the scheduled time is inconvenient, please contact me at 650-565-8800 to reschedule.

As was the case with the first phase of this investigation, my additional work has been deemed *not a personnel investigation* by the City of Santa Cruz. I am satisfied that, in connection with this additional work, there is no credible allegation of misconduct by any Department member, including yourself. Nevertheless, please feel free to bring a representative with you if wish to do so.

The narrow focus of my work is to further elucidate how the decision was reached to resort to undercover officers to gather information on the DIY Last Night Parade.

If you have any questions or concerns, please do not hesitate to contact me at the above phone number.

Dated: February 28, 2006


Robert H. Aaronson
Police Department Auditor

Robert H. Aaronson
Independent Police Auditor
CITY OF SANTA CRUZ
(650) 565-8800



TO: Deputy Chief Kevin Vogel
FROM: IPA Robert Aaronson
RE: Additional Interview for DIY Parade Investigation

Pursuant to direction from the City Manager, I have been tasked with completing some additional investigative steps in connection with the above matter. For that purpose, I will need to interview you on Friday, March 3rd, 2006 at 1:00 p.m. in the Administrative Conference Room, on the second floor of the Police Department. I anticipate that your interview will take no more than one to one and a half hours.

The City Manager is requiring your attendance at and cooperation in my interview of you. If the scheduled time is inconvenient, please contact me at 650-565-8800 to reschedule.

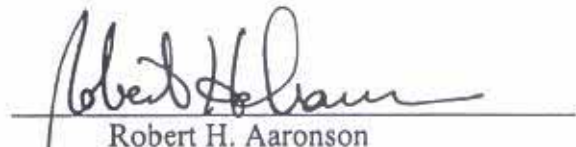
As was the case with the first phase of this investigation, my additional work has been deemed *not a personnel investigation* by the City of Santa Cruz. I am satisfied that, in connection with this additional work, there is no credible allegation of misconduct by any Department member, including yourself. Nevertheless, please feel free to bring a representative with you if wish to do so.

The narrow focus of my work is to further elucidate how the decision was reached to resort to undercover officers to gather information on the DIY Last Night Parade.

If you have any questions or concerns, please do not hesitate to contact me at the above phone number.

Dated: February 28, 2006

February 28, 2006


Robert H. Aaronson
Police Department Auditor

Subj: RE: Lockyer docs
Date: 3/3/2006 2:24:57 PM Pacific Standard Time
From: mschlosberg@aclunc.org
To: RHAaronson@aol.com

Bob,

While, *White* was an appeal from a demurrer, the court did find that the surveillance described in the complaint constituted "government snooping in the extreme." The Lockyer guidelines indicate that under *White* the threshold for engaging in investigation is reasonable suspicion of criminal activity. That is the threshold standard.

But it seems that your question is an additional one - how great a threat is necessary to justify increasingly intrusive police tactics. Unfortunately, as I'm sure you've learned from your research, aside from *White*, there are no additional California cases that address this issue. Lockyer's pending investigation of infiltration of Peace Fresno by a member of the County Sheriff's terrorism team will hopefully provide some additional guidance on this and some local police departments have policies on this - for example San Francisco. But as far as case law in California, *White* is basically it. Federal case law is not particularly helpful, because the federal constitution is not as protective as California's when it comes to privacy. Lockyer's public statements also provide some guidance with regard to the scope of the privacy protections.

Hope this helps and if you have any additional questions, please let me know.

Mark

-----Original Message-----

From: RHAaronson@aol.com [mailto:RHAaronson@aol.com]
Sent: Friday, March 03, 2006 6:18 AM
To: Mark Schlosberg
Subject: Re: Lockyer docs

Mark:

I spent a couple of hours yesterday in the law library. *White* calls for a balancing test, but, because the appeal was from a demurrer, doesn't actually do the balancing.

I looked for any California or Federal case that might shed some light/offer some language on an actual balancing test of the feared crime vs. the level of intrusion; so far, I have been unable to find any. (This surprises me, given the nature and gravity of the issue.)

Do you (or other resources you can reach out to) know of any legal authority that could help illuminate the landscape for me?

BTW, Lockyer's pamphlet has good language, but ultimately fails to reach the question I'm posing.

I appreciate your assistance.

Best,
Bob Aaronson

Subj: **Lockyer docs**
Date: 3/2/2006 5:03:34 PM Pacific Standard Time
From: mschlosberg@aclunc.org
To: rhaaronson@aol.com

Good talking with you. Below are links to some relevant documents from Lockyer including his guidelines for local law enforcement and some articles where he discusses the meaning of California's right to privacy. Hope you find them useful. If you have questions, please give me a call.

Link to manual: <http://aclunc.org/police/CA-surveillance-manual.pdf>

Link to Fresno Bee article: <http://www.fresnobee.com/local/v-textonly/story/11789704p-12508155c.html>

Article about Lockyer guidelines: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/07/15/BA257997.DTL&hw=lockyer+privacy+CATIC&sn=001&sc=1000>

Mark

Mark Schlosberg
Police Practices Policy Director
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