



March 28, 2006

VIA FACSIMILE / U.S. MAIL / E-MAIL

Santa Cruz City Council
Public Safety Committee
809 Center Street, Room 10
Santa Cruz, CA. 95060

Re: Police Department Policy on Undercover Operations

Dear Councilmember:

I am writing on behalf of the American Civil Liberties Union of Northern California to urge changes in the Police Department's policy regarding the use of undercover officers to monitor the activities of community organizations. The recent incident involving the surveillance of the Last Night DIY parade planning meetings and the recent report issued by the Independent Auditor provide a unique opportunity for the City to move from an unfortunate incident towards the adoption of a policy that could serve as a model for others.

The Independent Police Auditor's report ("IPA Report") provides a detailed account of the decision by the Santa Cruz Police Department ("SCPD") to send undercover officers to planning meetings for the Last Night DIY parade. The report indicates that little thought went into the decision and that potential civil liberties concerns were not considered. According to the report, "what circumstances suggest is that the undercover operation during its inception and implementation, was not perceived to be 'a big deal.'" The IPA report goes on to provide an analysis of the legal issues involved and concludes that in this case "the Santa Cruz Police Department violated the Last Night DIY Parade organizers' rights to privacy, freedom of speech and freedom of assembly in the manner in which they went about obtaining information about the organizers' activities."

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It is my understanding that the Council has been waiting to take action in regard to this matter until the IPA investigation was concluded. Now that it has – and in light of its findings – I urge you to consider significant and substantive changes to the current policy regarding undercover investigations. The IPA report was clear that “neither Santa Cruz nor the vast majority of other law enforcement agencies, large or small, have explicit policies which adequately deal with this issue.” Now is the time to adopt such policies to protect the rights of Santa Cruz residents and provide adequate guidance to officers so that such incidents no not happen in the future.

The current SCPD policy - adopted in February 2006 - is inadequate for a number of reasons. While it is certainly better than no policy (and therefore an improvement over what existed prior to the Last Night DIY incident), it still fails to provide clear guidance in a number of critical areas.

1. No Reference to California's Constitutional Right to Privacy: The current policy does not reference California's Constitutional right to privacy, which provides the legal basis for limitations on surveillance of First Amendment protected activity. California Attorney General Bill Lockyer issued guidelines in 2003 in this area and has repeatedly stressed that the California constitution is more protective than the federal constitution in this area. Any policy addressing this issue should reference this constitutional right.
2. Current Policy is Too Broad: The current policy allows the use of undercover officers when there is reasonable cause to believe that the group, *or an individual within the group, are involved in the planning of or intending to engage in illegal and/or violent activity*” (emphasis added). This is very broad and, potentially – if the organization did not want to openly communicate with SCPD for example – would allow the department to use undercover officers to infiltrate a group where police only have reasonable suspicion to believe *one member* of an organization is planning to engage in civil disobedience. More concretely, under the policy, if the police had reason to believe that a member of the ACLU was planning to engage in civil disobedience and the local ACLU chapter did not want to provide the department information about this one individual's planned activity, under the policy, the department might feel justified in sending undercover officers to ACLU meetings. This is far too broad a policy and could potentially infringe of the rights of large numbers of people for negligible public safety benefits.

Instead, we urge the use of language similar to what is used in San Francisco. There, the policy provides that:

The Department may conduct a criminal investigation that involves the First Amendment activities of persons, groups, or organizations when there is an articulable and reasonable suspicion to believe that

1. They are planning or engaged in criminal activity:
 - a. Which could reasonably be expected to result in bodily injury and/or property damage in excess of \$2500; or
 - b. Constitutes a felony or misdemeanor hate crime;
2. And the First Amendment Activities are relevant to the criminal investigation

This policy (a copy of which is attached) is much more protective and strikes a more reasonable balance between privacy rights and public safety needs. It is more in line with the meaning and intent of California's right to privacy.

3. Lacks Clarity as to Less Intrusive Tactics: The current policy indicates that police should employ less intrusive tactics before sending undercover officers to organizational meetings. However, the policy does not define what those tactics are. We have seen in the Last Night DIY situation the problems caused by the lack of a clear and well-defined policy. The San Francisco policy defines a number of "less intrusive" methods for information collection that may be tried before undercover officers are used. These include the examination of public records and other open source information, examination of current department files, interviews with individuals, and physical surveillance from a public location. All of these, of course, should only be done if open communication with the group is unsuccessful as stated in the current policy, but they are certainly less intrusive than sending in an undercover officer. Such guidance should be incorporated into the policy.
4. No Guidance on Video Surveillance: While not an issue in the Last Night DIY incident, the current policy allows video surveillance of public events without providing any guidance. While police use of video tape to document crimes or for training use is certainly legitimate, using video camera to identify members of a lawful demonstration and retaining the tape could violate the rights to those individuals, even if they happen to be demonstrating in a public place. We therefore urge regulation in this area outlining the circumstances under which video recording is legitimate, and when it is not.
5. Inadequate Provision for Auditing/Reporting: The current policy requires approval by the Deputy Chief and reports by the Chief on an annual basis to the Public Safety Committee. The policy does not, however, require any written documentation of undercover actions (either the request or approval) and does not provide for an outside audit. It is important that request be made and approved in writing to document the reasons why the infiltration was requested and approved. External audits are also important to ensure public confidence in the process and compliance with policy.

In this case, for example, neither Deputy Chief Vogel nor Lt. Escalante considered the Last Night DIY parade a political event with First Amendment implications. The outside audit demonstrated that the parade did, in fact, have a political message. This shows the importance of an outside perspective.

We therefore recommend that the current policy be amended – as is done in San Francisco - to require requests for use of undercover officers in these contexts to be made in writing and approved in writing by the Chief of Police. Further, the IPA should conduct annual audits to ensure compliance with the policy and report to the City Council and City Manager on all investigations involving First Amendment protected activity.

At the conclusion of his report, the IPA wrote that while individual rights were violated in his case, “the more telling question is how such a person responds when his/her error becomes manifest.” The City could choose to ignore the IPA report and make, perhaps, some cosmetic changes or it could embrace this opportunity to create a strong policy that would not only benefit the people of Santa Cruz, but would also serve as a model for other jurisdictions. I hope the City chooses the latter.

In my job at the ACLU of Northern California, I have worked with a number of police departments on a wide range of policies and procedures. I would welcome the opportunity to assist you in crafting a new policy regulating the use of undercover officers in investigations impacting First Amendment activity. I can be reached at 415-621-2493. Thank you for your consideration.

Sincerely,



Mark Schlosberg
Police Practices Policy Director
ACLU of Northern California

Cc: City Manager
Police Chief
Mayor
City Council
Independent Police Auditor

Enclosed: San Francisco Police Department General Order 8.10