

**DRAFT PROPOSAL:
REGULATIONS FOR INVESTIGATION OF
FIRST AMENDMENT ACTIVITIES**

I. STATEMENT OF PRINCIPLES

A. It is the policy of the Santa Cruz Police Department to ensure that the First Amendment and privacy rights guaranteed by the United States and California Constitutions are protected for all individuals. The actions of the Santa Cruz Police Department and its officers shall impact or be involved in the exercise of those rights only in the course of legitimate investigation of actual criminal activity.

B. 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 petty damage in excess of \$_____ [to be determined]; or
 - b. constitutes a felony or misdemeanor hate crime; and
2. the First Amendment activities are relevant to the criminal investigation.

C. When These Regulations Apply.

1. The Department must follow these regulations in every criminal investigation that involves the First Amendment activities of a person, group or organization. These guidelines do not apply to criminal investigations that do not involve First Amendment activities.

2. These regulations are intended to regulate the conduct of criminal investigations that involve First Amendment activities by requiring (1) written justification for the investigation and (2) written approval by the Chief of Police.

3. These regulations, however, are not intended to prevent investigations into actual criminal activity. Investigations of criminal activities that involve First Amendment activities are permitted provided that the investigation is justified and documented as required by these regulations.

D. The Chief of Police shall ensure that all members of the Department that may be assigned to investigate potentially protected activities attend training concerning these regulations before engaging in such assignments.

II. DEFINITIONS

A. First Amendment Activity. All speech associations and/or conduct protected by the First Amendment and/or California Constitution Article I, section 2 (Freedom of Speech) and/or Article 3 (Right to Assemble and Petition the Government, including but not limited to expression, advocacy, association or participation in expressive conduct to further any political or social opinion or religious belief.) First Amendment Activity includes speaking, meeting, writing, marching, picketing or other expressive conduct protected by the First Amendment.

B. Articulable and Reasonable Suspicion. The standard of reasonable suspicion is lower than probable cause. This standard requires officers to be able to articulate specific facts or circumstances indicating a past, current or impending violation of the law, forming an objective basis for initiating the investigation. A mere belief or suspicion is insufficient.

The Department shall not conduct an investigation in connection with a planned political demonstration, march, rally or other public event, including an act of non-violent civil disobedience, unless the prerequisites of Section I. B, *supra*, are met. Nothing shall preclude the Department, however, from openly contacting organizations or persons knowledgeable about a public event to facilitate traffic control, crowd management or other safety measures concerning the event.

C. Infiltrator. An undercover officer or civilian acting under the direction of the Department who attends a meeting, joins an organization, develops a relationship with an individual or organization or eavesdrops for the purpose of obtaining information about an individual or organization for transmittal to the Santa Cruz Police Department or to other police agencies through the Santa Cruz Police Department.

D. Informant. A person who provides information to the Santa Cruz Police Department motivated by the expectation of receiving compensation or benefit, but is not acting under the direction of the Department or any of its employees.

E. Source. A person who provides information to the Santa Cruz Police Department with no expectation of compensation or benefit and is not acting under the direction of the Department or any of its employees.

F. Other Police Agencies. Members of other law enforcement agencies at the local, state, or federal level including police, military, or other investigative agencies.

III. AUTHORIZATION REQUIRED FOR AN INVESTIGATION

A. A member of the Department may undertake an investigation that comes within these guidelines only after receiving prior written authorization by the Chief of Police. However, neither the Chief of Police, any other employee of the Santa Cruz Police Department, or any member of any other police agency is authorized to approve an investigation and/or the gathering or maintenance of information by employees the Santa Cruz Police Department or anyone working on behalf of the Santa Cruz Police Department in violation of the terms of this General Order.

B. To obtain written authorization, an officer must submit a memorandum to the Chief of Police either directly or through their commanding officer containing the following:

1. the identity of the subject of the proposed investigation, if known;
2. the facts and circumstances that create an articulable and reasonable suspicion of criminal activity as defined in Section I. B; and
3. the relevance of the First Amendment activities to the investigation.

C. When an investigation is authorized by the Chief of Police, s/he shall approve or disapprove in writing. The approval of requests from outside agencies must be based on the same level of information and the same standards of investigation as a request from a Department employee.

D. Time Limits. Written approval of an investigation is in effect for 120 days. If the Department continues an investigation past 120 days, a new memorandum and approval must be obtained. The new memorandum must describe the information already collected and demonstrate, based on that information, that an extension is reasonably necessary to pursue the investigation. If the information giving rise to the reasonable suspicion to support the investigation is subsequently proven untrue or suspicion is otherwise allayed, the investigation shall cease.

E. Emergencies. If there is an immediate threat of criminal activity, an investigation may begin before a memorandum is prepared and approved, but verbal permission must be received from the Chief of Police, Acting Chief of Police or the Deputy Chief. The required memorandum must be written and approved by the Chief of Police within five days of the occurrence of the emergency.

F. If any officer of the Department becomes aware of a criminal investigation that s/he believes will involve First Amendment activities as defined in these guidelines, the officer shall refer the case to his or her commanding officer for a determination as to how the investigation should be conducted.

G. No employee of the Santa Cruz Police Department may conduct any investigation of groups or individuals at the request of, or on behalf of another government agency or official outside of these regulations. This prohibition applies to both on-duty and off-duty activities.

H. The investigative techniques used in a particular case shall be dictated by the gravity of the crime under investigation, the evidence of criminal activity and the need for particular investigative technique. The Department shall use the least intrusive investigative techniques possible under the circumstances. The least intrusive technique is talking with the leadership of the organization. Other less intrusive techniques include examination of public records and other sources of information available to the general public, interviews with individuals, and examination of police files and records.

IV. RULES OF CONDUCT FOR INFILTRATORS, INFORMANTS AND UNDERCOVER OFFICERS

A. The officer-in-charge shall specifically direct the undercover officers, infiltrators or informants:

1. not to participate in acts of violence or unlawful acts;
2. not to use unlawful techniques to obtain information;
3. not to initiate, propose, suggest, encourage, or incite criminal acts or plans to commit criminal acts;
4. not to be present during criminal activity unless it has been determined to be necessary for the investigation and prosecution of criminal suspects;
5. not to live with or engage in sexual relations with members of an organization or individual under surveillance (unless a civilian infiltrator was so involved before becoming an infiltrator);
6. not to assume a leadership position or intentionally cause dissension within an organization;
7. not to attend meetings or engage in other activities for the purpose of obtaining legally-privileged information, such as confidential sources of reporters, attorney-client communications, or physician-patient communications;
8. not to record or maintain records concerning individuals who are not targets, unless the information is relevant for the investigation, or the information would itself justify an investigation under these guidelines;
9. not to communicate with or provide information to any other person or group, public or private, or any other government agency concerning the investigation or material which has been discovered through the investigation. The transmission of information collected under this order to outside agencies must be through, or by written approval of the Chief of Police;

B. Commanding officers shall monitor the compliance of undercover officers and infiltrators with these guidelines.

C. All employees of the Department shall be advised that a willful or negligent violation of these regulations shall subject the offending member to disciplinary action which may include suspension or termination.

V. Independent Police Auditor Review

A. On an annual basis, the Independent Police Auditor shall review the Department's files, records and documents to determine whether the Department is in compliance with the

regulations. The findings will be conveyed to the Chief of Police, City Manager, and City Council Public Safety Committee. In addition, such a review may be conducted at the discretion of the Independent Police Auditor at any time.

1. The Independent Police Auditor shall review the following:
 - a. all current regulations, rules and memoranda interpreting this order.
 - b. all documents relating to the investigations and their compliance with these regulations.
 - c. all documentation relating to the transmittal of information from investigations conducted under these regulations by the Santa Cruz Police Department to other intelligence or law enforcement agencies.
2. The City Manager shall prepare a written report concerning its annual review, which shall include but not be limited to:
 - a. the number of investigations authorized during the prior year;
 - b. the number of authorizations sought but denied;
 - c. the number of times that the use of undercover officers or infiltrators were approved;
 - d. the number and types of unlawful activities investigated;
 - e. the number and types of arrests and prosecutions that were the direct and proximate result of investigations conducted under these regulations;
 - f. the number of requests by members of the public made expressly pursuant to these regulations for access to records, which shall include: the number of such requests where documents or information was produced, the number of such requests where the documents or information did not exist, and the number of requests denied;
 - g. the number of requests from outside agencies for access to records of investigations conducted pursuant to these regulations, including the number of such requests granted, and the number of such requests denied;
 - h. a complete description of any violations of these regulations, including information concerning: the nature and causes of the violation and the sections of the guidelines that were violated; actions taken as a result of any violations, including whether any officer has been disciplined as a result of the violation; and recommendations of how to prevent recurrence of violations. The report shall not contain information that may compromise investigations that are on-going at the time of the report's creation. Such information shall be included in the first report submitted after the completion of the investigation.

D. By the end of each year, the City Manager shall deliver to the Public Safety Committee a copy of the written annual report.

VI. Violations of The Guidelines

A. If the Chief of Police or any member of the Department becomes aware of information that a possible violation of these guidelines has occurred, the member shall immediately inform his/her commanding officer who shall inform the Chief who in turn will immediately inform the Police Auditor.

B. If the Police Auditor determines that a possible violation of these guidelines has occurred, he/she shall:

1. Commence an immediate investigation of the possible violation;

2. Ensure that any activities in violation of these guidelines immediately cease.

C. If the Police Auditor determines that an actual violation of these guidelines and/or the First Amendment (as defined in Section xxx above) has occurred, the Auditor shall:

1. Notify the parties about whom information was gathered or maintained in violation of the guidelines pursuant to the following:

a. When information is released to individuals or organizations, the names and identifying information concerning private citizens other than the individual notified shall be excised to preserve their privacy;

b. Full disclosure is not required where the Independent Police Auditor determines that disclosure of the information is reasonably likely to endanger the life, property or physical safety of any particular person, if disclosure would be in violation of local, state, or federal law, or would jeopardize a legitimate ongoing investigation. In such circumstances information may be withheld, however the Department and Police Auditor shall release as much information as possible under the circumstances.

2. Refer the violation to the Chief of Police for a recommendation concerning discipline of the members involved.

D. All members of the Department shall receive training on these guidelines and be advised that a willful or negligent violation of these guidelines shall subject the offending member to disciplinary action which may include suspension or termination.

VI. FILES AND RECORDS

A. The collection, maintenance and use of information pursuant to an authorization shall be limited to the scope stated in that investigative memorandum and authorization.

B. The Department shall not collect or maintain information of a personal nature that does not relate to a criminal investigation. In the absence of a specific investigation authorized under these guidelines, the Department shall not collect or maintain information such as names from political petitions, mailing lists, organizational memberships or writings espousing a particular view which is protected by the First Amendment.

C. Information to be retained in a criminal intelligence file shall be evaluated for source reliability and content validity prior to filing. The file shall state whether reliability or accuracy have been corroborated.

D. All requests for information from outside agencies, relating to investigations covered by these regulations, shall be evaluated and approved prior to dissemination by the Chief of Police who shall determine whether the request is based on a legitimate criminal investigation which comports with the constitutional standards required by these regulations. In addition, the requesting agency must be reliable in treating the information with the requisite care and sensitivity and shall be denied the request if they are not considered sufficiently reliable.

E. All dissemination of information shall be done by written transmittal that describes the documents or information transmitted. A copy of the transmittal letter shall be kept in the file from which the information was disseminated.

F. All requests for information by civilians, other than the parties subject to the investigation shall be governed by applicable laws and regulations concerning the dissemination of records under the Public Records Act. Any denial of access to information shall specifically state the reasons for the denial. If access is denied, appeal may be made to the City Manager.

VII. EVENT PLANNING INVOLVING FIRST AMENDMENT ACTIVITIES

A. Certain types of public gatherings require the Department to collect a limited amount of information in order to preserve the peace, asses the need to deploy members for crowd control purposes, and protect the rights of free expression and assembly. This information may only be collected openly and non-covertly as part of event planning.

B. The Department shall only videotape and photograph public events in a manner that minimizes interference with people lawfully participating in First Amendment events. Video or photographic equipment shall not be brought to events or used by Santa Cruz Police Department employees without the written authorization of the event commander.

C. The Department shall videotape or photograph only for crowd control training or for legitimate evidentiary purposes. Legitimate evidentiary purposes shall include only evidence that is reasonably likely to be used in administrative, civil, or criminal proceedings, investigations that comport with these regulations, or evidence related to allegations against employees of the Department.