



**Metropolitan Police Department First
Amendment Investigations
Substantially Complied with District
Law**

March 19, 2014

Audit Team:

Keisha Turner, Audit Manager

Joshua Stearns, Analyst

Lilai Gebreselassie, Analyst

A Report by the Office of the District of Columbia Auditor
Yolanda Branche, District of Columbia Auditor



Office of the District of Columbia Auditor

March 19, 2014

Dear Chief Lanier:


The attached report presents the audit of the Office of the District of Columbia Auditor (ODCA) of the Metropolitan Police Department's conduct of investigations subject to the "Police Investigations Concerning First Amendment Activities Act of 2004 (Act)." This audit was included in the fiscal year (FY) 2013 ODCA Audit Plan.

ODCA conducted this audit to determine whether the Metropolitan Police Department (MPD) was in compliance with the Act during FY 2012. We examined records of the one qualifying investigation that was conducted by MPD in FY 2012. In addition, we interviewed MPD officials and examined the policies and procedures of MPD. We found that in FY 2012, MPD was substantially in compliance with the Act.

Our second objective in the audit was to determine whether MPD effectively implemented all of the recommendations made by ODCA on September 27, 2012 in the audit report entitled "Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities." We are pleased that MPD implemented these recommendations.

We have discussed the audit conclusions with MPD officials. As is required by law, in FY 2014 ODCA will conduct another annual audit of the Metropolitan Police Department's conduct of investigations subject to the "Police Investigations Concerning First Amendment Activities Act of 2004."

Sincerely,


600 Yolanda Branche
District of Columbia Auditor



March 19, 2014

Metropolitan Police Department First Amendment Investigations Substantially Complied with District Law

Why ODCA Did This Audit

The audit was conducted per the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004.

What ODCA Recommends

We have made no recommendations in this report.

What ODCA Found

The Metropolitan Police Department (MPD) conducts investigations of groups suspected of or known to have committed crimes in connection with planned First Amendment activities (typically public demonstrations or assemblies). The Police Investigations Concerning First Amendment Activities Act of 2004 (the Act) provides certain guidelines and restrictions on when and how these investigations may be conducted. The Act also requires the Office of the District of Columbia Auditor to conduct an annual audit of MPD files and records relating to these investigations.

Overall, we found that MPD complied with the requirements of the law during FY 2012.

We also sought to determine whether MPD had implemented the recommendations we made to them in our report entitled “Audit of the Metropolitan Police Department’s Investigations and Preliminary Inquiries Involving First Amendment Activities,” published September 27, 2012. We found that they had implemented these recommendations satisfactorily.

For more information regarding this report, please contact Anovia Daniels, Communications Analyst/ANC Outreach, at Anovia.Daniels@dc.gov or 202-727-3600.

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Background

The District of Columbia has long been a place where Americans have come to express their opinions on issues of public policy. Often, these expressions have taken the form of rallies held in public places like the National Mall or marches through District streets. In the majority of cases, these demonstrations happen peacefully and without incident. Through the years, the Metropolitan Police Department (MPD) has helped to maintain peace and order during most demonstrations, even when the crowds have been very large and boisterous or when faced with potentially combative counter-demonstrators.

However, there have been demonstrations where crimes were committed by demonstrators. These crimes have ranged from blocking traffic to breaking windows and assault. As the District's law enforcement agency, MPD has an interest in responding to or, when possible, preventing such crimes from happening. Consequently, MPD regularly prepares in advance for known demonstrations, sometimes conducting investigations of groups planning a demonstration when reason exists to anticipate criminal activity associated with the event.

The District Council passed the Police Investigations Concerning First Amendment Activities Act of 2004 (the Act) in response to a number of instances that occurred between the years 2000-2003. These instances involved the mistreatment of persons gathered in the District to exercise their First Amendment rights to assemble and protest government actions. At several of these protests, MPD made arrests and took other actions that were later challenged in court as unjustified or excessive. These lawsuits resulted in large payments made by the District government to victims of MPD misbehavior. The Act was passed in an attempt to provide legal guidelines and controls on the manner in which MPD handled demonstrations themselves as well as any investigations conducted leading up to demonstrations.

The Act requires the Office of the District of Columbia Auditor (ODCA) to conduct an annual audit of MPD operations related to investigations involving First Amendment activities. The purpose of the audit is to determine whether MPD is in compliance with the Act. Although the Act was effective in April 2005, ODCA did not conduct our first compliance audit of MPD's First Amendment investigative activities until 2012. As we explained in our audit report issued in 2012, the reason for the delay had to do with a lack of resources and competing audit priorities. However, at that time we reviewed all of MPD's First Amendment investigations that had been conducted

under the Act through the end of Fiscal Year 2011. Please see our report entitled “Audit of the Metropolitan Police Department’s Investigations and Preliminary Inquiries Involving First Amendment Activities.”

The Metropolitan Police Department (MPD) is the District of Columbia’s municipal law enforcement agency. As such, it is responsible for helping to maintain the safety and security of all those who live and work in the District. MPD provides a range of services through patrols, investigations and other security and intelligence operations. MPD currently has an annual budget of approximately \$510 million and employs over 4,500 people.

First Amendment investigations are conducted by the Criminal Intelligence Branch (CIB) of the Intelligence Division, located within the Homeland Security Bureau at MPD. The CIB is primarily occupied with providing intelligence to other parts of the Department on gang activity in the District. Through the use of undercover officers and other investigative techniques, MPD seeks to keep track of known gang members, become aware of planned violence between rival gangs, and provide this intelligence to the uniformed members of the Department so that they can respond to or prevent crimes before they happen. The CIB maintains approximately 30-35 staff, including undercover officers. According to CIB’s Acting Captain, more than 90 percent of the staff’s time is spent on gang-related investigative work with only 10 percent or less of their time spent on First Amendment investigations.

According to the Act, First Amendment investigations are to be conducted only when there is “reasonable suspicion” to believe that a crime has occurred, is occurring, or is planned to occur in conjunction with a known demonstration/protest/rally. CIB officers use a variety of methods to arrive at this reasonable suspicion. If groups with a known history of criminal behavior have announced their intention to participate in the event, this can be one cause for suspicion. By monitoring public online discussions, officers may learn of calls for violence or other kinds of law-breaking activity. If the officers conducting this background research conclude that reasonable suspicion exists, they will then request authorization to open an investigation.

The request to open an investigation takes the form of a memorandum to the Executive Director of the Intelligence Division. The memo includes a summary of the information that led to the reasonable suspicion of criminal activity, the name of the group or groups to be investigated (if known), and the related First Amendment activity at which the crimes are possibly to be committed. According to MPD officials, it has been CIB practice to convene a meeting to discuss these memos and decide whether to proceed. This meeting typically includes the Captain in charge of the CIB, the Executive Director of the Intelligence Division (who has the

authority to approve the investigation), the MPD General Counsel, a Sergeant from the CIB, and often the Assistant Chief of Police.

Once the investigation is underway, CIB shares intelligence obtained about possible upcoming criminal activity with other branches of the Department. According to the Captain of the CIB, the goal is to assign uniformed police officers to areas where crimes are suspected to be committed and thus either deter the would-be criminals or to apprehend those who commit crimes.

The conduct of an investigation involves continued monitoring of “open source” websites, including discussion threads and other such sites where protesters can exchange information publicly. In addition, for most of the First Amendment investigations our office reviewed, CIB has requested the use of undercover officers. According to interviews with members of CIB, the undercover officers attend meetings of the groups suspected of planning criminal activity. They report whatever they learn about how many people might be involved, what exactly they are planning, where the crimes are to take place, and any other relevant details. As noted above, this information can be used to deploy uniformed officers so as to prevent the crime or arrest those involved. Information gathered in this way is transmitted back to CIB. Undercover officers will also attend the First Amendment event itself and alert MPD commanders if they observe criminal activity as it is occurring or about to occur.

The Act requires that investigations be terminated when “logical leads have been exhausted and no legitimate law enforcement purpose justifies its continuance.”¹ In practice, this typically means that the investigations are wrapped up after the date of the protest, march or other relevant First Amendment activity. It is current MPD practice to seal the investigative file upon the closing of the investigation. The file is only to be unsealed with the approval of the Executive Director of the Intelligence Division.

United Students Against Sweatshops

While this audit was underway, we became aware of the civil lawsuit filed against MPD by an activist group known as United Students Against Sweatshops. The Office of the District of Columbia Auditor has also been named as a party to the lawsuit. The lawsuit alleges violations of the Act. The activities alleged in the lawsuit purportedly occurred in May and June of 2013 and fall outside the scope of this audit.

¹ D.C. Code § 5-333.05 (f)

Objectives, Scope and Methodology

Objectives

The objectives of the audit were to determine:

- Whether MPD was in compliance with the requirements of the Act during the scope of the audit; and
- Whether MPD implemented the recommendations made in our audit report entitled “Audit of the Metropolitan Police Department’s Investigations and Preliminary Inquiries Involving First Amendment Activities,” released September 27, 2012.

Scope

The scope of the audit included all investigations and preliminary inquiries subject to the requirements of the Act that were completed in fiscal year (FY) 2012. We examined all files, training records and MPD policies and procedures related to the First Amendment investigations conducted in FY 2012.

According to MPD officials, there was only one investigation conducted in FY 2012 that was subject to the requirements of the Act. The investigation was initiated in October 2011 and continued through May 2012.

Methodology

In order to determine whether MPD is in compliance with the requirements of the Act, ODCA reviewed MPD’s:

- Standard operating procedures for First Amendment investigations;
- MPD’s Investigative files for the time period;
- Communications between undercover officers and their superior officers; and
- Records showing training given to MPD personnel on the requirements of the Act.

In order to determine whether MPD had implemented the recommendations made in our previous audit, we reviewed:

- MPD's standard operating procedures for First Amendment investigations;
- MPD documents related to the designation of authority under the Act; and
- Records showing training given to MPD personnel on the requirements of the Act.

Evidence Limitation

The Act prohibits undercover officers assigned to First Amendment investigations from conducting certain named activities. In addition, the Act also requires MPD management to monitor undercover officers' compliance with the Act. In our attempt to determine compliance with these two sections of the Act, we were hindered by a lack of written records. The investigative file that we reviewed did not contain sufficient documentary evidence of what actions were taken by undercover officers assigned to the investigation. Consequently, we cannot fully determine compliance with these sections of the Act. It is important to note that we did conduct interviews with both CIB staff and an undercover officer in our attempt to determine actions normally taken by undercover officers assigned to a First Amendment investigation.

Questions of Independence

In November 2013, just prior to receiving the ODCA draft report for MPD First Amendment investigations conducted in FY 2012 for review, the Chief of Police for the Metropolitan Police Department (MPD) sent a letter to the Auditor claiming that MPD had discovered information that "call[ed] into question" the independence of a member of the ODCA audit staff. It is important to note that similarly, MPD questioned the independence of a member of the ODCA audit staff when ODCA presented MPD with the draft report for First Amendment investigations conducted from FY 2005 through FY 2011.

In the letter, MPD advised ODCA that MPD planned to withdraw from the FY 2012 audit. However, the MPD letter provided no specific information to support the alleged independence violation. Additionally, the letter did not include the name of the ODCA staff member that MPD believed presented independence issues. In response to the MPD letter, ODCA advised MPD that, as required by law, ODCA would proceed with the audit.

ODCA sent the draft report to MPD for comment on January 10, 2014. Shortly thereafter, MPD officials requested a meeting with the ODCA Deputy Auditor. At the January 28, 2014 meeting, MPD

officials presented ODCA with the information that led MPD to question the independence of an ODCA audit team member. In addition, these officials expressed concern that ODCA had a fundamental problem with independence and indicated they would seek to request that the D.C. Council appoint an outside audit organization to conduct future audits of MPD.

Government Audit Standards (Standards), to which ODCA adheres, state that:

“In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be independent.”²

The Standards go on to state:

“Independence comprises:

- a. Independence of Mind. The state of mind that permits the performance of an audit without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism.
- b. Independence in Appearance. The absence of circumstances that would **cause a reasonable and informed third party, having knowledge of the relevant information, to reasonably conclude that the integrity, objectivity, or professional skepticism of an audit organization or member of the audit team had been compromised.**³ (Auditor’s emphasis.)

In short, not only must auditors be independent in fact, but auditors must also be independent in appearance.

There are many different kinds of threats to independence, however not every threat automatically impairs independence. On this subject, the Standards state:

“Whether independence is impaired depends on the nature of the threat, whether the threat is of such significance that it would compromise an auditor’s professional judgment or create the appearance that the auditor’s professional judgment may be compromised, and on the specific safeguards applied to eliminate the threat or reduce it to an acceptable level.”⁴

² *Government Auditing Standards*, GAO-12-331G (Washington, D.C.: December 2011) p. 27

³ *Ibid.*

⁴ *Ibid.* p. 31

In order to comply with the Standards, and in keeping with commonly accepted practices in the government auditing community, ODCA established specific policies and procedures to ensure the independence of audit staff members. Audit team members are required to provide written assertions of independence upon assignment to each audit. Audit Supervisors review the audit independence assertions and based on a review of the independence assertions a determination is made as to whether it is acceptable for the staff member to participate in the audit. In addition, the Audit Supervisor must reassess the independence of each member of the audit team at the conclusion of the audit.

ODCA analyzed the information that MPD presented on January 28 2014 that MPD believed represented a threat to independence. ODCA found that the information provided by MPD would not cause “**a reasonable and informed third party, having knowledge of the relevant information, to reasonably conclude that the integrity, objectivity, or professional skepticism of ... [a] member of the audit team had been compromised.**” As a result, no further action was required by ODCA.⁵

Government Auditing Standards place the responsibility for ensuring the independence of individual auditors with the audit organization. The Institute of Internal Auditors’ guidance on maintaining the independence of an audit organization states that auditors should not “subordinate their judgment on audit matters to that of others.” In addition, basic governance principles affirm that it is the management of an agency that is responsible for the official actions of its employees.

However, despite ODCA’s compliance with Government Auditing Standards and compliance with the policies and procedures of ODCA, during the conduct of the FY 2012 and FY 2005 through FY 2011 First Amendment MPD audits, the Metropolitan Police Department continues to attempt to substitute their judgment for the judgment of ODCA, regarding determinations of independence. To ensure the continued independence of ODCA and in accordance with standard audit practice, MPD must discontinue the practice of attempting to substitute their judgment for the judgment of ODCA’s in matters pertaining to Auditor’s independence.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁵ *Ibid.* p. 215

Audit Results

Based on a review of the information available to us, we found that Metropolitan Police Department (MPD) was substantially in compliance with the requirements of the Act during its conduct of the one investigation which occurred in FY 2012. In addition, we found that MPD effectively implemented all of the recommendations we made in our report entitled, “Audit of the Metropolitan Police Department’s Investigations and Preliminary Inquiries Involving First Amendment Activities” released September 27, 2012. See Appendix I for a list of recommendations from ODCA’s 2012 report.

Conclusion

Since 2005, the Metropolitan Police Department (MPD) has been conducting investigations subject to the Police Investigations Concerning First Amendment Activities Act of 2004. We have now audited, for compliance with the Act, every such investigation asserted to by MPD between fiscal year (FY) 2005 and FY 2012. Our 2012 audit, covering investigations conducted between FYs 2005 through 2011, revealed some important areas of non-compliance. We made several recommendations for improvement in MPD policies and procedures to help improve compliance levels.

In this audit, we examined investigations conducted in FY 2012. ODCA found much improved compliance with the requirements of the Act. We also noted that MPD had effectively implemented all of the recommendations made in our previous audit.

It is important to note that during the conduct of this audit, MPD again questioned the independence of a member of the ODCA audit team when presented with the draft report for First Amendment investigations conducted in FY 2012. To ensure the continued independence of ODCA and in accordance with standard audit practice, MPD must discontinue the practice of attempting to substitute their judgment for the judgment of ODCA's in matters pertaining to Auditor's independence.

We look forward to working with MPD again on our annual audit of their First Amendment investigations.

Sincerely,



for: Yolanda Branche
District of Columbia Auditor

Agency Comments

On January 10, 2014, we submitted a draft version of this report to Metropolitan Police Department (MPD) for review and comment. As required by the Act, we provided them with 30 days to submit a reply.

MPD did not provide us with formal written comments. Comments, however, were provided during the January 28, 2014 meeting held to discuss issues related to the audit and draft report. Most of their comments involved relatively minor changes such as corrections to the name of the Intelligence Division or the percentage of time the Criminal Intelligence Branch (CIB) spends on First Amendment investigations. These suggested changes were accepted and incorporated into the report.

MPD also requested that we remove the section entitled “Evidence Limitation.” MPD officials objected to this section, claiming that we were asking MPD to take steps that would be in violation of federal regulations governing the maintenance of intelligence files by police organizations receiving federal assistance. Their objections represent a misunderstanding of what the Evidence Limitation section says. Government Auditing Standards require us to obtain sufficient and appropriate evidence upon which our conclusions must be based and if we are unable to do this, we are required to state as such. This section notes that we were unable to obtain sufficient and appropriate evidence to evaluate MPD compliance with sections of the Act, specifically having to do with what actions undercover officers may not take while conducting a First Amendment investigation. It is not a finding and contains no recommended course of action for MPD to take. We stand by our statements and no changes have been made to this section.

Appendix I

Recommendations Made in the ODCA Fiscal Year 2012 Report

Number	Recommendation
1	Develop written Standard Operation Procedures (SOPs) that are consistent with the laws and regulations for authorizing preliminary and full First Amendment investigations. At a minimum, the Standard Operating Procedures should require the responsible official to affirm in writing that the First Amendment investigation was authorized. This authorization should include the authorizing official's printed name, position title, signature, and date signed.
2	Develop Standard Operating Procedures that outline the MPD's policy on purging investigative files. This Standard Operating Procedure should define the terms "accurate, reliable, relevant, and timely" as provided in the law and regulations, and include the process MPD will employ to identify and remove information that MPD considers is not "accurate, reliable, relevant, and timely."
3	Develop Standard Operating Procedures that provide the Auditor with access to MPD's files and records to conduct audits of MPD's investigations of First Amendment activities. The Standard Operating Procedures should define documentation that must remain in the First Amendment investigation files to verify that MPD properly authorized preliminary and full investigations.
4	Designate, in writing, those MPD members who may, in the absence of the Chief of Police's signature, authorize the use of undercover officers in conjunction with MPD's investigations of First Amendment activities.
5	Develop Standard Operating Procedures for requesting and authorizing the use of undercover officers that clearly document approval to use undercover officers in the investigation.
6	Develop Standard Operating Procedures that require MPD to provide MPD staff members who investigate First Amendment activities initial and refresher training regarding: <ol style="list-style-type: none"> a. Authorization, conduct, monitoring, and termination of investigation and preliminary inquiries; and b. The maintenance, dissemination, and purging of records, files, and information in connection with First Amendment investigations.
7	Develop a curriculum, training agenda, and attendance documentation that would allow MPD and the Auditor to be able to determine: <ol style="list-style-type: none"> a. What First Amendment training MPD provided, b. The dates when MPD provided the First Amendment training; and c. The names of MPD members that attended the First Amendment training.

8	Develop Standard Operating Procedures for First Amendment investigation file reviews. At a minimum, the Standard Operating Procedures should provide: <ul style="list-style-type: none"> a. The name, title, and signature of the person performing the investigation file review, b. The dates MPD conducted the investigation file review; and c. A narrative description of the results of the investigation file review.
9	Develop Standard Operating Procedures that require MPD to review First Amendment investigations prior to filing, and include within the investigation file a statement that MPD has corroborated the reliability, validity, and accuracy of the investigative information.
10	Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations at least every 90 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, review results, and the documenting of review panel attendance and approval.
11	Develop Standard Operating Procedures for reviewing and authorizing First Amendment investigations that exceed 120 days. At a minimum, these Standard Operating Procedures should provide for required review panel attendance, review requirements, and the documenting of review panel attendance and review results.
12	Develop Standard Operating Procedures that require undercover officers to provide regular, routine, and periodic status reports on the details of undercover activities conducted while performing First Amendment investigations.
13	Revise the recordkeeping and purging policies of the Metropolitan Police Department to allow the Auditor access to pertinent and relevant documents and records so that the Auditor can determine whether MPD complied with applicable laws when conducting First Amendment investigations.