

Association of **LAW ENFORCEMENT INTELLIGENCE UNITS**

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Acknowledgment

The LEIU Executive Board is acknowledging the significant contribution of Mr. John Gordnier to this product. At the request of the Executive Board, John voluntarily undertook researching, drafting, and finalizing this document with input from members of the Executive Board. John has been a long-time friend and advisor to the LEIU Executive Board, many of its members, and to other law enforcement entities around the nation. He has advised us on issues ranging from changes in the Code of Federal Regulations (relating to criminal intelligence) to our published criminal intelligence file guidelines. Many of you may have also attended his workshops on legal issues in criminal intelligence at our annual conferences.

John received his BA degree from the University of Washington in 1966. His JD was earned at the University of Wyoming in 1969. In January 1970 he was sworn in as a member of the California bar. From 1970 until 1972 John worked as a Deputy District Attorney in the County of San Bernardino. In October 1972 he became a Deputy Attorney General in the Criminal Law Division of the California Attorney General's Office. During his time in the Criminal Law Division he tried cases involving public officials, served as the head of the Political Reform Act Enforcement Unit, and was in charge of the Attorney General's Legislative/Lobbyist Task Force. When the Special Prosecutions Unit was created to handle organized crime cases in 1979, John was one of the attorneys assigned to a team consisting of an attorney and two special agents. In 1983 he was named the Senior Assistant Attorney General in charge of the Special Prosecutions Unit, a position he held until the Unit was disbanded in 1991. During his tenure in the Special Prosecutions Unit, John not only prosecuted cases and supervised prosecutions by the unit he also was responsible for the creation and enactment of laws penalizing money laundering, allowing for asset forfeiture, and permitting prosecution under a state RICO provision. From 1991 to 1998 John was a Senior Assistant Attorney General in the Trials and Special Projects Unit. In this capacity he served as the legislative liaison for the Criminal Law Division, prosecuted certain cases such as the Mark Furman perjury case, implemented the Attorney General's response to the Medical Marijuana initiative and successfully defended California's Assault Weapons Law. From 1998 until his retirement in 2007, John was assigned to act as the attorney for the California Department of Justice's intelligence systems, serve as the legal advisor to the CalGANG intelligence system, and teach intelligence law for both basic level and executive level courses sponsored by the Attorney General's Advanced Training Center. Since retiring from public service, John has acted as a consultant and instructor on criminal intelligence law.

Please join the LEIU Executive Board in expressing our thanks to John for his significant support, wise counsel, and professional and personal assistance. It is through friends like John that allow us to develop products such as this.

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LEIU Demonstration Guidelines for Intelligence Units

The LEIU Board has received a number of requests from membership asking that we provide guidelines which address interaction between a law enforcement intelligence entity and citizens engaged in a public demonstration. In this context the word “demonstration” means any effort by a citizen or citizens to express a point of view by lawful means in a public space normally open to use by all citizens. Such a model is provided in the main portion of this paper. Several caveats are appropriate with respect to these suggested guidelines.

First, the only demonstrations to which these guidelines ought to be applied are those which fall under the freedoms granted by the First Amendment of the United States Constitution (which freedoms are contained in the constitutions of the states). Other types of demonstrations may be subject to other, specific rules. If, as an example, a labor demonstration is involved these rules should not be applied and the agency should consult with knowledgeable counsel before acting.

Second, it is important to stress that these guidelines assume that there has been no judicial action that has resulted in a consent decree or other order that directs how law enforcement shall respond to such events.

Third, in all cases, no policy should be adopted by an agency without legal review which assures that the legal advisor for that agency is satisfied that it is based on the appropriate controlling legal authorities for that jurisdiction. In some jurisdictions such legal review may require approval by the governing body of the agency as well as the legal advisor.

Fourth, once a policy has been adopted there should be proper, ongoing training directed at the goal of providing the officers who will be tasked with implementing the policy, with a clear understanding of the proper manner in which to discharge their responsibilities.

Last, each event which requires application of all or any part of the policy should be treated as an opportunity to evaluate and, if necessary, modify the policy based on the lessons learned from the event.

When appropriate, under the LEIU Criminal Intelligence File Guidelines or Code of Federal Regulations, Title 28, Part 23, information obtained while following the policy adopted in the particular jurisdiction may be used for creating temporary files, intelligence files, or both.

MODEL GUIDELINES

Statement of Need

It is the responsibility of law enforcement agencies to provide for the safety of the public at public events, including events which are for the purpose(s) of exercising First Amendment privileges. The purpose of these guidelines is to assist in establishing the proper balance between the needs of law enforcement to secure the public's safety and the right of citizens to exercise First Amendment privileges.

It is always the case that an agency has an obligation to respect First Amendment freedoms. Those citizens who participate in a demonstration have an expectation that they will be permitted to lawfully make their point safely and without disruption from persons within the demonstration or disruption by persons not participating in the demonstration. Citizens not participating in a demonstration have an expectation that the demonstration will not be conducted in a manner that will endanger the safety of their persons or property. Law enforcement does not have an obligation to enable the exercise of constitutional rights; rather it has an obligation to provide for the safety of all citizens, demonstrators and non-demonstrators, in a manner that honors constitutional rights.

Right to Access Information

A law enforcement agency may seek information from all legal sources with regard to the question of whether the group(s) or any member(s) of the group(s) to be involved in the demonstration have been involved in unlawful behavior which would present a threat of harm to persons or property within the jurisdiction of the law enforcement agency or would prevent other citizens from exercising their First Amendment Rights.

Information, which a law enforcement agency may access, shall include all materials that have been gathered by the authority that has or shares approval responsibility for demonstrations if that authority is not the law enforcement agency. Such information may be used by the law enforcement agency in its planning with respect to the demonstration.

Observation

In all cases, law enforcement intelligence officers/agents may observe the demonstration to the same extent as any member of the public who is invited to observe the demonstration. This "same as any member of the public" rule applies to demonstrations that occur in any location to which there is no limitation on which members of the public are invited.

A law enforcement intelligence officer does not have to identify himself or herself as a law enforcement officer while observing a demonstration.

Photography/Recording

Law enforcement intelligence personnel may take photographs, videotape, make audio recordings or otherwise record a demonstration. If the demonstration is conducted peaceably and in accordance with the permit issued for the demonstration, the recordings may be retained for a reasonable period of time not to exceed 60 days, and then destroyed. If the demonstration is not conducted peaceably or in accordance with the permit issued for the demonstration, the recordings may be retained and may be used for identification and prosecution and/or for intelligence purposes.

Unless law enforcement intelligence personnel have a legal justification to detain a person involved in a demonstration, no person shall be detained for the purpose of making a visual record of his/her presence at the demonstration.

If credible, reliable information has been received that persons, groups or organizations participating in the demonstration have, in the past, been involved in unlawful behavior in connection with demonstrations, then law enforcement intelligence personnel may record such persons, groups or organizations and the persons, groups or organizations with whom or which they interact at the demonstration. Such recordings shall be made for the purpose of protecting the rights of those persons whose goals are within the proper exercise of their First Amendment privileges and the safety of members of the public present at the demonstration.

Recordings made for the purposes stated in the preceding paragraph may be retained for a reasonable period of time not to exceed 60 days, and then destroyed unless unlawful conduct has occurred. If unlawful conduct has occurred, the recordings may be used to identify those persons reasonably suspected of engaging in, instigating or aiding/abetting the unlawful conduct. Images of persons reasonably suspected of engaging in unlawful conduct may be retained for the purpose of prosecution and/or may be retained in intelligence files for the appropriate period of retention governing such files. Any images that do not assist in identifying persons reasonably suspected of involvement with the unlawful conduct should be destroyed within a reasonable period of time not to exceed 60 days.

Documentation

All observations of demonstrations by law enforcement intelligence personnel may be used for the purpose of improving security procedures in connection with public demonstrations.

When a demonstration has been peaceful and conducted as required by the permit issued for the demonstration, the head of the law enforcement agency (or his/her designee) with jurisdiction may notify the permitting agency(s) that there were no incidents. In the event the law enforcement agency is the sole permitting agency, it may place such a notice in the public records pertaining to the demonstration.

When there has been unlawful behavior in the demonstration a report should be filed. This report may be used for prosecution purposes and/or any other legitimate law enforcement purpose including intelligence purposes.

Participation

A law enforcement intelligence officer may participate in a demonstration in an undercover capacity when the level of approval required by the policies and procedures of his/her department has been met and:

1. there is documented credible, reliable information that a person(s) lawfully participating in the demonstration is in danger of harm; or
2. that an officer already acting in an undercover capacity needs to participate in the demonstration to preserve his/her undercover credibility; or
3. there is a legitimate investigative or public safety need for an officer(s) to participate in the demonstration, such as monitoring the activities of the demonstrators and spectators, to prevent any unlawful activity or disruption of the demonstration; or
4. to further an intelligence or criminal investigation.

If a law enforcement intelligence officer participates to maintain undercover credibility, the participating officer should not assume any leadership or organizational role in the planning or execution of the demonstration plan other than participation.

In any of the situations mentioned above occur; the participating officer(s) should file a complete report of his/her actions and observations within the shortest reasonable time after the demonstrations. Such reports shall not be open to the public unless state or local law requires that they be open to the public.

DEMONSTRATION GUIDELINES AUTHORITIES

These case authorities were relied on in the construction of the Demonstration Guidelines document. While they were persuasive in the mind of the Guidelines author, it is always prudent to have legal counsel for your agency examine them in light of the controlling legal authorities in your jurisdiction.

1. Access to Permit Information:

- *Sullivan and Dansinger v. City of Augusta* 511 F.3d 16 (1st. Cir. ME. 2007) – The issue in this case was the application of a city ordinance which dealt with parades and “mass outdoor gatherings”. Useful rules from this case are: (a) although the First Amendment protects protest marches there is no absolute right to stage a protest march; (b) the standard applied is whether the permit requirements are reasonable in light of the other regulations governing the streets; (c) the mere existence of a regulation that applies to street marches does not “chill” the exercise of First Amendment rights; (d) if a party asserts that the regulation “chills” or otherwise impinges on the exercise of the First Amendment right the burden is on that party to show (i) a concrete and particularized invasion of a legally protected interest which (ii) is actual or imminent rather than hypothetical or conjectural; (e) an advance notice requirement of up to 30 days is reasonable provided there is a provision for spontaneous demonstrations; and (f) law enforcement may review the permit information in those cases in which it is not the primary entity with which the permit must be vetted, such review may require face to face meetings so long as reasonable exceptions are provided.

The case also contains most of the provisions of the ordinance that was upheld against the various challenges and can serve as a useful source of language for jurisdictions which are creating permit ordinances.

- *Green v. City of Raleigh* 523 F.3d 377 (4th Cir. NC. 2008) – The city ordinance at issue in this case requires persons who wish to picket or demonstrate on public sidewalks or other public thoroughfares to give advance notice and comply with certain restrictions. Useful rules from this case are: (a) a city has a legitimate interest in maintaining the “safety, order and accessibility of its streets and sidewalks”; (b) an advance notice requirement which doesn’t interfere with the speech interest more than necessary is constitutionally proper; and (c) the advance notice requirement allows the police to assign those personnel necessary “to protect the safety, order and First Amendment right of both demonstrators and bystanders.”

Obviously law enforcement has a right to the information so it can carry out its duties. A copy of the city code sections upheld as constitutional is attached to the case as an appendix.

- Long Beach Area Peace Network v. City of Long Beach 522 F.3d 1010 (9th Cir. CA. 2008) – A municipal ordinance governing demonstrations was challenged on various constitutional grounds. While the case – not surprisingly since it is the 9th Circuit – found some parts of the ordinance to be acceptable and others to be unacceptable, it upheld and applied the general rules that: (a) permit requirements are appropriate when an event would likely pose a threat to public safety and (b) law enforcement has a legitimate need to have access to permit information.

The case does provide a good review of the First Amendment issues and discussion of authorities in the issue area.

2. Observation of the First Amendment Activity:

- Laird, Secretary of Defense v. Tatum 408 U.S. 1 (1972) held that the mere surveillance of First Amendment activity by government authorities does not “chill” the exercise of such rights. While this case arose out of the 1967 Detroit riots it is the standard for this proposition. Obviously the cases cited above which endorse law enforcement involvement in First Amendment event control for public safety and related purposes assume that law enforcement will observe the events.

3. Photography/Recording of First Amendment Activity:

- Handshu v. Special Services Division 475 F.Supp.2d 331 (U.S.D.C., Southern Dist. N.Y. 2007) – Although this case arose and relates to a jurisdiction which was under a judicial consent decree it is useful on the photography issue. Here there were two contrasting situations. In one, photographs had been taken of persons who were committing infractions of the law (running stop signs) in connection with a sanctioned demonstration. In the other, photographs were taken of persons who were engaged in a demonstration but no legal or permit violations occurred (a subsequent factual submission would show that there were permit violations).

In the first instance the court found that there was a “legitimate law enforcement purpose” (a reasonable suspicion or belief) for the photography, in the second it found no such purpose. Of importance is the fact that this ruling was a “tightening” of an order entered immediately after 9/11/01, which allowed photography when documentation was deemed “potentially beneficial or useful”.

Further, this case applied the Laird rule that law enforcement observation of demonstrations did not “chill” the exercise of the First Amendment rights. It also commented on the use of infiltration and/or undercover operations as constitutionally permissible, so long as the infiltrating/undercover person does not encourage the unlawful exercise of these rights (the infiltration issue is discussed more extensively in a subsequent section of these authorities).

- Piscottano v. Murphy 511 F.3d 247 (2nd Cir. Conn. 2007) involved a disciplinary action against state correctional officers who were members of the Outlaws M.C. This case made several helpful findings: (a) it is proper to rely on information from an intelligence system, criminal prosecution records and expert analysis/opinion based on such sources to determine/establish that an organization engages in unlawful activities; (b) when an association with an organization which engages in unlawful activity poses a threat which the government needs to address the association can be the basis for acting as to the associated individual provided there is credible evidence that the individual supports the unlawful goals and/or methods.

4. Infiltration/Undercover:

- U.S. v. Mayer 490 F.3d 1129 (9th Cir. Cal. 2007), *cert.den.* 128 S. Ct. 1105 (2008) is a very helpful case. An FBI agent infiltrated NAMBLA initially in connection with an ongoing investigation. After the investigation was closed, the agent continued to belong to and participate in activities of the organization. The agent was not entirely passive in his association.

The helpful findings in this case are: (a) the test here is whether the actions undertaken are unreasonable in light of the values of free expression; (b) rejected the concept that introduction of an “agent provocateur” into an organization was forbidden by the First Amendment (had this concept been accepted it would essentially eliminate undercover operations with respect to First Amendment situations); (c) measured the undercover operator’s conduct by the standard whether it interfered with the organization’s expressive/associational interests finding that because there was no assumption of leadership or published misstatements of the organization’s goals no interference occurred; (d) applied the “invited informer” doctrine which sustains an undercover investigation if (i) it is undertaken in “good faith” (not for the purpose of interfering with exercise of First Amendment rights) and (ii) the investigator acts strictly within the limits of the invitation which has been extended. In other words, the court concluded that the invitation extended determines the extent of the privacy expectation which is reasonable.

With respect to “good faith” the court held “...good faith...requires that an investigation threatening First Amendment rights, like any government investigation, be justified by a legitimate law enforcement purpose that outweighs any harm to First Amendment interests.”. In this connection, then, so long as there is a legitimate law enforcement purpose there is no need for reasonable suspicion or probable cause before an investigation can occur.

5. Counter-Demonstration Issues:

- While this matter is not covered as part of the model a recent case is worth noting because it provides a good example of measured and appropriate conduct by law enforcement. In *Startzell v. City of Philadelphia* F.3d (3rd Cir. PA. 2008) a gay pride group had obtained a permit for a street celebration open to the public. A counter belief group had announced its intention to attend and protest the event. When the permitted group learned of the intentions of the counter belief group, it requested that the police prevent the counter belief group from attending. The helpful rulings from the case are: (a) that a private sponsored event open to the public in a public forum is just that, and the police will not be required to bar admission of any member of the public; (b) issuance of a permit to conduct an event in a public place does not transform the nature of the place – it is still public; (c) the state may take reasonable action to maintain public order when the exercise of First Amendment freedoms would threaten public order; and (d) that “**The right to free speech does not encompass the right to cause disruption...**”
- It would also be useful for counsel to read *ACLU of Colorado v. City and County of Denver* 2008 U.S. Dist. LEXIS 59591 (8/6/08). Although this case was not certified as citable, it contains a very good and complete constitutional analysis of the steps taken to provide for safety and provide for the exercise of First Amendment rights at the recent political convention in Denver. Of greatest importance is the point that it is the purpose of the government regulation that will be the focus of the legal analysis. Thus, the better the articulation of the reasons for the action proposed or taken, the more likely that the regulation will be permitted.
- Undercover operations involving groups, organizations or associations active in the areas protected by the associational freedoms umbrella have generated discussion. Some comments are in order.
 - “Agents provocateur” is the concept arising out of the ConIntelPro era during which some law enforcement entities not only infiltrated groups but became actively involved in advocating that the groups engage in unlawful acts. The initial *Handshu* case involved such activities. In the *Mayer* case the court rejected the argument that any infiltration by an undercover operator ought to be viewed as the introduction of an “agent provocateur”, which would lead to the conclusion that such infiltration could never occur, period. Thus, the issue turns to an examination of the conduct of the infiltrator.
 - Leadership positions ought to be avoided by an undercover operator simply because the exercise of leadership will be construed as setting the policy and/or actions of the group, association or organization. Any basis for the argument that the infiltrator was able to set policy is the predicate for the argument that, but for the undercover agent’s assumption of the leadership position, the unlawful activity would not have occurred. Put another way,

the organization would never have expressed its beliefs in an unlawful manner had it not been for the “agitation” of the infiltrating law enforcement agent.

- This leads to the wisdom of the application of the “invited informer” rule. As the discussion in Mayer makes clear, so long as the infiltrator does not assume a leadership role and does not act beyond the role he/she is “invited” to play, there is not going to be a finding that the infiltration “chilled” the exercise of associational freedom. Obviously, this will allow the use as intelligence and/or evidence of the information gathered by the infiltrator.