



**AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO**

CATHRYN L. HAZOURI EXECUTIVE DIRECTOR, MARK SILVERSTEIN, LEGAL DIRECTOR

December 30, 2004

John W. Hickenlooper, Mayor  
City and County of Denver

Rick Garcia,  
Denver City Council

Elbra Wedgeworth, President  
Denver City Council

Jeanne Faatz,  
Denver City Council

Judy H. Montero,  
Denver City Council

Rosemary E. Rodriguez,  
Denver City Council

Jeanne Robb,  
Denver City Council

Peggy Lehmann  
Denver City Council

Michael B. Hancock,  
Denver City Council

Marcia Johnson,  
Denver City Council

Carol Boigon,  
Denver City Council

Charlie Brown,  
Denver City Council

Doug Linkart,  
Denver City Council

Kathleen MacKenzie,  
Denver City Council

Dear Mayor Hickenlooper, Council President Wedgeworth, and Members of the City Council:

Since 1997, without any decision by the City Council or any other elected official, the Denver Police Department (“DPD”) has committed the City and County of Denver to an intergovernmental agreement with the FBI. Pursuant to this signed agreement, two Denver police detectives, Tom Fisher and Stephen MacKenna, are working full-time for the FBI’s Joint Terrorism Task Force (“JTTF”).

Although these officers remain on Denver’s payroll, they are supervised by the FBI and not by Denver’s Chief of Police. They work outside the normal lines of DPD accountability. Indeed, FBI rules forbid these officers from disclosing the details of their work through the DPD’s chain

of command, which does not have the security clearances the FBI requires for such communications. The DPD Internal Affairs Bureau cannot obtain the full information it would need to investigate a complaint that these officers violated the law or DPD regulations. The Denver City Attorney's office cannot provide informed legal advice about whether specific activities of these officers comply with Colorado law and the applicable policies of the Denver Police Department.

Those applicable DPD policies include DPD Policy 118.03, which governs the collection, maintenance, and dissemination of intelligence information. The Denver Police Department adopted this policy in 2003 as part of the Settlement Agreement in American Friends Service Committee v. City and County of Denver, the lawsuit that is commonly known as the "Spy Files" case. The Settlement Agreement and Policy 118.03 are more restrictive than the Attorney General Guidelines that govern FBI investigations. Thus Denver police officers are prohibited from collecting, maintaining, or disseminating information that their counterparts at the FBI are permitted to collect, maintain, and disseminate.

The Settlement Agreement and Policy 118.03 require periodic audits to evaluate Denver's compliance. To conduct these audits, Denver hired former Colorado Court of Appeals Judge Steve C. Briggs, of the Judicial Arbiter Group, Inc. Because of FBI secrecy, however, Judge Briggs cannot obtain the information he needs to do his job. In his Third Audit Report, dated October 27, 2004, Judge Briggs devoted several pages to this problem. He concluded that he does not have sufficient information to determine whether the Denver detectives assigned to the JTTF are complying with Policy 118.03 and the Settlement Agreement.

In other localities, unelected officials are not permitted to commit their city to the terms of an intergovernmental agreement. In Portland, Oregon, for example, elected officials make the decision whether their city's police officers will participate in the FBI's Joint Terrorism Task Force. In recent years, the Portland City Council has received input from members of the public and has carried out a public discussion of the pros and cons of renewing the Memorandum of Understanding with the FBI.

In Denver, however, the City Council has never ratified or even discussed the decision to assign Denver police officers to work full-time for the FBI. There has been no public airing of the pros and cons. Indeed, the Police Department refused an ACLU request to disclose basic information about the City's arrangement with the FBI, such as a copy of the Memorandum of Understanding. After the ACLU filed suit in 2003 under the Open Records Act to obtain a copy of that document, the City Attorney's office argued that it would be "contrary to the public interest" to disclose the number of police officers on Denver's payroll who are assigned to the FBI.<sup>1</sup> The Denver City Clerk's office does not even have a copy of a second document, the Reimbursement Agreement, that lays out certain financial arrangements between Denver and the FBI.

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<sup>1</sup> Chief Whitman had earlier revealed, at a public meeting of the Denver Public Safety Review Commission on May 15, 2003, that two Denver detectives are currently assigned to the JTTF.

Denver's elected officials, not the Chief of Police, should decide whether Denver should continue to participate in the FBI's Joint Terrorism Task Force. They should make that decision after obtaining input from the public and full information about the role that Denver police officers play in the JTTF.

This issue is especially important in Denver. To its credit, Denver has taken a strong stand in favor of protecting civil liberties, and it has done so at a time of widespread concern that federal law enforcement authorities may be moving in the opposite direction.<sup>2</sup> The Settlement Agreement in the Spy Files case represents Denver's commitment to end the prior practice of monitoring and keeping files on the opinions and peaceful political activities of Colorado residents who do not pose any threat. The FBI, however, continues to collect the same kind of information about peaceful political activities that Denver police are now prohibited from gathering. (Documents confirming the FBI's collection of such political surveillance information in recent years, many obtained from Denver police files in the Spy Files lawsuit, are available on the ACLU of Colorado's website at <http://www.aclu-co.org/spyfiles/fbifiles.htm>). In May, 2002, while the Spy Files controversy was unfolding in Denver, the Department of Justice relaxed the Attorney General Guidelines that govern the FBI. Thus, the contrast between the newly-adopted DPD regulations and the FBI rules is even more pronounced than in the past.

Chief Whitman maintains that Denver police officers assigned to the JTTF are bound by Policy 118.03 and the Settlement Agreement. Because of FBI secrecy, however, the DPD chain of command cannot verify or confirm that these officers are indeed complying. According to Judge Briggs, DPD Deputy Chief Battista confirmed that the Department "has no way of actually knowing whether the two detectives [assigned to JTTF] are performing their duties in compliance with the policy."<sup>3</sup>

Indeed, it is not clear that these two detectives have even understood that they are obligated to comply. Although Chief Whitman told the Public Safety Review Commission in May, 2003, that the JTTF-assigned officers are bound by the Settlement Agreement and Policy 118.03, he was immediately contradicted at the same public meeting by then-City Attorney Wallace Wortham. According to Mr. Wortham, the Settlement Agreement does not apply to the DPD officers assigned to the JTTF. Mr. Wortham declared that the information-collection activities of these officers are governed solely by the rules and guidelines of the FBI.

Sixteen months later, Judge Briggs's team interviewed Detective Fisher and Detective MacKenna. The Third Audit Report states that both detectives shared Mr. Wortham's understanding rather than the view expressed by Chief Whitman:

Both stated their understanding that when they are working with DJTTF they are subject only to federal guidelines, such as the United States Attorney General

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<sup>2</sup> In 2002, for example, Denver became the second of what are now 363 cities and counties that have responded to the threats to freedom posed by the USA Patriot Act by adopting resolutions confirming their commitment to civil liberties.

<sup>3</sup> Steve C. Briggs, Third Audit Report, Denver Police Intelligence Bureau, October 27, 2004, at 12 (hereinafter "Third Audit Report").

(AG) guidelines. The [DPD Intelligence] Policy does not apply. This is contrary to the understanding of Chief Whitman, as expressed to the Public Safety Review Commission at its meeting on May 15, 2003.<sup>4</sup>

In a written response, Chief Whitman said that the two DPD detectives assigned to the JTTF “may not have elaborated enough on their answers [to the auditor], thus causing the misunderstanding, and they regret any misunderstanding.”<sup>5</sup>

The Third Audit Report also raised questions about the role of DPD officers in a controversial JTTF operation that targeted young political activists in Denver in the summer of 2004. On July 22, two teams of JTTF agents, accompanied by Denver police officers in SWAT gear, appeared simultaneously at two Denver residences that are home to a number of young people who have participated in local rallies and demonstrations.

At the first residence, the JTTF agents posed three questions: Are you planning to commit any crimes at the upcoming Democratic and Republican conventions in Boston and New York? Do you know anyone who is planning any crimes? Are you aware that you commit a crime if you have some information but fail to tell the FBI? When the young people declined to provide their names, the FBI responded that they would therefore have to use more “intrusive means” to complete their job. One of the DPD detectives assigned to the JTTF participated in the visit to the second home, where JTTF agents asked the same three basic questions about the upcoming political conventions.

These JTTF visits to Denver homes were part of a coordinated JTTF action carried out in at least six states. They were the subject of repeated media attention in both the Denver newspapers and the national press, as critics charged that the FBI was actively attempting to intimidate dissenters rather than conducting a legitimate investigation.<sup>6</sup>

After the New York Times published a front-page article about the JTTF campaign,<sup>7</sup> three members of the House Judiciary Committee called for a Justice Department investigation to determine whether the JTTF was engaged in “systematic political harassment and intimidation of legitimate antiwar protesters.”<sup>8</sup>

The Third Audit Report devoted five pages to an analysis of the DPD’s role in the JTTF’s interrogation of young people in Denver. After reviewing the explanation that the FBI provided to the news media, Judge Briggs concluded that the FBI’s rationale did not satisfy Policy

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<sup>4</sup> Third Audit Report, at 11.

<sup>5</sup> Letter dated November 15, 2004 from Chief Whitman to Judge Steve C. Briggs, at 2-3.

<sup>6</sup> See Karen Abbott, “FBI, Police Visits to Young People Rile ACLU Official,” Rocky Mountain News, July 24, 2004; Karen Abbott, “FBI Queries Rattle Activist,” Rocky Mountain News, July 27, 2004; Karen Abbott, “FBI Admits Probe,” Rocky Mountain News, July 29, 2004; Karen Abbott, “Missouri Activists Dogged by FBI,” Rocky Mountain News, July 30, 2004; Jim Hughes, “FBI Interviews, Subpoenas Activists,” The Denver Post, July 30, 2004; Bill Johnson, “Scary New Era in U.S. History,” Rocky Mountain News, July 31, 2004; Susan Greene, “Activists Decry Pre-Convention Security Tactics,” The Denver Post, August 26, 2004.

<sup>7</sup> Eric Lichtblau, “FBI Goes Knocking for Political Troublemakers,” The New York Times, August 16, 2004.

<sup>8</sup> Eric Lichtblau, Inquiry Into FBI Questioning Sought,” The New York Times, August 18, 2004

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118.03's minimum standard of reasonably suspected involvement in criminal activity. Judge Briggs also quoted a New York Times editorial that criticized the JTTF operation for chilling dissent, and which also warned that "the knock on the door from government investigators asking about political activities is the stuff of totalitarian regimes."<sup>9</sup>

The JTTF campaign of interrogations in the summer of 2004 poses an even greater threat to First Amendment rights than the Denver police practices that prompted the Spy Files controversy. The JTTF is not simply collecting information and building files on political views and associations. The JTTF campaign of knocking on doors and questioning activists represents an active, deliberate attempt to intimidate dissenters. It resembles tactics drawn from the Hoover-era FBI and the COINTELPRO years, when FBI agents intentionally initiated interviews for the very purpose of intimidating and deterring persons from participating in constitutionally-protected expression and association.

In light of Denver's commitment to ending the practices that prompted the Spy Files controversy, the Mayor and the City Council should evaluate Denver's role in the intergovernmental agreement that assigns Denver police detectives to the JTTF. The City's elected officials – not the Chief of Police acting on his own – should decide Denver's relationship with the JTTF. Denver's elected officials should determine whether detectives on Denver's payroll should continue working – with no accountability to Denver officials – for a secret law enforcement agency whose activities pose a greater threat to First Amendment rights than the practices Denver agreed to end when it settled the Spy Files lawsuit.

Sincerely,

Mark Silverstein,  
Legal Director, ACLU of Colorado

Cc: Cole Finegan, Denver City Attorney

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<sup>9</sup> Third Audit Report, at 20-21, quoting Editorial, "Interrogating the Protesters," The New York Times, August 17, 2004.