



TO: Mayor Sam Adams
Commissioner Randy Leonard
Commissioner Amanda Fritz
Commissioner Nick Fish
Commissioner Dan Saltzman

FROM: Andrea Meyer, Associate Director of Advocacy & Policy, ACLU
David Fidanque, Executive Director, ACLU of Oregon

DATE: February 23, 2012

RE: ACLU Analysis of the Annual JTTF Report per Resolution 36859

Introduction

The ACLU remains committed to ensuring that the terms of the April 2011 Council Resolution on cooperation between the Portland Police Bureau and the FBI's Joint Terrorism Task Force are followed. The ACLU of Oregon publicly supported passage of the Resolution last year despite our significant reservations. Many of our coalition partners expressed surprise at our support, but we took that position because we believed the Resolution contained meaningful legal requirements and safeguards that would be carefully followed.

We have looked forward to the first report on the Resolution's implementation in hopes that it would provide the Council and the public the level of transparency and compliance necessary to overcome the very legitimate ongoing objections and concerns regarding the Justice Department's and the FBI's intrusive monitoring of lawful constitutionally protected activity.

Unfortunately, these first reports from the Chief of Police and the Mayor fall far short of providing any information other than vague reassurances to the public that the City is actually in compliance with the requirements of the Resolution, Oregon law and the Constitution, including protections for lawful political, religious and social activities.

Of particular concern to us is that the Chief appears to have ignored his responsibility to ensure the Resolution's requirement that PPB officers work only on investigations of "suspected terrorism that have a *criminal nexus*." During consideration of the Resolution last spring (and consistent with the Resolution), the Chief testified that he would personally make that determination

in each case, but there is no indication in his report that he has done so. While the ACLU expressed concerns about the use of the undefined term “criminal nexus” in the Resolution, one of the key reasons we still supported its passage was the safeguard that the Chief would make that determination in consultation with the Commissioner-in-Charge. Again, there is no indication in either report that this critical factual determination was made by the Chief in any instance, much less in consultation with the Mayor.

The Resolution requires that the Mayor and the Chief have FBI security clearance “to ensure access to information necessary to manage and supervise PPB officers.” Almost one year in, the Mayor has not received any clearance and the Chief, after significant delay in applying, has not obtained the required level of clearance.¹

In addition, we have concerns about the role of the City Attorney, the adequacy of the training provided to the officers and their supervisors, and the lack of compliance with other terms of the Resolution as we set out in more detail below.

We do not understand how the Chief can report that a Senior Deputy City Attorney has concluded the city is in full compliance with the Resolution. The requirements for access and oversight were not companions to the City’s participation in JTTF work, but were preliminary obligations necessary to the City even *considering* requests from the FBI. The Resolution in and of itself does not authorize PPB officers to work with the JTTF. Instead, it sets forth the terms and conditions which must be met *prior to* commencing any work by the PPB to with the JTTF on a particular investigation.

Having engaged in good-faith discussions and negotiations with the City in 2010 to 2011, having advocated for the specific safeguards now being ignored, and having cautioned that the test of our support would be reflected in the contents of this first report, we could not be more fundamentally disappointed.

We believe the City should suspend its engagement with the JTTF until the City complies with the requirements of the Resolution. In addition, we now believe that independent oversight should be added as a future prerequisite because the past year demonstrates at best an incomplete understanding of the Resolution, little appreciation for Oregon law, and none for the import of the very different rules and policies of the FBI.

Key to Formatting

For purposes of the memo, we have numbered the operative provisions of the Resolution sequentially and have **highlighted key text**. We have then excerpted the relevant text from both of the reports “in bold and quotes” followed by either or both a

¹ We presume he has secret clearance but it is not stated.

CP (Chief of Police) or MA (Mayor Adams) to identify which report. Following that we have added our analysis.

The Resolution, the Report & the ACLU's Concerns

- I. *BE IT FURTHER RESOLVED, the Police Chief shall regularly consult with the FBI Special Agent in Charge (SAC) to determine which aspects of JTTF work could benefit from PPB participation and whether there are PPB resources available to be allocated;*

“Since the passage of the City’s Resolution, I have conferred on numerous occasions with the FBI SACs about terrorism investigations and threats from terrorism. In order to have an accurate sense of resources that might be available to work with the JTTF, I confer as needed with the lieutenant of the Criminal Intelligence Unit (CIU) or his supervisor to ensure an appropriate balance is maintained between the local staffing needs of his unit and our work with JTTF.” (CP)

What is missing is any suggestion that the Chief directly handled every request by the FBI SAC for the use of Portland resources and that the Chief then made the necessary factual analysis in order to determine which *aspects* of any JTTF work were appropriate for Portland.

The requirement of the Resolution was clear to the Chief at the time of passage. At the April 28, 2011 hearing on the Resolution, Commissioner Dan Saltzman and Chief of Police Mike Reese had the following exchange:

Saltzman: So the criminal nexus language that was just being discussed, as I’m reading the Resolution, that’s really a decision that the Chief, in consultation with the Commissioner in Charge, makes. It’s a deliberately new term, so it’s really the discretion of the Chief to make that decision about criminal nexus, if requested by the FBI?

Reese: Yes.²

For **each** request for assistance by the FBI, the Chief of Police should have ascertained the stage of the inquiry as defined by the FBI. And, if the inquiry was either at the assessment or preliminary investigation stage, it should automatically trigger more questions to ensure that PPB involvement in those inquiries would not run afoul of the Resolution and Oregon law. In addition, that information should be shared with the Commissioner-in-Charge as part of the Chief’s further consultation and discussion.

² You can find the April 28, 2011, City Council hearing audio at 122:27 minutes: <http://www.portlandonline.com/index.cfm?c=49508&a=347091>.

Making that independent determination, including ascertaining the stage of the FBI investigation, is important because between March 25, 2009 and March 31, 2011, the FBI opened **82,325** assessments of people and groups, of which **42,888** were assessments of people or groups possibly related to terrorism or espionage.³ Assessments do *not* require a particular factual basis for suspecting a target of wrongdoing according to the FBI manual. Almost all of those assessments, more than 95%, were closed without finding evidence of wrongdoing that would have justified further inquiry. Nevertheless, all information collected during these assessments is retained and maintained by the FBI.

Assessments do not require a “criminal nexus,” the requirement which is necessary under the terms of the Resolution in *all* cases when the Police Bureau assists the FBI.

Similarly, FBI preliminary investigations are also permitted based on the lower standard that a federal crime “may have” occurred or “may occur” and the investigation “may obtain” information of such activity. In our view, this tenuous standard also falls far short of the Resolution’s “criminal nexus” standard which must be met before authorizing any assistance at the FBI preliminary investigation phase. Since as a matter of practice, the FBI categorizes all of its inquiries, the Chief need only ask for this information when a request is made to him.

Last year the ACLU presented City Council with well-documented abuses by the FBI of their own guidelines and policies confirmed by investigations carried out by the Office of Inspector General of the Department of Justice. We also presented unrefuted testimony that the Justice Department’s response to those abuses was to further weaken the Attorney General’s Guidelines and FBI policies, rather than to strengthen the FBI’s oversight and accountability.

As a result, the FBI’s current policies allow them to collect and maintain information on a person based **primarily** on constitutionally protected First Amendment activity even when there is no articulable suspicion of criminal wrongdoing. When the FBI is engaged in “assessments” or “preliminary investigations,” the risk of activity that violates Oregon law is at its highest. While Council did not specifically bar Portland from assisting at those stages, it did require that Portland would *not* participate in *any* investigative work which includes investigating a person’s political, religious or associational activities unless there is reasonable suspicion the individual is involved in terrorist activity.

The safeguards in the Resolution were included because everyone understood that JTTFs across the country have engaged in work that not only would violate Oregon law, but also violated the FBI’s previous policies. Since nothing in either the Chief’s or

³ New York Times, August 23, 2011 http://www.nytimes.com/2011/08/24/us/24fbi.html?_r=1 and August 1, 2011 FBI response to FOIA, <http://www.documentcloud.org/documents/238254-fbi-assessment-data-2009-11.html>

the Mayor's reports indicates there was ever any inquiry by the City regarding the stage of the FBI inquiries in which the Bureau participated, we are left to conclude that no independent determination of this critical issue was made prior to each allocation of Portland officers for JTTF work.

If our conclusion is correct, we cannot understand how the City Attorney's Office, the Mayor or the Chief could have had any evidence with which to conclude there has been no violation of Oregon law. Instead of making vague assurances, the Chief and the Mayor, with the assistance of the City Attorney, should have engaged in some factual analysis in order to determine whether Portland was legally authorized to assist the FBI with the particular inquiries.

II. *BE IT FURTHER RESOLVED, the Police Chief may assign PPB officers to work with the JTTF on an as-needed basis as determined by the Police Chief in consultation with the Commissioner-in-Charge of PPB;*

"In consultation with the Commissioner-in-Charge of PPB, I decided that CIU was the best unit to be prepared to provide resources if requested. I asked the Lieutenant of CIU to identify two officers who could be assigned to JTTF if needed. I limited the number of officers eligible to work with the JTTF in order to ensure effective oversight and consistency with the City's Resolution.

I know that some of the public has a keen interest in knowing the details of our work with the JTTF. We have committed a very limited amount of PPB resources to JTTF work, so disclosure of the number of cases or hours worked would be likely to compromise ongoing investigations and reveal the operational tempo of our work on terrorism. But I can affirm that we have worked with the JTTF at their request on a limited number of domestic terrorism investigations, and we have shared information with the JTTF regarding a suspected international terrorism case." (CP)

"I affirm that the Police Chief has consulted with me regarding the assignment of PPB officers to work with the JTTF on an as-needed basis." (MA)

We separate our comments into two sections:

A) The requirement to consult the Commissioner-in-Charge

Apparently, the Chief consulted the Mayor only once for the purpose of agreeing that the CIU would be the source of the two officers who have been authorized to work with JTTF on an "as-needed" basis.

If the wording of the relevant portion of the Resolution is ambiguous as to whether a single such consultation between the Chief and the Commissioner-in-Charge would be adequate, we believe that read in the context of the entire Resolution and its development, it is very clear. Simply put, the Resolution requires ongoing consultation between the Chief and the Mayor regarding the nature of the assistance requested by the FBI, in particular with regard to the existence of the Resolution's "criminal nexus" requirement.

The consultation requirement was not surplusage. It was intended to be a check on the PPB to ensure that, if the Chief and others had not asked the right questions and adequately determined that the request for assistance fully complied with the Resolution and Oregon law, the Commissioner-in-Charge would do so and that such questions and concerns would be addressed *prior* to the commencement of any PPB work on specific JTTF inquiries.

Despite the Chief's statement that he has "implemented strong, multi-level, and redundant oversight" and despite his representation that a Senior Deputy City Attorney (who we assume is David Woboril) has reported to the Chief that Portland is "in full compliance with...the City's Resolution" the fact is that the Resolution's required oversight has not been implemented and the City is therefore not in compliance.

B) Investigation Details

We find the one sentence excuse by the Chief in his report as to why no quantitative information of any kind will be released regarding the number and types of investigations the Bureau participated in to be nonsensical.

When the ACLU urged the inclusion of an annual report in the Resolution, we discussed with the City what we wanted to see in the Report *prior* to the final introduction and adoption of the Resolution. In addition, our public testimony focused on the types of detail we thought would be necessary to ensure compliance. At neither time was there any indication from the Mayor, the Chief or the City Attorney that providing such information would be viewed as "compromising" ongoing investigations. This includes when Commissioner Fritz affirmed her expectation of the content to be included in the report during the Council hearing.⁴

While we do not purport to be experts on what type of information should be kept confidential, we are confident that merely providing the number of inquiries in which PPB collaborated, the types of inquiries, and whether such inquiries are open or closed, would not in and of itself "compromise ongoing investigations" or reveal Portland's "operational tempo" on terrorism work.

This assertion appears to simply be an excuse for a decision possibly made by the Department of Justice that no quantitative information would be provided by the City. If there has been such an informal or formal requirement imposed by the FBI, the U.S. Attorney or the leadership of the Justice Department in Washington, D.C., the public

⁴ "I appreciate the Mayor agreeing to my request that the annual report in January will be a public document; that every year we will get a report on the activities and citizens will be available -- will have that information and be able to comment on it. And **I do want to see all of the data and statistics requested by Andrea Meyer in this hearing in that report.** I think **those kinds of details are what I will be looking for next January and I think it will be good that again Portland will be having a very public review of what our officers have been doing** and maybe some, what the good outcomes or bad outcomes." Commissioner Amanda Fritz at City Council hearing on April 28, 2011 (emphasis added). http://blog.oregonlive.com/portlandcityhall/2012/02/aclu_of_oregon_and_commissione.html

should be informed. To suggest that stating, for example, that the two officers combined spent a total of 60 hours in 2011 engaged in two full investigations that remain open would somehow compromise an ongoing investigation would be offensive if it were not so ridiculous.

As noted above, in response to a Freedom of Information Act request, the FBI itself has reported the number and types of assessments it opened over a 2 year period. The FBI also disclosed the number of preliminary and full investigations that were opened and remain open based on those assessments. It's worth noting that absent a public records request, the FBI was not providing this information. A desire by a public agency, especially a law enforcement agency, to shroud itself in secrecy under the guise of public safety and security not only has no legal basis but has, in the past, been used to cover up illegality.

As explained above, knowing the type and scope of work of Portland's officers who are cooperating with the FBI is the only way for Council and the public to have any assurance that the necessary checks and balances are working. The failure to provide this critical information reinforces our conclusion that those supervising the work of the CIU officers are not asking the right questions to ensure compliance with Oregon law.

The Chief and the Mayor cannot comply with the Resolution's terms by merely saying "Trust us." Portland is not immune to illegal conduct; both the FBI and the Portland CIU have a well-documented history of violating constitutional rights.

III. *BE IT FURTHER RESOLVED, in addition to regular briefings, and the Police Chief's participation in JTTF Executive Committee meetings,*

PPB officers shall work with the JTTF only on investigations of suspected terrorism that have a criminal nexus;

(I)n situations where the statutory or common law of Oregon is more restrictive of law enforcement than comparable federal law, the investigative methods employed by PPB officers working on JTTF investigations shall conform to the requirements of such Oregon statutes or common law;

A) City of Portland participation in JTTF Executive Committee meetings:

"In order to ensure that I have multiple points of views on our work with the JTTF, I require the Assistant Chief and the CIU Lieutenant to attend JTTF Executive Committee meetings along with me or in my place when I am absent." (CP)

The Resolution requires the Chief to attend the JTTF Executive Committee meetings, **no one else**. This issue was specifically discussed during Council's consideration last spring.

During the Council hearing on April 28, 2011, Deputy City Attorney Ellen Osoinach testified about that provision and very clearly stated that "the Chief of Police is going to

participate in the JTTF Executive Committee meetings.” The testimony and the agreement did not provide for someone else designated by the Chief. We would have raised objections to that and it certainly would have been part of the extensive discussions.

We believe that attendance by anyone from PPB other than the Chief is not authorized by the Resolution and according to the terms of the Resolution should not be happening, absent a modification to the Resolution. We also believe the Chief’s report should include the following additional information:

1. How many meetings of the JTTF Executive Committee have been held since approval of the Resolution?
2. How many did the Chief attend?
3. Does attendance require some level of FBI security clearance?
4. If so, what security clearances do the CIU Lieutenant and the Assistant Chief of Investigations have?
5. When did they receive that clearance?

B) PPB officers shall work with the JTTF only on investigations of suspected terrorism that have a *criminal nexus*:

“I affirm that our officers have only worked on investigations of suspected terrorism that had a criminal nexus and that their investigative methods have complied with Oregon law. We have adhered to the City Attorney’s explanation (provided in testimony before the City Council) of the term “criminal nexus” which was intended to identify the subject matter (i.e. terrorism) on which officers are allowed to work with the JTTF....Thus I affirm that when officers work on JTTF investigations, they are only allowed to work on investigations related to terrorism as defined in federal criminal law and that their investigative methods conform to the requirements of Oregon law.” (CP)

The use of the term “criminal nexus” in the Resolution does not mean that the Chief is merely required to establish that the request from the FBI for assistance is only “related” to the subject matter of terrorism. (We suppose that is to be distinguished from a request to work on a bank robbery crime or some other crime that would not constitute terrorism). Certainly, the lengthy discussion at Council and the testimony by all the participants does not suggest that Council was merely looking for a term to make it clear that the investigations were limited to inquiries related to terrorism. Most, if not all, of the work of the JTTFs is related to terrorism. Indeed, most of the abuses by the JTTF and the FBI across this country, and certainly all the ones we provided documentation for last year, were all carried out under the overbroad banner of preventing terrorism.

The “criminal nexus” language was added at the last minute to replace language in a previous draft of the resolution that the FBI objected to, namely an outright restriction on Portland participating in cases designated at the “assessment” or “preliminary investigation” stage. (As we noted above, both “assessments” and “preliminary”

inquiries can be opened based on extremely limited information including information based on the First Amendment expression of subjects. Both rely on an easily attainable and speculative “possibility” standard that would not comply with the Resolution or Oregon law.)

As Ms. Osoinach testified last year, “The term was intended to describe the investigative activities of the officer that they need to be related to crime.” When Commissioner Fritz asked if the “criminal nexus” test would be satisfied if a person was investigated simply because they attend a mosque where another person has been found to be involved in terrorist activities, Ms. Osoinach answered that this would **not** satisfy the “criminal nexus: test because it would be considered impermissible guilt by association. We note here, that such an investigation *would* comply with the FBI’s operative guidelines and policies.

That particular question by Commissioner Fritz could not be *timelier* in light of the recent detention and interrogation by the FBI of two U.S. citizens traveling abroad who attend the same mosque in Portland. As just reported this week, Jamal Tarhuni was detained as he attempted to return to Oregon and was then interrogated by the FBI, including **Portland FBI agent** Bryan Zinn, about his religious beliefs and about Libya's political future.⁵ (Is Agent Zinn one of the Portland FBI JTTF officers? Were any Portland police officers involved in that inquiry?)⁶

Commissioner Leonard testified last spring that he put forward the “criminal nexus” term because it was *not* a term of art and that Council, current and future ones, could define what it means for themselves.

A few things are clear: the term “criminal nexus” has no legal definition in and of itself. Absent legal counsel providing guidance to the Chief (in consultation with the Mayor) within the factual context of each request for assistance from the FBI, the term would be meaningless and would provide no boundary on PPB activities. The reference cited above in the Chief’s report related to the “criminal nexus” requirement leads us to conclude that he and PPB are reading the term to provide **no articulable individualized suspicion** regarding an individual, group or organization investigated by PPB in cooperation with the FBI. If so, the “criminal nexus” “requirement” is pointless.

IV. *BE IT FURTHER RESOLVED, the PPB officers who work with the JTTF shall notify the FBI SAC and Police Chief if ever the work PPB officers are asked to do would be a potential violation or violation of ORS 181.575 or ORS 181.850*

⁵ See http://www.oregonlive.com/portland/index.ssf/2012/02/portland_man_mustafa_elogbi_ho.html

⁶ We say this, knowing full well that such information will not be disclosed. However, the FBI’s actions against these two individual U.S. citizens is part of a larger “no fly” practice by the FBI that the ACLU and the ACLU of Oregon are currently challenging. We believe these investigations would raise serious problems under Oregon law. In many of our clients’ cases, the FBI detained them abroad, offering them the ability to return to the U.S. if they would spy on their religious community. When they refused, they were not allowed to return.

and shall immediately report any actual violation to the Commissioner-in-Charge of the PPB;

“I have implemented strong, multi-level, and redundant oversight of officers who work with the JTTF. The two officers who were chosen to work with the JTTF as needed are very experienced. They have received training and guidance about the limitations in Oregon law concerning information gathering (ORS 181.575) and immigration investigations (ORS 181.850) from the City Attorney, the CIU lieutenant, the AC of Investigations, and me.

In order to provide oversight, the CIU Lieutenant is involved in the day to day management of these officers’ activities. The Assistant Chief of Investigations meets regularly with the CIU lieutenant to receive up to date reports. And I meet regularly with the AC of Investigations and the CIU lieutenant to review any work we do with the JTTF to ensure it is compliant with Oregon law, the City’s Resolution, and PPB’s policies and procedures.

Officers who work with the JTTF are aware that they should report directly to me (and the FBI SAC) if ever the work PPB officers are asked to do would be a potential violation or violation of Oregon law.

As a result of this oversight, I can attest that officers have not engaged in any violations of Oregon law nor has any officer reported any potential or actual violations of Oregon law to me, the AC of Investigations, or the CIU Lieutenant.” (CP)

“I affirm that no actual violation of ORS 181.575 or ORS 181.850 have been reported to me.” (MA)

We have a number of concerns that we will address in order.

A) Training

First, while we appreciate that the two CIU officers have received training about the Oregon law and the Resolution, we are a bit surprised that this training comes not just from the City Attorney but also from “the CIU lieutenant, the AC of Investigators and me [the Chief of Police].”

With all due respect, the Resolution requires that training come from the City Attorney and, indeed, since the reports state that the only training sessions were limited to the CIU, we are not aware that the AC of Investigations or the Chief, himself, have been trained by the City Attorney. While we do not want officers, or even the Chief, providing the training, we are certainly concerned if they are doing so without having received their own training from the City Attorney. If, indeed the Chief and the AC of Investigations also were trained on these issues by the City Attorney, that would be beneficial and the report should make that clear.

B) Security Clearance: Who Has It & What Type?

While the Chief reports that two officers from the CIU were designated to work with the JTTF as needed, we do not know what their FBI security clearance level is. Since there is no mention that the officers sought security clearance *after* the Resolution was passed, we can only assume they already had it. Prior to 2005, Portland officers working with the JTTF had TS/SCI clearance and, since the two officers currently designated are long time CIU employees, we assume they previously engaged in JTTF work and already had clearance. In addition, the Chief's Report states that the CIU lieutenant serves as the required PPB supervisor when any officer is assigned to JTTF work, that the AC of Investigations provides oversight, and both report to the Chief. The report does not state whether they have clearance.

The facts around who at the Portland Police Bureau has clearance, what type of clearance and when it was obtained should be reported to clarify the situation for the public. As noted earlier, one of the critical safeguards is for the Chief, and ideally other supervisors, to have the same level of clearance as the officers involved in the work so that the chain of command can operate effectively.

C) Potential or Actual Violations

The Reports provide no information on whether there was any verification process by the City Attorney to independently ascertain whether there have been any violations of Oregon law. Other than the Chief's description of his and other supervisors' oversight, the report contains only vague assurances that nothing bad has happened. This concern cannot be emphasized strongly enough as it is critical to ensuring compliance with the Resolution. The Justice Department's refusal in 2005 to allow the City Attorney to apply for a security clearance was one of the reasons Mayor Potter and the Council chose to withdraw from direct participation in the JTTF at that time.

The context of this requirement for officers to inquire of the City Attorney, which ACLU urged and Council adopted, was that the **PPB** has a long history of well-documented abuses of violating Oregon law regarding the surveillance of lawful political, religious and social activity. Requiring independent City Attorney oversight, including examining all CIU files on a regular basis, which occurs *today*, is critical to prevent such abuses now and in the future.

It is essential to know whether the basis for the Chief's assertion that there were no violations of Oregon law was based primarily on his assertion that no actual or potential violations were reported to him. If so, that is inadequate. Absent independent confirmation, the statement that there have been no unintended or intentional violations of Oregon law provides no meaningful assurance of compliance.

If there were an *intentional* violation by an officer (which has happened in the past), no one would be told because such a violation would subject the officer to discipline. If the violation were *unintentional*, the officer would not know (and the FBI won't tell the

officer), so no one but the City Attorney would be able to identify it as a violation. The authority in the Resolution for the officer to seek advice of the City Attorney if the officer has any concerns is only one piece, and was never intended to be the sole check or balance on compliance. We have reason to believe that the CIU officers and FBI agents are routinely working together in the normal course of their duties. If that is true, it will make it more difficult for CIU officers to raise questions or objections.

The Report states that there were no situations created by Portland's work with the JTTF that raised any questions. Why not? Absent knowing: 1) what types of investigations ("assessment," "preliminary investigations," "full investigations") were involved; 2) that a meaningful "criminal nexus" standard was met; 3) there was full compliance with Oregon laws at the outset and throughout; and 4) independent oversight of the investigations and tactics used by the City Attorney, the reports cannot provide the type of assurance required by the Resolution and expected by ACLU when we endorsed the Resolution last year.

- V. *BE IT FURTHER RESOLVED, that PPB officers working with the JTTF shall seek legal advice from the City Attorney whenever the officer has any question about the application of Oregon law, including ORS 181.575 and ORS 181.850, or this Resolution to their work with the JTTF. Any consultation with the City Attorney will be undertaken consistent with the requirements for the handling of classified information and with the other legal restrictions on the dissemination of information. In the event disclosure of classified information is necessary for the City Attorney to provide appropriate advice, the Police Chief shall request the FBI SAC to authorize the City Attorney to receive such information pursuant to a non-disclosure agreement. If the City Attorney cannot obtain the necessary authorization to provide legal advice, the City Attorney shall notify the Police Chief and the Commissioner-in-Charge of PPB;*

A Senior Deputy City Attorney who has provided legal advice to the Police Bureau for over fifteen years has reported to me that we are in full compliance with Oregon law and the City's Resolution regarding JTTF. He has met individually with the two officers identified as eligible to work with the JTTF as well as the lieutenant of the CIU to ensure that they are familiar with the application of Oregon law, including Oregon's limitations concerning the collection and retention of information about a person's political, religious, and social affiliations.

The FBI has not asked the City Attorney to sign a non-disclosure agreement, and the attorney reports that he has received unfettered access to ample information from the officers and their lieutenant in order to assess compliance with Oregon law and this Resolution." (CP)

"I affirm that the staff of the Office of the City Attorney has assured me that they have been able to freely train, question and advise PPB officers on all legal matters regarding their work with the JTTF.

I further affirm that the City Attorney has trained, questioned and advised officers directly and at times independently without their supervisors present." (MA)

- VI. *BE IT FURTHER RESOLVED, PPB officers assigned to the JTTF shall attend annual training, to be conducted by the Office of the City Attorney, to ensure compliance with applicable state and federal law;*

“I affirm that we are in compliance with this provision. In May of 2011 and January of 2012, the City Attorney’s office had an in-service training for the entire CIU which included the two CIU officers identified as eligible to work with the JTTF as needed. The City Attorney trained officers about the provisions of the Resolution, ORS 181.575, ORS 181.850, and Oregon laws that are more restrictive of law enforcement investigative methods and comparable federal law.” (CP).

We have combined the two sections because of the overlap on the training issue and oversight by the Office of City Attorney.

A) Legal Advice & City Attorney Access

The Mayor’s report that the Senior Deputy City Attorney’s asserts that the City is in compliance with Oregon law and the Resolution raises the question of how the Office of City Attorney interprets the relevant law and the binding requirements of the Resolution.⁷ To focus on just one, as we noted above, we believe it is clear that there has been no case-by-case determination that the required “criminal nexus” has been present prior to PPB officers working with the FBI.

Does the Office of City Attorney have any knowledge to the contrary? If so, providing the types and frequency of interaction by the Office of City Attorney with the Chief, the supervisors, and the officers (other than in-service training) would provide some level of reassurance that there is truly meaningful oversight. Or does the Office of City Attorney believe there is no requirement in the Resolution to make a case-by-case finding of “criminal nexus” despite the Chief’s testimony to the contrary last spring?

Has the Office of City Attorney been briefed on the specific investigations and the FBI’s designation (assessment, preliminary or full) in each case as well as the specific work the FBI has asked PPB officers to perform? Even more important, what is the Senior Deputy City Attorney’s working definition of “criminal nexus” and how is it to be applied in a case-by-case basis to determine if it is legal for Portland to assist? Other than

⁷ We want to draw particular attention to the Chief’s statement that the City Attorney has reported the City is in full compliance with the law. If the City Attorney would like to go on record to that effect, that would be interesting. The reports make clear on their face that some important provisions of the Resolution have not been followed. For example: 1) the individualized “criminal nexus” determination by the Chief for each investigation; 2) the lack of ongoing consultation with the Mayor as part of that process; 3) the untimely seeking and obtaining of security clearances by the Chief and Mayor; and 4) the delegation to other PPB personnel to attend JTTF Executive Committee meetings. Any statement that the City is in “full compliance” would raise serious issues about the sufficiency of the inquiry regarding the terms of the Resolution. If there is any doubt about the requirement that all conditions of the Resolution must be followed, not just some, the final provision of the Resolution made it clear that *all* its provisions “are binding city policy.” If this report establishes one *fact* it is that at least some of the binding provisions are not being adhered to as required.

training, what types of interactions has the City Attorney had with the Chief, the CIU lieutenant and the AC of Investigations all of whom are purported to have provided oversight to the CIU officers assigned to work with the JTTF?

In preparing this Report, did the City Attorney, after reviewing all of Portland's work on JTTF activity in 2011, make an independent evaluation? Have there been any lessons learned or protocols put in place by the Office of City Attorney (other than the training) that would provide consistent and meaningful oversight and prevent future violations of Oregon law and the terms of the Resolution?

B) Contents and Length of Training

The Report indicates there were two separate in-service trainings for the entire CIU, portions of which covered JTTF work. In response to our request for copies of the training material, we were advised the training material constituted a written copy of the Resolution and of ORS 181.575.

We had recommended in our testimony before Council that the training should specifically include training on the FBI Guidelines. The officers won't have a meaningful understanding of what they can and cannot do if they are not also trained on what the FBI Guidelines authorize the FBI to do, including the standard for "assessments" and "preliminary investigations" which do not require articulable facts giving rise to individualized suspicion. The Chief and Mayor expect the officers to understand and identify possible or actual violations of Oregon law, but the officers were not trained how to recognize the actual types of situations that will arise in FBI JTTF work that *will* violate Oregon law.

The training curriculum, the length of the course and the frequency of training should have been set forth in great detail or attached as an appendix to the reports.

Also, nowhere in his report did the Chief state that he received any training or meetings with the City Attorney to discuss how he handles the requests from the FBI. The Chief is the only one who receives the requests for assistance (or is supposed to) and apparently approves those requests without consulting the Mayor, and without training or ongoing legal guidance from the City Attorney.

- VII. *BE IT FURTHER RESOLVED, the Police Chief may assign PPB officers to work on JTTF investigations that comply with the requirements stated above regardless of whether or not the investigation is based in the City of Portland. On those occasions, all the terms of the resolution apply, including that the PPB officer's investigative methods must still conform to Oregon law;*

"I have not assigned any officers to work on JTTF investigations outside the City of Portland." (CP)

We would like to know whether the FBI ever requested the use of Portland officers for JTTF investigations outside of the City of Portland. If no such requests were made,

that should be stated explicitly. If they were, the process for deciding not to participate should be explained.

VIII. *BE IT FURTHER RESOLVED, to ensure access to information necessary to manage and supervise PPB officers, the Police Chief will seek clearance at the Top Secret/Secure Compartmentalized Information level, and the Commissioner-in-Charge of PPB will seek clearance at the Secret level;*

“I have implemented this provision. I am in the process of seeking to obtain Top Secret/Secure Compartmentalized Information (TS/SCI) clearance.

When the Resolution was passed, we anticipated that the FBI would require any of our officers who worked with the JTTF to have TS/SCI clearance. After the adoption of the Resolution, the FBI informed us that PPB officers who work with the JTTF would not be required to possess Top Secret clearance. The SAC and I decided that Secret level clearance for the two officers whom I identified as eligible to work with the JTTF would be sufficient.” (CP)

“I affirm that I have sought a FBI clearance at the “Secret” level and that my clearance application is being reviewed by the FBI.” (MA)

A) Chief of Police & CIU Officers

The Resolution required that the Chief obtain TS/SCI clearance and this has not been done. Not only has it not been done, but we are under the impression, which is substantiated by the inclusion of the detailed explanation about why TS/SCI clearance may not be necessary for the Chief, that there was significant delay by the Chief in applying for TS/SCI clearance. We believe Council should request the date the application was submitted and an explanation for any delay. If conditions have changed in a way that would justify a different security requirement, then the proper course would have been to seek an amendment of the Resolution. Until that is done, neither the City Attorney nor the Portland Police Bureau can take it upon themselves to alter the terms of the Resolution informally.

If any CIU officers cooperating with the FBI do have TS/SCI clearance (regardless of when it was obtained), then the Chief should vigorously pursue his current application for TS/SCI clearance so that he can carry out his responsibilities in the chain of command with the same level of clearance enjoyed by officers he is helping to supervise. If officers do *not* have that clearance and there is a decision that as a result, the Resolution should be modified, we would urge that the Resolution be amended so as to explicitly require that at all times the Chief has to have the highest level of clearance that any Portland police officer has.

The reports need to set forth how many Portland police officers have clearance, what type of clearance and when that was received, as well as whether or not there are pending requests for clearance by an officer.

B) Commissioner-in-Charge (Mayor)

When did the Mayor apply for FBI clearance? How long has it been pending? Those in the community who question the FBI's willingness to honor the unique requirements of Portland's Resolution will assume that the FBI intends to let the clock run on the Mayor's remaining term in office and delay so that there is never compliance with the requirement for the Mayor to receive the required security clearance.

Since there has been no mention of applications pending for the CIU officers, they apparently already have FBI clearance and as a result, are engaged in JTTF work in the absence of the Mayor's and the Chief's clearance. While the City cannot control the timing of the FBI in granting a security clearance, the framework of the Resolution, the discussions prior to and upon passage of the Resolution, indeed the entire premise of ensuring that this Resolution had all the necessary protections going forward, required that the Mayor and Chief have the appropriate security clearance as a condition of any JTTF work.

The ACLU, along with our coalition partners, has called for this safeguard for more than a decade and, again, it was one of the major reasons Mayor Potter and the Council withdrew from the JTTF in 2005. It appears that ongoing JTTF work is being authorized by means of a semantic end-run around the terms of the Resolution. In doing so, it undermines the fundamental fabric of the oversight protections intentionally put in place.

We do not understand why any JTTF work has been authorized given the delay on this issue. We do not understand how the Mayor has been able to provide his required portion of the oversight without clearance. We do not understand how the Chief has been able to direct anyone to work with the JTTF (in consultation with the Mayor) in light of the fact that neither of them has obtained the level of security clearances specifically *required* in the Resolution. Those clearance levels were discussed and debated (extensively) and purposefully chosen. The FBI was aware of that requirement and if there were any concerns and issues about compliance on their end, they should have informed the Mayor and Council members prior to, not after and not only to whomever the "us" means in the Chief's Report.

C) All other PPB Personnel

The Report mentions a number of other PPB personnel involved in oversight, supervision, training and chain-of-command reporting. As noted earlier, it is relevant and important to know which PPB employees have FBI security clearance and what type of clearance they have. If they do not have it, how can they provide adequate oversight, supervision, and chain-of-command responsibilities?

Are there additional CIU (or non-CIU) officers who hold FBI security clearance? If so, why, what level and when did they obtain clearance?

- IX. *BE IT FURTHER RESOLVED, that within 30 days after any change in personnel in the positions of Commissioner-in-Charge of PPB, Police Chief, FBI SAC for the Portland Field Office, or United States Attorney for Oregon, the Commissioner-in-Charge of PPB shall ensure that this Resolution is understood by all;*

“I affirm that the Police Chief, the FBI SACs for the Portland Field Office, and the New United States Attorney and I have met and that the terms of Resolution 36359 are understood by all. I met with the new SAC Greg Fowler, U.S. Attorney Dwight Holton, and Chief Reese on August 24, 2011. And on January 6, 2012, I met with the new U.S. Attorney Amanda Marshall, SAC Greg Fowler, and Chief Reese.” (MA)

Although appointed far earlier, SAC Fowler began his work in Portland at the beginning of August and was briefed within the 30 day requirement.

Amanda Marshall was sworn in as U.S. Attorney on November 10, 2011, almost **60 days** prior to her briefing. The Resolution requires a 30 day window for compliance. On its face, the reports reflect a violation and yet it is neither acknowledged nor explained, which is puzzling. We appreciate the challenges in complying within 30 days but the Council set that time in the Resolution and if appropriate through an amendment process that can be changed. Regardless of next steps, the breach of the Resolution’s terms should be acknowledged and explained.

- X. *BE IT FURTHER RESOLVED, the Office of the City Attorney is directed by the end of January each year to confer with the office of the Oregon Attorney General and determine in writing whether or not based on any changes to federal laws, policies or rules, and any Oregon law, including ORS 181.575 and ORS 181.850, that PPB officers are precluded from legally working with the JTTF;*

No Answer Provided.

At our request, the City Attorney has provided us a copy of the letter submitted to the Attorney General. The Resolution requires that the City Attorney and the Attorney General confer. We think that this information along with further explanation about the operation of this provision should have been included in the Report. If this requirement is unworkable or unnecessary, perhaps it should be modified or eliminated, but it should not be ignored.

- XI. *BE IT FURTHER RESOLVED, that the City Council directs the Police Chief and Commissioner-in-Charge of PPB to request regular briefings from the FBI SAC, at least twice a year, on the work of the JTTF so that the Police Chief and the Commissioner-in-Charge of PPB will be familiar with terrorist threats in the Portland area and will, therefore, be better able to manage local public safety issues;*

“Since the passage of the City’s Resolution, I have conferred on numerous occasions with the SAC about threats from terrorism and terrorism investigations. I receive regular briefings on the work of the JTTF, certainly at a rate of more than twice a year.” (CP)

“I affirm that I have received more than the required two annual briefings from the FBI SACs on the work of the JTTF and have been provided with status report on terrorist threats in the Portland area.” (MA)

A) Chief of Police

There seems to be some strategic use of words which puzzles us.

Who provided the Chief with “regular briefings” on the JTTF work? Was the Mayor part of these regular briefings? If not, why not. While we appreciate that the Chief states he has been briefed regularly and more than twice a year, his report should either state the actual number of briefings or the schedule for such briefings if that schedule is periodic (such as monthly or quarterly).

What does the Chief mean by stating he conferred with the SAC on numerous occasions? Were these the occasions when the FBI requested Portland’s assistance? Does the Chief include meetings of the JTTF Executive Committee as occasions on which he was “briefed” or were they separate meetings and who else participated?

B) Mayor

We do not understand how the Mayor was briefed by the FBI SAC absent FBI security clearance. The briefings were premised on the fact that the Mayor and Chief would have security clearance and be able to discuss any and all issues related to Portland’s assistance with JTTF work.

We take the Mayor at his word that he received meaningful briefings on the work of the FBI JTTF as well as a status report of “terrorist threats” in the Portland area. What we don’t understand is how that could have been accomplished without prior approval of the Mayor’s application for security clearance. His report should have addressed this issue.

XII. ***BE IT FURTHER RESOLVED, the Chief will assign a PPB supervisor to the JTTF at any time that a PPB officer is assigned to JTTF work;***

“I have fulfilled this provision. I assigned a CIU lieutenant to oversee the two officers identified as eligible to work with the JTTF. The lieutenant has regular meetings with the [FBI] JTTF supervisor⁸ and attends JTTF Executive Committee meetings. Any time these officers have been assigned to JTTF work, the lieutenant, the AC of Investigations, and I have actively supervised their work.” (CP)

⁸ Addition of [FBI] made after consultation with the City Attorney’s Office seeking clarification. We understand an updated version of the Report will make this, or similar, change.

XIII. *BE IT FURTHER RESOLVED, the City understands that the FBI SAC or designee needs the ability to direct the operational and day-to-day work of PPB officers who work with the JTTF. However, at all times, PPB officers who work with the JTTF remain in the chain of command and under the formal supervision of PPB;*

“I affirm that PPB officers who work with the JTTF have remained in the PPB chain of command and their work is overseen by the PPB supervisors, including a lieutenant, the Assistant Chief of Investigations, and me. The lieutenant holds regular meetings with the assigned officers to inquire about the subject matter of the investigations, monitor the investigative methods being employed, and verify that the work performed meets federal, state, and city requirements. And the AC and I hold regular meetings with the lieutenant.” (CP)

We would like to understand the different roles the CIU lieutenant, the AC of Investigations and the Chief provide in “actively” supervising the officers’ work, since we assume the type of active supervision is different for each. In one statement, the Chief states he is actively supervising the officer’s work and then in another his active supervision is with the AC of Investigations and the lieutenant.

Finally, as we noted above, the CIU officers routinely work with the FBI in the normal course of their duties and would like a better understanding of these relationships. Is this beyond the JTTF work? If so, what type of work does it entail? The reason we are concerned is that close daily relationships, possibly beyond JTTF work, change the dynamics and naturally creates bonds where it would be more difficult for the CIU officers to question a situation and could make it easier to overlook what might be perceived as a slight variation of standard of practice. This issue makes our call for independent oversight more critical. The close ties between the CIU and the FBI are fundamentally troublesome and underscore the need independent verification that the terms of the Resolution are being followed.

XIV. *BE IT FURTHER RESOLVED, the provisions of this Resolution are binding city policy and no element can be changed without an open public hearing and ratification by City Council;*

As noted above, there appear to be a number of requirements of the Resolution that have been violated, ignored, and in some cases glossed over during the first 10 months of its operation. If the Chief, the Mayor or the City Attorney believe that changes should be made to the Resolution, that should be stated clearly and publicly rather than violations being ignored or swept under the rug. There certainly should be an opportunity for public consideration and comment before Council is asked to weaken or eliminate portions of the Resolution going forward.

Most importantly, we are at a loss how there can be on-going interaction between the PPB and JTTF work in light of the facts set forth in the reports and our analysis of them. As noted in our introduction, the Resolution, in and of itself, did not give

permission for the PPB to work with the JTTF. Instead, it set forth rigorous terms and conditions that have to be met *prior* to any allocation of PPB resources and officers to JTTF work.

We hope that Council will insist that the final reports address these concerns and, in light of the facts, that there will be a critical examination of further use of PPB officers with the FBI at this time. To do otherwise, suggests the terms of the Resolution are not really binding and that the annual report need not be more than a generalized summary reflecting the historic "Trust Us" approach that has not served the City of Portland in the past and is fundamentally contrary to the purpose of the Resolution.