



Testimony of David Fidanque  
Executive Director

Before the Portland City Council  
Annual Reports regarding Portland Police Bureau  
Cooperation with the FBI (JTTF)

February 29, 2012

The ACLU of Oregon appeared before you last April in support of Council Resolution 36859 relating to the relationship between the Portland Police Bureau and the FBI's Joint Terrorism Task Force. We supported the resolution despite a high degree of concern because the FBI operates under very different guidelines and policies than the City of Portland.

We considered this resolution the continuation, not the end, of an ongoing conversation regarding the appropriate boundaries and safeguards for the Bureau's task of protecting the safety of all Portland residents, workers and visitors while at the same time complying with and respecting the constitutional and statutory rights of individuals and organizations.

We will not repeat the well-documented (and ongoing) abuses by the FBI of the constitutionally protected activity of law-abiding American citizens and residents. We will however, note that we are most appreciative that Oregon is 3,000 miles away from New York. There, it has been the New York City Chief of Police and Mayor who have authorized widespread surveillance and collection of information on the lawful activities of Muslim Americans and Muslim student organizations not just in New York but also in New Jersey and Connecticut. We provide a copy of the AP article that broke the story.

Last year we set out very specific expectations that we had for the annual reports on the City's relationship with the JTTF and the FBI and urged the Mayor and Police Chief to put the systems in place that would ensure both that the terms of the resolution would be honored and that Portland would be a model of transparency.

We were not only very disappointed in the first set of draft reports that were placed on the City's web site on February 13, but alarmed by what those reports did and did not say. Last Thursday, we circulated a 20-page analysis of those drafts that led us to conclude that several important safeguards of the resolution were not being followed. We therefore, at that time, urged the Council to suspend its cooperation with the JTTF until our questions could be answered and the City's practices were made to conform to the resolution.

Since we released that analysis, a second draft of the Chief's report was released Friday afternoon that clarified some important points. And this week, Andrea Meyer and I had the opportunity to engage in extensive discussions with the Mayor regarding our concerns and questions.

As you know, additional revisions were made to both the Mayor's and the Chief's reports within the past 24 hours that have addressed many more of our concerns, although certainly not all. The current reports before you are much closer to what we had envisioned and we very much appreciate the responsiveness of the Mayor and Chief Reese to our concerns.

Before we raise our remaining concerns, we want to specifically identify our previous concerns and the additional information included in the final reports that address those concerns:

- While the initial drafts were silent on the City's process for review of the FBI requests and the role of the Mayor in conferring on those requests, the revised reports state clearly that the Chief personally reviewed each and every request for assistance and, in direct consultation with the Mayor (as Commissioner-in-Charge of the Police Bureau), ensured that each FBI request was consistent with the requirements of the Resolution and of Oregon law and city policies prior to authorizing any PPB involvement;
- While the initial drafts were silent on the investigative status of the FBI inquiries at the time the requests of PPB were made, the revised reports state that as part of the Chief's determination he reviewed the stage of the investigation and whether the inquiries were FBI "assessments," "preliminary investigations" or "full investigations." Knowing the stage of the FBI inquiry at the time of the request is a critical for the Chief, the Mayor and the City Attorney to be able to analyze whether PPB involvement is permissible under Oregon law and the Resolution;
- While the initial drafts were silent on the Chief's interaction with the City Attorney upon receiving and evaluating a request by the FBI for assistance, the revised reports state that the Chief will proactively consult with the City Attorney before accepting any request if he has *any* doubts whether the request complies with Oregon law and the Resolution;
- While the initial reports noted that neither the Chief nor the Mayor had yet obtained their required security clearance from the FBI, the revised reports clarify that each has still been able to access all necessary information needed to properly evaluate the FBI requests and maintain the proper chain of command within the Police Bureau;

- While the initial reports only noted that the Mayor had sought but not yet received Secret Clearance, the revised reports affirm that the Mayor has been able to confer with both the Chief and the City Attorney and state the Mayor's expectation that all future Commissioners-in-Charge of the PPB will seek such clearance immediately upon appointment;
- While the initial reports identified that various members of the PPB were involved in JTTF activity or oversight, they failed to identify what type of FBI clearance they had. The revised reports provide the current level of FBI clearance for all personnel involved and clarify that the two CIU officers, the Assistant Chief of the Investigations Branch, and the Lieutenant of the CIU all have Secret security clearance and none hold Top Secret clearance, which some of them did have in the past;
- While the initial reports identified the availability of the City Attorney to answer any questions the CIU officers may have, the initial drafts did not indicate whether the City Attorney had or ever would be contacted. The revised reports make clear that the City Attorney will proactively approach the officers about their work and those officers will also be expected to proactively approach the City Attorney with questions;
- While the initial reports noted that the officers are aware they can report potential or actual violations to the Chief, the revised reports clarify that the officers have been able to freely share information and seek advice from the City Attorney and are expected to reach out to the City Attorney's office for ongoing consultation and legal advice;
- While the initial reports did not discuss how the City Attorney's office staffed its work related to the Resolution, the revised reports clarify that the Mayor, to ensure multiple levels of oversight, assigned two separate City Attorneys: one for day-to-day advice, and the second for purposes of training and oversight to ensure the terms of the resolution are being followed. In addition, the Chief, in preparation for this report, had that the City Attorney independently question the officers to verify their activities over the past ten months, and had the attorney provide that report to himself and the Mayor;
- While the initial draft reports were silent as to whether the training of the CIU officers by the City Attorney's office included relevant details on the FBI's guidelines and policies and the differences of those policies from Oregon law, the revised reports note that the training did include this critical information;
- While the initial reports were silent on what, if any, training the Mayor, Chief of Police and supervising officers had, the revised reports clarify that the Mayor, the

Chief of Police and the Assistant Chief of the Investigations Branch have all been trained;

- And finally, the revised reports also address our concern about attendance at the JTTF Executive Committee meetings, accurately note the minor delay in briefing the new U.S. Attorney, and provide the documentation that the City Attorney has taken all the steps it can to comply with the Resolution's requirement to confer annually with the Oregon Attorney General.

Nevertheless, we would not be doing our job if we failed to remind you that last April we called for the greatest level of transparency and detail so that the public could be assured that all of the intentions and expectations of the Resolution were followed. I want to emphasize that we did not request the City to disclose the content of any investigation.

However, still missing from the report is data indicating the number of investigations, the types of investigations, at what stage of the FBI inquiries the Police Bureau was asked to work with the JTTF, and the total number of hours the investigating CIU officers worked on terrorism inquiries.

While we believe all of this information is important, we believe the most critical is for the City to disclose the number and types of inquiries in which our officers have participated.

You may recall that last spring we had urged that the Resolution limit PPB involvement to only those inquiries designated as "full investigations" by the FBI. We had taken that position because the FBI's investigation guidelines and policies permit them to carry out "assessments" and "preliminary investigations" without a reason to believe that the target of the inquiry is or may be involved in terrorism activity.

As we noted in our memo distributed to you last week, the FBI itself has released data regarding the number of "assessments" it initiated between March 2009 and March 2011. A New York Times report published last August reported that the FBI launched 42,888 "assessments" somehow related to potential terrorism and of that total, more than 95 percent were closed without reaching even the "preliminary investigation" stage.

Based on other Freedom of Information Act requests and investigations by the Office of Inspector General, we know there is a greater likelihood that FBI "assessments" and "preliminary investigations" will result in surveillance and collection of information related to political, religious and social activities that are lawful and constitutionally protected.

Only inquiries at the "full investigation" stage require a factual predicate towards a specific individual, group or organization.

Thus, if the FBI request of the Police Bureau is made during either the “assessment” or “preliminary investigation” stage, it should automatically trigger heightened inquiry by the Chief, the Commissioner-in-Charge and the active involvement of the City Attorney to ensure that the City’s involvement will not violate either the Resolution or Oregon law.

Especially because the “criminal nexus” standard of the Resolution is undefined and fuzzy, it is *critical* for the public and the Council to know *how many* inquiries PPB officers have participated in and at *what* stage (as classified by the FBI). We can If we knew that few, if any, of our officers worked on either “assessments” or “preliminary investigations,” it would go a long way toward public verification that the City is in compliance with the Resolution and Oregon law.

Conversely, if PPB officers were involved only in “assessments” and “preliminary investigations,” it would indicate there was a much greater likelihood that the City was in violation of the Resolution and Oregon law. Having this data is really the only way for the public to “trust but verify.”

Before the Council accepts these reports, you should ensure that a means for addressing this important issue is put in place for next year and future years’ reports. One important step would be to ensure that the Police Chief keeps a log of all terrorism requests made by the FBI and the stage of the inquiry at the time of the request. If such a record were not maintained, it would be impossible in future years to release cumulative data covering a number of years.

In just a few months, we will have different Council members, a different Commissioner-in-Charge, and a different Mayor. In future years, we will have different Chiefs of Police and City Attorneys as well as different City Councils. The ACLU wants to ensure that no matter how many layers of oversight are implemented internally, the public and other interested parties will be provided enough independent factual information to leave no doubt that the Resolution, Oregon law and the Constitution are being adhered to and honored.