



Testimony of Andrea Meyer
Legislative Director/Counsel

Before the Portland City Council:
Substitute Resolution regarding Portland Police Bureau
Cooperation with the FBI (JTTF)

April 28, 2011

The ACLU of Oregon appears today in support of the substitute resolution. However, with all due respect, we do not support this resolution for the same reasons as the U.S. Attorney for Oregon – *and* we support with a high degree of concern and caution. We consider this resolution the beginning, not the end, of the conversation.

The reasons we support the resolution is because it builds on the 2005 resolution:

1. Portland is not re-joining the JTTF nor is it entering into an agreement of any kind with the federal government, including a Memorandum of Understanding. Instead, the resolution sets forth the following requirements prior to the use of any Portland Police Bureau (PPB) resources in conjunction with any FBI JTTF investigation: the Chief, in consultation with the Commissioner-in-Charge will make PPB officers available on an as-needed basis only when there is an investigation that has a criminal nexus *and* complies with Oregon laws. Those Oregon laws include the requirement that there be reasonable suspicion prior to the collection or retention of information on a person's or organization's political, religious, social or associational activities. It also includes limitations on what constitutes a legal search and seizure under our constitution as well as limitations on immigration enforcement.
2. There are additional protections that the ACLU of Oregon has urged prior to 2005, including: the same level of security clearance by the Chief of Police and his or her officers, security clearance by the Commissioner-in-Charge, access by the officers and the Chief to the City Attorney for legal advice, the requirement that Oregon officers comply with Oregon law and not only notify the Chief of Police and the Commissioner-in-Charge if there is a violation but also the ability to seek legal advice from the City Attorney if there is any question about compliance with any Oregon law, training by the City Attorney to all PPB personnel working with the FBI and regular briefings by the FBI to the Chief of Police and the Commissioner-in-Charge.
3. Finally, the resolution requires an annual report to the City Council and the public. As noted, this resolution is not the "end" but the beginning and the annual report needs to be as transparent and detailed as possible so that everyone understands whether the

intentions and expectations of City Council were followed as well as a clear understanding of what type of work our officers were asked to do when participating in “terrorism investigations” with the FBI.

We urge the following to be part of the report:

- A. Non-confidential details regarding the steps taken to ensure PPB personnel comply with Oregon laws, and any requests PPB personnel made to the City Attorney, including the number of consultations, the types of issues raised, and the action taken as a result of such consultations.
- B. The number of investigations, the types of investigations and at what stage PPB officers were asked to work with the FBI JTTF.
- C. The annual number of hours and officers participating.
- D. The number of briefings made by the FBI to the Chief of Police and the Commissioner-in-Charge.
- E. How often terror alert information was shared with City officials.

In determining how well the resolution worked, the City should interview all PPB personnel working with the FBI JTTF to better understand any issues or problems that arose, especially around compliance with Oregon laws.

While today, we hope that the expectations of City Council and the community are met, in a year from now we should have the type of report that allows us to know whether those expectations were met and if not, what the City has or will do to address such deviations.

However, to be clear the ACLU of Oregon still has significant concerns and reservations. *Most* of us in this room understand that there is much sunlight between what the FBI can legally do under the U.S. Attorney General Domestic Guidelines and what our PPB officers can legally do under Oregon law. Indeed, this resolution is intended to address this very issue.

We are pleased that we are not joining the JTTF or signing an MOU deputizing our officers as JTTF officers, especially in light of the recent revelations that the FBI and the San Francisco Police Department have been operating with a secret MOU that appears to authorize the SFPD to ignore local police orders and California privacy law.

The reason we urged that PPB officers only work on full investigations is that when the FBI engages in assessment or preliminary inquiries, there is no requirement that there be reasonable suspicion that the person or group being monitored is or may be engaged in criminal activity, as required by Oregon law.

Assessments only require an authorized purpose but not any particular factual nexus. Preliminary inquiries can be opened based on extremely limited information including information about the First Amendment expression of subjects and it is an easily attainable and speculative “possibility” standard. Neither of these standards complies with Oregon law.

To give an example (a real life example, except rather than occurring in Portland it actually occurred in Pittsburgh): it is the day after Thanksgiving and a well-established Portland peace center holds an anti-war rally. An FBI agent sitting in the Portland FBI office, at the request of his supervisor but with no suggestion that anyone who might be at the rally is connected with terrorism, decides to go to the event, collect material and take a photograph of a woman who appears of “Middle Eastern” descent. He then returns to the FBI Portland office and conducts additional Internet research on the peace center, writes a report which, along with the photograph of the “Middle Eastern” woman is filed for permanent retention.

Under the 2008 U.S. Attorney General Guidelines every single action by this FBI agent described above was legal: from attending the event, collecting information, photographing a woman based solely on her appearance and political activity, doing more research to filing this in the FBI filing system.

Anyone who actually understands Oregon law, including ORS 181.575, knows that this so-called “criminal investigation” does not comply with Oregon law requiring a PPB officer to have “reasonable suspicion” that the person subjected to surveillance and collection of information is or may be involved in criminal conduct.

We believe – we hope – that our Chief of Police, the Commissioner-in-Charge and the City Attorney understand the significant legal difference and will work diligently to make sure that our PPB officers do not participate in those types of so-called “investigative” activities.

I want to be clear – it is not a question of if but when, our officers will be asked to engage in investigative activities in violation of Oregon law. To guard against this, we expect that there will be appropriate training of PPB personnel not just on Oregon law but on the FBI guidelines and the minimal criteria necessary for them to be able to engage in assessments and preliminary inquiries so that our PPB officers will be equipped to ask the right questions and refuse to participate and report this to the Chief and, in turn, the Commissioner-in-Charge.

And one last note about the U.S. Attorney General Guidelines – they also allow for the FBI to identify locations of concentrated ethnic communities if those locations will “reasonably aid the analysis of potential threats and vulnerability, and, overall, assist domain awareness for the purpose of performing intelligence analysis.”

You will hear from a survivor of the WW II Japanese-American internment camps. He will describe the FBI mapping of Japanese-American communities in Oregon over 60

years ago. The current FBI ethnic mapping is not much different...except it targets a different group today.

This resolution attempts to create the necessary protections for our officers and for Portland residents, workers and visitors. We urge passage, but we also urge you to convey your expectation that our officers will refuse to participate in the type of current FBI activity, documented across this country, that abuses our civil liberties and civil rights. Such activity is inconsistent with the values of Portlanders *and* is in violation of Oregon laws and the Oregon Constitution.