



Office of Mayor Ted Wheeler
City of Portland

April 1, 2022

Mary Hull Caballero
City Auditor
1221 SW 4th Avenue, Ste. 310
Portland, OR 97204

Dear Auditor Hull Caballero,

Thank you for the opportunity to review and respond to your audit of police intelligence gathering. The people of Oregon have placed strong privacy protections on the ways in which law enforcement can collect and use information about the citizenry. I support these protections because of the very real history of shameful and biased surveillance practices by some law enforcement agencies in our state and nation. This history cannot be forgotten as we forge ahead with efforts to improve policing and work to earn trust between law enforcement and our community.

As Police Commissioner, my team and I will work with PPB to enact all five of audit recommendations, four in full and one in part. PPB's Policy Development Team will lead efforts to engage subject matter experts to ensure that all policies, existing or new, accurately reflect legal and procedural requirements. My administration will also continue to work with PPB to ensure these policies are implemented without delay.

Auditor, I appreciate your team's efforts and thoughtful consideration in making these assessments. Thank you for the important work you do.

Sincerely,

Mayor Ted Wheeler



CITY OF PORTLAND, OREGON



Bureau of Police

Ted Wheeler, Mayor

Charles Lovell, Chief of Police

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March 26, 2022

Dear Auditor Hull-Caballero:

We have reviewed the recent audit by your office regarding Police Intelligence Gathering and Surveillance. While we agree, fully or in part, to the five recommendations, we would like to provide critical, clarifying information in addition to our recommendation responses.

As we discussed with your team, the application of a Criminal Intelligence Unit (CIU) Standard Operating Procedure (SOP) to the five police reports was incorrect as the reports cited were not criminal intelligence (a sixth was an outside law enforcement agency bulletin). These reports were filed appropriately, in RegJIN, in accordance with Portland Police Bureau Directive 900.00 General Reporting Guidelines. The retention of such reports is bound by State Public Records Law. This information was shared with the audit team but this assertion remained in the final report. A new directive regarding criminal intelligence will address the overall concerns expressed by the audit regarding the safeguarding of information.

In addition, the audit uses the term “searching” when referring to the use of social media by investigators. It’s important to note that while common vernacular might include the terms “searching the internet” or “searching social media,” the term “search” has a specific meaning under the law. The City Attorney’s Office pointed out the constitutional significance of the word “search” and, moreover, that various court opinions have held that viewing open source social media does not constitute a “search” under the Fourth Amendment. For clarity, when viewing publicly available social media information, it should not be labeled a “search” but instead a “query” or “viewing.” The term “search,” as it relates to viewing social media, should only be used to describe police accessing private information after obtaining a subpoena, search warrant, or court order.

As you will see the Portland Police Bureau is in the process of implementing several of the recommendations provided by your office as we continue to improve our transparency and trust building.

The following is our response to each of the audit’s recommendations.

1. Adopt a directive related to investigating First Amendment activity that provides guidance for the appropriate collection of information to protect people’s civil rights.

Agree, in part. Current Portland Police Bureau (PPB) Directive 635.10 Crowd Management/Crowd Control defines Freedom of Speech as: “The right to speak, associate,

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assemble, and petition the government; speech that is protected by the First Amendment to the United States Constitution and Article I, sections 8 and 26 of the Oregon Constitution. For the purposes of this Directive, the rights issuing from both the federal and state Constitutions are collectively referred to as First Amendment rights.”

Under the directive’s policy section it states:

1. “The purpose of this Directive is to provide guidance for demonstrations, special events, the managing of crowds during demonstrations, and controlling crowds during civil disturbances.”
2. “Freedom of speech, association, assembly, and the right to petition the government are subject to reasonable restrictions on the time, place, and manner of expression; the content of the speech does not provide the basis for imposing limitations on First Amendment rights.”
3. “The Portland Police Bureau recognizes that the City of Portland has a tradition of free speech and assembly. It is the responsibility and priority of the Portland Police Bureau not to unduly impede the exercise of First Amendment rights and to provide for the safe and lawful expression of speech, while also maintaining the public safety, peace and order. A police response that impedes otherwise protected speech must be narrowly tailored to serve a significant government interest.”
4. “While the First Amendment provides broad protections for the expression of speech, it does not provide protection for criminal acts including, but not limited to, riot, disorder, interference with traffic upon the public streets, or other immediate threats to public safety, peace or order.”

This directive is currently under review. The Policy Development Team and subject matter experts will look to provide additional guidance on the appropriate collection of information, in accordance with Oregon Revised Statute (ORS) § 181A.250 (Specific information not to be collected or maintained), and in accordance with other Directives including but not limited to Directive 900 Report Writing, and Directive 660.00 Management of Criminal Intelligence Files (DRAFT).

All PPB members will be required to sign and acknowledge understanding the directive.

2. Create a procedure that limits access to sensitive information and promotes compliance with state law about collecting and maintaining political, religious, and social information that is not associated with criminal activity.

Agree. Directive 660.00 Management of Criminal Intelligence Files (DRAFT) provides definitions, policy, and procedures specific to criminal intelligence, including ORS § 181A.250. Upon adoption of this directive, all PPB members will be trained on the directive (including refresher training on ORS § 181A.250) and will be required to sign and acknowledge understanding the directive.

3. Adopt a technology directive that includes Council authorization of surveillance technology, advice from a privacy commission, and requirements for policies and reporting.

Agree, in part. Currently PPB follows the current state law that governs surveillance.

In accordance with ORS § 181A.250, members shall not collect or maintain information about the political, religious, or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

Furthermore, PPB Directive 344.05 Bias-Bases Policing clearly states:

“Bureau members are committed to respecting and preserving the constitutional rights of all individuals. Members are prohibited from taking or refraining to take any police action motivated by bias or prejudice and should, when appropriate, strive to engage community members in a positive manner.”

Furthermore, “members shall not profile or discriminate against any individual who is a member of a legally protected class. Legally protected classes, as defined by federal or state statute, as well as case law, include an individual’s race, color, national origin, citizenship, ethnicity, religion, sex, pregnancy, sexual orientation, gender identity, age, actual or perceived mental or physical disability, language (spoken or signed), marital or familial status, veteran status or any other protected status under law.”

PPB will draft a Standard Operating Procedure (SOP) that more specifically governs the use and reporting of electronic surveillance technology.

More specifically, the SOP prohibits the use of electronic surveillance technology (EST) to:

- Conduct random or indiscriminate mass surveillance activities.
- Target a person based solely on individual characteristics, such as, but not limited to race, ethnicity, national origin, religion, disability, economic source or status, housing status, gender or sexual orientation.
- Harass, intimidate or discriminate against any individual or group.
- Conduct personal business of any type.
- To be combined with any type of facial recognition technology.

Authorized use of EST includes the following:

- Ongoing and current criminal investigations, where the investigator has reasonable suspicion to believe that person(s) to be surveilled, have committed a crime, or about to commit a crime, or are involved in the commission of a crime.
- Pursuant to a court order authorizing it’s use in an investigation if required by law.

- With consent from the person(s) to which the EST is monitoring (900 Alarms, Threats / Safety).
- In instances where there is an imminent threat to life / safety where exigent circumstances exist.
- All uses of EST will follow current local, state and federal laws as to the use, placement, monitoring, and reporting.

As part of the SOP, the authorization of EST will be at the direction of the Commissioner in Charge of the Police Bureau. PPB must obtain Commissioner in Charge approval prior to any of the following:

- Accepting state or federal funds for surveillance technology.
 - Acquiring, purchasing, or using new electronic surveillance technology.
4. Add to the social media directive guidance for its use for investigations and a requirement to document the law enforcement purpose for searching individuals and groups.

Agree. Current PPB Directive 311.40 Personal Use of Social Media does not govern the official use of social media and states that official uses will be governed by a separate directive.

The PPB Policy Development Team will work with subject matter experts (SMEs) to create a directive governing the official use of social media resources to include definitions, policies, and procedures. The directive may include policy and procedure on documenting the law enforcement purpose, if applicable and legally required.

5. Publish public reports on the Bureau's use of surveillance technology to ease the public's concerns about inappropriate intelligence-gathering and how devices are managed to prevent it.

Agree. As part of the PPB annual report, PPB will report the use of EST which will include the following:

- a. Description of the technology was used, and the purpose of its use.
- b. A general geographic area where the technology used.
- c. Record of any community complaints in the use of the specific surveillance technology.
- d. Any violations of Directives or Operating Procedures.
- e. Overall effectiveness of the technology, or problems identified.
- f. Any recommendations to the policy.



Chief of Police