



Commonwealth Fusion Center Standard Operating Procedure

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Subject	
Guidelines For Investigations Involving First Amendment Activity	

Policy

It is the policy of the Commonwealth Fusion Center (CFC) that its members will not initiate or participate in investigations into groups or individuals based solely upon their lawful exercise of First Amendment rights. Where the CFC must initiate or participate in investigations of unlawful activity incidentally involving speech or conduct protected by the First Amendment, those investigations must conform to the guarantees of the Massachusetts Constitution, the United States Constitution, state law, and federal law. CFC policy further requires that those investigations be supported by a legitimate law enforcement or public safety purpose.

General Principles

In its effort to anticipate or prevent unlawful activity, including terrorist acts, the CFC must initiate, at times, inquiries or investigations in advance of unlawful conduct. An inquiry or investigation under these guidelines is warranted when facts and circumstances establish a potential for, or indicate an apparent intent to engage in unlawful conduct, particularly acts of violence or other conduct that may threaten public safety. An inquiry or investigation is warranted when oral or written statements advocate unlawful or violent activity, to determine whether there exists a real threat of such activity. An inquiry or investigation is not warranted when it is apparent from the circumstances or the context in which the statements are made, that there is no prospect of unlawful activity.

The CFC understands and affirms that investigations under these guidelines will always proceed in a good faith effort to anticipate and prevent unlawful activity and will never be based solely on activities protected by the First Amendment. Further, investigations under these guidelines will not be directed towards disrupting the lawful conduct of persons or groups involved in First Amendment activity and will not interfere with any individual's participation in lawful activities. Investigations shall be terminated when all logical leads have been exhausted and no legitimate law enforcement purpose justifies their continuance.

Applicability

These guidelines apply only to CFC investigations of unlawful conduct incidentally involving speech or conduct subject to protection under the First Amendment. They do not apply to, or limit other activities related to the investigation or detection of unlawful conduct, the preservation of the peace and public safety, or other legitimate law enforcement activities that do not involve First Amendment activity. These guidelines specifically do not apply to investigations focused on solving crimes that have already been committed. These guidelines also do not apply to investigations under the direction or control of the Joint Terrorism Task Force or other federal, state, or local task forces that members of the CFC may be assigned to. Furthermore, for the purpose of detecting or preventing unlawful activities, as well as to assess the

Three Levels of Investigations

need for police planning related to lawful activities, CFC members are authorized to visit any place, attend any event, and visit any website that is open to the public, on the same terms and conditions as members of the public generally.

When the CFC possesses or receives facts and information concerning a potential for unlawful actions incidentally involving First Amendment activities, these guidelines provide for three levels of investigative activity to ascertain what response, if any, is appropriate. The creation of these levels is intended to ensure that CFC inquiries and investigations proceed using the least restrictive or invasive techniques to obtain information while still providing the CFC with the necessary flexibility to act well in advance of the commission of unlawful conduct. If, however, the available information shows at the outset that the threshold standard for a preliminary inquiry or full investigation is satisfied, then the appropriate investigative activity may be initiated immediately, without progressing through more limited investigative stages.

A. Checking Of Leads

This level of investigative activity is the reasonably prompt and limited checking out of initial leads, which should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of unlawful activity is warranted. This limited activity should be conducted with an eye toward promptly determining whether further investigation (either a preliminary inquiry or a full investigation) should be conducted. Generally, officers are expected to check leads as a first step unless there already is a reasonable suspicion of unlawful activity. When checking leads, investigators should employ techniques that are as minimally restrictive or invasive as can be reasonably effective.

Officers engaged in checking of leads should document the purpose of their activity, the steps taken, the information learned, and whether further investigation is necessary. If the checking of leads fails to produce facts or information suggesting a potential for unlawful activity, all records created should be closed out, except officers shall maintain a chronological log of activity that indicates the officer involved, steps taken, reasons for the inquiry, and outcome of the lead checking. This chronological log will only indicate the officer's activity and will not indicate the names of specific individuals or groups under investigation.

B. Preliminary Inquiries

In cases where the CFC receives information or an allegation indicating the possibility of unlawful activity and the responsible handling of the information requires some further scrutiny beyond the reasonably prompt and limited checking out of initial leads, the CFC may initiate a "preliminary inquiry" in response to the allegation or information. In a preliminary inquiry, the information initially received does not warrant a full investigation because there is not yet a "reasonable suspicion" of unlawful activity. Whether it is appropriate to open a preliminary inquiry immediately or instead to engage first in a limited checking out of leads depends on the circumstances presented. A preliminary inquiry is not required when there already is a reasonable suspicion of unlawful activity.

Once the CFC determines that a group or individual does in fact plan or advocate the commission of crimes, thus giving facts supporting the possibility of unlawful activity, a preliminary inquiry may be undertaken to determine whether the individual, group, or members of its audience have the apparent ability or intent to carry out or attempt to carry out the unlawful act.

A preliminary inquiry allows the CFC to respond in a measured way to ambiguous or incomplete information, with as little intrusion as the needs of the situation permit. Such inquiries are carried out to obtain the information necessary to make an informed judgment as to whether a full investigation is warranted.

Except as stated herein, all lawful investigative techniques may be used in a preliminary inquiry. At the preliminary inquiry stage, undercover operations may only be used to attend meetings that are open to the public for the purpose of observing and documenting events. Undercovers may not seek to gain access to private meetings and should not actively participate in meetings. At the preliminary inquiry stage, sources and informants should not be used to cultivate relationships with persons and groups that are the subject of the preliminary inquiry. Investigators may, however, interview, obtain and accept information known to sources and informants.

The CFC Commander must assure that the allegation or other information that warranted the preliminary inquiry has been recorded in writing before authorizing a preliminary inquiry. Upon authorizing a preliminary inquiry, the CFC Commander must make an immediate notification to the Massachusetts State Police (MSP), Division Commander of Investigative Services.

Preliminary inquiries shall be completed within 180 days after authorization from the CFC Commander. The CFC Commander, with immediate notification to the MSP Division Commander of Investigative Services, may grant an extension of time in a preliminary inquiry for succeeding 90-day periods. Where a preliminary inquiry fails to disclose sufficient information to justify a full investigation, the CFC shall terminate the inquiry and make a record of the closing.

C. Full Investigation

A full investigation may be initiated when the facts and information known to the CFC establish a reasonable suspicion that an unlawful act is being or will be committed. There must be an objective, articulable, factual basis for initiating the investigation; a mere hunch or subjective perception of a threat is insufficient. The standard for opening an investigation is satisfied where there is not yet a current substantive or preparatory unlawful act, but facts and circumstances reasonably indicate that such unlawful conduct will occur in the future. Any lawful investigative technique may be used in a full investigation. The limitations outlined for a preliminary inquiry do not apply to full investigations.

A full investigation must be authorized by the CFC Commander after a written recommendation setting forth the facts or circumstances reasonably indicating that an unlawful act is being or will be committed. Upon authorizing a full investigation, the CFC Commander must make an immediate notification to the MSP Division Commander of Investigative Services.

When exigent circumstances exist, a full investigation may be commenced immediately without approval where it would be impractical to seek approval without compromising officer safety, public safety or the integrity of the investigation. In such a case, a written recommendation must be submitted as soon as reasonably possible thereafter to the CFC Commander. Exigent circumstances are circumstances requiring action before authorization otherwise necessary under these guidelines can be reasonably obtained, in order to protect life or substantial property

interests; to apprehend or identify a fleeing offender; to prevent the hiding, destruction, or alteration of evidence; or to avoid other serious impairment or hindrance of an investigation.

A full investigation may be initially authorized for a period of up to one year. As needed, a full investigation may be continued upon written request for additional twelve-month periods. Renewal authorization shall be obtained from the CFC Commander. Upon granting renewal authorization for a full investigation, the CFC Commander must make an immediate notification to the MSP Division Commander of Investigative Services.

A written request to continue a full investigation must be submitted and acted upon before the expiration of the current authorization unless exigent circumstances require the full investigation to be continued. In such a case, authorization for the continuance must be sought in writing and obtained as soon as reasonably possible. A full investigation that has been terminated may be reopened upon a showing of the same standard and pursuant to the same procedures as required for initiation of a full investigation. All requirements regarding a full investigation shall apply to reopened investigations.

**Undercover
and
Confidential
Informant
Operations**

Subject to the limitations already set forth, undercover operations, confidential informants, or both, may be used when such operations are warranted to effectively obtain information, taking into account the circumstances of the investigation, including the need for the information and the seriousness of the threat. For the purposes of these guidelines, undercover operations involve more than just attending meetings in plain clothes. Undercover operations shall be those that require an officer to adopt a false persona in order to engage with groups and persons being investigated.

The CFC Commander must authorize the use of undercovers and confidential informants in investigations covered by these guidelines prior to commencement of the respective operation. The request to use undercovers or confidential informants must be in writing and must include a description of the facts on which the investigation is based and the role of the undercover.

Undercovers and informants are strictly prohibited from engaging in any conduct the sole purpose of which is to disrupt the lawful exercise of political activity, from disrupting the lawful operations of an organization, from sowing seeds of distrust between members of an organization involved in lawful activity, or from instigating unlawful acts or engaging in unlawful or unauthorized investigative activities. Undercovers should not become so involved in a group that they are participating in directing the operations of a group, either by accepting a formal position in the hierarchy or by informally establishing the group's policy and priorities. This does not mean an undercover cannot support a group's policies and priorities; rather an undercover should not become a driving force behind a group's unlawful activities.

Undercovers are not required to identify themselves or leave a gathering if it is requested that police officers leave or identify themselves. In addition, the mere presence of legal counsel at a meeting does not require an undercover to miss or leave the meeting. Where reasonably possible, and without exposing one's cover or compromising the investigation, undercovers should not attend meetings where legal counsel is discussing or preparing legal strategy for pending or anticipated litigation.

**Maintenance
of Information**

It is the policy of the CFC not to maintain files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of Massachusetts or the United States. Rather, the maintenance of all such information must be based upon a valid law enforcement or public safety purpose and must be carried out in conformity with all applicable statutes, CFC regulations and policies. All information gathered under these guidelines shall only be maintained by the CFC for so long as there is a legitimate law enforcement purpose for having the information.

The CFC will establish a method of tracking all the intelligence gathered under this policy. At a minimum, that system will allow data to be retrieved through searches by individual names, group names, and related events. The CFC will review all information gathered under this policy at least once every five years to determine whether a legitimate law enforcement purpose still exists to hold the information. Once the legitimate law enforcement purpose to have the information has ended, the information shall be destroyed in conformance with state records retention laws and fusion center standards.

Reservations

Nothing in these guidelines is intended to limit the CFC's responsibility to investigate certain applicants and employees, or to pursue efforts to satisfy any other of its legal rights, privileges, or obligations.

These guidelines are set forth solely for the purpose of internal CFC guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the CFC, the MSP or the Commonwealth of Massachusetts.

Promulgated by

