
The Metropolitan Police Department Complies with Surveillance Portion of First Amendment Law

January 23, 2019

A report by the Office of the District of Columbia Auditor



Audit Team

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Background

The Metropolitan Police Department (MPD) is the primary law enforcement agency for the District of Columbia. MPD's mission is to safeguard the District and protect its residents and visitors with the highest regard for the sanctity of human life. MPD carries out its mission through a variety of services and operations, such as patrols, investigations, and homeland security services.

The D.C. Council investigated the MPD's handling of anti-war and anti-globalization demonstrations between 2000 and 2002 and faulted MPD for violating the First Amendment and liberty rights of hundreds of demonstrators. This included conducting surveillance of political organizations. The findings from the report led the Council to conclude that MPD "acted preemptively against demonstrators in an apparent effort to hamper the exercise of First Amendment rights."¹ In response to the investigation, the D.C. Council passed the First Amendment Rights and Police Standards Act of 2004² (the Act). The Act provides policy guidance for MPD, affirms the importance of the right to free speech and freedom of assembly, restricts certain policing tactics and uses of force, requires a standard of "imminent likelihood" of lawbreaking before police can surround or disrupt an event, and creates checks and balances for occasions when police investigate the activities of members of political organizations.

Title II of the Act is known as the Police Investigations Concerning First Amendment Activities Act of 2004³ (Title II). Section 212 of Title II provides guidelines and controls on how MPD handles investigations and preliminary inquiries into First Amendment activities. First Amendment investigations are conducted by the Intelligence Branch of the Joint Strategic & Tactical Analysis Command Center, located within the Homeland Security Bureau at MPD. According to the Act, MPD may conduct a criminal investigation that involves the First Amendment activities of persons, groups, or organizations only when there is reasonable suspicion to believe that the persons, groups, or organizations are planning or engaged in criminal activity, and the First Amendment activities are relevant to the criminal investigation.⁴

The Act also requires that ODCA annually audit MPD's files and records related to its investigations and preliminary inquiries concerning First Amendment activities. Since the passage of the Act in 2004, ODCA has conducted and published four such audits.

1 See Committee on the Judiciary Committee Report on Bill 15-968, the "First Amendment Rights and Police Standards Act of 2004," dated December 1, 2004, page 1.

2 D.C. Law 15-352, § 201 et seq.

3 Codified at D.C. Code § 5-333.01 et seq.

4 D.C. Code § 5-333.05 (a)

Objective, Scope, and Methodology

Objective

The objective of the audit was to determine whether MPD complied with the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004 during the scope of the audit.

Scope

The scope of the audit included all investigations and preliminary inquiries subject to the requirements of the Act that were completed during calendar year 2017.

According to MPD officials, there was one investigation during calendar year 2017: the First Amendment investigation related to the Presidential Inauguration on January 20, 2017.

Methodology

In compliance with the D.C. Official Code § 5-333.12 (d)(1) and (2)⁵ ODCA conducted an audit of the 2017 investigation initiated by MPD.

To determine whether MPD complied with the requirements of the Act, ODCA:

- Interviewed MPD staff involved in the approval of the 2017 investigation.
- Reviewed standard operating procedures for First Amendment investigations.
- Reviewed MPD's case file for the investigation regarding the Inauguration on January 20, 2017.
- Reviewed communications between undercover officers and their superior officers.
- Reviewed records showing training given to MPD personnel on the requirements of the Act.
- Reviewed annual reports for 2015 through 2017 submitted by MPD notifying the Council of the number and types of First Amendment preliminary inquiries and investigations conducted during 2015 through 2017.
- Reviewed an electronic case file for the investigation regarding the Inauguration on January 20, 2017. The case file contained documentation relevant to the 2017 investigation. Documentation reviewed included but was not limited to the following information:

5 D.C. Code § 5-333.12 (d)(1) and (2) state: (d)(1) The Office of the District of Columbia Auditor ("ODCA") shall serve as auditor of MPD's investigations and preliminary inquiries involving First Amendment activities in order to assess compliance with this subchapter. (2) On an annual basis, the ODCA shall audit MPD files and records relating to investigations and preliminary inquiries involving First Amendment activities. In conducting the audit, the ODCA shall review each authorization granted pursuant to §§ 5-333.05 and 5-333.06, requests for authorization that were denied, and investigative files associated with the authorizations. The ODCA shall prepare a public report of its audit that shall contain a general description of the files and records reviewed, and a discussion of any substantive violation of this subchapter discovered during the audit. A preliminary report of the audit shall be provided by the ODCA to the Chief of Police for review and comment at least 30 days prior to issuance of a final audit.

- Confidential Memorandum dated January 2, 2017, Subject: Request to Initiate Investigation Regarding Upcoming Inauguration on January 20, 2017.
- Intelligence Fusion Division Intelligence Branch Guidelines for members working in an Undercover Capacity Regarding First Amendment Investigations.
- Confidential Memorandum dated February 24, 2017, Subject: Request to Officially Close the Investigation Regarding the Inauguration on January 20, 2017.
- Summary of research conducted by the Criminal Intelligence Branch (CIB).
- Calendar outlining undercover officer assignments.
- Homeland Security Bureau, Intelligence Division, CIB list of events/activities during the Inauguration.
- Inauguration Day police deployment assignments.
- News, Twitter, and other social media posts documenting alleged criminal activity that took place during the Inauguration.
- Information related to the three arrests that resulted from the First Amendment investigation.
- Listing of all individuals arrested on January 20, 2017.
- Criminal Intelligence Branch Standard Operating Procedures Regarding First Amendment Activities

This report was drafted, reviewed, and approved in accordance with the standards outlined in ODCA's Policy and Procedure Manual.

Audit Results

According to MPD officials, during calendar year 2017 MPD initiated one investigation and there were no preliminary inquiries or request for authorization that were denied. The First Amendment investigation conducted by MPD was related to the Inauguration on January 20, 2017.

The case file on the investigation provided by MPD was heavily redacted due to the sensitive nature of the information pertaining to MPD use of undercover officers. The investigation was initiated based in part on open source website information. The file contained information related to one or more arrests made as a result of the investigation. Information also indicated use of a search warrant. ODCA visually reviewed a sufficient portion of the unredacted file to be satisfied that MPD supervision was adequate and appropriate and consistent with the provisions of the law.

Based on a review of the information available to us, we found that MPD was in compliance with the requirements of the Act during its conduct of the one investigation that occurred in FY 2017.

Agency Comments

On January 11, 2019, we sent a draft copy of the report the Metropolitan Police Department (MPD) for review and written comment. MPD responded on January 16, 2019, with written comments, which are appended in full to this report.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT**

January 16, 2019

Ms. Kathleen Patterson
District of Columbia Auditor
Office of the D.C. Auditor
717 14th Street NW, Suite 900
Washington, DC 20005

Dear Ms. Patterson:

This letter is in response to the draft report entitled “MPD Complies with Surveillance Portion of First Amendment Law,” that you forwarded to me on January 11, 2019. The purpose of sharing the draft report was to comply with the policy of the District of Columbia Auditor to obtain comments on draft reports from directly affected agencies and other relevant parties before the release of the final report. You requested that the Metropolitan Police Department (MPD) review the draft report and provide comments no later than Friday, January 25, 2019.

I was pleased to learn that your audit confirmed MPD was in compliance with the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004, D.C. Code § 5-333.01, et seq. (2001 Ed.), for the only First Amendment investigation initiated during FY 2017. As you are aware, MPD is particularly careful to ensure that those wishing to exercise their First Amendment rights peacefully in the nation’s capital are free to do so. As you may also be aware, MPD facilitates such activities rather than resorting to what may be perceived by some protestors and/or observers as heavy-handed police action. On the other hand, MPD remains committed to its mission to safeguard the District and protect its residents and visitors with the highest regard for the sanctity of human life.

In light of the favorable outcome of this audit, I do not see the need for an exit conference. We look forward to working with you and your staff in future audits of the MPD’s handling of investigations into First Amendment activities.

Sincerely,

Peter Newsham
Chief of Police

cc: Betsy Cavendish, General Counsel to the Mayor

About ODCA

The mission of the Office of the District of Columbia Auditor (ODCA) is to support the Council of the District of Columbia by making sound recommendations that improve the effectiveness, efficiency, and accountability of the District government.

To fulfill our mission, we conduct performance audits, non-audit reviews, and revenue certifications. The residents of the District of Columbia are one of our primary customers and we strive to keep the residents of the District of Columbia informed on how their government is operating and how their tax money is being spent.

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