

TO PROTECT AND SPY: THE SAN FRANCISCO POLICE DEPARTMENT & THE CIVIL RIGHTS ORDINANCE

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INTRODUCTION

On May 9, 2012, the San Francisco Board of Supervisors unanimously passed the Safe San Francisco Civil Rights Ordinance. The Ordinance—which was hailed as a “landmark” piece of legislation¹—was designed to curb abuses within the San Francisco Police Department (SFPD). In 2002, like many police departments following 9/11, the SFPD entered into an agreement with the FBI to aid with counterterrorism efforts. The SFPD enlisted some of its officers in a Joint Terrorism Task Force (JTTF). After revelations that SFPD officers engaged in discriminatory policing and surveillance as part of this partnership, San Francisco responded with the Civil Rights Ordinance.

This Note begins by examining the problems with the SFPD’s involvement in federal counterterrorism investigations. It then considers how San Francisco’s Civil Rights Ordinance presented an innovative yet simple approach to remedying these problems. Three years after its passage, however,

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1. *Safe San Francisco Civil Rights Ordinance: Landmark Law Requires Community Input on Police Cooperation with FBI*, HUFFINGTON POST (May 5, 2012), http://www.huffingtonpost.com/2012/05/10/safe-san-francisco-civil-rights-ordinance_n_1507344.html.

this promise remains unfulfilled and San Francisco's experiment raises the question of whether localities can use legislation to protect the rights of its citizens and prevent police abuse.

I. THE SAN FRANCISCO POLICE DEPARTMENT TEAMS UP WITH THE FEDS

In the wake of 9/11, state and local police agencies were to serve as the "eyes and ears" of our nation's counterterrorism efforts.² JTTFs—hybrid teams of local and state officers and federal agents that actively investigate terrorism threats—were central to this strategy. These Task Forces brought local police officers under the control of the FBI. The FBI described JTTFs as "one-stop shopping for information regarding terrorist activities" and claimed these task forces have been essential in disrupting countless terrorist plots.³ But JTTFs across the country have been accused of violating civil liberties by engaging in racial and religious profiling, infiltrating mosques and community centers, and collecting vast amounts of private data.⁴ Given the nature of the FBI's investigative practices, it is unclear how local police departments fit in. Should local police officers engage in surveillance of the residents they are entrusted to serve? Does their participation on these Task Forces detract resources from other public safety needs?

The SFPD's experience with the JTTF reveals the possible dangers of these partnerships and provides a backdrop to the Civil Rights Ordinance. After initially rejecting an invitation to join the JTTF in 1996, the SFPD entered into a Memorandum of Understanding (MOU) with the FBI in 2002.⁵ This agreement included "six specific clauses that guaranteed local policies would fully apply to the SFPD's activities in the JTTF."⁶ These protections were quickly discarded. In 2007, the MOU was secretly revised and all local and state protections were eliminated.⁷

The 2007 MOU was extraordinary: it gave SFPD officers in the JTTF the power to *disregard* state and local law.⁸ These officers were instead only accountable to federal policies that were often much more permissive. The

2. DAVID L. CARTER, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT INTELLIGENCE: A GUIDE FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 344 (2d ed. 2009), available at www.it.ojp.gov/docdownloader.aspx?ddid=1133.

3. *Protect America from Terrorist Attack: Our Joint Terrorism Task Forces*, FBI, http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtfts (last visited Apr. 19, 2015).

4. Jerry Markon, *FBI Accused of Spying on Muslims at Community Outreach Forums*, *ACLU Says*, WASH. POST, (Dec. 1, 2011), http://www.washingtonpost.com/politics/fbi-illegally-using-community-outreach-to-gather-intelligence-aclu-alleges/2011/11/30/gIQAIqxyGO_story.html.

5. Sarah Phelan, *Spies in Blue*, S.F. BAY GUARDIAN, (Apr. 26, 2011, 4:25 PM), <http://www.sfbg.com/print/2011/04/26/spies-blue>.

6. Letter from Nasrina Bargzie et al. to Police Chief Greg Suhr 2 (on file with author).

7. *Id.*

8. *See id.*

SFPD's policy for criminal investigations, for example, requires police officers to first have an "articulable and reasonable suspicion."⁹ The 2007 MOU, however, mandated that SFPD officers follow the federal guidelines issued by then-Attorney General Michael Mukasey, which "significantly loosen[ed] the restrictions on the FBI's investigative power."¹⁰ The Mukasey Guidelines permitted surveillance and the use of informants without any factual or criminal predicate.¹¹ Further, the 2007 MOU barred SFPD officers from even discussing their activities with their police department supervisor without the permission of their FBI supervisor.¹² Thus, the SFPD entered into an agreement that allowed its JTTF officers to disregard state and local law and to surveil San Francisco residents without any basis—all without meaningful oversight.

Though the full extent of SFPD participation remains unknown, Freedom of Information Act lawsuits have revealed extensive evidence of discriminatory policing in the Bay Area. Since 9/11, FBI officers have infiltrated numerous mosques and community organizations.¹³ For example, documents reveal that FBI agents attended a Ramadan dinner at the San Francisco Islamic association under the pretense of community outreach.¹⁴ Members of the Arab, Middle Eastern, Muslim, and South Asian communities have documented dozens of examples of religious and racial profiling, including those who receive regular visits from the FBI.¹⁵ At hearings before the San Francisco Human Rights Commission, community members also testified that "the FBI continues to offer immigration or similar benefits to Muslims if they become FBI informants and threaten negative consequences to deny those benefits if they do not agree to become informants."¹⁶ Further, there have been documented cases of SFPD officers joining FBI agents for "voluntary interviews" of Muslim Americans.¹⁷ Given the formal SFPD-FBI partnership, the SFPD's role in these violations was called into question.

9. S.F., CAL., POLICE DEPARTMENT GENERAL ORDER 8.10, COMMUNITY POLICING (Oct. 1, 2008).

10. EMILY BERMAN, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 2 (2011).

11. *Id.* at 22.

12. Letter from Nasrina Bargzie et al., *supra* note 6, at 2.

13. Markon, *supra* note 4.

14. *Id.*

15. CITY AND CNTY. OF S.F. HUMAN RIGHTS COMM'N, COMMUNITY CONCERNS OF SURVEILLANCE, RACIAL AND RELIGIOUS PROFILING OF ARAB, MIDDLE EASTERN, SOUTH ASIAN, AND MUSLIM AMERICAN COMMUNITIES AND POTENTIAL REACTIVATION OF SFPD INTELLIGENCE GATHERING 18 (2011), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=983>.

16. *Id.* at 22.

17. Jonah Owen Lamb, *SF Police Could Be Violating City Law in Work with FBI's Joint Terrorism Task Force*, S.F. EXAMINER (Mar. 3, 2015), <http://www.sfexaminer.com/sanfrancisco/sf-police-could-be-violating-city-law-in-work-with-fbis-joint-terrorism-task-force/Content?oid=2922163>.

II. A SIMPLE FIX? SAN FRANCISCO'S LEGISLATIVE APPROACH

A. *The Bill's Origins*

San Francisco's Civil Rights Ordinance was offered as a solution to the SFPD's problematic relationship with the FBI. Following Portland, San Francisco became only the second city to adopt a legislative approach to this issue.¹⁸ As its text reveals, the Ordinance is San Francisco's attempt to minimize the federal government's control of its police force, to reinstitute local accountability measures, and to protect its citizens from discriminatory law enforcement practices.

The passage of the Civil Rights Ordinance is intimately tied to the Coalition for a Safe San Francisco (the Coalition)—a collection of nearly eighty civil rights and civil liberties organizations.¹⁹ The Coalition was formed in 2010 and soon began investigating the SFPD's involvement in national security investigations.²⁰ In 2011, coalition members discovered and released the previously secret agreement between the SFPD and FBI.²¹ The Coalition first attempted to work directly with the SFPD and the Police Commission (a civilian police oversight body) to scrap or significantly reform the 2007 MOU.²² After these efforts were rebuffed, the Coalition focused its energy on San Francisco's legislative body, the Board of Supervisors.

In partnership with the Coalition, District 6 Supervisor Jane Kim introduced the Ordinance in January 2012.²³ The initial fourteen-page document detailed the exact local laws and regulations that all SFPD officers would have to follow.²⁴ It listed seven conditions that SFPD officers had to meet before working with the JTTF,²⁵ and it further banned the use of city funds in a manner inconsistent with the policy.²⁶ After the bill narrowly passed by a 6-5 margin, Mayor Ed Lee vetoed it.²⁷ In a letter to the Board of Supervisors, he

18. MICHAEL PRICE, NATIONAL SECURITY AND LOCAL POLICE 38 (2013).

19. *Activists Slam Hollow Report on SFPD-FBI Spying*, S.F. BAY GUARDIAN (Jan. 31, 2013), available at <http://www.sfbg.com/politics/2013/01/31/activists-slam-hollow-report-sfpd-fbi-spying>.

20. Veena Dubal, *The Demise of Community Policing? The Impacts of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 ASIAN AM. L.J. 35, 48 (2012).

21. *Id.* at 49.

22. Telephone Interview with Veena Dubal, former Director of National Security & Civil Rights program, Asian Law Caucus (Feb. 23, 2013).

23. Steven T. Jones, *Lee Veto Protects SFPD's Ability to Spy on You*, S.F. BAY GUARDIAN (Apr. 11, 2012, 2:46 PM), <http://www.sfbg.com/politics/2012/04/11/lee-veto-protects-sfpds-ability-spy-you>.

24. S.F. Board of Supervisors, Originally Proposed Safe San Francisco Civil Rights Ordinance (Jan. 24, 2012), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/ps120046tdr.pdf>.

25. *Id.* at 11-12.

26. *Id.* at 11.

27. Jones, *supra* note 22.

explained, “While the civil rights goals of the ordinance that I am vetoing are laudable, the restrictions it places on our Police Department overly constrain their ability to protect our City from very real threats.”²⁸ Undeterred, Supervisor Kim reintroduced a slimmed-down version of the Ordinance that was ultimately passed by the Board of Supervisors and signed into law by Mayor Lee.²⁹

B. *The Bill’s Core Provisions*

The Civil Rights Ordinance, which fills less than two pages, consists of three central provisions. First, it explicitly states that the SFPD can only participate in the JTTF:

in a manner that is fully consistent with the laws of California, including but not limited to the inalienable right of privacy guaranteed by Article 1, Section 1 of the California Constitution, as well as the laws and policies of the City and County of San Francisco and, as applicable to the Police Department, that Department’s policies, procedures, and orders.³⁰

This provision was designed to limit SFPD officers from participating in JTTF investigations that were undertaken without any criminal or factual basis. Second, the Ordinance eliminates the possibility of any further secret agreements between the SFPD and FBI; instead, any proposed changes to the MOU must be submitted for public comment at a Police Commission meeting.³¹ Finally, the Ordinance imposes reporting requirements on the SFPD, requiring the Chief of Police provide an annual report to the Police Commission regarding the SFPD’s work with the JTTF during the previous year.³²

C. *The Bill’s Shortcomings*

The Civil Rights Ordinance took effect on June 8, 2012 and was widely celebrated as an important safeguard against further police abuses. There is no denying that the Civil Rights Ordinance is novel. Given that “courts often decline to review counterterrorism practices challenged as violations of constitutional rights,”³³ the San Francisco legislature chose to legislatively enshrine limitations on its police force. Further, the substance of the Ordinance seemingly offers a simple fix—it unambiguously states that San Francisco

28. Letter from Mayor Ed Lee to Board of Supervisors (Apr. 10, 2012), available at <http://sfbos.org/ftp/uploadedfiles/bdsupvrs/communications/2012/120376.pdf>.

29. See *supra* note 1.

30. S.F., Cal., Ordinance 120046 (Jan. 9, 2012) (amending the Administrative Code by adding § 2A.74).

31. *Id.*

32. *Id.*

33. Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1029 (2013).

police officers cannot take part in JTTF activities in violation of state or local law. Though it is only two pages, the Civil Rights Ordinance includes provisions that are aimed at achieving the dual goals of transparency and accountability. Coalition members were optimistic that the bill would not only lift the veil of secrecy that had surrounded the SFPD's decade-long involvement in the JTTF, but that it would also significantly limit the SFPD's participation in the program.

Despite San Francisco's novel approach and the Coalition's high hopes, the text of the Civil Rights Ordinance leaves much to be desired. For one, the Ordinance failed to renounce the 2007 MOU. The problematic agreement between the SFPD and FBI—the very agreement that first triggered the need for the Civil Rights Ordinance—was left unaltered. It remains unclear whether the Ordinance has the legal force to supersede or amend this private agreement. Further, the final version of the Ordinance lacks specificity. There is no mention of monitoring the SFPD officers' involvement with the JTTF on an ongoing basis, either by the civilian Police Commission or the police department itself, and the Ordinance does not contemplate any disciplinary process for officers who violate local laws or regulations. Finally, the Ordinance fails to enumerate what content must be included in the Police Chief's annual report. It simply requires the inclusion of "appropriate public information" regarding this partnership, "including any issues related to compliance" with the Ordinance.³⁴

III. IMPLEMENTATION FAILURES AND POLICY IMPLICATIONS

Directly following the passage of the Civil Rights Ordinance, ACLU attorney John Crew said "[i]t is a step in the right direction, there's no doubt it's progress, but whether it's real progress depends on the implementation."³⁵ In Crew's eyes, the question of implementation turns on two considerations: whether there is "a vigilant, meaningful, and sustained effort to implement this law," and whether there is "sufficient transparency."³⁶ Over the past two years, supporters of the bill have engaged in a constant struggle to implement the law—a struggle that underscores the key limits of the Civil Rights Ordinance.

The main challenge to implementation has been the police department's failure to comply with the bill's reporting requirements. After the bill's passage, the Coalition recommended that the Chief of Police's annual report include certain basic information. Among other pieces of information, they requested the number of stops, interviews, arrests, and prosecutions related to the SFPD-FBI partnership, a complete description of what SFPD officers in the

34. S.F., Cal., Ordinance 120046 (Jan. 9, 2012).

35. Steven T. Jones, *Mayor Lee Signs Watered-Down Limits on SFPD Spying*, S.F. BAY GUARDIAN, (May 9, 2012, 4:56 PM), <http://www.sfbg.com/politics/2012/05/09/mayor-lee-signs-watered-down-limits-sfpd-spying>.

36. *Id.*

JTTF are tasked with, and a list of violations and possible violations of the Ordinance.³⁷

The first annual report that Chief Suhr presented to the Police Commission on January 23, 2013 did not contain any of this specified information. Indeed, the one-page report did not include much of anything. The entirety of the report's Compliance section read, "In 2012, SFPD members assigned to the JTTF were in full compliance with Department General Order 8.10 and Operations Bureau Order 2011-07."³⁸ The only substantive information revealed in the report was that three full-time SFPD inspectors were assigned to the JTTF as Task Force Officers. After criticism from members of the Coalition and claims that the SFPD failed to comply with the Ordinance, Chief Suhr issued an apology and pledged that future reports would be more detailed.³⁹ While subsequent reports have been more detailed, much remains unknown about the SFPD's relationship with the FBI.⁴⁰

The Chief of Police's cavalier attitude towards the Civil Rights Ordinance did little to inspire confidence. The failure to disclose basic information allows neither the Police Commission nor the public to learn about—much less oversee—the program. To be fair, recent reports have provided far more detailed information.⁴¹ But there are still legitimate concerns that SFPD officers have misreported their involvement and are still engaged in activities that violate local laws.⁴² Knowing only what the Chief's reports disclose, there is no indication that these federal investigations are carried out in compliance with state and local laws. As written, the Ordinance provides little incentive for Chief Suhr to provide detailed information on the SFPD's involvement with the JTTF. The Ordinance could be significantly strengthened by mandating that specific information be reported, and by levying consequences on the SFPD for failing to provide that information.

Without a more complete understanding of the specific roles that full-time SFPD offices and sergeants play on the Task Force, there can be no assurances that the Civil Rights Ordinance can serve as an effective accountability mechanism. Based on the reports provided thus far, one concern is that SFPD/JTTF officers are unable, in practice, to limit themselves to the segments of federal investigations that *do* comply with state and local laws. Indeed, in the Portland context, United States Attorney Dwight Holton challenged the

37. Letter from Nasrina Bargzie et al., *supra* note 6, at 8-10.

38. S.F. POLICE DEP'T, ANNUAL REPORT ON SFPD PARTICIPATION IN THE JTTF (2012) (on file with author).

39. Steven T. Jones, *Suhr Apologizes for Sparse Spying Report, Pledges More Info*, S.F. BAY GUARDIAN (Apr. 11, 2012, 5:54 PM), <http://www.sfbg.com/politics/2013/02/01/suhr-apologizes-sparse-spying-report-pledges-more-info>.

40. Nasrina Bargzie, *Safe San Francisco Civil Rights Ordinance: Third Year Report*, ASIAN LAW CAUCUS BLOG (Feb. 11, 2015), <http://www.advancingjustice-alc.org/news-media/blog/safe-san-francisco-civil-rights-ordinance-third-year-report>.

41. *Id.*

42. *Id.*

assumption that police officers could only participate in some JTTF activities. Holton wrote that such a “restriction is not workable. Investigation and prevention of complex crimes and terrorism are typically fluid and fast-moving, and it makes no sense to ask [Portland Police Bureau] officers to be in for one part of the conversation, but out for another part of the same conversation as investigators discuss findings from assessments, investigations, etc., in evaluating and addressing terrorist threats”⁴³

The bill’s failings also raise larger questions about the proper role of local police departments. The SFPD’s inadequate compliance with the bill could create further divisions between residents and their local police force. The SFPD’s unmonitored participation in the JTTF runs directly counter to the “community policing” model—a policing philosophy that prioritizes earning the trust of the individuals they serve.⁴⁴ The San Francisco Human Rights Commission has already documented how SFPD policies contributed to mistrust of law enforcement.⁴⁵ The SFPD’s failure to follow the Ordinance’s reporting requirements only compounds this problem. Equally troubling, San Francisco’s experience demonstrates the difficulty of achieving meaningful police reform. Reforming police departments is always a difficult task,⁴⁶ but even after widespread community mobilization and the support of the city’s legislature, the SFPD’s JTTF program remains largely immune from local actors. The Civil Rights Ordinance, then, perhaps shows that police reform will be even more challenging in the context of covert national security programs.

But despite its failings, the Civil Rights Ordinance represents an important first step towards reform. Although many police departments are party to secret and unregulated agreements with the FBI, San Francisco has, at the very least, pressured its law enforcement officials to require compliance with local and state laws. Further, the Ordinance fostered necessary dialogue and confronted the issue of discriminatory law enforcement practices within the Bay Area. With this first step taken, it is possible that SFPD officers will limit their unlawful police practices over time. The Ordinance may not encapsulate all the protections that are ultimately needed, but its passage provides a hook for future, more expansive legislation.

43. Tung Yin, *Joint Terrorism Task Forces as a Window into the Security vs. Civil Liberties Debate*, 13 FLA. COASTAL L. REV. 1, 21-22 (2011).

44. See Dubal, *supra* note 20, at 47-50.

45. See S.F. HUMAN RIGHTS COMM’N, *supra* note 15, at 31.

46. See generally SAMUEL WALKER, POLICE ACCOUNTABILITY: CURRENT ISSUES AND RESEARCH NEEDS (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf>.