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BEFORE PORTLAND CITY COUNCIL
INFORMATIONAL HEARING WITH EXPERTS
ON THE FBI JTTF

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Thank you for the opportunity to present our perspective on whether Portland should formally rejoin the FBI Joint Terrorism Task Force (JTTF). In addition to my testimony, we are providing Council with notebooks. The documents I reference today are all contained in those notebooks. We have posted the Oregon-related documents on our web.

I want to briefly review part of the history of Portland's participation in the FBI Joint Terrorism Task Force. Although Portland's participation started in 1997, it was not until 2000 that the Memorandum of Understanding (MOU), came before Council for approval. It came to the attention of ACLU, thanks to Dan Handelman of Portland Copwatch who spotted the MOU on the consent agenda and asked for it to be removed.

When we reviewed the mission of that JTTF MOU, it reflected a mission to monitor lawful political activity. The original 2000 MOU stated that "The mission of the PJTTF is to identify and target for prosecution those individuals or groups who are responsible for Right Wing and/or Left Wing movements, as well as acts of the anti-abortion movement and the Animal Liberation Front/Earth Liberation Front." That version of the 2000 MOU had already been signed by the FBI and the Portland Chief of Police. Apparently, no one had objected to what was clearly a mission targeted at lawful movements not criminal activity, until Mr. Handelman brought it to light.

We jump to 2005 when Council by a vote of 4-1 approved resolution 36315, only after extensive negotiations with the US Attorney and FBI. I urge everyone to read this resolution – it reflects the commitment by the City for appropriate civilian oversight as well as for ongoing cooperation and collaboration between the Portland Police Bureau and the FBI on specific cases or investigations. It authorizes the Police Chief to stay on the JTTF Executive Committee and to brief the Mayor after each meeting. It states that the FBI will brief the Mayor and Chief of Police regarding any threats in Portland and provides that the City, in turn, will immediately contact the FBI if it has any information related to possible terrorist threats.

The 2005 resolution, which we assume is still in effect, is a moderate and responsible approach. It does not remove Portland from collaboration with the federal government on a criminal investigation, including threats of terrorism. In fact, it specifies just the opposite. But it does remove the Portland Criminal Intelligence Unit from the FBI JTTF and it reinstated direct oversight and supervision of all Portland officers by city, not federal, officials.

There seems to be two overriding questions about whether or not Portland can and should rejoin the FBI JTTF. The first is whether the FBI has changed in the last 6 years in a way that may reduce concerns about civil liberties. The short answer is “No,” the policies and practices of the FBI have gotten worse since 2005, not better. Mike German, ACLU Policy Counsel will address this.

The other question is whether Portland can participate in the JTTF without violating Oregon law. Despite what proponents and some in law enforcement say, the answer to that question is also “No,” Portland cannot participate in the JTTF without serious risk of violating part of the law and doing an end-run around the other part. That was the answer in 2005 and remains the same answer today. And, based on Portland’s history, not all of which is that “historic,” it is critical that there be civilian oversight of **all** Portland police activities, most especially, intelligence gathering activities.

We begin in 1975, when the ACLU of Oregon received a copy of its first Portland Police Bureau file which documents the illegal collection of information on the ACLU by the Portland Police Bureau (Tab B)

At that time, the Portland Police Bureau had clear written policy and procedures prohibiting the monitoring of the lawful activities of organizations such as the ACLU

We were told this illegal monitoring of the ACLU should not have happened and would not happen again.

In 1981, the ACLU successfully urged the Oregon legislature to pass ORS 181.575 which provides, in part, that no law enforcement agency may collect or maintain information about the political, religious or social view of individuals or organizations “**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.”

Despite that law, the Portland Police Bureau continued to monitor the lawful political and religious activities of thousands individuals and organizations. In 2002, the Portland Tribune obtained those files and published a series of stories.

Included in that collection was a new rather extensive, second, file on the ACLU of Oregon, with documents dating from 1967 to 1985, four years after ORS 181.575 was enacted. We have included samples from that file as well (Tab C). I mention only one, a Portland police bureau

Criminal Intelligence Report on an upcoming Impeach Nixon Demonstration, setting out the details of the planned event. The ACLU is identified as the leading organization and it states that State Senator Betty Roberts is listed as one of the planned speakers who had recently announced her candidacy for Governor.

According to the Tribune story, the Police Bureau activities included not only files but infiltration of lawful political groups. It reported that 20-plus police officers wrote reports, that they were addressed to at least 7 commanding officers and that the entire unit was not only familiar with the political surveillance but contributed to it.

Unfortunately, violations of ORS 181.575 have continued in Portland, at least well into the 1990s. We have included a copy of a 1992 Portland police bureau intelligence report listing over 20 organizations that held a planning meeting to discuss a variety of political issues, including the need to push for a civilian police review board. The only reason that document came to light was through a criminal case, which ultimately resulted in a decision known informally as *Squirrel v. Moose* (but really *Squirrel v. City of Portland*).

In that 1996 case, Judge Marcus held *retention* of this 1992 report in the police bureau files violated ORS 181.575 and ordered the City Attorney to review all criminal intelligence unit files on an ongoing basis. The City Attorney sent a letter to the court acknowledging this review process.

The other document we have, again, only discovered in connection with a criminal prosecution, is a 1998 report with the subject line: "Anti-US Gov't involvement in Iraq demonstrations sponsored by Peace & Justice works and the Iraq Affinity Group." It identified under "non-criminal information" Daniel "Handleman", leader of the Iraq Affinity Group.

All of this is to explain that the reason for requiring civilian oversight of Portland police officers isn't just the "Portland" way; it happened after years of documented abuse of intelligence gathering by Portland police. In 2002, explaining the role of ongoing civilian oversight, a Deputy City Attorney explained the process taken to ensure Portland complies with ORS 181.575: "Criminal intelligence reports written by Portland officers and kept in the Criminal Intelligence Division as part of the Bureau's criminal intelligence function are reviewed every three months for compliance with Oregon law by the Office of the City Attorney and the Director of the Independent Police Review Division of the Office of the Auditor."

Compliance with Oregon law cannot happen when Portland officers are deputized as federal agents and work directly as members of the FBI JTTF. Officers participating would not be able seek the advice of the City Attorney during an investigation, to ensure they remain within the requirements of ORS 181.575. In addition, *all* intelligence reports, indeed all records, created by participants in the JTTF are kept by the FBI. Unless the City Attorney was granted Top Secret security clearance the City Attorney could not oversee the work of those officers and none of the FBI intelligence reports created by those officers would be purged or redacted in compliance with Oregon law.

Resuming Portland's participation in the JTTF would also ignore the very reasons Portland has and continues to need civilian oversight. That oversight is necessary so city officials and the public can be assured that Portland's history of collecting information on the lawful political and religious activity of individuals and organizations without the necessary reasonable suspicion required under Oregon law is, truly, a thing of the past.

In various venues, the federal proponents of joining the JTTF have stated that the JTTF does not gather information on anyone based *solely* on their religious or political view, on their union membership, or their organizational membership. And they state there are 5 reasons: One, it's immoral. Two, it's unconstitutional. Three, it violates federal law and federal guidelines. Four, it violates state law. And five, it's a waste of time.

I want to make clear, we have never said that the FBI is *authorized* to investigate **solely** based on First amendment activity, since that *would* violate FBI guidelines.

However, what we do say is that the FBI is *legally* allowed to engage in intelligence gathering without meeting the necessary "reasonable suspicion" standard required under ORS 181.575.

As the US Department of Justice Office of Inspector General wrote in 2010, the FBI has authority under the guidelines "to open preliminary inquiries based on extremely limited information including information about the First Amendment expressions of subjects." Preliminary investigations require only an allegation or information indicating the possibility of criminal activity. The Inspector General described that as an "easily attainable and speculative 'possibility' standard".

I want to briefly quote another September 2010 Inspector General report regarding allegations of cheating by the FBI. "To the credit, the FBI implemented training and a rigorous exam of the new Domestic Investigations and Operations Guide [which describes the procedures its employees must follow when conducting domestic investigations]. Unfortunately, the actions of some FBI employees undermined these actions. In our limited investigation, we found that a significant number of FBI employees engaged in some form of improper conduct or cheating on the DIOG exam, some in clear violation of FBI directive regarding the exam.. . Several supervisors, including two Assistant Special Agents in Charge, two Supervisory Special Agents and a legal advisor, were all involved in cheating."

Proponents of joining also assert that we can resolve any concerns about Portland officers complying with Oregon law by adding language to the MOU specifically mandating Portland officers comply with ORS 181.575.

This is not a new concept and would do nothing to address the legal objections raised by us and others. The model JTTF MOU already has language about local police officers complying with their applicable laws, as did Portland's previous MOUs. That language was included because of the risk of liability to the city if local officers violate the laws they are sworn to uphold.

However, having that language in the MOU would do nothing to assure meaningful compliance or oversight of the officers' actions.

Proponents argue that we can trust our Portland officers to identify and alert their supervisors if there is any question they are being asked to violate Oregon law. At which point, the theory goes, these officers would not proceed with any orders by the FBI that violate our laws. This argument is flawed.

Because the FBI does not have to follow Oregon law, they have no duty to identify to the local officers where their actions, although in compliance with federal guidelines, violate Oregon law. Are we supposed to believe that a Portland officer is going to demand that the FBI produce the necessary documentation to show that the Portland officer is engaged in an investigation that complies with Oregon law? That doesn't seem....realistic.

And proposing such a solution ignores the fact that of the previous violations by the Portland police bureau of ORS 181.575 since 1981, or before that of Bureau policies, *none* were discovered because an officer reported it.

The proponents also argue that if the officers have any question about Oregon law, they could seek the advice of their own supervisors. This scenario would replace the role of the City Attorney, who is charged with giving the Bureau and its police officers legal advice, with a Police Bureau supervisor. This should raise concerns, if for liability reasons alone. But more importantly, it creates a group of Portland officers who could not seek the legal advice of their own attorney. And if those officers suspected they were being asked, even unintentionally, to violate Oregon law, neither those officers nor their supervisors could report any of this to the Mayor, who oversees the Police Bureau or the City Attorney, because that would expose the City to significant liability for an unauthorized disclosure of classified information. (And, of course, because we are talking about situations where there would be no violation of federal law, there would be nothing to report to the FBI.)

In addition, the idea that we write into the MOU language requiring specific compliance with ORS 181.575, seems to presume that all violations of ORS 181.575 would occur at the front-end of an investigation and could be prevented.

That "solution" completely ignores the second portion of the Oregon law that requires that files lawfully collected during an investigation be reviewed and, where appropriate, not maintained by either redaction or purging. This is the provision of the Oregon law that Judge Marcus specifically held Portland violated. He wrote: "The mere presence of an individual, group, [or] organization . . . at an event or activity where criminal behavior is discussed, planned or conducted by others shall not be sufficient basis for including the individual, group [or] organization . . . in a document that is subject to the mandates of ORS 181.575."

Portland, specifically through the City Attorney, is required, after the completion of an investigation, to review all criminal intelligence files and to ensure that any files *maintained*

comply with Oregon law. Since all JTTF officers would create FBI files and FBI retention practices are inconsistent with Oregon law, there is nothing that could be put in an MOU to ensure our officers would fully comply with ORS 181.575. The only ways to adequately ensure that Portland officers could follow Oregon law would be to authorize the Portland City Attorney to review all Portland officer FBI work product and remove any items that violate Oregon law. In 2005, the Justice Department was not even willing to grant the City Attorney a "Secret" clearance. It is even less likely that DOJ would grant the City Attorney "Top Secret" clearance now.

One more "real life" Portland example: the majority of the FBI's affidavit submitted to federal court on Brandon Mayfield was focused on Mr. Mayfield's religious activities. If Portland officers had collected that information through the criminal intelligence unit, that information would have been reviewed by the City Attorney and removed under Oregon law once it became clear that Mr. Mayfield was totally innocent. However, because that information was collected by the FBI, it has not only *not* been redacted, it has been shared throughout the federal government.

The City Attorney assured the courts, and all of us, back in 2000 and again in 2002 that they were actively reviewing Portland's criminal intelligence files. If we turn over those same officers to the FBI JTTF, the City Attorney can no longer assure us that Portland police officers are in full compliance with ORS 181.575 and there is no additional language to an MOU that could fix that.

For all of these reasons, we urge you not to authorize Portland to rejoin the FBI JTTF. Instead, we should reaffirm the 2005 resolution and take the necessary steps to ensure that the commitment by both the City and the FBI in 2005 to cooperate on a case-by-case basis is followed in the future.