



October 21, 2009

Senator James E. Timilty
State House
Room 507
Boston, MA 02133

Representative Michael A. Costello
State House
Room 167
Boston, MA 02133

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

MICHAEL W. MACLEOD-BALL
ACTING DIRECTOR

NATIONAL OFFICE
125 BROAD STREE, ST 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

RE: TESTIMONY IN SUPPORT OF SENATE BILL 931 BEFORE THE
JOINT COMMITTEE ON PUBLIC SAFETY AND HOMELAND
SECURITY

Dear Chairman Timilty, Chairman Costello, and members of the Committee,

My name is Michael German, and I am policy counsel at the American Civil Liberties Union's Washington Legislative Office, where I focus on national security and open government issues. Thank you for the opportunity to testify as you consider legislation to regulate intelligence fusion centers. Too often since the terrorist attacks of September 11th, 2001 we have been told that we need balance our liberty interests against our security interests, but my experience during a 16 year career in federal law enforcement taught me this is a false construction. In fact, what I learned by infiltrating domestic terrorist groups as an FBI undercover agent is that the opposite is true: by failing to protect the liberty interests of innocent people we actually harm our security, and by failing to properly regulate and oversee the activities of law enforcement and intelligence agencies we allow them to become less competent and less effective.

I found that the legal standard I operated under as an FBI agent before 9/11, which required reasonable suspicion that someone was engaging in or planning to engage in illegal activity before investigating that person did more than just protect the innocent from unnecessary scrutiny; it made me a more effective law enforcement officer. In short, the reasonable suspicion standard helped me to focus my attention on real threats to the community rather than on people who simply said or did things I didn't like. Investigating people who aren't breaking the law is a waste of law enforcement time and finite security resources, as well as an unnecessary violation of privacy.

Unfortunately, after 9/11 law enforcement agencies at the federal, state and local levels moved away from the time-tested reasonable suspicion standard toward a new model known as “intelligence led policing,” or ILP. This new theory of criminal intelligence argues that collecting even outwardly innocuous behaviors will somehow enhance security. In 2006, former DHS Secretary Michael Chertoff said,

Intelligence is about thousands and thousands of routine, everyday observations and activities. Surveillance, interactions – each of which may be taken in isolation as not a particularly meaningful piece of information, but when fused together, give us a sense of the patterns and flow that really is at the core of what intelligence is all about.ⁱ

Fusion centers are a direct institutional outgrowth of ILP, which promotes information collection and sharing as a strategy for preventative law enforcement, emphasizing the use of data mining technology in order to find patterns of potential criminal or terrorist behavior in a community. Despite a federal regulation that requires reasonable suspicion of criminality before personally-identifiable information can be collected in a shared criminal intelligence system, Fusion Center Guidelines published by DHS and the Department of Justice encourage fusion centers to broaden their sources of data “beyond criminal intelligence, to include federal intelligence as well as public and private sector data.”ⁱⁱ Rather than being constrained by the law regarding what they can collect, Delaware State Police Captain Bill Harris, head of the Delaware Information Analysis Center (DIAC), appeared to feel constrained only by resources: “I don’t want to say it’s unlimited, but the ceiling is very high... When we have the money, we’ll start going to those other agencies and say, ‘Are you willing to share that database and what would it cost.’”ⁱⁱⁱ

This erosion of reasonable limits on police power to collect our private information has set the stage for a return of the abusive practices of the past. In recent years the ACLU has uncovered substantial evidence that domestic intelligence powers are being misused at all levels of government to target non-violent political activists. In Maryland a State Police spying operation targeted at least 23 non-violent political advocacy organizations based solely on the exercise of their members’ First Amendment rights lasted more than 14 months.^{iv} None of the reports from these operations suggested any factual basis to suspect these groups posed any threat to security and, not surprisingly, no criminal activity was discovered during these investigations. Despite this lack of evidence, the MSP labeled many of these activists “terrorists,” distributed information gathered in their investigations widely among other law enforcement and intelligence agencies – including a local police representative of the FBI’s Joint Terrorism Task Force (JTTF), a National Security Agency security official, and an unnamed military intelligence officer –and uploaded the activists’ personal information into a federal drug enforcement and terrorism database.^v The Department of Homeland Security (DHS) was also involved, collecting and disseminating e-mails from one of the peace groups to assist the MSP spying operations.^{vi} From a pure information sharing perspective, this case worked well. But the sharing of such misleading, erroneous and irrelevant information provided no security benefit to the people of Maryland, and only undermined the credibility of state and federal intelligence systems.

In addition to the abusive Maryland investigations, the ACLU of Colorado uncovered illegal surveillance of peaceful protestors and environmental activists by the Denver Police and the

FBI,^{vii} and the ACLU of Northern California produced a report of widespread illegal spying activities by federal, state and local officials.^{viii} ACLU Freedom of Information Act litigation revealed FBI JTTF investigations targeting peace activists in Pennsylvania and Georgia, and Department of Defense intelligence operations targeting anti-military protestors from around the country.^{ix} This is not an isolated problem: since 9/11 the ACLU has documented improper spying on or obstruction of First Amendment protected activity in 29 states and the District of Columbia. And the security of the information collected for law enforcement databases is also in doubt, and not just because private companies often house or have access to the information. Here in Massachusetts a recent audit revealed police from across the state abused the criminal records system to search for data on local celebrities.^x It is unclear how many private citizens might have also had their privacy violated with these improper searches.

The ACLU has also produced two reports detailing problems at intelligence fusion centers.^{xi} Since these reports were published a Texas fusion center released an intelligence bulletin that described a purported conspiracy between Muslim civil rights organizations, lobbying groups, the anti-war movement, a former U.S. Congresswoman, the U.S. Treasury Department and hip hop bands to spread Sharia law in the U.S.^{xii} The same month, but on the other side of the political spectrum, a Missouri Fusion Center released a report on “the modern militia movement” that claimed militia members are “usually supporters” of presidential candidates Ron Paul and Bob Barr.^{xiii} In March 2008 the Virginia Fusion Center issued a terrorism threat assessment that described the state’s universities and colleges as “nodes for radicalization” and characterized the “diversity” surrounding a Virginia military base and the state’s “historically black” colleges as possible threats. These bulletins, which are widely distributed, would be laughable except that they come with the imprimatur of a federally-backed intelligence operation, and they encourage law enforcement officers to monitor the activities of political activists and racial and religious minorities.

It should be clear enough that these abusive intelligence reports and unnecessary investigations of peaceful activists do nothing to improve security. Sharing misleading information about the ideologies and activities of non-violent groups only wastes security resources and the exposure of this misconduct undermines public support for law enforcement. But a recent National Academy of Sciences National Research Council study funded by DHS raises even more fundamental questions about whether data mining technology behind the fusion center concept is a scientifically viable methodology, which may explain why these programs have not yet produced demonstrable accomplishments. The study concluded:

Automated identification of terrorists through data mining (or any other known methodology) is neither feasible as an objective nor desirable as a goal of technology development efforts. One reason is that collecting and examining information to inhibit terrorists inevitably conflicts with efforts to protect individual privacy. And when privacy is breached, the damage is real. The degree to which privacy is compromised is fundamentally related to the sciences of database technology and statistics as well as to policy and process.^{xiv}

Expending resources on scientifically unsound technology is not a wise use of our security dollars, particularly when the rights of ordinary Massachusetts residents are unnecessarily being put at risk.

All law enforcement agencies feel the same pressure as a result of their responsibility for providing security to the communities they serve, so it is not surprising that they sometimes step over the line, even with the best intentions. But it is their obligation to protect our rights as well as our security. Providing our law enforcement officers with uniform, clear standards that protect the rights of all Massachusetts residents will only make these public servants more efficient and more effective at protecting their communities from real threats to public safety. Providing strong oversight will ensure that abuses are caught and corrected before they undermine public confidence. Senate Bill 931 provides reasonable checks that will make Massachusetts fusion centers more effective at protecting our rights as well as our security.

Thank you,



Michael German
Policy Counsel

ⁱ Secretary of Homeland Security Michael Chertoff, Remarks at the 2006, Bureau of Justice Assistance, U.S. Department of Justice and SEARCH Symposium on Justice and Public Safety Information Sharing, Mar. 14, 2006, http://www.dhs.gov/xnews/speeches/speech_0273.shtm.

ⁱⁱ TODD MASSE, SIOBHAN O'NEIL AND JOHN ROLLINS, CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: FUSION CENTERS: ISSUES AND OPTIONS FOR CONGRESS at 1, (July 6, 2007) [hereinafter CRS Fusion Center Report].

ⁱⁱⁱ Mike Chalmers and Lee Williams, *Intelligence Facility Casts a Wide Net*, THE NEWS JOURNAL, May 7, 2007, <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20070507/NEWS/705070333>. See also, 28, Code of Federal Regulations, Part 23.

^{iv} See, ACLU of Maryland "Stop Spying" info page, <http://www.aclu-md.org/Index%20content/NoSpying/NoSpying.html> (last visited Oct. 19, 2009).

^v MSP submitted the information to the Washington-Baltimore High Intensity Drug Trafficking Area Task Force (HIDTA) database. HIDTA is a federal program that provides funding and support to participating law enforcement agencies to support regional counter-drug and counter-terrorism efforts. See, 21 U.S.C. §1706 (2006).

^{vi} Lisa Rein, *Federal Agency Aided Md. Spying*, WASH. POST, Feb. 17, 2009, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/16/AR2009021601131.html>.

^{vii} The Denver Police Spy Files, ACLU of Colorado, <http://www.aclu-co.org/spyfiles/fbifiles.htm> (last visited Apr. 15, 2009).

^{viii} MARK SCHLOSBERG, STATE OF SURVEILLANCE: GOVERNMENT MONITORING OF POLITICAL ACTIVITY IN NORTHERN AND CENTRAL CALIFORNIA, ACLU OF NORTHERN CALIFORNIA (July 2006), available at http://www.aclunc.org/issues/government_surveillance/asset_upload_file714_3255.pdf.

^{ix} Faces of Surveillance: Targets of Illegal Spying, ACLU Website, <http://www.aclu.org/safefree/general/24287res20060227.html> (last visited Apr. 15, 2009).

^x Andrea Estes and Peter Schworm, “Police Prying into Stars’ Data,” May 6, 2009, available at:

http://www.boston.com/news/local/massachusetts/articles/2009/05/06/police_prying_into_stars_data/

^{xi} MICHAEL GERMAN AND JAY STANLEY, WHAT’S WRONG WITH FUSION CENTERS? AMERICAN CIVIL LIBERTIES UNION (Dec. 2007), http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf; MIKE GERMAN AND JAY STANLEY, AMERICAN CIVIL LIBERTIES UNION, FUSION CENTER REPORT UPDATE (July 2008), http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf.

^{xii} North Central Texas Fusion System Prevention Awareness Bulletin, (Feb. 19, 2009), available at http://www.baumbach.org/fusion/PAB_19Feb09.doc. For a discussion of DHS support of the North Central Texas Fusion Center, See U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, DHS’S ROLE IN STATE AND LOCAL FUSION CENTERS IS EVOLVING (Dec. 2008), available at <http://www.fas.org/irp/agency/dhs/ig-fusion.pdf>; GENERAL ACCOUNTABILITY OFFICE, HOMELAND SECURITY: FEDERAL EFFORTS ARE HELPING TO ALLEVIATE SOME CHALLENGES ENCOUNTERED BY STATE AND LOCAL INFORMATION FUSION CENTERS (Oct. 2007), available at <http://www.gao.gov/new.items/d0835.pdf>.

^{xiii} T.J. Greaney, ‘Fusion Center’ Data Draws Fire over Assertions, COLOMBIA DAILY TRIBUNE, (March 14, 2009), available at <http://www.columbiatribune.com/news/2009/mar/14/fusion-center-data-draws-fire-over-assertions/>.

^{xiv} NATIONAL RESEARCH COUNCIL, PROTECTING INDIVIDUAL PRIVACY IN THE STRUGGLE AGAINST TERRORISTS: A FRAMEWORK FOR PROGRAM ASSESSMENTS, COMMITTEE ON TECHNICAL AND PRIVACY DIMENSIONS OF INFORMATION FOR TERRORISM PREVENTION AND OTHER NATIONAL GOALS (Oct. 2007), available at http://www.nap.edu/catalog.php?record_id=12452.