

Laura Rótolo
Staff Attorney
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170
lrotolo@aclum.org

-- FREEDOM OF INFORMATION APPEAL --

April 21, 2010

Director, Office of Information Policy
U.S. Dep't of Justice
1425 New York Avenue, NW
Suite 11050
Washington, DC 20530-0001

Re: Appeal of FOIA Request No. 1141755-00

Dear Sir or Madam,

This letter constitutes an appeal pursuant to 6 C.F.R. § 5.9 of the determination in response to request number 1141755-00. The underlying request for “records showing the number of JTTF personnel whose responsibilities require them to be physically present at the CFC [Commonwealth Fusion Center] or the BRIC [Boston Regional Intelligence Center]” was made jointly by the American Civil Liberties Union Foundation of Massachusetts (ACLUM) and Political Research Associates (PRA) on December 30, 2009. Exhibit A.

On February 24, 2010, the Federal Bureau of Investigation denied this request citing 5 U.S.C. § 552(b)(2) and § 552(b)(7)(E). Exhibit B. For the following reasons, we appeal that determination.

I. FOIA PRESUMES THAT DOCUMENTS ARE NOT EXEMPT FROM DISCLOSURE

The purpose of FOIA is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). FOIA is premised on the notion that ““the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.”” A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 140 (2d Cir. 1994) (quoting The Federalist No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961). “[O]ur government, relying as it does on the consent of the governed, may not succeed unless its ‘people who mean to be their own governors ... arm themselves with the power knowledge gives.’” Id. at 140-41 (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 2, 3 (1965)).

FOIA “adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies.” Halpern v. FBI, 181 F. 3d 279, 286 (2d Cir. 1999). While there are nine exemptions that allow an agency to withhold information, see 5 U.S.C. §§ 552(a)(4)(B) & (b)(1)-(9), the exemptions are narrowly construed and the government bears the burden of proving that any one applies. See Halpern, 181 F.3d at 287; see also Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 7-8 (2001) (FOIA exemptions are narrowly construed); John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989); DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989). It is well established that these “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is

the dominant objective of the Act.” Klamath Water Users, 532 U.S. at 7-8. For this reason, any reasonably segregable portion of any record must be released. See 5 U.S.C. § 552(b).

Consistent with the statute and a renewed commitment to open government, on January 21, 2009, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act (FOIA) directing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.”

Memorandum from President Barack Obama to Heads of Executive Departments and Agencies (Jan. 21, 2009) available at http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/. Moreover, the President instructed agencies to “adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” Id.

The agency’s response indicates that it did not follow this statutory requirement and executive guidance regarding a presumption in favor of disclosure. With little explanation, the agency denied the request, simply pasting the text of the exemptions and then asserting that the release of the information could “reasonably be expected to interfere with the enforcement proceedings and risk circumvention of the law.” Exhibit B.

For the following reasons, the agency erred in this determination.

II. EXEMPTION 2 DOES NOT BAR DISCLOSURE OF THIS DOCUMENT

“Exemption 2” permits the withholding of documents “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). It was created to apply purely to internal matters in which the public has no interest. The document requested does not fit into the exempted category for two reasons. First, it is not purely internal. Second, it is a matter of great public interest.

A. The number of JTTF personnel physically present at the CFC or the BRIC is not a housekeeping matter

“[T]he general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspections matter in which the public could not reasonably be expected to have an interest.” Dep’t of Air Force v. Rose, 425 U.S. 352, 369-70 (1976). Thus, the Exemption “relates to information concerning those rules and practices that affect the internal workings of an agency, and therefore, would be of no genuine public interest.” Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (internal quotations omitted).

In essence, Exemption 2 applies to “trivial” or “housekeeping” matters. Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (internal deadlines and instructions about which agency officials to contact for assistance are “housekeeping matters” not subject to disclosure).

Courts have upheld the withholding of such housekeeping matters that are of no public interest as FBI file numbers; computer codes; internal report numbers; informant and violator codes; FBI handling and dissemination instructions; and Bureau of Prisons internal markings. See McCoy v. Moschella, No. 89-2155, 1991 U.S. Dist. LEXIS 13618

(D.D.C. Sept. 30, 1991); Wightman v. Bureau of Alcohol, Tobacco and Firearms, 755 F. 2d 979, 982 (1st Cir. 1985); Texas Instruments, Inc. v. Customs Serv., 479 F.Supp. 404 (D.D.C. 1979); Albuquerque Publ'g Co. v. DOJ, 726 F. Supp. 851 (D.D.C. 1989); Meeropol v. Smith, No. 75-1121, slip op. (D.D.C. Feb. 29, 1984), aff'd in relevant part & remanded sub nom. Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986).

The request asked for “records showing the number of JTTF personnel whose responsibilities require them to be physically present at the CFC [Commonwealth Fusion Center] or the BRIC [Boston Regional Intelligence Center]” Exhibit A. These records are not simply a “housekeeping matter.” There is nothing “trivial” about the role the JTTF plays at our Massachusetts Fusion Centers, the CFC and BRIC. Unlike lists of computer codes or file numbers, the requested documents refer to agents who are fully-functioning parts of our communities, working hand-in-hand with our state and local police and carrying out operations in New England. The staffing breakdown affects persons outside of the agency on a daily basis as JTTF agents carry out investigations and process information throughout our region.

B. Even if considered predominantly internal, the document must be disclosed because it is a matter of public interest and its disclosure would not circumvent any agency regulation.

If the threshold test of predominant internality is met, an agency may withhold the requested material “by proving that either [1] ‘disclosure may risk circumvention of agency regulation,’ or [2] ‘the material relates to trivial administrative matters of no genuine public interest.’” Schiller, 964 F.2d at 1207 (citing Schwanner v. Department of

Air Force, 898 F.2d 793, 794 (D.C. Cir.1990)). Matters that are of no genuine public interest are generally referred to as “Low 2” while matters that are in the public interest but would risk circumventing agency regulations if disclosed are referred to as "High 2." Id. at 207.

Assuming, arguendo, that the responsive documents are a purely internal matter, they fit the “High 2” category because there is a clear and demonstrated public interest in

matters relating to the JTTFs.¹ The records are needed because the system of government collaboration across jurisdictions implicates core privacy concerns, yet almost nothing is

¹ See e.g. Colin Moynihan, *Activist Unmasks Himself as Federal Informant in G.O.P. Convention Case*, N.Y. TIMES, Jan 5, 2009; Denny Walsh, *Student's Path to FBI Informant*, SACRAMENTO BEE, Sept. 12, 2007; Pachuco, *Joint Terrorism Task Force Questions Professor*, March 13, 2006, <http://la.indymedia.org/news/2006/03/150016.php>; *FBI paid controversial NJ blogger for help*, ASSOCIATED PRESS, November 29, 2009; Stephanie Ebbert, *Fusion Center takes aim at terror, But secrecy alarms civil libertarians*, BOSTON GLOBE, September 26, 2005; T.J. Greaney, *'Fusion center' data draws fire over assertions: Politics, banners seen as suspect*, COLUMBIA DAILY TRIBUNE, March, 14, 2009; Hilary Hylton, *Fusion Centers: Giving Cops Too Much Information?*, TIME MAGAZINE, March 9, 2009; Robert O'Harrow, Jr., *Centers Tap Into Personal Databases, State Groups Were Formed After 9/11*, WASH. POST, April 2, 2008; Ryan Singel, *Fusion Center Cash Infusion*, Wired Magazine, March 14, 2007; Brent Kendall, *FBI to Assess Actions Before Hood Shooting*, WALL. ST. J., December 9, 2009; Anderson, Jennifer, *New Council Inherits Task Force Decision*, PORTLAND TRIBUNE Dec. 21, 2004; *Activists Announce Letter to Governor Demanding Complete Investigation of Spying*, MD. NEWS, Aug. 12, 2008; David E. Kaplan, *Spies Among Us*, US NEWS AND WORLD REPORT, May 8, 2006; Erin Rosa, *Colorado Fusion Center to Step Up Intelligence Gathering During DNC*, COLO. INDEPENDENT, July 30, 2008; Bures, Frank, *City's split: fear for safety vs. fear for rights*, CHRISTIAN SCIENCE MONITOR, Oct. 17, 2001; Nakashima, Ellen, *\$1 billion FBI database will track physical characteristics of millions*, BOSTON GLOBE, Dec. 23, 2007; Lisa Myers, *Is the Pentagon Spying on Americans?* MSNBC, Dec. 14, 2005; *Fusion Center Meltdown: Feds stifling open government in VA?* ARS TECHNICA, March 24, 2008; Joseph Straw, *Fusion Centers and Civil Rights*, SECURITY MANAGEMENT, August 2008; Rogers M. Smith, *Civil Liberties in the Brave New World of Antiterrorism*, 93 RADICAL HISTORY REVIEW at 170-85, Fall 2005; James Casey, M.A., *Managing Joint Terrorism Task Force Resources*, FBI ENFORCEMENT BULLETIN, November 2004, at 1-6; Roberto Lovato, *Building the Homeland Security State*, NACLA REPORT ON THE AMERICAS, Vol. 41, No. 6, Nov/Dec 2008, at 15-20; Christopher Ortiz, Nicole Hendricks & Naomi Sugie, *Policing Terrorism: The Response of Local Police Agencies to Homeland Security Concerns*, CRIMINAL JUSTICE STUDIES, Vol 20, No. 2, June 2007, at 91-109; Naomi Klein, *Big Brother Democracy: How Free Speech and Surveillance Are Now Intertwined*, THE NATION, Aug. 28, 2006; Shelley Murphy, *False tips cost antiterror officials time and credibility*, Feb. 1, 2005; Erich Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004; John Friedman, *Spying on the Protesters*, THE NATION, Sept. 19, 2005; Matthew Rothschild, *Tales of Big Brother*, THE PROGRESSIVE, Aug. 25, 2004; Dafna Linzer, *In New York, a Turf War in the Battle Against Terrorism*, WASHINGTON POST, Mar. 22, 2008.

known about its role at our fusion centers, the standards that guide it or limit this potentially-invasive information-sharing system, or whether the system is being abused. The level of JTTF participation at our local fusion centers is an important piece of information that the public has an interest in knowing.

Because the issue a matter of public interest, the agency may only withhold the documents by proving that “disclosure may risk circumvention of agency regulation.” Schiller, 964 F.2d at 1207. Additionally, the agency must demonstrate with adequate specificity how disclosure of records at issue would “significantly risk circumvention of federal statutes or regulations.” See e.g., Crooker v. Bureau of Alcohol, Tobacco, and Firearms, 670 F.2d 1051, 1074-1075 (D.C. Cir. 1981) (en banc) (concluding that it is the government’s burden to show that release of a surveillance manual might “help individuals evade detention by law enforcement authorities”). The agency has not made such an argument.

In fact, the staffing of many FBI, JTTF and other law enforcement agencies already are part of the public record. For example, in open hearings before Congress, Juliette Kayyem, Undersecretary for Homeland Security of the Commonwealth of Massachusetts, spoke at some length about the different federal and local agencies who have officers at the CFC. See Exhibit C. Another publicly available document, published by the Naval Post Graduate School, goes into some detail describing the staffing of the CFC, including information about JTTF officers assigned there. See Exhibit C.

Withholding the requested information would allow for secret participation in our own cities and towns where the JTTF could operate without accountability to the public whom it is seeking to protect.

Finally, if the agency can prove that disclosure of certain documents would significantly risk circumvention of the law, the agency nonetheless has to demonstrate that it has segregated nonexempt material for disclosure. Schreibman v. Dep't of Commerce, 785 F.Supp. 164, 166 (D.D.C. 1991) (requiring agency to segregate and release portions of documents that merely identify computer systems rather than contain security plans, which remain protected as vulnerability assessments.).

III. EXEMPTION 7(E) DOES NOT BAR DISCLOSURE OF THESE DOCUMENTS

“Exemption 7(E)” provides for the withholding of “records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

The documents sought here – records indicating the number of JTTF agents physically present at the CFC and BRIC – do not fit the statutory definition. The mere number of agents at the fusion centers does not disclose techniques, procedures or guidelines.

Furthermore, in order to demonstrate a “risk of circumvention of the law,” the agency must demonstrate that the rules or procedures it seeks to withhold are not well known to the public. See Rosenfeld v. DOJ, 57 F.3d 803, 815 (9th Cir. 1995) (“Exemption 7(E) only exempts investigative techniques not generally known to the public.”); National Sec. Archive v. FBI, 759 F.Supp. 872, 885 (D.D.C. 1991); Albuquerque Publishing Co. v. Dep’t of Justice, 726 F.Supp. 851, 857 (D.D.C. 1989).

Thus, there must be a particularized showing by the withholding agency that disclosure would undermine or lead to the circumvention of the law. See Davin v. DOJ, 60 F.3d 1043, 1064 (3d Cir. 1995) (requiring agency “to establish that the release of this information would risk circumvention of the law,” while rejecting as inadequate “speculation” in government’s brief on this subject.) There has been no particularized showing in this case.

Finally, even if disclosure of certain documents would significantly risk circumvention of the law, the agency must demonstrate that it has segregated nonexempt material. See PHE, Inc. v. DOJ, 983 F.2d 248, 252 (D.C. Cir 1993) (holding that agency must “clearly indicate[] why disclosable material could not be segregated from exempted material”); Voinche v. FBI, 412 F.Supp. 2d 60, 73 (D.D.C. 2006) (ordering agency to produce, inter alia, a proper segregability analysis.)

IV. CONCLUSION

The requested documents are subject to disclosure because the FOIA statute and more recently, Presidential guidance, strongly favor a presumption of disclosure and

because neither of the cited exemptions allows the agency to withhold the responsive documents. We urge you to release the document.

Thank you for your consideration.

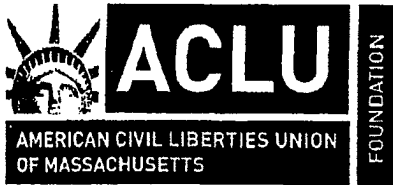
Laura Rótolo
ACLUM Staff Attorney

Thomas R. Cincotta
PRA Civil Liberties Project Director

FREEDOM OF INFORMATION APPEAL

-- FOIA Request No. 1141755-000 --

EXHIBIT A



Laura Rótolo
Staff Attorney
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170
lrrotolo@aclum.org

Carmen M. Ortiz
United States Attorney for the District of Massachusetts
John Joseph Moakley
United States Federal Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210

Federal Bureau of Investigation
Record Information/Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843

Warren T. Bamford
Special Agent in Charge
Federal Bureau of Investigation
One Center Plaza
Boston, MA 02108

December 30, 2009

To whom it may concern:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 made jointly to the U.S. Attorney for the District of Massachusetts and the Federal Bureau of Investigations. The Request is submitted on behalf of the American Civil Liberties Union of Massachusetts and its educational arm, the American Civil Liberties Union Foundation of Massachusetts (jointly referred to as ACLUM) and Political Research Associates (PRA).

Background

Over the past nine years, the federal government has implemented or expanded various programs that have resulted in an unprecedented degree of information sharing between federal and state law enforcement agencies and in the increased federalization of law enforcement activities in general and anti-terrorism activity in particular. This request seeks documents regarding the nature and extent of the cooperative efforts of

and terrorist incidents (like actual bombings).”⁸ At the same time, state and local government agencies in Massachusetts have separately established intelligence units which are reported to be linked both to these national intelligence sharing systems and to JTTF.

Notwithstanding the scale of these changes, little information about how these cross-agency programs work in practice is readily available to the public. Given the checkered history of internal security investigations in this country and the inherent threat to personal privacy posed by nationwide intelligence information sharing, the creation of a domestic intelligence and security apparatus requires the highest level of transparency and public oversight. This request seeks basic information about the workings of the three federal programs described above, including how authority is divided, how information is shared, and what safeguards are in place to ensure the civil liberties of those whom it targets.

Documents Sought

JTTF

1. Records indicating the purpose and organization of the JTTF, its membership and command structure and relationship with the Federal Bureau of Investigation and the Office of the United States Attorney.
2. Documents containing the location of all JTTF offices in New England.
3. Records indicating the number of FBI personnel assigned to JTTF and, of that number, how many are (a) field agents or investigators, (b) intelligence analysts and (c) support personnel.
4. Records identifying each federal, state or local agency other than the FBI that participates in the JTTF and the number of employees of each such agency assigned to JTTF.
5. Memoranda of understanding, contracts or agreements between the Massachusetts Joint Terrorism Task Force (JTTF) and (a) any federal agency, (b) the Commonwealth of Massachusetts or any department, agency, authority or official of the Commonwealth, and (c) any Massachusetts city or town or any department, agency or official of a Massachusetts city or town providing for the assignment of personnel to JTTF.
6. Records showing the number of JTTF personnel whose responsibilities require them to be physically present at the Commonwealth Fusion Center or the Boston Regional Intelligence Center.

⁸ http://www.fbi.gov/page2/sept08/eguardian_091908.html

ATAC

16. Records indicating the present structure, purpose and membership of the Massachusetts Anti-Terrorism Advisory Council;
17. Records created after January 1, 2005 of the agenda, attendees and minutes of the Massachusetts ATAC.
18. Records describing investigative and prosecutorial priorities or strategies recommended or approved by Massachusetts ATAC.
19. Records of communication between the Office of the United States Attorney and members of Massachusetts ATAC;
20. Records of communications between the Massachusetts JTTF and members of Massachusetts ATAC;
21. Records of communications between the Boston Office of the FBI and members of Massachusetts ATAC
22. Documents describing the relationship between ATAC and the Massachusetts JTTF including records describing specific measures recommended or approved by ATAC to (1) coordinate specific antiterrorism initiatives; (2) initiate training programs; and (3) facilitate information sharing.;
23. Documents describing the relationship between ATAC and the Commonwealth of Massachusetts, any of its cities, towns, state or local agencies, police departments or other law enforcement units or officials in Massachusetts, colleges or universities.
24. Documents showing the budget for the Boston ATAC, including funding sources for the years 2005 to present.

Requesters are entitled to a fee waiver

ACLUM and PRA are entitled to a fee waiver under the FOIA statute and Department of Justice Regulations for two reasons. First, the requesters qualify as representatives of the news media. Second, release of the records requested is in the public interest and not in any commercial interest of the requesters.

1. **ACLUM and PRA are representatives of the news media as defined in the statute and regulations.**

PRA's overall goal is to advance progressive thinking and action by providing social justice allies – individual and organizational activists/organizers/advocates at the grassroots and national levels, journalists, social scientists, and other stakeholders – with in-depth research, analysis, and referrals related to our major issue areas identified in its strategic plan:

- Civil Liberties
- Reproductive Justice
- LGBT and Gender Equality and Justice
- Racial and Economic justice (with special attention to immigrant right under both of these categories)
- Understanding the Right

These characteristics are typically sufficient to convey “representative of the news media” status on FOIA requesters. Courts have held that “[i]t is critical that the phrase ‘representative of the new media’ be broadly interpreted if the act is to work as expected ... [i]n fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’” *Electronic Privacy Ctr. v. Dep’t of Defense*, 241 F.Supp. 2d 5, 10 (D.D.C. 2003).

On account of these factors, the requesters have not been charged fees associated with responding to FOIA requests on numerous occasions.⁹

2. The records sought are in the public interest and the requesters have no commercial interest in the disclosure.

Therequesters are entitled to a waiver or reduction of fees because “[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” and “[d]isclosure of the information is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 28 CFR § 16.11(k)(1)(i) and (ii).

⁹ The following are examples of requests in which government agencies did not charge the ACLU or ACLUM fees associated with responding to a FOIA request: (1) Immigration and Customs Enforcement granted the ACLU of Massachusetts a waiver of all search fees for a request submitted on Jan. 25, 2007; (2) The Office of Science and Technology Policy in the Executive Office of the President told the ACLU that it would waive the fees associated with a FOIA request submitted by the ACLU in August 2003; (3) The Federal Bureau of Investigation did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; (4) The Office of Intelligence Policy and Review did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002; and (5) The Office of Information and Privacy in the Department of Justice did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation and quotation marks omitted)).¹⁰

As stated above, gathering and disseminating current information to the public is a critical and substantial component of PRA and ACLUM’s mission and work.

ACLUM publishes newsletters, news briefings, reports and other printed materials that are disseminated to the public. See Exhibits A – C. ACLUM also disseminates information through its heavily subscribed website, www.aclum.org, a blog, <http://www.massrightsblog.org> and regular posts on social media sites such as Facebook and Twitter. See Exhibits D – F.

ACLUM regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. Many ACLUM reports include a description and analysis of government documents obtained through FOIA.¹¹

As the state affiliate of the national ACLU organization, ACLUM also disseminates information through the ACLU. Since 2007 alone, ACLU national projects have published and disseminated over 30 reports. The ACLU also regularly publishes books, “know your rights” publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.¹²

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily.¹³ The ACLU also creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features.¹⁴ The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.”¹⁵

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the

¹⁰ Notably, courts have found organizations with missions similar to the ACLU and that engage in information dissemination activities similar to the ACLU to be “primarily engaged in disseminating information.” See, e.g., *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (Leadership Conference on Civil Rights); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (Electronic Privacy Information Center).

¹¹ See *Detention and Deportation in the Age of ICE*, available at www.aclum.org/ice and the accompanying document gallery of FOIA documents at <http://aclum.org/ice/gallery.php>.

¹² A recent search of Amazon.com produced over 60 books published by the ACLU.

¹³ See <http://www.aclu.org/blog>.

¹⁴ See <http://www.aclu.org/multimedia/index.html>.

¹⁵ See <http://aclu.tv/>.

PRA fuses journalistic reporting techniques and reliable, even-handed research to disseminate quality analytical content. See Exhibits G – I. Its in-depth research reports, press interviews, e-updates, library of primary and secondary materials about right-wing and anti-democratic movements, quarterly magazine, and website are all aimed at helping our allies craft more effective, non-demonizing language and strategies that further social justice. PRA's researchers respond to daily telephone inquiries from journalists and advocates, supply customized information packets, offer advice on organizing strategies, and serve as nationally known public speakers for workshops and conferences.

According to a quarterly analysis done earlier this year, Political Research Associates' online resources receive an average of 1.5 million hits a month from 600,000 visitors. It has a ranking of 6 out of 10 from Google, which indexes some 3,400 of its pages. There are over 1,110 known links to PRA's home page.

The Public Eye, PRA's quarterly magazine, is read by advocates, legislators, journalists, academics, donors, and many others, with a subscription base of over 1,000 subscribers. See Exhibit G. PRA is currently running investigative stories on a range of civil liberties issues, including government misconduct related to civil liberties, informants, fusion centers, and political spying. *The Public Eye's* feature length analyses anchor the coverage of burning issues on our website and are picked up by numerous news aggregators, such as AlterNet.

PRA's website, www.publiceye.org, which includes a dedicated "portal" page for civil liberties and other major issue areas. The civil liberties page is being designed to house our central repository for investigative research on civil liberties, domestic surveillance, racial profiling, and counterterrorism, for use by journalists, activists, the legal community, and others and will include research findings, primary documents, links to related information, and audio and video files. The site is promoted as go-to location for advocates, activists, and journalists.

Print Reports: PRA will be publishing reports based upon its civil liberties research with press conferences in several large cities. These reports will be released on the Web, as well as in print editions, to ensure broad circulation and availability and arrange cross-promotion with allied groups and bloggers. PRA regularly publishes reports, studies, and Activist Resource Kits, available at the website, www.publiceye.org/reports.html.

Radio: PRA is partnered with the National Radio Project (producer of the nationally syndicated radio show, *Making Contact*). PRA researchers are regularly interviewed on public radio shows, including *Democracy Now* and morning news shows, and we will promote interviews with lead and local civil liberties researchers.

Print articles and op-eds: PRA writes and places stories for outside outlets, including op-eds for their local newspapers as well as Web based news aggregators, and pitch features to national magazines.

Books: Books by PRA authors include:

2009) (testimony of Janet Napolitano, Sec. Dep't of Homeland Security); *Strategies for Terrorism Information Sharing, Hearing Before Senate Judiciary Comm., 111th Cong.* (April 21, 2009) (testimony of Caroline Frederickson, Director, ACLU Washington Legislative Office).

As the sustained public interest concerning the FBI's work with local law enforcement clearly attests, the workings of the JTTFs constitute a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," 28 C.F.R. § 16.5(d)(1)(iv).

Accordingly, expedited processing is appropriate in this case.


Conclusion

If our request is denied in whole or part, we ask that you justify all deletions by reference to specific exemptions of the FOIA. We expect you to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees or expedited processing.

We look forward to your reply to the Request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i). Please reply to this request to by contacting Laura Rótolo at (617) 482-3170 x311 or through email at lrotolo@aclum.org.

Thank you for your prompt attention to this matter.

Sincerely,



Laura Rótolo
ACLUM Staff Attorney

Thomas R. Cincotta
PRA Civil Liberties Project Director

FREEDOM OF INFORMATION APPEAL

-- FOIA Request No. 1141755-000 --

EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

February 24, 2010

MS. LAURA ROTOLO
ACLU OF MASSACHUSETTS
211 CONGRESS STREET
BOSTON, MA 02110

FOIPA Request No.: 1141755- 000
Subject: JTTF/NUMBER OF PERSONNEL TO BE PRESENT AT
COMMONWEALTH FUSION CENTER OR BOSTON ET AL.

Dear Ms. Rotolo:

This responds to your Freedom of Information/Privacy Acts (FOIPA) request.

The material you requested is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(2), and 5 U.S.C. § 552(b)(7)(E). 5 U.S.C. § 552(b)(2) and 5 U.S.C. § 552(b)(7)(E) exempts from disclosure:

records or information related solely to the internal personnel rules and practices of an agency,

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law...

In applying these exemptions, I have determined that the records responsive to your request are law enforcement records; and that release of this information contained in these responsive records could reasonably be expected to interfere with the enforcement proceedings and risk circumvention of the law. For a further explanation of this exemption, see enclosed Explanation of Exemptions Form.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Enclosed for your information is a copy of the Explanation of Exemptions Form and FBI File Fact Sheet.

Very truly yours,

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosures

FREEDOM OF INFORMATION APPEAL

-- FOIA Request No. 1141755-000 --

EXHIBIT C

Testimony of Juliette N. Kayyem

**Undersecretary for Homeland Security
Commonwealth of Massachusetts**

**“Moving Beyond the First Five Years: Evolving the Office of Intelligence and
Analysis to Better Serve State, Local, and Tribal Needs.”**

April 24, 2008

It is an honor to testify in this important matter, "Moving Beyond the First Five Years: Evolving the Office of Intelligence and Analysis to Better Serve State, Local and Tribal Needs." It is especially an honor to be here in front of Chairwoman Harman, who has not only been an exceptional leader in this field, but a friend and mentor to me as well.

I hope my testimony today will highlight some of the exceptional work performed by our Commonwealth Fusion Center, provide guidance for how this committee might think about the relationship between the states and the Department of Homeland Security (DHS) regarding intelligence efforts, and provide some thoughts on what does and does not work in the structure that now exists. And since this committee is already familiar with many of the challenges facing fusion centers, including continuing funding by homeland security grants, I will focus my discussion instead on themes and priorities. Of course, like every other homeland security advisor, I worry about sustainability and continued funding of the state's many efforts, but enough said in that regard.

The last time I testified before this committee, I was a lecturer at the Kennedy School of Government, and my focus then was on how the federal government could better collect and analyze intelligence. For the last year, I have served as the Undersecretary of Homeland Security for the Commonwealth of Massachusetts. In this position, I report to Secretary of Public Safety Kevin Burke. In addition, I am Governor Deval Patrick's federally designated homeland security advisor. In many respects, the status of my position reflects the trends and changes within homeland security on both the federal and state level. Just as Hurricane Katrina painfully taught us that a Department solely focused on terrorism may be at risk of undervaluing threats brought by mother nature, a state homeland security apparatus not aligned with the daily needs of public safety entities or first responders could not survive or remain relevant.

In this capacity, then, Governor Patrick and Secretary Burke charged me and our public safety agencies with evaluating the status of homeland security in the state to promote successful integration of our public safety and emergency management operations. Our legacy is in ensuring that policies and practices better protect our citizens from harm, wherever it may arise. So, first and foremost, this meant requiring that the state had plans and policies in place to guide the significant homeland security funds coming to the state, whether they be for interoperability, evacuation planning, resource management, recovery efforts or, as I will highlight here, intelligence efforts.

The Commonwealth Fusion Center, the CFC, is, by Executive Order, the state's designated fusion center and was established in October, 2004. The Boston Regional Intelligence Center, the BRIC, serves as the UASI's primary fusion entity, and we continue to ensure that both of their efforts are cooperative and, to the extent practicable, not duplicative. DHS needs to ensure that limited resources, capabilities and information do not unnecessarily create competition, but ensure cooperation. We have a very good working relationship with the BRIC, and the Boston police for that matter. DHS can play a very useful role in ensuring that resources are shared to create a unified system.

The CFC is, like most fusion centers, part of our state police, reporting through the chain of command to the Colonel of the Massachusetts State Police (MSP). While in the past newspaper articles and commentators have decried the fact that many fusion centers are joint tasked – intelligence and law enforcement based – I think those concerns are ill-founded. Indeed, I can't imagine a structure in which a fusion center was not, in major respects, focused on traditional crime analysis, providing information to localities and receiving important criminal trends from them in return. A fusion center that was solely terrorism focused could not sustain itself, not given the intelligence that is out there nor the competing needs of Governors and Mayors who are, as we are, concerned about crime. And because traditional crime often serves as a means for more nefarious or dangerous activities, we have to focus our efforts holistically. The true power that resides at the state and local level of law enforcement vis-à-vis terrorism prevention is not some grand new intelligence mission, but rather a culture of sharing the product of the good work that has been going on for years. The information that police officers routinely collect in the course of their normal duties is the same information that may identify terrorist financing or a pre-operational cell. It is also, it should be noted, the same information that a local chief can use to identify criminal hotspots or emerging trends.

To that end, we are working to put information and tools in the hands of state and local law enforcement that will enable them to detect and track precursor crimes as well as other trends. The Statewide Information Sharing System, or SWISS, has been funded by our homeland security dollars and while available and utile to all contributing departments, it will drastically enhance the CFC's homeland security and traditional crime missions. The dual-use concept is thoroughly ingrained in our homeland security strategy so that we might both meet head-on and mitigate the challenge of sustainability. Indeed, our fusion center is so integrated into the workings of the MSP that it is financially sustained wholly as part of the current operational costs of the MSP. While homeland security funds focus the CFC's efforts and training, we are not presently facing a wholesale crisis or the potential loss of analysts as is occurring in other fusion centers.

What is interesting here, however, is that not until recently has there been a discussion by DHS with states and localities on how the federal government could access that information in a strategic manner. A recent article in the Los Angeles Times highlights the LAPD's efforts to utilize some standardized form that would serve as a trigger for suspicious reporting to DHS. That was a local effort, and to our knowledge the most proactive attempt to treat what the fusion centers are doing as relevant to federal threat gathering. We do not need a state by state capacity to access information about specific investigations or persons; indeed, once an individual jurisdiction sends information to the FBI under Guardian, we no longer have "peeking" ability. What we need is a system in which the trends or activities that are reported to the DHS Office of Intelligence and Analysis (I&A) are done so in a systematic way, and made transparent to those who would need to know the information. Without that capability, the efforts on the state level will be of little value to DHS.

The CFC has, like most fusion centers, been an evolving entity. I sometimes imagine it like Goldilocks, searching for the "just right" fit. Ours began, like many of the post-9/11

entities, as an answer to the call from the federal government to help prevent the “next 9/11.” The changes that have occurred in the CFC, and that will continue to occur, happen because of the unique needs of our state and the changing nature of the intelligence we receive.

So, what I want to lay out here are my thoughts at this moment in time, with an eye to guiding this committee, as well as DHS, on bettering our collective efforts in the future. The CFC was one of the pilot fusion centers in the recent CENTRA report, and we learned a lot in that process. Where I critique, it is only to urge a more thoughtful assessment for the future; where I compliment, it is to provide, however anecdotally, some evidence where efforts ought to be sustained.

To begin, it might be helpful to simply lay out who is, and isn't, at the fusion center now and what they do. The core of the CFC is staffed with MSP personnel, who first and foremost are responsible to their chain of command. Representatives from other agencies include one Federal Bureau of Investigation (FBI) analyst, one agent and one analyst from the Bureau of Alcohol, Tobacco, Firearms and Explosives, one counter-drug analyst from the Massachusetts National Guard, one analyst from the Department of Correction (currently deployed to Iraq), one representative from DHS I&A, one police officer from CSX railroad, and a Geographic Information Systems specialist from the U.S. Army Civil Support Team. In addition, several MSP troopers under the direct command of the CFC, and therefore the Executive Office of Public Safety and Security, are assigned to the FBI Joint Terrorism Task Force (JTTF) for specific investigation support.

The primary focus for today's hearing is on the Office of Intelligence and Analysis, and how it works with state fusion centers. We are fortunate to be a state with a designated I&A analyst. She had previously worked at the fusion center, and so her knowledge of it, and the state itself, has been a tremendous asset.

She is, for the fusion center, and for me specifically, our one stop shopping. While she may not have every answer at hand, she knows how to get it for us. We should not underestimate how important that is. DHS, for any state, can be both amorphous and large. In Massachusetts alone, the DHS entities – from ICE, to Coast Guard, to FEMA, to a critical infrastructure analyst, to chemical industry regulators, to TSA – are all professional, but from the perspective of a state, are also too numerous to count. While FEMA has taken the lead on trying to integrate these entities, the truth is that their mission and chains of command so vary that it can be difficult. For us to have one liaison that can tap into, at the very least, intelligence efforts at DHS, and across the federal government, has proven exceptionally helpful. There are, after all, 16 federal agencies that make up the Intelligence Community, all attempting to assess the persistent and evolving threats this nation faces. It may be, one wonders, too many for the federal government; it is certainly too many for a single state. As one of our fusion center analysts noted, our I&A analyst provides a mechanism to reach into the “quagmire” and get the information and resources needed by the state.

This is particularly true in one aspect of our needs: Requests for Information (RFI). Working with the CFC and the BRIC, and due to the CENTRA assessments, I&A submitted recommendations for creating a process which would efficiently serve the state's needs. This process was concluded before the CENTRA report findings, but is supported by that report. While I cannot disclose the details of the requests we have made, they have revolved around unique aspects and threats to our state and to Boston, whether they be related to critical infrastructure or visits by foreign dignitaries. I&A provides connectivity and rapid response for us; some requests are returned with information within hours of being relayed. This information can then be utilized to guide operational planning by the state police or local law enforcement.

There are other benefits, including access to secure cell phones for state designees and getting through the red tape that often is involved in security clearances. Indeed, in a recent trip I took to Paraguay, a nation that has a relationship with the state's National Guard, our I&A analyst was able to successfully transition our security clearances to the state department with one day's notice.

Thus, the physical presence of a single person who can tap into DHS, who knows why we are asking and what it means for the state, has gone exceptionally far in our relationship with DHS regarding intelligence efforts.

However, it is in the CFC's role as a consumer of intelligence that many of the more persistent difficulties arise. First, the CENTRA report, which I have studied, places tremendous emphasis on making intelligence more accessible to states and localities. That is an important effort. But, while DHS focuses these efforts on ensuring that the quantity of information getting to us continues to flow, we are likely similar to many other states in wondering whether we aren't at risk of threat assessment fatigue.

Let me put this another way. We have placed so much focus on ensuring that intelligence flows horizontally and vertically from and to state and federal governments that we may be at risk of the intelligence version of the often quoted academic trajectory: publish or perish. The quantity of information coming to us, often without much reference to either its strategic or tactical relevance, is overwhelming. And, as a state, we are left in a bit of a dilemma: distribute the information and risk triggering responses that are not justified by the validity of the intelligence or simply close-hold the information and be at risk of recreating the very stovepipes this whole effort was meant to destroy. Thus, while DHS assesses its own intelligence capabilities in the years to come, and under a new president from either party, the quality of the intelligence being shared has got to be an essential aspect of that conversation.

A relatively public example may be helpful. In 2008, there have been a number of Osama bin Laden audiotapes. We received notification of each of them by DHS (as well as by the FBI) but also, I must admit, by CNN. Their substance, for those of us who follow these things, was nothing novel: the literal rantings of the terrorist against everything associated or affiliated with the United States. But, as we all know, we need to remain exceptionally vigilant during times of democratic transition; both Spain and the

United Kingdom were victims of terrorist attacks immediately before or immediately after a change in government. So while the fact of the tapes didn't seem to raise anything new in our mind, and the literal statements didn't seem particularly worrisome, as more and more audiotapes came out (and may continue to be released), we would want to be in a position to know how the federal government is assessing this, how are they thinking through this summer and fall of transition, and whether we shouldn't be doing the same. It is that kind of strategic guidance that would be helpful.

I am relatively confident that any information that is worthy of a preliminary or criminal investigation will be properly vetted and analyzed by our JTTF, where many of our CFC troopers work. But, for the majority of information, call it white noise or background atmospherics, we are simply consumers, not quite able to decipher whether there is any strategic relevance to so much information, but pretty confident that our operational assessments will not change.

Second, and this is not something we can fix on the state level, DHS needs to ensure that the kinds of guidance we are receiving from other DHS entities or other federal entities is aligned with the very intelligence we are receiving from I&A. Most recently, the states received guidance and priorities for the major state homeland security grant cycle, which concludes in May. This is the major grant that states and the UASIs receive to support first responder capabilities. While we know that IEDs continue to be a threat in Iraq and against our soldiers abroad, no intelligence we had received from DHS or any federal entity prepared us for the explicit focus that the grant now has on IED prevention, protection, and response planning. To be clear, this is an important effort, one that needs attention and one that we have and will continue to address, in particular with our critical infrastructure program, which I will discuss further in a moment. But, by explicitly focusing on IEDs, we were left wondering whether we proverbially didn't know what we didn't know. Or, for another example, the Buffer Zone Protection grants are annually distributed to critical infrastructure sites to buttress prevention and law enforcement efforts. At the same time, some specific industries – say telecommunications or water purifying sites – will be chosen for site visits. From what we know, on the state level, these industries are chosen without us knowing why, and certainly without the industry knowing why. It may be, as I believe now, that DHS is doing due diligence and ensuring that states focus on many different sectors. But, since there is no intelligence to decipher why a specific industry is chosen, or in one case in our state, a specific site, we are left explaining to our private sector partners to simply accept the designation, trying to assure them that they are not at increased risk.

This gets me to the final comment on the challenges of our “consumer” role. Intelligence can be inherently vague and hard to define; with it, comes a tremendous amount of responsibility. While we continue to live with threats, from terrorists or bad actors or even from mother nature, the knowledge of those threats demands that those of us who work and respond to them act professionally and in a reasoned fashion. When intelligence goes from atmospherics, to potentially a real threat, we need to ensure that the very processes we have put into place are utilized and reinforced. This was made entirely clear from our recent responses to the potential consequences of an NRO spy

satellite falling to earth. From my perspective, I don't really care if the Secretary of Defense, the Secretary of Homeland Security or even the Secretary of Agriculture, if he is so inclined, is designated the principal federal officer for an event. The concern is that, as the other homeland security advisors shared information they were receiving in that two week period leading up to the successful Defense Department downing of the satellite, it was clear that we simply didn't have a unified notion of how we ought to prepare our public safety agencies, let alone the public. There was also a lack of a reality check in all the chaos that could answer whether the real issue at hand was one of a danger to the public for emergency management planning purposes, or a danger to our national security in that secret information might be disclosed if pieces of the satellite fell in adversary hands. It was in that vacuum that, I believe, each state likely planned differently, based on information that we all believed was probably not forthcoming. Perhaps it was because there was confidence that the Defense Department would successfully shoot down the satellite, or perhaps because the trajectory couldn't actually be determined, or maybe we knew less because the trajectory never made its way to New England, but it was in that vacuum that both paranoia and gossip gets started, and when confidence in the entire process gets undermined. The states must be treated as mature partners in these intelligence efforts.

As we look forward as well, I want to add two important efforts into the mix of how we should be thinking of DHS and I&A intelligence functions in the future. We need to continue, as we do in all homeland security efforts, to provide policies and practices that will be dual-use and respond to many hazards. Thus, as we think about the legacy of fusion centers and their continuing viability, one of the major arenas where they will and can provide unique value is in critical infrastructure assessments. In the past, our state's critical infrastructure assessments were locally based, providing the state with hundreds of potential and vulnerable sites, ranging from nuclear facilities to local high schools. Both are, of course, important, but we had no mechanism to focus these efforts on risk reduction and, from the perspective of the state, response needs.

Specific intelligence against a particular site, and our response to that information, is different than the kind of analysis we are now supporting through the fusion center in Massachusetts. Indeed, many of the homeland security dollars going to the CFC are now supporting training and efforts related to creating a unified critical infrastructure assessment tool, known as ACAMS, which is supported by DHS. We know, and explicitly express in the Commonwealth's State Homeland Security Strategy^[1], that in order to effectively carry out their missions, public safety officials and policy makers need a comprehensive understanding of the vulnerabilities of assets, systems, networks, and functions that provide critical services to the people of the Commonwealth. This knowledge will drive public safety and public policy decisions regarding preventative and protective measures, as well as response activities to natural and man-made incidents. We are committed to understanding and assessing risk in the Commonwealth by ranking what assets are in the state based upon their vulnerabilities, whether they are likely to be

[1]

<http://www.mass.gov/?pageID=eopssubtopic&L=3&L0=Home&L1=Homeland+Security+%26+Emergency+Response&L2=State+Homeland+Security+Strategy&sid=Eeops>

under threat, and how their destruction, through any means, would impact the state. ACAMS and the CFC provide a statewide, coordinated approach to the identification, prioritization, and protection of critical infrastructure and key resources that can be shared with important stakeholders and emergency response personnel. For this to be a successful effort, we must also partner with I&A to ensure that their strategic knowledge is shared and disseminated.

Another such critical infrastructure initiative that has recently begun to take shape at the CFC in regard to critical infrastructure is a relationship between the CFC and the Nuclear Regulatory Commission (NRC). At the recent fusion center conference in San Francisco, it was brought to our attention that there exists an NRC database cataloging suspicious activities reported by utility companies throughout the country. Being a state with one active nuclear power plant and two others in bordering states that affect Massachusetts' communities within the 10 mile emergency planning zone, we were intrigued by this information and the opportunity to further our critical infrastructure protection efforts utilizing the NRC database. We have reached out to the NRC and are beginning a process in which the NRC, the CFC, and our emergency management agency will communicate on issues of suspicious activity involving radiological threats.

I believe that these efforts, in conjunction with DHS and I&A, are really the foundation of a legacy for fusion centers nationwide. Not simply because we can better prevent and respond to terrorist threats against our critical infrastructure, but also because we can know, beforehand, how we might prioritize any number of important public safety and public policy needs.

Finally, and this is something that I know Chairwoman Harman promotes, we need to continue to demand that fusion centers are as transparent as possible, ensuring that they serve our important public safety needs in a democratic society. There will always be a tension between liberty and security, but the tension need not impede honest discussion and even evaluation. I believe, as someone who began her career in the Justice Department's Civil Rights Division, and someone who has written extensively in this regard, that we may never permanently settle this issue, but we must always be prepared to have the discussion. Before I came to work for the Commonwealth, my notion of what was going on in the intelligence world was not always a benign one.

The balance at the CFC and in the state we are trying to achieve now has made us reexamine our efforts, our policies, and our transparency. In response to the most recent ACLU examination of fusion centers, we vowed to provide a reply with an honest assessment of where we were and where we hoped to be in the future. That letter is attached for your review. We are, in addition, promoting a privacy council to ensure that we have the benefit of outside council not on specific investigations, but on how the state's public safety agencies might better balance their important public safety mission with the rights of our citizens. I am confident that we are closer now, but I am also confident that the world is changing so quickly and access to information, databases, and technology is so rapidly evolving, that we can not simply rest on such assurances. Such advice need not just apply to the fusion centers, but perhaps to any entity that utilizes

intelligence and information sharing as a prevention, protection, and mitigation tool. As information becomes more readily available, and the risks (as well as the benefits) are more easily multiplied, we must formalize structures and policies that embrace the debate, rather than deny or ignore it. We are not alone in our state, and to the extent that DHS can serve as a model or provide the very practices we all are seeking to achieve, we will ensure that we will take the proper steps to protect privacy and civil liberties, while continuing to utilize the mechanisms of intelligence and analysis that help protect our citizens from critical incidents.

I hope I have provided you with useful information to assess and enhance DHS I&A. I have discussed the issues that are at the forefront of the CFC's concerns; which we know also hit home with many other fusion centers. Efforts on the part of DHS and the federal government to address the issues that were raised today offer a solid basis for making improvements and continuing useful efforts by I&A.



**NAVAL
POSTGRADUATE
SCHOOL**

MONTEREY, CALIFORNIA

THESIS

**FUSION CENTER PRIVACY POLICIES:
DOES ONE SIZE FIT ALL?**

by

Jennifer L. Harper

December 2009

Thesis Advisor:
Second Reader:

John Rollins
Michael Petrie

Approved for public release; distribution is unlimited

Unit” (GBI, 2008). The directive states GISAC will comply with the requirements of Title 28, Part 23 of the Code of Federal Regulations, the National Criminal Intelligence Sharing Plan and other relevant federal and state laws regarding criminal intelligence information in Georgia.

The directive clearly defines terms used in the policy, describes how the criminal intelligence system operates; how requests for information are handled; the evaluation and classification of information and the analysis, dissemination, retention and security safeguards of information. The establishment of a Privacy Officer to serve as the security officer is to ensure that information is handled appropriately by providing training, an annual audit and outlines how a user will be dealt with if there is misuse of information within the GISAC. A search conducted on the ACLU of Georgia Web site did not produce any results regarding GISAC, GEMA or GOHS.

A review of the relevant federal guidance for fusion center privacy and civil liberties policy reveals that the GISAC adheres to the “Fair Information Practices,” 28 CFR Part 23. It appears that the ‘issues for consideration’ in the Fusion Center Guidelines document were incorporated, as was the Information Sharing Environment. The Baseline Capabilities guidance was developed after the last revision of the GBI Directive; however, it appears the directive complies with the information outlined in that later guidance.

B. COMMONWEALTH (MASSACHUSETTS) FUSION CENTER

The Massachusetts State Homeland Security Strategy established the Commonwealth Fusion Center (CFC) in October 2004 as the state’s principal center for information collection and dissemination. It was later codified by then Governor Mitt Romney when he signed Executive Order 476 in January 2007. According to the CFC Web site: “The Commonwealth Fusion Center collects and analyzes information from all available sources to produce and disseminate actionable intelligence to stakeholder for strategic and tactical decision-making in order to disrupt domestic and international terrorism” (Commonwealth Fusion Center, n.d.). CFC is an all-threat, all-crime fusion center that encompasses criminal and counter-terrorism analytical support functions.

CFC supports the Massachusetts Emergency Management Agency as necessary in responding to all-hazard incidents that occur within the Commonwealth.

A 2007 GAO report stated:

CFC works with various federal and state and agencies including FBI, ICE, U.S. Coast Guard, HIDTA, Secret Service, TSA, ATF, the United States Marshals Service, U.S. Attorney's Office, the Massachusetts Emergency Management Agency, Massachusetts Department of Fire Services, Department of Public Health, Department of Corrections, and the National Guard. There are 15 analysts assigned to CFC, the majority of who are Massachusetts State Police employees. However, officials said that four of these analysts are assigned to other duties, such as the Crime Reporting Unit or security officer or are otherwise engaged. The Department of Corrections and the Army National Guard have also each assigned an analyst to CFC. All analysts and most sworn members' officers of CFC have Secret clearances, and a few sworn members have Top Secret clearances. The FBI has assigned both an intelligence analyst and special agent to CFC, and DHS has assigned an intelligence officer to the center.

CFC also possesses an investigative component through the Massachusetts State Police Criminal Intelligence Section that provides 5 state troopers and the Massachusetts JTTF, which has 11 state troopers in Boston and Springfield, for a total of 16 investigators assigned to CFC. CFC also has a railroad representative and is involved in public/private outreach through Project Sentinel, which is a program targeting businesses likely to identify precursor terrorist activity. CFC also has personnel assigned to the Boston Regional Intelligence Center, which is the regional intelligence center for the Boston/Cambridge Urban Areas Security Initiative (UASI) region that is led by the Boston Police Department. (pp. 78-79)

The CFC creates four types of intelligence products: bulletins, briefs, report and assessments. It also has a network of various stakeholders that receive these various products based on the classification of the document (unclassified, sensitive but unclassified or law enforcement sensitive) and the stakeholders need-to-know and right-to-know. This affords the CFC the ability to continue its investigation, without compromising it, yet share information to allow other entities to provide it additional information to further that investigation. Depending upon the classification of the product, it could be shared with a wider network of entities thus creating the potential for

information from many sources to aid in their investigation. When CFC produces a bulletin, it is widely distributed to get the information out in a timely manner to alert stakeholders of an imminent event/situation or to provide for their safety. Additionally, it utilizes Geographic Information Systems to enhance products to its customers.

Massachusetts officials reviewed their legislative requirements after 9/11 and conducted a review of existing statutes to determine what laws were applicable to the current counter-terrorism effort and what additional legislation was necessary to protect the public welfare and provide for security against terrorist acts. After that review, the Legislature passed a series of laws that addressed issues associated with the use of hoax substances, the possession of weapons at airports, limitations on public access to sensitive infrastructure data, criminalizing unauthorized possession of explosives and the use/possession of biological and/or chemical weapons and criminalizing the communication of terrorist threats in various media. During the development of the anti-terrorism laws, there was a constant focus on ensuring that basic civil liberties were not weakened within the state.

Since its inception, the ACLU of Massachusetts has consistently challenged the CFCs role and activities. Massachusetts ALCU, Executive Director, Carol Rose stated: “We need a lot more information about what precisely the fusion center will do, what information they will be collecting, who will have access to the information, and what safeguards will be put in place to prevent abuse” (ACLU, 2005). Rose also stated: “The need for transparency and accountability of these centers is paramount ... It is time for Massachusetts to develop public oversight of the Fusion Center, including privacy standards and an annual public evaluation by an independent person or body...” (ALCU MA, 2007).

In 2006, the CFC instituted the “Commonwealth Fusion Center Privacy Policy,” its purpose is “...to ensure safeguards and sanctions are in place to protect personal information as information and intelligence are developed and exchanged. It is the policy of the CFC to protect the legitimate privacy concerns of citizens while conducting its mission.” (Commonwealth Fusion Center [CFC], 2006).

Figure 6 outlines the flow of information handling and evaluation performed at the CFC:

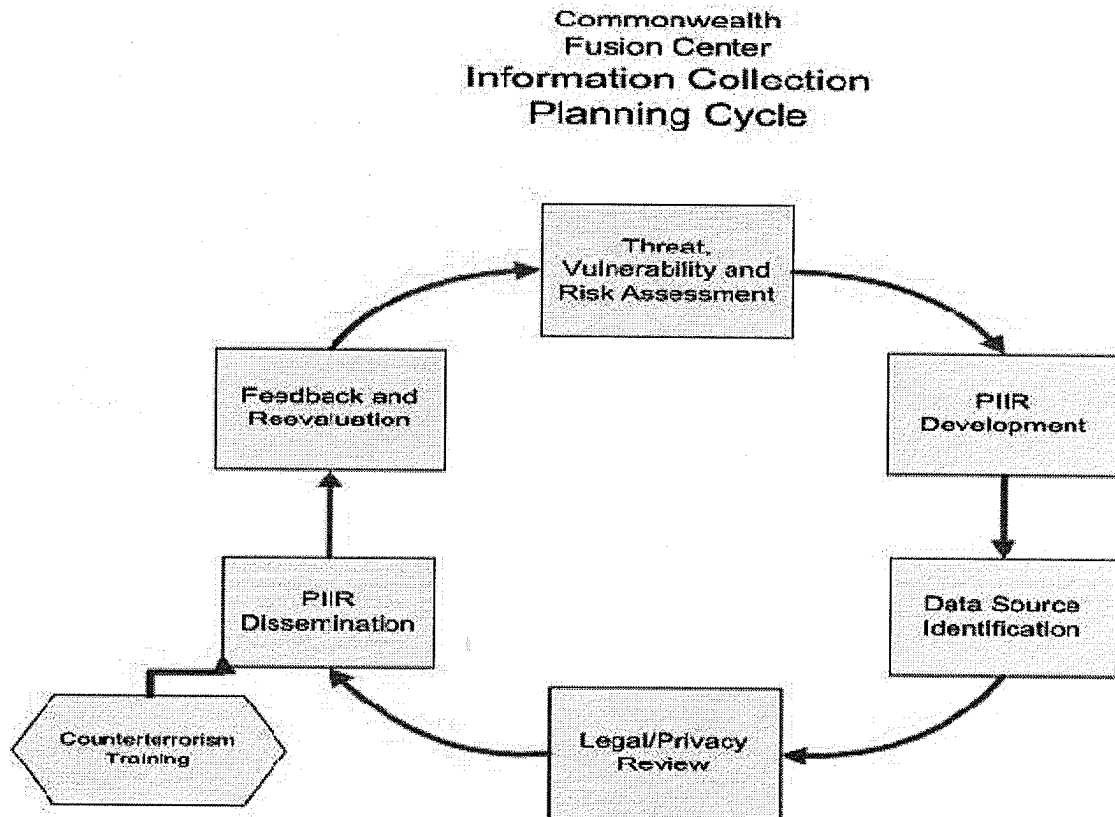


Figure 6. CFC Information Flow (From CFC Operations Manual, 2006)

For clarification purposes on Figure 6, the chart above, PIIR stands for Priority Information/Intelligence Requirements, which are the details of what a customer needs from the intelligence function (CFC, 2006b). The CFC met with stakeholders to discuss various types of information/intelligence they would like to receive. From this, CFC staff members have developed a process to analyze and synthesis that for their customers in terms of the various products CFC creates and distributes.

In reviewing the CFC Privacy Policy, it appears that CFC followed the outline of the “Fusion Center Model Privacy Policy” in Appendix D and adopted the eight privacy design principles of the “Fair Information Practices.” CFC’s policy contains sections on collection limitation, data quality, use limitation, security safeguards, openness, participating agency responsibilities and accountability. It also outlines the

responsibilities of a Compliance Officer who will conduct audits and investigate the misuse of data. References outlined in the policy indicate 28 CFR Part 23 was utilized in the development of the policy.

One area not outlined in the CFC privacy policy is that of an oversight committee which would align them with the ISE Privacy Guidelines – Section 12. However, in the CFC’s “Operations Manual” dated June 2006, it describes the Commonwealth Fusion Center Advisory Council and that it will amongst other things “provide leadership on collection management goals” (CFC, 2006b). It is unclear to this author whether this involves any privacy oversight responsibilities or not. The CFC’s 50-page Operations Manual delineates goals, objectives and the operating environment for information sharing and analysis for the state. CFC also developed other SOPs for the center that include, but are not limited to its “National Standards of Intelligence Sharing” and “Processing of Tips and Leads.”

CFC may want to consider producing an annual report on its activities that could be shared with the Legislature, state and local government entities, as well as the Massachusetts ACLU. This would help to reinforce CFC’s goal of protecting privacy and civil liberties while balancing the safety of the citizens of Massachusetts from bad people that may be trying to do bad things within the Commonwealth with less than good intentions.

The Massachusetts Legislature is currently engaged in debate on Senate Bill 931 (SB931) introduced as “An Act Regarding the Commonwealth Fusion Center and Other Intelligence Data Centers” (Chandler, 2009). If passed, it will prohibit law enforcement from collecting information about individuals’ political and religious views, associations or activities, unless it relates directly to a criminal investigation based on reasonable suspicion of criminal conduct. The Bill will create an office of data protection and privacy oversight for all intelligence data centers in Massachusetts. A commissioner who will have full access and subpoena power in order to enable the office to investigate and analyze intelligence data center operations, which includes reports to the public on its findings, will lead this office. The Bill will require basic privacy and quality controls on

data and allow for individuals to access, review and correct information concerning them in order to ensure data accuracy and reliability.

The Massachusetts ACLU fully supports the passage of Senate Bill 931. It surmises that fusion centers collect and compile personal information from an array of public and private electronic sources, operate with very little independent oversight, do not conduct compliance audits and have no quality controls in place. It also believes that SB931 will afford the accountability and oversight that is necessary to protect individual's civil liberty rights and freedoms (American Civil Liberties Union Massachusetts [ACLU MA], 2009).

Carol Rose, Executive Director of ACLU of Massachusetts stated that the CFC "...secretly monitor and collect data on virtually every aspect of our daily lives" and "deploying state and local law enforcement officers as surrogates for federal surveillance efforts" (ACLU MA, 2009). The ACLU's biggest concern is oversight and the fact that other Massachusetts law enforcement agencies were established by statute, yet the CFC was created only by Executive Order (Commonwealth of Massachusetts, 2007). It feels that both the ACLU and the public were left out of the process, which has created anxiety over the activities it perceives are taking place within the CFC. In supporting the passage of SB931, the ACLU feels that Legislative monitoring and the creation of strict standards for data collection, use, accuracy and operational oversight will provide Massachusetts citizens with the protections they inherently deserve.

CFC could perhaps enhance its standing with the ACLU, and others, by providing more transparency in its operations in sharing what it does, how it does what it does and providing documentation of such in a more proactive manner than it has over the past five years. This could be as easy as producing an annual report. In the post 9/11 world, fusion centers need to be seen as credible by advocacy groups, the public as well as by their stakeholders. The more transparent government can be at all levels for ensuring civil liberty protections through such actions as the development of a fully vetted privacy policy, staff trained on privacy issues, procedures and policies and the continued marketing and outreach of fusion centers, the more they will be understood and valued for their mission and purpose—in any state.

Juliette N. Kayyem, Massachusetts Undersecretary for Homeland Security, testified in April 2008 on the first five years of fusion centers and the CFCs progress. She stated:

Just as Hurricane Katrina painfully taught us that a Department solely focused on terrorism may be at risk of undervaluing threats brought by mother nature, a state homeland security apparatus not aligned with the daily need of public safety entities or first responders could not survive or remain relevant. ...The balance at the CFC and in the state we are trying to achieve now has made us reexamine our effort, our policies, and our transparency. ...We will ensure that we will take the proper steps to protect privacy and civil liberties, while continuing to utilize the mechanisms of intelligence and analysis that help protect citizens from critical incidents. (Kayyem, 2008)

Lisa Palmieri, DHS Office of Intelligence and Analysis Intelligence Officer and assigned to the Commonwealth Fusion Center in Massachusetts, stated, "It's about the flow of information up to the federal government, but also from the government to the state and local level and creates a network to link everyone together and across states" (Stelter, 2009). The growth and refinement of these centers has helped connect agencies, both public and private, across state lines. Palmieri also stated, "We've made a lot of progress on information sharing and intelligence sharing" (Stelter, 2009).

C. ARIZONA COUNTER TERRORISM INFORMATION CENTER

The Arizona Counter Terrorism Information Center (AcTIC) was operational in October 2004 as a "cross-jurisdictional partnership among local, state and federal law enforcement; first responders; and emergency management" (GAO, 2007). According to the Arizona Department of Public Safety's Web site: "The mission of the Arizona Counter Terrorism Information Center is to protect the citizens and critical infrastructures of Arizona by enhancing and coordinating counter terrorism intelligence and other investigative support efforts among local, state and federal law enforcement agencies." (Arizona Department of Public Safety [AZDPS], 2008).

AcTIC is an all-crimes fusion center that encompasses an investigative, intelligence and analytic support processes for its 24-hour, 7-day a week operation that is