



Legislation to Prevent Spying on Protected First Amendment Activities¹

I. Prohibit law enforcement surveillance and investigation of protected First Amendment activities.²

- E.g., political organizing and peaceful assembly, demonstration and petitioning of government, without reasonable, articulable suspicion of criminal activity.³
- Require law enforcement agencies to adopt regulations regarding compliance with the law; require the Maryland Attorney General to publish recommended policies regarding compliance with the law.⁴

II. Prohibit any agency or entity from receiving, collecting, maintaining or distributing information on protected activities obtained in violation of Maryland law.⁵

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¹ The Sachs report notes that federal regulations prohibit the collection and dissemination of information about the views and expressive activities of peaceful activist organizations, 28 C.F.R. Part 23. It also cites as models U.S. DOJ 2002 Guidelines, known as the “Ashcroft Guidelines” and laws and policies that have incorporated the Ashcroft Guidelines. One such law is DC Code §§ 5-333.01 through 5-333.13. All provisions of this outline are based upon the DC Code, which in turn incorporates standards in the Ashcroft Guidelines and in 28 C.F.R. Part 23. There is one exception: in anticipation of including new provisions in Maryland Public Information Act, the remedies and liability section should follow State Government Article § 10-623.

² Sachs report repeatedly calls for prohibition of such conduct; see, p. 3 (“the surveillance undertaken here is inconsistent with an overarching value in our democratic society—the free and unfettered debate of important public questions. Such police conduct ought to be prohibited. . .”) See also, p. 8 and p. 56.

³ This is the standard recommended by Mr. Sachs: “. . . police infiltration of advocacy groups should be prohibited unless it is based on a reasonable suspicion of present or planned violation of the law and no less intrusive investigation is likely to yield equivalent results.” on p. 56; See also, p. 8 (same standard). Mr. Sachs also notes, as discussed above, this is the standard in applicable federal law; it is also the standard adopted by the US DOJ, the District of Columbia, and the numerous law enforcement agencies cited by Sachs at pp. 79 et. seq. This standards precludes infiltration and surveillance based on peaceful civil disobedience under 28 C.F.R. 23.2; see Sachs Report at 56 (investigation warranted “only with regard to offenses that constitute significant and recognized threats to the community. . . . Trespassing, unlawful assembly, and other crimes associated with civil disobedience are not such offenses.” Maryland law should adopt the same standard.

⁴ Mr. Sachs recommends that MSP adopt regulations that reflect these standards; see, e.g., p.8, p. 84. MSP regulations will not apply to other law enforcement agencies in Maryland engaged in similar criminal intelligence or counter-terrorism intelligence gathering at their own initiative or pursuant to federal funding or direction. Many local law enforcement agencies cooperate in MCAC which results in dossiers’ dissemination to a wide range of local and federal security agencies—underscoring the importance of a clear and uniform standard for all Maryland intelligence gathering. The need for MSP regulation *pursuant* to legislation not *absent* legislation is discussed more fully elsewhere.

III. Ensure prompt and meaningful access of individuals and organizations to information regarding their status as targets of prohibited surveillance. Require notice of parties about whom information was gathered or maintained in violation of the law.⁶

IV. Require information on protected activities obtained in violation of law to be purged from all files and databases into which it was entered.⁷

- Ensure that this remedy is afforded to the known targets of surveillance.⁸

V. Establish meaningful enforcement mechanisms and strong incentives for compliance

- Establish independent oversight authority to regularly audit compliance with the law and best practices and to investigate and prosecute violations of the law, including authority to seek damages and sanctions⁹.

⁵ See, 28 CFR Part 23, §23.20. This is consistent with Mr. Sachs' recommendations and with the model guidelines and law cited in the report. Op. cit.

⁶ The Sachs Report confirms that there are more wrongful targets than MSP revealed to ACLU (See, e.g., p. 50). The Sachs Report also confirms that wrongful targets have been identified with no basis as suspected "terrorists", "security threats" and "anti-government" terrorists in an unknown number of federal and local security agency files with unknown implications, as a result of entry of this information into the HIDTA database (see pp. 56-59). The Sachs Report confirms that all wrongful targets have yet to be identified; his report reviews only a limited period of time, while confirming that a very broad and aimless surveillance program was established prior to 2005 (See, e.g., pp. 44-45; and also indications on p.27-28). It does not confirm that this program fully ceased in 2006; rather the report notes that MSP stopped transmitting to HIDTA in 2005 and stopped surveilling the identified anti-death penalty and peace groups in 2006 (See p. 56).

⁷ See Sachs Report, pp.8-10. See also 28 CFR Part 23. Consistent with models cited by Mr. Sachs. This recommendation includes a requirement that files and databases to be regularly reviewed to ensure relevance and accuracy, compliance with relevant law, and to be regularly purged of information no longer relevant or accurate.

⁸ See Sachs Report, pp.8-10. NB, as discussed above, the report confirms that there are wrongful targets still to be identified. A remedy should be afforded to all wrongful targets.

⁹ This is also required by federal regulations, 28 CFR Part 23, § 23.20: MSP violated both the substantive provisions of federal regulations and their oversight provisions, provisions upon which federal funding is contingent. All models cited by Mr. Sachs include independent oversight.

As noted in the Sachs Report, the existence of federal regulations did not prevent or deter the wrongful conduct documented by the report; nor did it result in the discovery of the wrongful conduct. Discovery of wrongful conduct at issue here was fortuitous and occurred only after nearly three years of stonewalling by the MSP pursuant to a court order. Mr. Sachs notes on p.43 of his report: "It should not fall to civil libertarians alone to defend those freedoms."

An independent auditor, analogous to the Independent Monitor for juvenile justice could be placed in the Office of the Attorney General. Note, federal guidelines are subjected to Congressional oversight, both in terms of substance and compliance. LAPD guidelines cited by Mr. Sachs are result of court order and court oversight.

- Make applicable existing remedies in the Maryland Public Information Act to violations of prohibited criminal intelligence gathering.¹⁰

VI. Require annual report by local and state law enforcement to Governor and General Assembly on surveillance activities.¹¹

VII. Require regular training of law enforcement in compliance.¹²¹³

¹⁰ Legislation would most appropriately belong in Maryland’s existing Public Information Act, which includes remedies for improper gathering and dissemination of information; accordingly, those remedies should apply to this prohibited conduct. See, e.g. State Government Article, § 10-623.

¹¹ See, DC Code §5-333.12. This is also consistent with guidelines established by court order. It ensures accountability and transparency necessary to aid public oversight. Annual reporting will also help prevent the institutionalized “obliviousness” Mr. Sachs found pervading MSP. And, per discussion above, the existence of federal regulations did not prevent or deter the wrongful conduct documented by the report; nor did it result in the discovery of the wrongful conduct. Discovery of wrongful conduct at issue here was fortuitous and occurred only after nearly three years of stonewalling by the MSP pursuant to a court order. Mr. Sachs notes on p.43 of his report: “It should not fall to civil libertarians alone to defend those freedoms.”

¹² The Sachs report mentions several times a pervasive and institutional “obliviousness” and “blind spot” with respect to First Amendment rights; the report also notes the staffing of HSID with new and relatively inexperienced and untrained personnel; and acknowledged failures of supervision—all of which mandated training can help address.

¹³ It should go without saying that Maryland State Police and all law enforcement agencies should receive the resources, including personnel, funding and training, necessary to conduct effective intelligence gathering that protects our public safety and our civil liberties. The Sachs report contains evidence that such resources are lacking at MSP.