

April 8, 2015

**VIA E-MAIL AND MAIL**

Hon. Desley Brooks (dbrooks@oaklandnet.com)  
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Hon. Dan Kalb (dkalb@oaklandnet.com)  
Hon. Rebecca Kaplan (atlarge@oaklandnet.com)  
Hon. Lynette McElhaney (lmcclhaney@oaklandnet.com)  
Hon. Larry Reid (lreid@oaklandnet.com)  
Oakland City Council  
1 Frank H. Ogawa Plaza  
Oakland, CA 94612

Re: April 21, 2015 – Federal FY2014/2015 PSGP Grant Funds

Dear Honorable Members of the Oakland City Council:

I write to follow up on the March 31, 2015 Special City Council Meeting Consent Agenda Item 7.24, the acceptance of PSGP funds for purchase of a Forward Looking Infrared thermal imaging system (“FLIR”). This item is expected to be on the agenda before you on April 21.

With regard to the comments made by Chief Whent and Chief Reed on March 31, and CM Guillen’s proposal to apply the DAC Privacy and Data Retention Policy (“DAC Policy”) to the FLIR, following is my interpretation of the DAC Policy’s impact on OFD and OPD’s suggested uses for the FLIR. With a couple amendments, the DAC Policy can be adapted and applied to the FLIR. However, now that the June 30, 2016 grant deadline has been clarified and loss of funding is no longer an issue, applying the DAC Policy to the FLIR is not the most practical route as I discuss further below. It may now be appropriate to revisit our original request for a FLIR-only policy.

A top priority of the Ad Hoc Committee is a surveillance equipment ordinance which outlines the general criteria needed for a privacy and data retention policy, but without dictating any specific uses or restrictions. This is the most appropriate method of handling the issue of equipment procurement as it arises. The effect of such an ordinance would be creation of a single equipment use policy for the FLIR, as was requested in our March 23, 2015 letter to the Public Safety Committee.

**Fire Department Use**

To adapt the DAC Policy to OFD’s list of proposed FLIR uses in the March 31, 2015 Supplemental Report, generally only one amendment would be needed. Most of OFD’s FLIR

proposals relate to fire, which is an existing Allowable Use. See DAC Policy, Section VIII. Allowable Use, attached as Exhibit A. The Port did not request Search and Rescue on their list of proposed allowable uses for DAC Committee consideration. The DAC Committee would likely approve this amendment.<sup>1</sup>

### **Police Department Use**

OPD's proposed uses included criminal activity, homeland security interdiction, patrols of the port, and as further clarified by Chief Whent on March 31, monitoring of protests.

The DAC Policy's current Allowable Uses include active shooter, barricaded subject, bomb threat, burglary, chemical or biological incident, container theft, intruder alarm (at Port), unauthorized person (at Port), hostage situation, major emergency (intentionally broadly defined as a catch-all), mass casualty, major acts of violence, medical emergency, missing or abducted persons, side show/street racing, and carjack/transit jack.

If "patrols of the port" is not covered by the current Allowable Uses, a specific, narrow amendment could be made to the DAC Policy. This proposed use is vague, and could lead to unrestricted general use of the FLIR. What's more, with finances a major concern for Oakland, it makes sense to have a specific need to use taxpayer dollars to get airborne and use the FLIR, rather than just "patrol."

We reject the proposed three-year retention limit absent any criminal predicate, and I thank CM's Guillen, Brooks, and Kaplan for their observations and acknowledgment of the privacy implications of FLIR use. A helicopter mounted FLIR is a real-time tool, used most often in hot pursuit or during an active (or suspected) fire. Lengthy retention is unnecessary and risks the collection of multiple data points about individuals, which reveals patterns and creates a privacy-invasive mosaic of people's activities.<sup>2</sup>

I also take issue with Chief Whent's proposal to use a FLIR to monitor protests, for three main reasons.

First, the Committee has unanimously and repeatedly rejected the monitoring of protests. Outside of that use, I believe no amendments are needed here to adapt the DAC Policy to the FLIR. The already approved DAC uses include specific types of criminal activity. Such specificity is necessary—the City would not (and should not) send the helicopter up and use the FLIR for a petty theft, for example, but without specificity, a blanket "criminal activity" use would allow misuse.

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<sup>1</sup> The DAC Policy is drafted to be Port-specific, and includes language regarding its specific geographic boundary. The DAC Committee would need Council direction to clarify if either a carve-out if needed for the FLIR, or some other manner of ensuring the DAC Policy mechanics apply and refer to the FLIR use.

<sup>2</sup> Joanne McNabb from the California Department of Justice presented to the DAC Committee and stressed the importance of purpose specification: collect only what you need and retain it only as long as needed to achieve the stated purpose. Build in safeguards to ensure no more is collected or retained longer than necessary. OPD's proposal does not comport with the DOJ standard.

Second, the DAC Policy prohibits monitoring of Protected Activity absent reasonable suspicion of criminal wrongdoing. The term reasonable suspicion means “specific and articulable facts”, and activation in such circumstances requires a written statement be submitted to the Privacy Officer explaining what those facts are.

These precautions exist because there is a need for them—OPD does not have a good record of dealing with protests, and monitoring of First Amendment protected activity should have to meet the highest threshold of requirement. What’s more, community members have made clear that such monitoring is simply not acceptable as it infringes upon their civil liberties.

Third, a FLIR is a poor choice of tools to use in a protest situation—a crowd of people, likely on a busy illuminated downtown street, with most everything present giving off a heat signature, is not ideal for FLIR. The operator would see a blurry mess, which while helpful when looking at a fire, is useless when looking for an active shooter, or even someone attempting to engage in property destruction. Contrast, and usually a cold background, is necessary for a FLIR to be effective. For relevant examples of FLIR use, please see the attached exhibit. It includes both helicopter and fixed-position FLIR images.<sup>3</sup>

OPD is not as familiar with the DAC Policy as they should be. The DAC Policy does not prohibit the use of equipment it regulates. However, it does require more thought and explanation before such use, to ensure equipment is not misused.

### **Surveillance Equipment Acquisition or Use**

There is a more practical solution for all involved. It cannot be emphasized enough that a top priority of the DAC Ad Hoc Committee and community at-large is a change in the manner in which Oakland goes about attempting to acquire surveillance equipment. When the administration intends to share, receive, or purchase surveillance equipment, the Ad Hoc Committee’s recommendation envisions a public comment period prior to possible equipment acquisition, followed by staff response to any concerns voiced during this comment period. A use policy consisting of privacy safeguards, data retention limits, independent audits, and annual reporting metrics would be drafted by citizens, in collaboration with staff, and then submitted for Council consideration. After this period closes, submission to the Council for possible approval would occur. A Standing Privacy Committee would provide recommendations on an as-needed basis, proposing or vetting proposed amendments to these policies as they develop over time.

One solution solves this: the ACLU model surveillance equipment ordinance. To date, groups representing over 10,000 Oaklanders have endorsed this approach.

The recent grant application for a FLIR was pursued by the administration with no outreach to the community or DAC Ad Hoc Committee, forcing Ad Hoc members, EFF, ACLU, Oakland

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<sup>3</sup> Please note the contrast against colder surfaces needed to produce the better quality images. OPD’s requested use of this for mass protests is not only an infringement upon 1<sup>st</sup> Amendment protected activity, but also the wrong tool for the job.

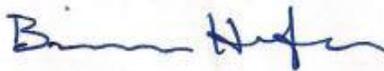
Privacy and others to react after the fact. After a year and a half of DAC debate and collaborative effort, this latest move does not help increase the trust so needed to narrow the rift between the community and OPD, and the increasing suspicion of law enforcement in this post-Snowden era.<sup>4</sup>

It may also be less efficient, and outright difficult for certain equipment, to attempt to adapt an umbrella DAC Policy to new equipment or uses. The Port-centric DAC is a unique animal, and the DAC Policy was drafted in that context.

A surveillance equipment ordinance, which simply outlines the overall use policy framework required without imposing specific uses, retention limits, or other restrictions, is a more effective method of dealing with these concerns as the proposal to acquire surveillance equipment arises. Then, each proposal would go through the process outlined above, and a policy specific to that equipment and its use would be submitted for Council approval. The ACLU model ordinance was called “pragmatic” by the LA Times in its recent editorial endorsement for a reason. The model ordinance allows staff and the community to work collaboratively on a policy specific to each type of equipment, without dictating the specific standards that are sure to be the subject of robust discussions, as occurred with the DAC Policy. The model ordinance does not specify X’s and O’s, allowing law enforcement and staff to have a strong voice in the matter. The ordinance would not shift control to either law enforcement or privacy activists, but rather requires collaboration between them, healthy in a democracy.

I am always available to discuss these matters, and willing to consider any suggestions. It is important that the privacy conversation continue, as this will be an ongoing concern in this modern, digital era. Your continued leadership and acknowledgment of our concerns is greatly appreciated.

Sincerely,



Brian Hofer  
Chair, DAC Ad Hoc Committee  
Member, Oakland Privacy Working Group

cc: Chief Whent, Chief Reed

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<sup>4</sup> The City’s refusal to respond to my December 2014 Public Record Act Request #7354 on this equipment is a further impediment to a good-faith collaborative path forward.

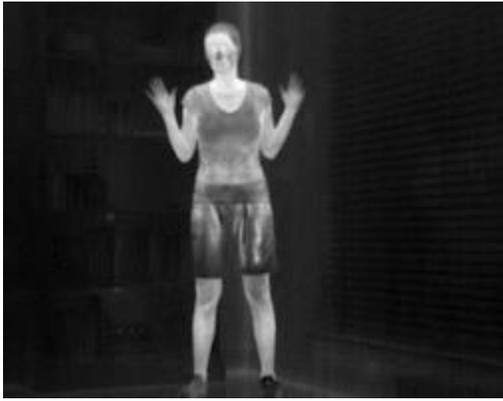
## Exhibit A

### VIII. ALLOWABLE USE |

**A. Uses:** The following situations at the Port are the only ones in which the use of the DAC is allowable and may be activated in response to:

Active Shooter	Mass Casualty Incident
Aircraft Accident or Fire	Major Acts of Violence (likely to cause great bodily injury)
Barricaded Subject	Medical Emergency
Bomb/Explosion	Missing or Abducted Person
Bomb Threat	Pandemic Disease
Burglary	Passenger Train Derailment
Cargo Train Derailment	Person Overboard
Chemical or Biological Incident	Port Terminal/Warehouse Intruder
Container Theft	Power Outage
Earthquake	Radiation/Nuclear Event Detected
Electrical Substation Intruder Alarm	Severe Storm
Fire	Ship Accident or Fire
Flooding-Water Main Break	Ship Intruder/Breach
HAZMAT Incident	Supply Chain Disruption
Hostage Situation	Street Racing/Side Show
Major Emergency	Takeover of a vehicle or vessel (transit jack)
Marine Terminal Fence Line Intruder Alarm	
Telecommunications/Radio Failure	Vehicle Accident requiring emergency medical attention
TWIC Access Control Violation	Wildfire -3 Alarm or greater
Tsunami Warning	
Technical Rescue	
Unauthorized Person in Secure Zone	
Unmanned Aerial Vehicle in Port airspace	





**FLIR image from hand-held**



**FLIR image from fixed equipment on building**



**FLIR image from handheld**