IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ACLU OF TENNESSEE, Inc. Intervening Plaintiff, v. THE CITY OF MEMPHIS, Defendant.	)	No. 2:17-cv-02120-jpm-DKV

PLAINTIFF'S RESPONSE IN OPPOSITION TO POLICIES PROPOSED BY DEFENDANT CITY OF MEMPHIS

The plaintiff, ACLU of Tennessee, Inc., hereby files its response in opposition to the policies proposed by Defendant, the City of Memphis ("Defendant" or the "City"). In the Court's *Opinion and Order* entered on October 26, 2018 [ECF 151] ("Opinion and Order"), and its *Order Memorializing Sanctions* entered on October 29, 2018 [ECF 152], the Court ordered the City to revise certain named policies and procedures to effectuate compliance with the *Order, Judgment and Decree* for Civil Case 76-449 ("*Kendrick* Consent Decree") and to submit those revisions to the Court.

In accordance with the Court's Orders, Plaintiff provides its objections and concerns regarding each of these submissions.

1. **DR 138 POLITICAL INTELLIGENCE (REVISED)**

The Court ordered the City of Memphis to revise Departmental Regulation 138 ("DR 138") as follows:

> The new regulation shall define "political intelligence." The new regulation shall specify that "political intelligence" includes any investigation into the lawful exercise of First Amendment rights, even if the investigating officer or unit does not have a partisan political motive. The new regulation shall specify that political intelligence is not permissible as a goal of an investigation nor as the means to an end of an otherwise lawful investigation. The new regulation shall inform officers that investigations into unlawful conduct that may incidentally result in the receipt of information relating to First Amendment rights are permissible, but require approval as set out in Consent Decree § G.

[ECF 152, PageID 6287-88.]

Plaintiff raises two concerns and proposes two simple revisions regarding the policy submitted by the City.

First, Plaintiff recommends that DR 138 be further revised to incorporate a definition of "First Amendment rights." The Court held in its *Opinion and Order* that Memphis Police Department officers were not familiar with the contents of the *Kendrick* Consent Decree, in part, because "MPD officers did not understand that the Consent Decree provided a specific definition of 'political intelligence.'" [ECF 151, PageID 6267.] Plaintiff proposes that a true understanding of the term "political intelligence" must be founded on an understanding of what rights are included among First Amendment rights.

The *Kendrick* Decree defines "First Amendment rights" as "rights protected by the First Amendment to the Constitution of the United States including, but not limited to, the rights to communicate and idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." Plaintiff proposes that this definition, or one similar in nature, be included

in DR 138 to ensure that MPD officers have a workable understanding of the Decree's requirements.

Secondly, Plaintiff also makes the minor recommendation that DR 138 link to the text of 28 CFR Part 23, in the same manner that it links to the *Kendrick* Consent Decree and the *Opinion and Order*. Linking in this way will permit officers to more easily deepen their understanding and to receive additional guidance on the operation of criminal intelligence information systems while safeguarding privacy and civil liberties.

2. TRAINING PLAN

The Court ordered the City of Memphis to design training for members of OHS, RTCC, and MPD's Command Staff as follows:

> The new training shall define "political intelligence." The new training shall specify that "political intelligence" includes any investigation into the lawful exercise of First Amendment rights, even if the investigating officer or unit does not have a partisan political motive. The new training shall specify that political intelligence is not permissible as a goal of an investigation nor as the means to an end of an otherwise lawful investigation. The new training shall inform officers that investigations into unlawful conduct that may incidentally result in the receipt of information relating to First Amendment rights are permissible, but require approval as set out in Consent Decree § G. No officer may be assigned to RTCC or OHS, or be promoted to the Command Staff without receiving this training.

[ECF 152, PageID 6288.] Defendant submitted two documents in this category: (a) a document entitled "Training Plan"; and (b) a Power Point presentation entitled "Kendrick Consent Decree | Introductory Training for MPD Officers."

a. Training Plan

With respect to the "Training Plan," Plaintiff seeks clarification as to one point. The plan submitted by Defendant states: "Training will be offered annually, or on an "as needed" basis for future members of OHS, RTCC, and/or MPD's Command Staff." However, that statement is nested underneath a separate point stating that "training will be included in the mandatory new hire or transfer orientation requirements." Accordingly, it is unclear as to whether the training will occur on an annual basis or only once upon hiring or transfer.

Plaintiff would object to training that occurs only once in an officer's career, advocating instead for a training plan that is continuing in nature. Plaintiff raises the concern that a short, one-time training presentation would fail to correct the system-wide information failures that led to the City's violation of the Decree in this case. Further, the Decree itself contains a commitment on the part of the City to train officers on the Decree's requirements and commitments "in the same manner in which those personnel are instructed about other rules of conduct governing such personnel." To the extent that MPD officers receive annual refresher training as to other critical policies and procedures, Plaintiff requests that MPD officers receive comparable training on the commitments contained in the Decree.

b. Kendrick Consent Decree | Introductory Training for MPD Officers

Plaintiff objects to the Introductory Training Power Point submitted by the City. In particular, Plaintiff objects that the training materials are insufficiently specific to ensure a workable knowledge of the Decree's commitments.

As an initial matter, Plaintiff suggests as it did in Section 1 above, that the training materials be further revised to include a definition of "First Amendment rights." Specifically, the training fails to educate officers as to what First Amendment rights are. Including the definition of First Amendment rights as contained in the Decree, or one substantially similar, would assist officers in applying the definition of "political intelligence" to real world situations.

Plaintiff also recommends that the training materials be augmented by providing specific examples of what violates the Decree. The Court in its *Opinion and Order* stated that included detailed explanations of specific violations of the Decree, in part, "in order to guide future MPD policy." [ECF 151, PageID 6260.] For example, the Court provided the following examples of violations of the prohibition on political intelligence:

- MPD's Real Time Crime Center ("RTCC") conducted political intelligence when an officer searched its social media collator for all instances of the term "Black Lives Matter," because the information gathered related to First Amendment Rights.
- MPD officers gathered and circulated social media posts about potential boycotts and boycotts are squarely within the protection of the First Amendment.
- MPD gathered information on journalists based on their associations with Black Lives Matter.
- MPD indexed information relating to the leadership of lawful protests.
- Major Lambert Ross ordered social media monitoring for a "BLM Rally" and a "Community Organizers Cookout."
- Each of these represents an affirmative investigative act focusing on First Amendment rights in violation of the Consent Decree.

[ECF 151, PageID 6261 (citations omitted).] The training materials' discussion of the commitment not to engage in political intelligence would be benefited from real world examples of what types of conduct are out of bounds. To that end, Plaintiff

recommends also including examples of what constitutes the operation of an office for political intelligence (and what does not), use of the Bob Smith account as an example of electronic surveillance, examples of dissemination of information related to First Amendment rights, and examples of recording the identities of protest attendees for the purpose of maintaining a record. [*See* ECF 151, PageID 6261-70.]

Similarly, the presentation would be benefited by including a discussion of what is *not* political intelligence. For example, the *Order and Opinion* contains the following discussion of what is permissible:

> The Director of Police does not conduct political intelligence by collecting the phone numbers of local activists for future dialogues, if those numbers are openly asked for and freely given. Even though the Director would have "indexed" "information… relating to… [the] exercise of First Amendment rights," the indexing in question would not be an "investigative activity." If, on the other hand, the Director instructs officers to datamine social media for activist phone numbers, he commits political intelligence by conducting an investigative gathering of information related to political beliefs.

[ECF 151, PageID 6256.] Likewise, the officers would be assisted by training on the "action requirement" as defined by the Court. [ECF 151, PageID 6257.]

Officers who receive the training on the Decree must achieve an understanding of the Decree that will permit them to apply their training to real world situations. Incorporating the examples provided by the Court in its *Opinion and Order* will help the City accomplish that goal.

3. AUTHORIZATION FOR INVESTIGATIONS WHICH MAY INCIDENTALLY RESULT IN THE COLLECTION OF INFORMATION RELATED TO THE EXERCISE OF FIRST AMENDMENT RIGHTS UNDER SECTION G OF *KENDRICK* CONSENT DECREE

The Court ordered the City of Memphis to establish a process for the approval of investigations into unlawful conduct that may incidentally result in political intelligence, holding:

> While the Court does not decide at this time whether the Consent Decree permits delegation of this task, the City's proposal may, for the time being, proceed as though delegation is permitted. If the City does seek to delegate the approval process set out by § G of the Consent Decree, it shall provide that the process is administered by an officer outside of the direct chain of command of the unit or officer requesting authorization.

[ECF 152, PageID 6288.]

Defendant submitted three documents in this category: (a) a draft Policy and Procedure entitled "Guidelines for Delegation of Authority of Director of Police Services to Authorize Investigation Which May Interfere with the Exercise of First Amendment Rights Under Section G of *Kendrick* Consent Decree"; (b) a draft Policy and Procedure entitled "Authorization for Investigations Which May Incidentally Result in the Collection of Information Related to the Exercise of First Amendment Rights Under Section G of *Kendrick* Consent Decree"; and (c) a form entitled "Authorization for Investigations That May Incidentally Result in Political Intelligence."

a. Policy and Procedure: "Guidelines for Delegation of Authority of Director of Police Services to Authorize Investigation Which May Interfere with the Exercise of First Amendment Rights Under Section G of Kendrick Consent Decree"

Plaintiff does not object to the utilization of a procedure by which the Director of Police Services may delegate some of the workload required to authorize investigations under the Section G of the *Kendrick* Decree. However, the Guidelines for Delegation proposed by Defendant are overbroad.

The *Kendrick* Decree requires the Director of Police Services to review the factual basis for investigations — as well as the techniques used — and to issue authorization upon required findings of fact. Plaintiff understands the desire to delegate under Section G to lessen the workload on the Director of Police Services. Any delegation policy, however, should honor the core principle contained in the *Kendrick* Consent Decree that the ultimate responsibility for authorizations under Section G remains with the Director of Police Services.

Accordingly, Plaintiff objects to the Guidelines for Delegation and recommends that they be amended to include a procedure by which designees report to the Director of Police Services and by which the Director of Police Services remains knowledgeable about and responsible for authorizations under Section G.

b. **Policy and Procedure: "Authorization for Investigations Which May Incidentally Result in the Collection of Information Related to the Exercise of First Amendment Rights Under Section G of Kendrick Consent Decree"**

Plaintiff objects to the Authorization Policy submitted by Defendant. Specifically, Plaintiff objects to the attempt on the part of Defendant to exclude whole areas of police activities from the application of the *Kendrick* Decree.

The *Kendrick* Decree provides the scope of its application. Section G's authorization requirement applies to any "lawful investigation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights, or [may] interfere in any way with the exercise of such First Amendment rights." As stated above, "First Amendment rights" means, for the purpose of the Decree, "rights protected by the First Amendment to the Constitution of the United States including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose."

The Authorization Policy states: "For the purposes of this Policy, the following activities shall not require a written authorization from the Director/designee." The Policy then lists six broad categories that Defendant attempts to exempt from Section G's authorization requirements. The first category of "activities" Defendant proposes should not require written authorization is "[o]ngoing active investigation into the planning or occurrence of a criminal act." In fact, that is *exactly* when Section G *does* apply. It is the incidental collection of information about the exercise of First Amendment rights (or interference therewith) that is significant, not the type of

lawful investigation that serves as the *context* for the exercise of First Amendment rights. The same flaw applies to each of the remaining "activities" articulated by Defendant.

The Authorization Policy would benefit from a robust discussion of when a lawful criminal investigation is likely to result in the collection of information about (or to interfere with) the exercise of First Amendment rights as well as a discussion of what constitutes First Amendment rights in the first place. Plaintiff objects to the exclusion of these "activities" from the application of Section G, and recommends that the discussion of when Section G applies be included in their place.

In a similar vein, Plaintiff objects to the "Documentation and Retention" section of the Authorization Policy. Specifically, Plaintiff objects to the carve out for "crime analysis and situational assessment reports." Those terms are not defined in the Policy, there is no explanation for why information about First Amendment rights would be kept in relation to them, and there is no alternate policy that governs crime analysis or situational assessment reports. Accordingly, Plaintiff objects to the inclusion of these exceptions and recommends that the Policy be revised either to remove these exceptions or to define these terms and to create a policy that governs documentation and retention in relation to them.

c. **Form: "Authorization for Investigations That May Incidentally Result in Political Intelligence**

Plaintiff objects to the Authorization Form submitted by Defendant because it does not provide for the written findings as required by Section G. The Authorization Form, instead, provides only a space for the Director or Designee to sign a prewritten

statement that the "investigation meets the requirements of Section G." This is insufficient to meet the commitments made by Defendant under the *Kendrick* Decree.

Section G of the *Kendrick* Decree provides the following procedure for authorization:

> "The Director of Police shall issue a written authorization for an investigation . . . only if the Director of Police makes written findings that:
>
> a. The investigation does not violate the provisions of this Decree; and
> b. the expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and
> c. every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and
> d. the investigation employs the least intrusive technique necessary to obtain the information.

The Authorization Form does not provide such written findings of fact or any approximation for them. Accordingly, Plaintiff objects to the Authorization Form and recommends that it be amended to include space for the four findings of fact articulated by the *Kendrick* Decree.

4. WRITTEN GUIDELINES FOR THE USE OF MANUAL SOCIAL MEDIA SEARCHES AND OF SOCIAL MEDIA COLLATORS

The Court ordered the City of Memphis to establish written guidelines for the use of manual social media searches and of social media collators, as follows:

> The City shall make these guidelines available to all officers with access to social media collators, and to all officers assigned to OHS and RTCC. The City shall submit these guidelines to the Court no later than January 14, 2019 for review and approval.

[ECF 152, PageID 6288.]

As an initial matter, Plaintiff raises a concern that the Policy and Procedure proposed by Defendant entitled "Utilizing Social Media for Investigations" governs only officers who use social media collators and those officers assigned to OHS and RTCC. Plaintiff acknowledges that the Social Media Policy proposed by Defendant complies with the Court's *Opinion and Order* in this manner. Plaintiff raises this concern, however, to emphasize that violations of the Decree through the use of social media, though concentrated in OHS and RTCC, was also present among officers in other units. Plaintiff cannot foresee a burden or harm to MPD to require all officers who use social media to comply with this portion of the Court's *Opinion and Order*, and so makes the recommendation that the policy apply to all officers who use social media for investigations.

In addition, Plaintiff believes that the Social Media Policy would benefit from revision in several ways.

First, Plaintiff observes that although the Social Media Policy lacks a concrete discussion of when an investigation is criminal, it does however, contain definitions that would be useful to such a discussion. For example, the "Definitions" section contains definitions for "Criminal Intelligence Information," "Criminal Predicate," and "Reasonable Suspicion," but these terms are not found elsewhere in the policy. Plaintiff recommends that the policy be revised to benefit from a discussion of when a criminal investigation warrants the use of social media investigation as suggested by these terms and definitions.

Second, Plaintiff suggests a clarification of when officers may use social media for personal purposes and when they may use their personal social media accounts for law enforcement purposes. The Social Media Policy contains the following two provisions pertaining to personal use of social media: (1) "Use of social media while on duty should be conducted for police business purposes only, and only in compliance with this Policy"; and (2) "The officer's personal use of the social media platform and any searches conducted for personal reasons are not subject to this reporting requirement." The tension between these two provisions could be harmonized by clarifying that it is only when an officer uses social media while not on duty and for personal reasons, that his or her use is not subject to the reporting requirement.

Third, Plaintiff recommends that the "Dissemination" section of the Social Media Policy be revised. Plaintiff requests that a clear statement be included that the information gathered from social media may not be forwarded or shared beyond those who are authorized by the Social Media Policy.

Plaintiff also recommends that the term "Command Staff" be defined in the Policy. Definition in the policy itself will prevent any misunderstanding regarding who may receive dissemination of information under the Policy. This definition will also make clear how large a group is eligible to receive such disseminations.

Finally, Plaintiff recommends revision of the final sentence of the "Dissemination" section, which currently states: "Any information gathered and retained from social media may only be disseminated to members of the Command Staff, and only when the information pertains to threats to public safety or is

potential evidence in a criminal investigation." This sentence is unclear. Is the dissemination appropriate in the following two situations: (1) to members of the Command Staff; and (2) when the information pertains to threats to public safety or is potential evidence in a criminal investigation; Or, is the dissemination appropriate to members of the Command Staff *only when* the information pertains to threats to public safety or is potential evidence in a criminal investigation. Revision would provide clarity and prevent the inadvertent dissemination of political intelligence.

5. LIST OF SEARCH TERMS

The Court ordered the City to maintain a list of all search terms entered into social media collators or otherwise used by MPD officers collecting information on social media while on duty. The City filed a document under seal entitled *Court-Ordered Search Terms* on January 14, 2019. [ECF 183.] Plaintiff has no objections to the list of search terms attached as Exhibit A to Defendant's January 14 filing.

Respectfully submitted,

/s/ Mandy Strickland Floyd

Mandy Strickland Floyd (BPR# 31123)
Thomas H. Castelli (BPR#24849)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TENNESSEE
P.O. Box 120160
Nashville, Tennessee 37212
Phone: (615) 320-7142
Fax: (615) 691-7219
mfloyd@aclu-tn.org
tcastelli@aclu-tn.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on February 4, 2019 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via electronic mail to:

Buckner Wellford, Esq.
Mark Glover, Esq.
Jennie Vee Silk, Esq.
Lawrence J. Laurenzi, Esq.
Mary Wu Tullis, Esq.
BAKER, DONELSON, BEARMAN,
CALDWELL, & BERKOWITZ, P.C.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103

Attorneys for Defendant

/s/ Mandy Strickland Floyd
Mandy Strickland Floyd