

Why Top Secret Security Clearance for PPB Commissioner-in-Charge and City Attorney Must Be a Precondition for any Discussion about Portland Participation in any FBI JTTF

Written testimony prepared for submission to Portland City Council
Herman M. Frankel, M.D., Portland, OR (04/21/11)

Mayor Sam Adams, and Commissioners Randy Leonard, Amanda Fritz, Dan Saltzman, and Nick Fish:

Why must top secret security clearance for Portland Police Bureau (PPB) Commissioner-in-Charge and Portland City Attorney be a precondition for any discussion about Portland participation in any FBI Joint Terrorism Task Force?

Because Oregon law – unlike federal law – specifies this:

“No law enforcement agency . . . may collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.” (ORS181.575)¹

Our City Attorney and Police Commissioner must have top secret security clearance if they are to be able to provide legal guidance to our law enforcement professionals working with such clearance in a federal task force, and to maintain civilian oversight over their activities. Only in this way can we be protected from the actions of federal law enforcement and criminal investigation agencies, and the mistakes of their personnel.

The 04/19/11 Draft JTTF Resolution

<http://www.portlandonline.com/shared/cfm/image.cfm?id=346016>

The 04/19/11 draft City of Portland JTTF Resolution includes the following paragraphs:

Page 2, paragraph 5:

BE IT FURTHER RESOLVED, to ensure access to information necessary to manage and supervise PPB officers, the Police Chief will seek clearance at the Top Secret/ Secure Compartmentalized Information level, and the Commission-in-Charge of PPB will seek clearance at the Secret level; and,

Page 3, paragraph 1:

BE IT FURTHER RESOLVED, the PPB officers who work with the JTTF shall notify the Portland FBI SAC and report to the Police Chief and the City Attorney, whenever there is a violation or any question as to whether work the PPB officers are asked to do

¹On 04/12/11, Herman M. Frankel, M.D., retired pediatrician and Portland resident since 1965, prepared this written testimony for submission to the Portland City Council. <jttf19.docx> Page 1 of

complies with Oregon law including but not limited to ORS 181.575 and 181.850, City policies and SOPs. The Police Chief immediately shall notify the Commissioner-in-Charge of PPB of actual violations; and,

In part because the Resolution is silent about the clearance that will be sought by (or granted to) PPB officers working with the JTTF, and is silent about the clearance that will be sought by (or granted to) the City Attorney, these questions call for attention:

1. What clearance will be sought by (or granted to) PPB officers working with the JTTF, in view of the fact that the draft Resolution is silent about this matter?
2. What clearance will be sought by (or granted to) the City Attorney, in view of the fact that the draft Resolution is silent about this matter?
3. If, in accordance with the draft Resolution, the Police Chief seeks clearance at the Top Secret/Secure Compartmentalized Information level, will that clearance be granted?
4. If, in accordance with the draft Resolution, the Commissioner-in-Charge of PPB seeks clearance at the Secret level, will that clearance be granted?
5. If, in accordance with the draft Resolution, the Commissioner-in-Charge of PPB is granted security only at the Secret level and the Police Chief (and, presumably, PPB officers working with the JTTF) are granted clearance at the Top Secret/Secure Compartmentalized Information level, how will the former be able to exercise responsible civilian oversight over the latter?
6. If the City Attorney does not seek (and is not granted) security clearance at the same level as the Police Chief (and, presumably, PPB officers working with the JTTF), how can the City Attorney deal responsibly with any question as to whether the work that the PPB officers are asked to do complies with Oregon law?

Brandon Mayfield

Exactly what mistakes led to the devastating arrest and imprisonment of innocent 37-year-old Portland-area attorney and Muslim convert Brandon Mayfield on the basis of the FBI misidentification of his fingerprint? How could these mistakes have been prevented or detected early?

I was astonished and terrified by what I learned when I examined the 331-page document titled, "A Review of the FBI's Handling of the Brandon Mayfield Case," released in

March 2006 by US Department of Justice Office of the Inspector General (OIG) ¹. (Link: documents.theblackvault.com/documents/terrorism/MayfieldFBIOIG.pdf.)

The mistakes could have been prevented or detected early by making sure that responsible, caring, and independent observers with access to all the facts were overseeing the process.

Here is some of what I learned:

THE OIG FOUND THAT THE FBI MADE A LARGE NUMBER OF SERIOUS TECHNICAL ERRORS IN FINGERPRINT IDENTIFICATION, DOCUMENTED IN 52 PAGES OF THE OIG REVIEW. (OIG Review, pages 127-79).

Further, THE OIG FOUND THAT THE FBI SIMPLY DID NOT FOLLOW THE PROCEDURE MANDATED IN ITS OWN QUALITY ASSURANCE MANUAL "TO ENSURE THAT APPROPRIATE EXAMINATIONS HAD BEEN PERFORMED AND THAT ANY IDENTIFICATIONS HAD BEEN VERIFIED AND DOCUMENTED." (OIG Review, page 175)

Details:

On March 19, 2004, the FBI Latent Print Unit (LPU) identified Mr. Mayfield as the source of a fingerprint recovered by the Spanish National Police, and the FBI opened an investigation of Mr. Mayfield, including 24-hour surveillance (Review page 28); BUT: Although the LPU Quality Assurance Manual requires that a Peer Review be conducted before a Report of Examination is issued to ensure "that appropriate examinations had been performed and that any identifications had been verified and documented" and that "conclusions are supported in the examination documentation and are within the limitations of the discipline," in this case, "the LPU examiners interviewed by the OIG confirmed, however, that in practice the Peer Review did not involve a substantive review of the basis of the examiner's conclusion and did not constitute a separate examination of the relevant fingerprints. In the absence of any requirement that the basis of the examiner's conclusions be described or recorded in the Report of Examination, in practice the Peer Review (in this case) could not actually involve a determination of whether an identification was "within the limitations of the discipline." (Review pages 122-3). The verifier "declined to be interviewed for this investigation," and "he created no documentation reflecting the mental processes that led to his conclusion of individualization (*i.e., identification*) (OIG Review, page 175).

Further, THE OIG CONCLUDED THAT HAVING RECEIVED THE SPANISH NATIONAL POLICE REPORT CONCLUDING THAT ITS COMPARISON OF

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MAYFIELD'S PRINTS WAS "NEGATIVE" (OIG Review, pages 51-52), THE FBI LABORATORY FAILED TO ADEQUATELY EXPLORE THE POSSIBILITY THAT IT HAD ERRED IN IDENTIFYING MAYFIELD. (OIG Review, page 172)

Details:

The April 13 Negativo Report provided an early warning to the FBI Laboratory that it had erred in identifying Mayfield and a corresponding opportunity to take a fresh look at the Mayfield identification. Although the meaning of the term "negativo" in the report was unclear to the FBI Laboratory, it was clear that the SNP Forensic Laboratory had at least preliminarily disagreed with the FBI's conclusions. The OIG found no evidence, however, that the FBI Laboratory adequately explored the possibility that it had erred in identifying Mayfield. Although *(one of the examiners and the Unit Chief in this case)* stated they took another look at the identification, they did not attempt to find out the basis of the SNP's doubts before reiterating their conclusions. Instead, Laboratory personnel told the Counterterrorism Division (CTD) on April 15 that they were "absolutely confident" in the identification. . . *(The Unit Chief)* told the OIG that his purpose in making the trip to Madrid was to explain the FBI's position, and he did not expect the SNP to make its own presentation. If so, it appears that *(the Unit Chief)* did not view the meeting as an opportunity to learn more about the SNP's position in order to inform the Laboratory's own reconsideration of the identification. The OIG believes that the Laboratory's overconfidence in the skill and superiority of its examiners prevented it from taking the April 13 Negativo Report as seriously as it should have. A better response to a conflicting determination by another forensic laboratory would have been, first, to determine the complete basis for the other laboratory's disagreement *before* committing anew to the validity of the original determination and, second, to arrange for a fresh examination of the relevant prints by a new examiner who had not previously committed himself to a particular conclusion. The FBI failed to take both these steps. (OIG Review, page 172)

Further, THE OIG CONCLUDED THAT MR. MAYFIELD'S MUSLIM RELIGION, ACTIVITIES, AND ACQUAINTANCES "LIKELY CONTRIBUTED TO THE EXAMINERS' FAILURE TO SUFFICIENTLY RECONSIDER THE IDENTIFICATION AFTER LEGITIMATE QUESTIONS ABOUT IT WERE RAISED." (OIG Review, pages 178-9)

Details:

Here are the final sentences of the OIG assessment of the likely effect of Mr. Mayfield's Muslim religion, activities, and acquaintances on the actions of the FBI LPU:

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(The Chief of the FBI Latent Print Unit in this case) candidly admitted that if the person identified had been someone without these circumstances, like the "Maytag Repairman," the Laboratory might have revisited the identification with more skepticism and caught the error.

The OIG concluded that Mayfield's religion was not the sole or primary cause of the FBI's failure to question the original misidentification and catch its error. We concluded that the primary factors in the FBI's failure to revisit the identification before the SNP identified Daoud were the unusual similarity between LFP 17 and Mayfield's prints and the FBI Laboratory's faith in the expertise and infallibility of its examiners and methods. However, we believe that Mayfield's representation of a convicted terrorist and other facts developed during the field investigation, including his Muslim religion, also likely contributed to the examiners' failure to sufficiently reconsider the identification after legitimate questions about it were raised. (OIG Review, pages 178-9)

Mohamed Osman Mohamud

The FBI has been involved more recently in the life of another Oregonian and US citizen, Mohamed Osman Mohamud, who at age 19 was arrested at the November 26, 2010 Christmas tree-lighting ceremony in Portland Pioneer Courthouse Square on an accusation of attempting to ignite what he thought was a bomb.

"The device was in fact inert, and the public was never in danger," according to a news release from the U.S. Attorney's office. According the FBI affidavit that had been used to support the criminal complaint signed by U.S. Magistrate Judge John V. Acosta, an FBI undercover operative had contacted Mr. Mohamud by e-mail in June 2010 under the guise of being an associate of someone overseas with whom Mr. Mohamud had been in e-mail contact and who was believed to be involved in terrorist activities. Also according the FBI affidavit, during the ensuing months one or more FBI operatives talked repeatedly with Mr. Mohamud in person; met with him November 4 "at a remote spot in Lincoln County, where they detonated a bomb concealed in a backpack as a trial run for the upcoming attack"; assembled the device to be used November 6; and transported him to Portland for the November 6 event.^{3,4}

In summary, FBI personnel provided Mr. Mohamud with what he allegedly thought was an explosive device but was not, helped him prepare to use it, filed an affidavit alleging that he was planning to use it, and transported him to Portland in preparation for its use. Then he was arrested on an accusation of attempting to use a weapon of mass destruction, a felony charge that carries a maximum sentence of life in prison and a \$250,000 fine.

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Two subsequent revelations regarding involvement of the FBI in the life of Mohamed Osman Mohamud are as troubling as the facts summarized above. They echo the sequence of appalling mistakes, and violations of rights and of professional protocol, that characterize FBI's assaults on the life of Brandon Mayfield.

1. Violation of the 2005 agreement⁵

In violation of the 2005 agreement between the FBI and the City of Portland that calls for the FBI to notify the mayor when it investigates a terrorist threat here, the FBI provided Mayor Sam Adams with no such notification until after Mr. Mohamud's arrest. When this violation came to light during a City Council hearing on February 15, 2011, City Commissioner Randy Leonard characterized it as a an "incomprehensible failure."

Arthur Balizan, Portland's FBI special agent in charge since 2009, revealed that when he became convinced on September 29, 2010 that Portland was becoming a viable target for a plot to bomb the holiday tree lighting, he informed Police Chief Mike Reese and required him to sign a non-disclosure agreement so that Portland police involvement could be secured. When US Attorney Dwight Holton said that he did not think it necessary to inform the mayor of an undercover operation involving a fake bomb, Commissioner Leonard replied, "You're trying to say that it's not dangerous enough to let the mayor know . . . a van's sitting over there by itself that a terrorist thinks is going to have a bomb in it to kill 10,000 people? That just doesn't hit me as plausible."

Mr. Balizan said that he had not known about the 2005 agreement.

2. Violation of the standard practice of recording a suspect's first words about criminal intent⁶

"The FBI's attempt to record Mohamed Mohamud's first words about taking part in a bombing failed because a recorder ran out of juice, government prosecutors revealed in court papers Thursday (04/07/11)."

" 'Put simply,' they wrote, 'it was human error: the device was accidentally turned on hours before the meeting time and therefore ran out of power before the meeting began.'"

"Mohamud's lawyers appear to be mounting an illegal entrapment defense, suggesting the FBI steered their client into a plot to bomb thousands of Christmas revelers at Portland's annual tree-lighting ceremony last Nov. 16.

"Legal scholars have said the FBI's botched recording will make for interesting arguments in court because first utterance of criminal intentions are pivotal in entrapment cases."

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Documented violations of local safeguards by local FBI Joint Terrorism Task Forces in San Francisco, Oakland, and Orange County

Alan Schlosser and Veena Dubal. Terrorism, transparency and Oregon law: Paying too high a price to rejoin a terror task force⁷

Portland has received repeated assurances recently from federal officials that by assigning police officers to the FBI's local Joint Terrorism Task Force, the city can meet all of its goals of combating terrorism, protecting individual rights and maintaining an open and inclusive community. But the recent task force experience of San Francisco and Oakland tells a different story.

California, like Oregon, has strong legal protections against law enforcement using intrusive tactics to gather intelligence on groups or individuals who are suspected of no wrong-doing. But in the Bay Area, we've seen how these clearly defined local safeguards get obscured and ignored when local law enforcement joins a Joint Terrorism Task Force.

In San Francisco, the FBI first proposed that the San Francisco Police Department join the agency's regional counter-terrorism task force in 1996, but only if police personnel were exempted from the strong local intelligence policy with its supervisory and civilian oversight protections. Robust opposition from the mayor and public quickly crushed the proposition. In 2002, the SFPD authorized local officers to participate in the joint task force, but only under an agreement that specifically required local officers abide by the local policy at all times. A few years later, SFPD command staff were still promising the city's police commission that officers participating in the joint task force were strictly following local policy and avoiding widely criticized FBI tactics.

The SFPD has since changed its tune. It now refuses to even say how many officers are currently working with the Joint Terrorism Task Force, whether they are following local policy or FBI guidelines, and whether the prior agreement providing local control is still in effect. For two months now, the SFPD has been claiming the FBI won't let it discuss these issues -- all involving basic, local policy choices that were openly debated in the past -- without the FBI's consent.

In Oakland, our organizations received several reports last year of an Oakland Police Department officer assigned to the Joint Terrorism Task Force approaching Muslim Americans to question them about their beliefs and associations, apparently as part of FBI intelligence "assessments" that allow this tactic in the absence of any suspicion of criminality. We formally requested a copy of the current agreement between the Oakland Police Department and the FBI governing the task force relationship -- a document that had been routinely released in the past. We were stunned by Oakland's official reply in

⁷On 04/12/11, Herman M. Frankel, M.D., retired pediatrician and Portland resident since 1965, prepared this written testimony for submission to the Portland City Council. <jttf19.docx> Page 7 of

late January acknowledging that an agreement was in effect but that the FBI would not provide a copy of it -- even to the city's police department.

Meanwhile, we've also learned of a First Amendment lawsuit filed by our colleagues in southern California against an FBI Joint Terrorism Task Force operation in Orange County. The FBI had recruited an informant to infiltrate mainstream mosques and spy on hundreds of innocent Muslim Americans, collecting names, emails and phone numbers disconnected from any suspicion of wrong-doing. While FBI guidelines enacted in the last month of the Bush administration authorize intelligence gathering without any reasonable suspicion, these kinds of surveillance operations violate California -- and Oregon -- law, and the task force partnership greatly heightens the chances that the local partners will become involved in these operations. The walls of secrecy in Oakland and San Francisco make us concerned that this is exactly what's taking place. And the consequences, including a growing distrust between Muslim-American communities and local law enforcement, do not make us any safer.

Portland is facing a choice in the weeks ahead. While federal officials may provide assurance that state law and local values will be respected, our experience in the Bay Area is that loss of control of local law enforcement, diminished trust of local law enforcement and lack of transparency are the price of task force participation.

That price is too high.

Alan Schlosser is legal director for the ACLU Foundation of Northern California. Veena Dubal is an attorney with the Asian Law Caucus.

Reaffirmation of commitment to democracy

In 1789, before agreeing to sign the Constitution, the representatives of our thirteen colonies created our Bill of Rights, to protect the rights of the people from assault by a powerful central government.

This stands at the heart of our democracy.

On October 29, 2003, the Portland City Council unanimously passed Resolution 36179 **“Expressing concern about the USA P.A.T.R.I.O.T. Act.”** On December 9, 2004, the Multnomah County Board of Commissioners passed a similar resolution, expressing explicit **commitment to protect civil rights in the era of the USA PATRIOT Act.**
Portland: www.portlandonline.com/shared/cfm/image.cfm?id=329925
Multnomah: <http://www2.co.multnomah.or.us/cfm/boardclerk/uploadedfiles/04-1831.pdf>

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Also, re Multnomah: Google > [PDF] SPEAKING OUT: Report from the Public Hearing

If we, our civil rights, and our Constitution are to be protected from the actions of federal law enforcement and criminal investigation agencies, and the mistakes of their personnel, our Police Commissioner and City Attorney must maintain civilian oversight – with Top Secret security clearance – over the activities of all city employees, including our law enforcement professionals. This is a matter of priority and principle, not a matter of yielding to threats of punishment or expectations of gain.

Have we forgotten the words of Pastor Martin Niemoeller, German anti-Nazi theologian and Lutheran pastor, imprisoned in Sachsenhausen and Dachau concentration camps from 1937 to 1945?

“First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the Trade Unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not speak out. And when they came for me, there was no one left to speak out for me.”⁸

I hope that all of us will commit ourselves to remembering the names of **Brandon Mayfield** and **Mohamed Osman Mohamud**, and the words written by James Baldwin in 1971 to Angela Davis: “. . . ***If they take you in the morning, they will be coming for us that night.***”

I’m grateful to you, our Mayor and City Commissioners, for repeatedly appealing for active public participation – in this case, input and testimony – in the making of decisions that affect the lives of all of us who live, work, study, travel, and worship here.

Thank you.

Documentation:

1. <https://www.oregonlaws.org/ors/181.575>
2. Office of the Inspector General. A Review of the FBI's Handling of the Brandon Mayfield Case. US Department of Justice, March 2006.
(This document may be accessed by copying and pasting this link:
documents.theblackvault.com/documents/terrorism/MayfieldFBIIOIG.pdf.)
3. Bryan Denson. FBI thwarts terrorist bombing attempt at Portland holiday tree lighting, authorities say. The Oregonian 11/26/10, update 11/29/10
http://www.oregonlive.com/portland/index.ssf/2010/11/fbi_thwarts_terrorist_bombing.html

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4. Steve Duin. Jihad at Pioneer Courthouse Square. The Oregonian 11/27/10
http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2010/11/jihad_at_pioneer_court_house_sq.html
5. Brad Schmidt. Portland's JTTF debate reveals how oversight agreement with FBI not followed for bomb plot. The Oregonian 02/15/11, updated 02/16/11
http://blog.oregonlive.com/portland_impact/print.html?entry=/2011/02/portlands_jtft_debate_reveals.html
6. Bryan Denson. FBI fails to record bomb plot suspect. The Oregonian 04/08/11 Page A1 col. 1, Page A7 col. 5.
<http://www.oregonlive.com/newsflash/index.ssf/story/prosecutors-recording-failed-in-bomb-plot-case/348bd30cbf7b4317b293abcb9fbac98c> (A four-paragraph summary of the 15-paragraph print version)
7. Alan Schlosser and Veena Dubal. Terrorism, transparency and Oregon law: Paying too high a price to rejoin a terror task force. The Oregonian 04/05/11 Page B5, Col. 1-4; also published 04/05/11 and updated 04/06/11 at
http://www.oregonlive.com/opinion/index.ssf/2011/04/terrorism_transparency_and_ore.html
8. Martin Niemoeller, German anti-Nazi theologian and Lutheran pastor, imprisoned in Sachsenhausen and Dachau concentration camps from 1937 to 1945
http://www.jewishvirtuallibrary.org/jsource/Holocaust/Niemoller_quote.html
http://en.wikipedia.org/wiki/Martin_Niem%C3%B6ller
9. James Baldwin to Angela Davis, 1971.
<http://www.nybooks.com/articles/10695>.