



Metropolitan Police Monitor Nearly 2,500 Demonstrations in 2014-2016 and Report No First Amendment Inquiries

July 3, 2017

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A Report by the Office of the District of Columbia Auditor
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July 3, 2017

Metropolitan Police Monitor Nearly 2,500 Demonstrations in 2014-2016 and Report No First Amendment Inquiries

Why ODCA Did This Audit

Every year thousands of individuals gather in the District of Columbia to exercise their First Amendment right to assemble. In 2016 alone, the District hosted approximately 1,224 marches and demonstrations overseen by the Metropolitan Police Department (MPD). To ensure public safety, the MPD may deploy patrol officers at events and carry out investigations and surveillance of “First Amendment activities.” Police conduct is dictated by the District’s First Amendment Rights and Police Standards Act of 2004, (FARPSA), which protects the constitutional rights and liberties of individuals and groups. As further protection, the law requires ODCA to “audit MPD files and records relating to investigations and preliminary inquiries involving First Amendment activities” while also authorizing the Office of Police Complaints to oversee police handling of demonstrations.

What ODCA Found

1. MPD has established policies covering appropriate police conduct for investigating First Amendment activities.
2. ODCA was not able to determine if MPD complied with the law because MPD did not conduct any First Amendment preliminary inquiries and investigations during the scope of this audit.
3. MPD has participated in some community engagement efforts during the scope of the audit.
4. MPD has never conducted preliminary inquiries of First Amendment activities prior to conducting investigations.

For more information regarding this report, please contact Diane Shinn, at diane.shinn@dc.gov or 202-727-3600.

What ODCA Recommends

Since the MPD conducted no First Amendment investigations, ODCA makes no recommendations on that issue. Separately, while the audit was under way, the Office of Police Complaints (OPC) released a report on February 27, 2017, documenting the use of riot gear by MPD officers during protests held on Inauguration Day. Various news sources also confirmed OPC’s observations.

In testimony provided to the Council Committee on the Judiciary and Public Safety on March 24, 2017, the Partnership for Civil Justice Fund (PCJF) asserted that the organization, pursuant to D.C. Code §5-331.16(a), requested any relevant commander’s report from January 20, 2017, authorizing the use of riot gear. In response, MPD stated that it was “not aware of any riot gear or tactics employed at any First Amendment Assembly on January 20,” and further stated that the request should fall within the Freedom of Information Act (FOIA). PCJF’s subsequent FOIA request for the report was denied under a FOIA law enforcement exemption.

D.C. legislators included in the First Amendment Rights and Police Standards Act (FARPSA) the transparency requirement that “Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request.” The plain language requires such a report, and requires it be public.

ODCA, citing transparency as a key element of §5-331.16(a) of the D.C. Code, released a **Management Alert Letter** on April 14, 2017, recommending that MPD release all relevant reports on the use of riot gear to the PCJF. In its response, MPD acknowledged use of riot gear on January 20, 2017, but disagreed with ODCA’s reading of the transparency requirement.

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Background

Every year thousands of individuals gather in the District of Columbia to exercise their First Amendment right to assemble. In 2016 alone, the District hosted approximately 1,224 marches and demonstrations.¹ To ensure public safety, the Metropolitan Police Department (MPD) may deploy patrol officers at events and carry out investigations and surveillance of “First Amendment activities.”² Police conduct is dictated by the District’s First Amendment Rights and Police Standards Act of 2004, which protects the constitutional rights and liberties of individuals and groups.³ As further protection, the law requires the Office of the D.C. Auditor (ODCA) to “audit MPD files and records relating to investigations and preliminary inquiries involving First Amendment activities.”⁴

ODCA found that between 2014 and 2016, the District hosted approximately 2,436 marches and demonstrations. MPD reported that it did not conduct investigations leading up to and/or during any of these gatherings. Furthermore, MPD officials said no MPD undercover officers or informants were used to surveil or monitor protests, religious communities, political organizations, advocacy organizations, or individuals in relation to First Amendment gatherings between 2014 and 2016. Based on interviews with MPD officials and other research, it is clear that MPD has put in place policies that comply with District law. However, since MPD reported that it did not actually conduct any investigations, ODCA could not determine whether MPD had followed these policies.

Requirements of the Police Investigations Concerning First Amendment Activities Act of 2004

Title II of the First Amendment Rights and Police Standards Act of 2004 is known as the Police Investigations Concerning First Amendment Activities Act of 2004.⁵ This act specifies policy and procedures that MPD must follow when conducting investigations and preliminary inquiries of activities protected by the First Amendment.

Investigations of First Amendment activities may only be initiated when there is “reasonable suspicion” that “persons, groups, or organizations are planning or engaged in criminal activity, and First Amendment activities

¹ See Appendix A for a breakdown of total number of marches and demonstrations by year and number of participants.

² See D.C. Code §§ 5-331.07, 5-333.05(a), 5-333.06(a), and 5-333.07(c)-(e).

³ D.C. Law 15-352, effective April 13, 2005.

⁴ D.C. Code § 5-333.12(d).

⁵ D.C. Law 15-352, §201 et seq.

are relevant to the criminal investigation.”⁶ Separately, preliminary inquiries may be initiated to help determine whether a full investigation is necessary. A preliminary inquiry can be undertaken when MPD receives information or an allegation requiring further scrutiny, and “the information or allegation does not justify opening a full investigation because *it does not establish reasonable suspicion...*” (emphasis added)⁷ D.C. law also outlines the steps MPD must take to authorize and conduct investigations and preliminary inquiries, to review their appropriateness, and to retain or purge related records, as necessary.⁸

Previous Audit Findings From ODCA as Required by Law

ODCA has conducted four First Amendment audits over the past dozen years, including this review. The first audit report, released on September 27, 2012, and covering 2005-2011, found that MPD had not fully complied with the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004. The report said MPD had not developed and implemented sufficient internal controls for conducting and documenting investigations of First Amendment activities. ODCA issued 13 recommendations—primarily focused on developing and implementing standard operating procedures (SOPs) and internal controls consistent with the law⁹—that have served as criteria for evaluating MPD’s performance in subsequent audits. In March 2014, ODCA issued a report on the only First Amendment activities investigation conducted by MPD during 2012. The audit team found that the investigation substantially complied with the law. However, it also noted that, with respect to MPD’s use of undercover officers assigned to First Amendment investigations, the investigative file “...did not contain sufficient documentary evidence of what actions were taken by undercover officers assigned to the investigation.”¹⁰ Therefore, the ODCA audit team said it could not fully determine MPD’s compliance with legal requirements for covering the use

⁶ D.C. Code § 5-333.05(a).

⁷ D.C. Code § 5-333.06(a)(1)-(2).

⁸ See D.C. Code §§ 5-333.05, 5-333.06, and 5-333.07 for rules on the authorization of preliminary inquiries and investigations, § 5-333.12(a) for rules on the review of their appropriateness, and § 5-333.11 for rules on the retention and purging of documents.

⁹ “[Audit of the Metropolitan Police Department’s Investigations and Preliminary Inquiries Involving First Amendment Activities,” Office of the D.C. Auditor, September 27, 2012.](#)

¹⁰ “Metropolitan Police Department First Amendment Investigations Substantially Complied with District Law,” Office of the D.C. Auditor, March 19, 2014, page 9. See: <http://www.dcauditor.org/sites/default/files/DCA092014.pdf>.

of undercover officers. The third audit report, issued in September 2014, found that MPD complied with the law during 2013.¹¹

MPD Mission, Services, and Organization Structure

According to MPD's FY16 Performance Plan, the agency's mission is to "safeguard the District of Columbia and protect its residents and visitors by providing the highest quality police service with integrity, compassion, and a commitment to innovation that integrates people, technology, and progressive business systems."¹² MPD "provides crime prevention and response services through patrols, investigations, and homeland security services."¹³

During the course of this review, MPD consisted of six bureaus: Patrol Services, Corporate Support, Professional Development, Investigative Services, Internal Affairs, and Homeland Security Bureau.¹⁴

Homeland Security Bureau

The Homeland Security Bureau oversees First Amendment activities and related patrol operations. Its divisions do the following:

- The **Special Operations Division** provides specialized patrol, tactical, rescue, and security services to the public, businesses, and government in the District.¹⁵
- The **Joint Strategic and Tactical Analysis Command Center (JSTACC)** supports the District functions in keeping both the command staff and the community aware, by sending out crime alerts that give timely information about offenses occurring within neighborhoods, and liaises with the Washington Regional Threat Analysis Center and the Capitol Police.¹⁶

¹¹ "Metropolitan Police Department First Amendment Investigations Complied with District Law in 2013," Office of the D.C. Auditor, September 16, 2014. See: <http://www.dcauditor.org/sites/default/files/DCA252014.pdf>.

¹² Metropolitan Police Department Performance Plan (FY16), page 1. See: [https://oca.dc.gov/sites/default/files/dc/sites/oca/publication/attachments/MPD 16.pdf](https://oca.dc.gov/sites/default/files/dc/sites/oca/publication/attachments/MPD%20FY16%20Performance%20Plan%20FY16.pdf).

¹³ Id.

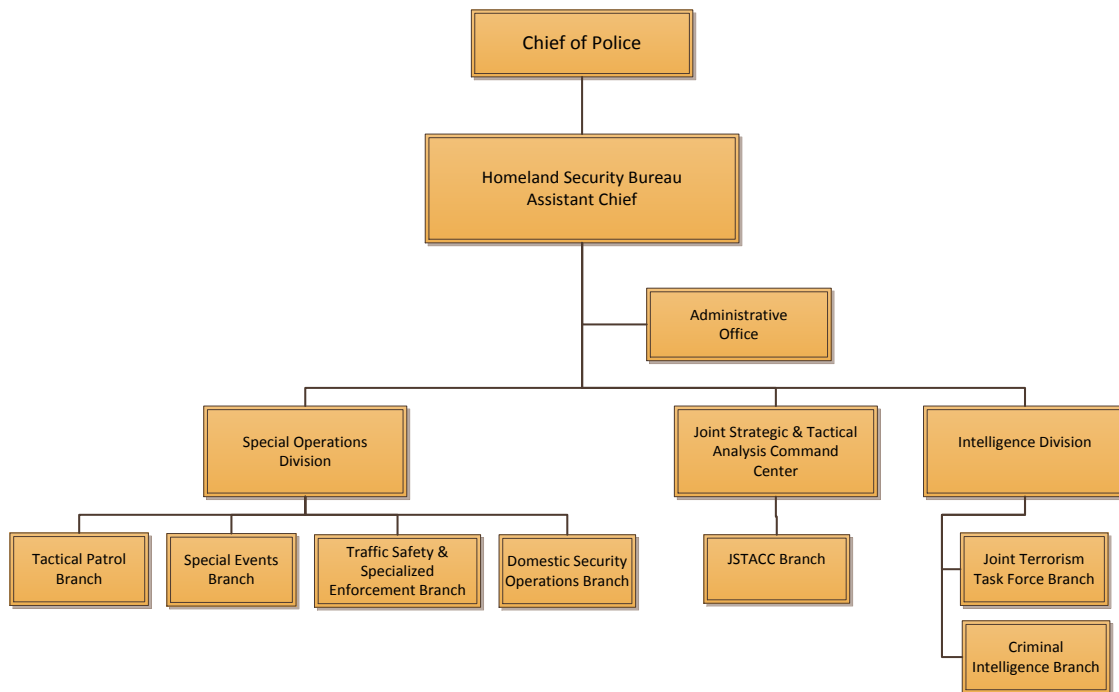
¹⁴ The organization chart shared by MPD with ODCA in January 2017 was effective as of October 3, 2016. As of April 23, 2017, MPD's organization chart has been revised to reflect seven bureaus. See page 1: [https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Org%20Charts UPDATED 04232017 v14.pdf](https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Org%20Charts%20UPDATED%2004232017%20v14.pdf).

¹⁵ FY16 D.C. Metropolitan Police Department Performance Plan, submitted to ODCA.

¹⁶ Id.

- The **Intelligence Division** works with local and federal partners to assist with intelligence gathering and dissemination relating to crimes that have been committed, or would be committed, within the District.¹⁷ This division is responsible for conducting First Amendment investigations.

Figure 1: Homeland Security Bureau Organizational Chart



Defining Surveillance

Preliminary investigations and full investigations of First Amendment activities may be carried out by MPD through various surveillance techniques. According to MPD, surveillance is the “...observation of a person(s), place, or a process to gain information about that person, place, or process.”¹⁸ Surveillance can be overt, discreet, from a fixed point or mobile, or conducted through computer monitoring, use of GPS devices, still photos, and videos.¹⁹ The law requires prior written approval and authorization from the chief or his designee for certain surveillance techniques, including the use of undercover officers, informants, mail covers, mail openings, pen registers, trap and trace devices, wire

¹⁷ Id.

¹⁸ “Terrorism Briefing for Restaurants,” Homeland Security Bureau, Metropolitan Police Department, December 2015.

¹⁹ Id.

interception, and interception of oral communications.²⁰ Authorized forms of surveillance not requiring the chief's authorization include interviews, examination of public information, MPD indices and files, records of other government and law enforcement agencies, and physical, photographic and video surveillance undertaken in public locations or otherwise legally made available.²¹

MPD's Investigation of First Amendment Activities Related to the 2017 Presidential Inauguration

This audit was initiated soon after the November 2016 presidential election. On Inauguration Day, multiple news sources reported vandalism, clashes with MPD officers, and arrests.²² In February 2017, the ODCA team asked MPD officials whether any First Amendment preliminary inquiries or investigations had taken place in 2016 prior to the presidential election and inauguration. Officials said no such reviews occurred in 2016, while noting that the department had conducted one investigation related to the presidential inauguration in early January 2017. An MPD official confirmed that 235 arrests were made resulting from Inauguration Day protests. ODCA will review this investigation in its 2017 First Amendment audit.

²⁰ D.C. Code § 5-333.07(d) and (e). Mail openings, wire interception and interception of oral communications may only be used in full-investigations. See D.C. Code § 5-333.07(d).

²¹ D.C. Code § 5-333.07(c).

²² "Protestors who destroyed property on Inauguration Day were part of well-organized group," The Washington Post, January 21, 2017. See: https://www.washingtonpost.com/local/public-safety/protesters-who-destroyed-property-on-inauguration-day-part-of-well-organized-group/2017/01/21/096678c8-dfeb-11e6-ad42-f3375f271c9c_story.html?tid=a_inl&utm_term=.c12f60e3dbb4.

"Inauguration Day's mass arrests are challenging for prosecutors," The Washington Post, February 4, 2017. See: https://www.washingtonpost.com/local/public-safety/mass-inauguration-day-arrests-a-challenge-for-prosecutors/2017/02/04/594bf238-ea2b-11e6-bf6f-301b6b443624_story.html?utm_term=.3551e8ee6459.

"Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom," The New York Times, January 25, 2017. See: <https://www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html>.

Management Alert: ODCA Recommends MPD Release Written Report(s) on the Deployment of Police in Riot Gear During Inauguration Day Protests

During ODCA's audit, the Office of Police Complaints (OPC) released a report on February 27, 2017, documenting the use of riot gear by MPD officers during protests held on Inauguration Day.²³ Various news sources also confirmed OPC's observations.

In testimony provided to the D.C. Council Committee on the Judiciary and Public Safety on March 24, 2017, the Partnership for Civil Justice Fund (PCJF) asserted that the organization, pursuant to D.C. Code §5-331.16(a), requested any relevant commander's report from January 20, 2017, authorizing the use of riot gear.²⁴ In response, MPD stated that it was "not aware of any riot gear or tactics employed at any First Amendment Assembly on January 20," and further stated that the request should be made under the Freedom of Information Act (FOIA). PCJF's subsequent request for the report was also denied under a FOIA law enforcement exemption.

On April 13, 2017, ODCA released a Management Alert Letter recommending that MPD release all reports on the use of riot gear to PCJF. Under the First Amendment Rights and Police Standards Act of 2004, the commander at the scene of a First Amendment assembly is required to make a written report to the Chief of MPD within 48 hours of the deployment of police officers in riot gear. This report, according to the law, shall be available to the public upon request.

²³ "OPC Monitoring of the Inauguration: January 20, 2017." Police Complaints Board. See:

<https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Inauguration%20Protest%20Monitoring%20Report%20FINAL.pdf>.

²⁴ Testimony of Mara Verheyden-Hilliard, Executive Director, Partnership for Civil Justice Fund, Public Roundtable on PR22-0144, the "Chief of the Metropolitan Police Department Peter Newsham Confirmation Resolution of 2017," D.C. Council Committee on the Judiciary and Public Safety, March 24, 2017. See: <http://lims.dccouncil.us/Download/37511/PR22-0144-HearingRecord1.pdf>.

Objectives, Scope and Methodology

Objectives

The audit was informed by the following objectives:

1. Whether MPD was in compliance with the requirements of the Police Investigations Concerning First Amendment Activities Act of 2004 during the scope of the audit.
2. Whether MPD has continuously implemented the recommendations made in ODCA's audit report entitled, "Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities (Act)," released on September 27, 2012.

Scope

The scope of the audit covered calendar years 2014, 2015, and 2016.

Methodology

To determine whether MPD complied with the requirements of the law during the scope of this audit, ODCA did the following:

- Interviewed and solicited statements made by MPD officials from the following divisions: Intelligence, Joint Strategic and Tactical Command Center (JSTACC), Special Operations, Office of Risk Management, and Office of the General Counsel.
- Interviewed officials from neighboring and local agencies including D.C.'s Office of Police Complaints.
- Reviewed annual reports submitted by MPD notifying the Council of the number and types of First Amendment preliminary inquiries and investigations conducted during 2014-2016.
- Reviewed MPD's performance plans for FYs 2014-2016.
- Reviewed reports and statements by the Office of Police Complaints on its monitoring of MPD's handling of various marches, demonstrations, and rallies from 2014-2016.
- Reviewed the "daily sheets" provided by MPD's Special Operations Division for the 2014-2016 period. The documents list daily demonstrations, protests, and other events that occurred in the District each month.
- Reviewed training materials, including presentations, and attendance sheets.

To determine whether MPD has continuously implemented the recommendations made in the ODCA audit report on September 27, 2012, ODCA did the following:

- Reviewed MPD's SOPs related to First Amendment preliminary inquiries and investigations.
- Reviewed records documenting training given to MPD personnel on the requirements of the law.

Audit Results

MPD has established policies covering appropriate police conduct for investigating First Amendment activities.

ODCA personnel reviewed all relevant SOPs and training materials provided by MPD. The review showed that MPD has maintained the 13 recommendations made by ODCA in its September 27, 2012, audit, including developing policies requiring written authorization of investigations, the provision of First Amendment activities-related training for MPD officers, and recordkeeping and purging policies, among others. For the complete list of recommendations, see: [Audit of the Metropolitan Police Department's Investigations and Preliminary Inquiries Involving First Amendment Activities](#).²⁵

ODCA was not able to determine if MPD complied with the law because MPD did not conduct any First Amendment preliminary inquiries and investigations during the scope of this audit.

The MPD monitored approximately 2,436 marches and demonstrations during 2014-2016, as shown in Figure 2. The figures do not include events over which the U.S. Capitol Police and National Park Service have jurisdiction. MPD officials have reported to the D.C. Council and to ODCA that no First Amendment activities-related preliminary inquiries or investigations were conducted during this time. It should be noted that on average, approximately 32 percent of the total marches and demonstrations constitute participation by only 1 to 24 individuals.

Figure 2: Marches and Demonstrations in D.C., 2014-2016

Year	1-24 People	25-999 People	1000+ People	Unknown # of People	Total # Marches, Demonstrations
2014	31%	42%	10%	16%	439
2015	34%	50%	5%	11%	773
2016	30%	45%	13%	12%	1224
Mean	32%	46%	10%	13%	N/A

²⁵ Subsequent ODCA audits also confirmed the MPD's development and implementation of appropriate policies regarding police conduct for investigating First Amendment activities. See: "[Metropolitan Police Department First Amendment Investigations Substantially Complied with District Law](#)," Office of the D.C. Auditor, March 19, 2014; "[Metropolitan Police Department First Amendment Investigations Complied with District Law in 2013](#)," Office of the D.C. Auditor, September 16, 2014.

ODCA asked MPD why the agency had not conducted any First Amendment activities investigations despite the high number of events during the scope of the audit. MPD officials provided two main responses: First, there simply were no instances that suggested reasonable suspicion of criminal activity; and second, with the rise of social media (Facebook, etc.), MPD officials said they are able to gather information through open sources or information made available to the public. Therefore, they said, it is less likely that they must deploy undercover officers or informants.

In addition, the Intelligence Division, which is responsible for conducting First Amendment investigations, only devotes about 10 percent of its time on First Amendment activities. It allocates the majority of its resources to investigating and monitoring gang-related activities. The Intelligence Division is staffed by 36 officers, with four officers detailed to First Amendment activities.

According to senior police officials, including MPD Chief Peter Newsham, cases involving a “terrorism nexus” are not handled by the MPD’s Intelligence Division, but are automatically referred to the Joint Terrorism Task Force (JTTF), a special organization of MPD officers and agents of the Federal Bureau of Investigation. An MPD official said that the division has referred 73 cases involving a “terrorism nexus” to the JTTF from 2014 through 2016.

ODCA also found no evidence that MPD conducted any surveillance or monitoring of protests, religious communities, political organizations, advocacy groups, and individuals during the scope of the audit.

Past ODCA audits have focused on MPD’s investigations of protests, demonstrations, and marches. However, considering the prevalence of global cyberterrorism and the increase of reported hate-crimes in the District, this ODCA audit also sought to review any possible MPD surveillance of religious communities and political organizations.

In February 2017, the ODCA team asked MPD officials to provide all “relevant data/documents that reflect the use of undercover officers, informants, and mail covers during CYs 2014-2016 on all instances implicating” the first amendment [sic], “specifically the *surveillance* of monitoring of protests, religious communities (mosques, temples, churches, etc.), political organizations, advocacy organizations, and individuals.”

An MPD official solicited responses from Assistant Chiefs of the Police for the Investigative Services Bureau, the Internal Affairs Bureau, the Patrol Services Bureau, and the Homeland Security Bureau, in addition to officials from the Intelligence Division, Joint Strategic and Tactical Analysis

Command Center (JSTACC), and others. The MPD official said: “...Each person contacted responded back that no undercover officers or informants or mail covers were used to investigate any first amendment [sic] protests, religious communities (mosques, temples, churches, etc.), political organizations, advocacy organizations, or individuals.” Moreover, the MPD official stated that “...no MPD undercover officers, informants, or mail covers were used to investigate, surveil or monitor protests, religious communities (mosques, temples, churches, etc.), political organizations, advocacy organizations, or individuals relating to *First Amendment gatherings* for calendar years 2014-2016.” (emphasis added)

MPD has participated in some community engagement efforts during the scope of the audit.

ODCA asked MPD officials whether they had engaged leadership within different communities in the District. An MPD official who led the Intelligence Division, previously called the Criminal Intelligence Branch (CIB), responded that following the Paris terrorist attacks in November 2015, the CIB reached out to the District’s restaurant and hospitality community. The CIB provided briefings on how to detect suspicious activities and to safeguard against threats of violence. The official also stated that, in October 2015, leaders from the District’s Muslim community initiated a meeting with MPD officials to address concerns about protests targeting a prominent D.C. mosque. Since 2015, however, JSTACC has not maintained contact with these two groups. An official from JSTACC stated that community engagement, generally, is performed through MPD’s patrol districts. Another MPD official noted the agency had developed an ongoing partnership with East of the River Clergy Police Community Partnership, a local organization focused on providing services to communities in the north and southeast sections of the District.

MPD has never conducted preliminary inquiries of First Amendment activities.

As stated earlier, MPD may initiate a preliminary inquiry to obtain sufficient information to determine whether an investigation is warranted, when:

1. MPD receives information or an allegation, the responsible handling of which requires further scrutiny.
2. The information or allegation received by MPD does not justify opening a full investigation because it *does not establish reasonable*

suspicion that persons are planning or engaged in criminal activity. (emphasis added).²⁶

In practice, the Intelligence Division only applies the standard of *reasonable suspicion* to all incidents that may implicate the First Amendment, since, according to an MPD official, the legal threshold for initiating a preliminary inquiry is vague. As a result, MPD has conducted only full investigations of First Amendment activities since the law was implemented in 2005. MPD, therefore, can only provide documentation or records related to those investigations.²⁷

²⁶ D.C. Code § 5-333.06(a).

²⁷ Per MPD policy and District law, in order to initiate a preliminary inquiry, similar to initiating a full investigation, an MPD official must submit a written memorandum to the head of the Joint Strategic Tactical Analysis Command Center, and receive prior written approval. See D.C. Code §5-333.06(c)(1)-(3).

Glossary of Terms

First Amendment activity is a “...constitutionally protected speech or association, or conduct related to freedom of speech, free exercise of religion, freedom of the press, the right to assemble, and the right to petition the government.”²⁸

First Amendment assembly is a “...demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views.”²⁹

Mail cover involves- “...opening and inspection and review of the outside of envelopes of posted mail and other delivered items.”³⁰

Mail opening involves the “...opening and inspection and review of the contents of posted mail and other delivered items.”³¹

Pen register is a “ device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted...”³²

Reasonable suspicion is a “...belief based on articulable facts and circumstances indicating a past, current, or impending violation of law. The reasonable suspicion standard is lower than the standard of probable cause; however, a mere hunch is insufficient as a basis for reasonable suspicion. A suspicion that is based upon the race, ethnicity, religion, national origin, lawful political affiliation or activity, or lawful news-gathering activity of an individual or group is not a reasonable suspicion.”³³

²⁸ See D.C. Code §5-333.02.

²⁹ See D.C. Code §5-331.02(2).

³⁰ See D.C. Code §5-333.02(7).

³¹ See D.C. Code §5-333.02(8).

³² See 18 USCS §3127 (3).

³³ See D.C. Code § 5-333.02(11).

Audit Results Summary

Finding	Recommendation
MPD has established policies covering appropriate police conduct for investigating First Amendment activities.	ODCA Recommends MPD Release Written Report(s) on the Deployment of Police in Riot Gear During Inauguration Day Protests.
ODCA was not able to determine if MPD complied with the law because MPD did not conduct any First Amendment preliminary inquiries and investigations during the scope of this audit.	
MPD has participated in some community engagement efforts during the scope of the audit.	
MPD has never conducted preliminary inquiries of First Amendment activities.	

Conclusion

Leaders of MPD are justifiably proud of their handling of the thousands of special events that take place in the nation's capital and the protection they provide to demonstrators and residents. To help ensure that the department's high standards in this work are maintained over time, the D.C. Council included accountability provisions within the First Amendment Rights and Police Standards Act of 2004. The Office of Police Complaints was authorized to monitor and evaluate MPD's handling of First Amendment assemblies, and the Office of the D.C. Auditor was required to audit "files and records related to investigations...involving First Amendment activities."

This report covers 2014 through 2016, a period in which MPD reported no investigations or preliminary inquiries on First Amendment activities. We highlight the number of events that did take place during the three-year period, acknowledge the prior development of rules and practices governing police handling of First Amendment assemblies, and in our Management Alert recommend that MPD comply fully with the transparency provision of the 2004 law pertaining to making publicly available reports on use of riot gear.

We appreciate the assistance provided by Chief Peter Newsham and officials within the Intelligence Division of MPD responsible for conducting First Amendment investigations.

Management Alert Letter

On April 14, 2017, we sent the following Management Alert Letter to MPD with a recommendation to release written report(s) on the deployment of police in riot gear during Inauguration Day. MPD responded on June 13, 2017; its comments are included below in their entirety.



April 14, 2017

Peter Newsham
Acting Chief of Police
Metropolitan Police Department
300 Indiana Ave., N.W.
Washington, DC 20001

Management Alert

Dear Chief Newsham:

As you know, the Office of the D.C. Auditor (ODCA) is conducting an audit of the Metropolitan Police Department's First Amendment Investigations as required by the Police Investigations Concerning First Amendment Activities Act of 2004, D.C. Code Section 5-333.12(d)¹. The First Amendment Rights and Police Standards Act placed oversight responsibility with ODCA with regard to political surveillance, and with the Police Complaints Board with regard to the handling of demonstrations. D.C. Code Section 5-1104(d-1) authorizes the Police Complaints Board to "monitor and evaluate MPD's handling of, and response to, First Amendment assemblies."

I write today to share a concern based on information received that is outside the scope of our audit in order that you might address the information timely and prior to the submission of our audit report. My concern derives from D.C. Code Section 5-331.16(a):

- (a) Officers in riot gear shall be deployed consistent with the District policy on First Amendment assemblies and only where there is a danger of violence. Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request [emphasis added].

In testimony provided to the Council Committee on the Judiciary and Public Safety on March 24, 2017, the Partnership for Civil Justice Fund (PCJF) asserted that the organization, pursuant to Section 5-331.16(a) requested any relevant commander's report from January 20, 2017. PCJF received an email response from MPD on January 27, 2017, stating that the department was "not aware of any riot gear or tactics employed at any First Amendment Assembly on January 20." Further, the MPD email stated that the request would be interpreted as relating to "the criminal riot of January 20, 2017" and would be considered to fall within the Freedom of Information Act (FOIA). Subsequently, the PCJF request was denied under a FOIA law enforcement exemption.

¹ The "Police Investigations Concerning First Amendment Activities Act of 2004" is a distinct subtitle within the "First Amendment Rights and Police Standards Act of 2004", DC Law 15-352, effective April 13, 2005.

Various sources, including the attached Police Complaints Board report from February 27, 2017, on the events of January 20, 2017, confirm the use of riot gear by MPD on that date. The Board reported that assembly activity began at Franklin Square Park with groups carrying "Honor the Treaties" signs and that MPD Civil Disturbance Units responded to the site. The report stated that "officers were outfitted in riot gear and were carrying less than lethal weapons," at 12th and L Streets, N.W., adjacent to Franklin Square, and the report included photographs of MPD officers in riot gear.

Transparency was an important element in the First Amendment Rights and Police Standards Act on its enactment. It appears that MPD is violating the above-cited transparency provision by not having made one or more commander's reports available on request. I recommend that you release all relevant commanders' reports forthwith to the PCJF.

As stated above, this concern with compliance with D.C. law falls outside the scope of our current audit of MPD's handling of First Amendment Investigations since it arises from events of January 20, 2017, and our current audit covers 2014 through 2016. At the same time, Generally Accepted Government Auditing Standards (GAGAS) call for auditors to share with responsible officials any instances detected of noncompliance with laws and regulations even when those findings fall outside the specific context of an audit's objectives (GAGAS Chapter 7.22.)

Please let me know if you plan to meet this recommendation. It is my intention, consistent with ODCA policy, to include this Management Alert and any written response from MPD, as an appendix when we publish the upcoming audit report on First Amendment Investigations.

Thank you for your consideration.

Sincerely yours,



Kathleen Patterson

cc: Betsy Cavendish, General Counsel, EOM

Attachment



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT**

June 13, 2017

Ms. Kathleen Patterson
District of Columbia Auditor
Office of the D.C. Auditor
717 14th Street NW, Suite 900
Washington, DC 20005

Dear Ms. Patterson:

This letter is in response to the Management Alert you forwarded on April 14, 2017, in which you wrote to share a concern based on information that is outside of the scope of the audit you are currently conducting of First Amendment Investigations by the Metropolitan Police Department (MPD). Your request focuses on requirements under D.C. Official Code § 5-331.16(a)¹ for a commander to make a written report to the Chief of Police within 48 hours after officers in riot gear are deployed at a First Amendment assembly, and that such report be available to the public on request.

Your concern arises from testimony by Ms. Mara Verheyden-Hilliard on behalf of the Partnership for Civil Justice (PCJF) before the Council Committee on the Judiciary and Public Safety on March 24, 2017. You described that in her testimony Ms. Verheyden-Hilliard asserted that PFCJ had made a request under § 5-331.16(a) for any commander's report from January 20, 2017, and that PFCJ received an e-mail response on January 27, 2017, that included a statement that "the Department was 'not aware of any riot gear or tactics employed at any First Amendment Assembly on January 20.'" You then described how the January 27 response indicated that "the request would be interpreted as relating to 'the criminal riot of January 20, 2017' and would be considered to fall within the Freedom of Information Act (FOIA)" and that the PFCJ's request was denied under a FOIA law enforcement exemption.

You then referred to various sources, including the February 27, 2017 Police Complaints Board report which confirmed the use of riot gear by MPD on January 20, 2017. You highlighted portions of the report that asserted "assembly activity began at Franklin Square Park" and MPD Civil Disturbance Units response to that location. The report provides that "'officers were outfitted in riot gear and were carrying less than lethal weapons,' at 12th and L Streets, N.W., adjacent to Franklin Square, and the report included photographs of MPD officers in riot gear." You suggested that MPD was violating the transparency provision of First Amendment Rights and Police Standards Act (D.C. Official Code § 5-331.16(a)) by not producing the commander's reports upon request.

¹D.C. Code Section 5-331.16(a) provides:

(a) Officers in riot gear shall be deployed consistent with the District policy on First Amendment assemblies and only where there is a danger of violence. Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request.

While I understand your position, I respectfully disagree with your conclusion. The MPD January 27th response to Ms. Verheyden-Hilliard described how thousands of individuals participated in several large-scale First Amendment assemblies, demonstrations, and protests in the District of Columbia on January 20 and 21. These events were managed by the MPD consistent with its mission to preserve peace while protecting the constitutional and statutory rights of people to assemble peacefully and exercise free speech.

The response also described how other individuals engaged in a criminal riot on January 20, 2017. These individuals tore trash cans and newspaper boxes off of the corners and dragged them into the street, setting them on fire; smashed windows of multiple private business establishments and a public safety vehicle; burned and destroyed a private vehicle; and attacked members of the Metropolitan Police Department by hurling bricks and other projectiles, resulting in injuries to several members. These rioters were ultimately arrested for their criminal actions, and the bulk of them are currently pending prosecution. It was only in response to this unrelenting riotous violence that members of the Metropolitan Police Department were compelled to use riot gear and tactics to preserve the peace and protect themselves from physical harm.

The response drew a distinction between how MPD responded to the numerous First Amendment assemblies and how it responded to the criminal riot. In short, MPD deployed officers in riot gear only in response to and only at the scene of the riotous behavior.

As you note, Ms. Verheyden-Hilliard's request for information was routed to the Department's Freedom of Information Act (FOIA) office for processing. This was not an attempt to frustrate transparency under the First Amendment Rights and Police Standards Act. To the contrary, it was an attempt to ensure that the Department complied with its disclosure obligations. Referral to the Department's FOIA office ensured that the request received a tracking number, was assigned to a point-of-contact for status inquiries, and would be handled within specific statutory timelines. From my perspective, these attributes facilitate, rather than frustrate, the transparency elements of the First Amendment Rights and Police Standards Act.

Should you require additional information, please contact Commander Ralph Ennis of the MPD Office of Risk Management on (202) 299-5298.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Newsham", written over a light gray rectangular background.

Peter Newsham
Chief of Police

cc: Rashad Young, City Administrator
Kevin Donahue, Deputy City Administrator and Deputy Mayor
Betsy Cavendish, General Counsel to the Mayor

Agency Comments on Draft Report

On June 2, 2017, we sent a draft copy of this report to MPD for review and written comment. MPD responded with comments on June 28, 2017. Agency comments are included below in their entirety, followed by ODCA's response.



GOVERNMENT OF THE DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT

June 28, 2017

The Honorable Kathy Patterson
District of Columbia Auditor
Office of the D.C. Auditor
717 14th Street NW, Suite 900
Washington, DC 20005

Dear Ms. Patterson:

This letter is in response to the draft of report of the Office of the District of Columbia Auditor (ODCA), "Metropolitan Police Monitor Nearly 2,500 Demonstrations in 2014-2016 and Report No First Amendment Inquiries," forwarded to the Metropolitan Police Department (MPD) on June 2, 2017. Please note the following responses from MPD below.

Page 1: "However, since MPD reported that it did not actually conduct any investigations, ODCA could not determine whether MPD had followed these policies." [Also repeated on page 9.]

- The posture of this sentence may unfairly intimate that MPD may not be forthcoming or is not following the relevant policies absent specific determination by ODCA. Did ODCA uncover any information to suggest MPD did conduct surveillance or is not following the relevant policies?

Page 5: "MPD's Investigation of First Amendment Activities Related to 2017 Presidential Inauguration"

This audit was initiated soon after the November 2016 presidential election. On Inauguration Day, protesters took to the streets in the District and multiple news sources reported vandalism by the protesters, clashes with MPD officers, and arrests that included college students, journalists, and others. In February 2017, the ODCA team asked MPD officials whether any First Amendment preliminary inquiries or investigations had taken place in 2016 prior to the presidential election and inauguration. Officials said no such reviews occurred in 2016, while noting that the department had conducted one investigation related to the presidential inauguration in early January 2017. An MPD official confirmed that 233 arrests were made resulting from Inauguration Day protests. ODCA will review this investigation in its FY 2017 First Amendment audit.

- This reference and commentary is outside the scope of the proposed audit and should be excluded.

- If it is to remain in the report, we respectfully request certain changes that will help ensure the objective and impartial representation of the information. The information should be clarified that the “vandalism” was not perpetuated by “protesters” but rather by a group of individuals who chose to participate in criminal riotous activity. The “clashes with police” included throwing bricks at and injuring officers. Additionally, to refer to those arrested as “college students” or other roles is irrelevant and nonobjective commentary. Moreover, if the number of arrests is mentioned, it should also be noted that a federal grand jury returned felony indictments against 215 of those individuals.
- To clarify the cited number of arrests, please note that there were 235 arrests.

Page 6: *“Management Alert: ODCA Recommends MPD Release Written Report(s) on the Deployment of Police in Riot Gear During Inauguration Protests”*

During ODCA’s audit, the Office of Police Complaints (OPC) released a report on February 27, 2017, documenting the use of riot gear by MPD officers during protests held on Inauguration Day. 23 Various news sources also confirmed OPC’s observations.

In testimony provided to the D.C. Council Committee on the Judiciary and Public Safety on March 24, 2017, the Partnership for Civil Justice Fund (PCJF) asserted that the organization, pursuant to D.C. Code §5-331.16(a), requested any relevant commander’s report from January 20, 2017, authorizing the use of riot gear. 24 In response, MPD stated that it was “not aware of any riot gear or tactics employed at any First Amendment Assembly on January 20,” and further stated that the request should be made under the Freedom of Information Act (FOIA). PCJF’s subsequent request for the report was also denied under a FOIA law enforcement exemption.

On April 13, 2017, ODCA released a Management Alert Letter recommending that MPD release all reports on the use of riot gear to PCJF. Under the First Amendment Rights and Police Standards Act of 2004, the commander at the scene of a First Amendment assembly is required to make a written report to the Chief of MPD within 48 hours of the deployment of police officers in riot gear. This report, according to the law, shall be available to the public upon request. ODCA’s Management Alert letter is included in this report as Appendix A.

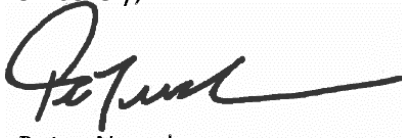
- Like the information presented on Page 5, this reference and commentary is outside the scope of the proposed audit and should be excluded.
- If it is to remain in the report, we would respectfully request that our response letter, which provides a full explanation of the issues and concerns outlined within this section, is also included.

Page 10: *“MPD officials said they are able to gather information through open sources or information made available to the public. Therefore, they said, they no longer must deploy undercover officers or informants.”*

- It's important to note that the spirit of the MPD officials' comments was that the use of UCs or informants was *less likely*, and not an absolute statement that we never need to use them ever again.

Should you require additional information, please contact Commander Ralph Ennis of the MPD Office of Risk Management on (202) 299-5298.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Newsham", written over a light gray rectangular background.

Peter Newsham
Chief of Police

Cc: Rashad Young, City Administrator
Kevin Donahue, Deputy City Administrator and Deputy Mayor
Betsy Cavendish, General Counsel to the Mayor

ODCA Response to Agency Comments

ODCA greatly appreciates the comments from MPD on our draft report and on our Management Alert Letter issued April 14, 2017, and its consideration of the recommendation that the Department release commander reports on the Department's use of riot gear on January 20, 2017. We regret, however, that MPD continues to claim that this portion of the First Amendment Rights and Police Standards Act of 2004 does not apply to actions taken on that day. MPD appears to make a distinction between the "First Amendment Assemblies" and what it describes as "the criminal riot," all of which took place in the area around Franklin Square Park and 12th and L Streets N.W. in downtown D.C. on January 20. The Department does not dispute that the department did, in fact, deploy officers in riot gear to that area on January 20.

The legislative intent of Section 5-331.16 is clear: the Council intended that any MPD use of riot gear be fully and promptly explained to the public. The background on the provision is relevant. As the [Judiciary Committee Report](#) notes, the American Civil Liberties Union (ACLU) in testimony on October 7, 2004, recommended that the D.C. Council Committee on the Judiciary add a section to the proposed legislation governing police use of riot gear and "riot tactics" including use of pepper spray and other irritants. The text proposed by the ACLU would have required a written report by the commanding officer to the chief of police explaining the decision on such use within 48 hours.

To this proposal D.C. legislators added the transparency requirement that was enacted into law, that "Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request." The plain language requires such a report, and requires it be public. The Department has not explained how and why it views this straightforward requirement as not applicable to the events of January 20. It states that riot gear and tactics were deployed at "the criminal riot" but were not deployed at the "First Amendment Assemblies," as if the statute made any such distinction. It does not. Riot gear deployed; publicly-available report required. We anticipate that the independent inquiry to be undertaken by the Office of Police Complaints will bring additional perspective to the events of January 20, 2017. Because the transparency issue is also the subject of ongoing litigation, we are hopeful that the Court will compel the Department to meet the law's requirement.

We appreciate MPD's comments on the draft audit report. The first finding, that we could not determine whether MPD followed relevant

policies because no investigations were conducted, is consistent with Generally Accepted Government Auditing Standards and the policies of ODCA. We made several requested edits to the text regarding the events on Inauguration Day including updating the number of arrests reported from the number provided in our earlier MPD interviews. We do believe it is important that we let the public know that MPD acknowledges undertaking an Inauguration-related investigation, and that it is our intent to review that investigation in our 2017 audit.

Appendix A

First Amendment Marches/Demonstrations in D.C., 2014-2016³⁴

Month, Year	1-24 People	25-999 People	1000+ People	Unknown # of People	Total Marches, Demonstrations
Jan-14	16	11	3	7	37
Feb-14	11	14	0	4	29
Mar-14	13	16	2	4	35
Apr-14	14	6	1	3	24
May-14	8	11	5	10	34
Jun-14	7	15	0	6	28
Jul-14	10	3	1	0	14
Aug-14	19	32	2	4	57
Sep-14	14	20	3	2	39
Oct-14	7	16	4	2	29
Nov-14	9	24	18	18	69
Dec-14	10	18	6	10	44
2014 Total	138	186	45	70	439
Jan-15	17	14	4	11	46
Feb-15	10	17	0	4	31
Mar-15	2	20	2	3	27
Apr-15	21	31	2	11	65
May-15	5	22	6	9	42
Jun-15	48	34	3	5	90
Jul-15	19	37	4	12	72
Aug-15	39	20	0	5	64
Sep-15	73	120	8	3	204
Oct-15	7	28	4	3	42
Nov-15	15	14	6	8	43
Dec-15	5	31	2	9	47
2015 Total	261	388	41	83	773
Jan-16	21	34	2	3	60
Feb-16	42	48	2	6	98

³⁴ The figures do not include events over which the U.S. Capitol Police and National Park Service have jurisdiction.

Month, Year	1-24 People	25-999 People	1000+ People	Unknown # of People	Total Marches, Demonstrations
Mar-16	70	94	8	3	175
Apr-16	65	54	24	4	147
May-16	16	40	11	13	80
Jun-16	12	39	2	5	58
Jul-16	9	53	6	9	77
Aug-16	7	15	3	3	28
Sep-16	12	31	13	6	62
Oct-16	5	37	8	13	63
Nov-16	30	49	50	45	174
Dec-16	74	61	36	31	202
2016 Total	363	555	165	141	1224
2014-16 Total	762	1129	251	294	2436