



City Attorney/Assistant/Deputy

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

Introduced by Councilmember _____

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR OR DESIGNEE TO ENTER INTO A THREE YEAR MEMORANDUM OF UNDERSTANDING (MOU) WITH THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION (FBI), TO FORM THE OAKLAND POLICE DEPARTMENT (OPD) FBI JOINT TERRORISM TASK FORCE (JTTF) TO FIGHT TERRORISM AND TERRORISM PLANNING ACTIVITY WHICH MAY OCCUR IN, OR RELATE TO, THE CITY OF OAKLAND

WHEREAS, the Federal Bureau of Investigation (FBI) defines international terrorism as violence “perpetrated by individuals and/or groups inspired by or associated with designated foreign terrorist organizations or nations, and domestic terrorism as “perpetrated by individuals and/or groups inspired by or associated with primarily United States-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature; and

WHEREAS, the policy of the FBI, with regard to domestic and international terrorism, is to deter, defeat, and respond vigorously to all terrorist attacks on U.S. territory and against U.S. citizens, or facilities; and

WHEREAS, the City of Oakland (City), including but not limited to its Police Department (OPD) and the FBI recognize the need for all federal, state, local, and tribal agencies that are involved in fighting terrorism to coordinate and share information and resources to achieve greater efficiencies and impact; and

WHEREAS, the City recognizes that civil rights and privacy advocates are concerned that that the City’s participation with the FBI JTTF could violate state law and/or City laws and policies; and

WHEREAS, the FBI has created multiple regional JTTFs to embody the objectives of U.S. counterterrorism efforts; and

WHEREAS, OPD seeks to obtain City Council approval to enter into a JTTF with the FBI; and

WHEREAS, if authorized, the mission of the OPD FBI JTTF will be to leverage the collective resources of the member agencies for the prevention, preemption,

deterrence and investigation of terrorist acts that affect the United States interests, and to disrupt and prevent terrorist acts and apprehend individual who may commit or plan to commit such acts; and

WHEREAS, OPD can support efforts to prevent, preempt and deter acts of terrorism from occurring in or near the City of Oakland through participation in the JTTF; and

WHEREAS, OPD benefits from access to actionable JTTF data through participation in the JTTF and by assigning a sworn OPD police officer as at JTTF taskforce officer; and

WHEREAS, the proposed OPD-JTTF shall serve to facilitate information sharing among JTTF members; and

WHEREAS, pursuant to the proposed OPD–JTTF, all operational and investigative activity, including the collection, retention and dissemination of personal information, will be conducted in a manner that protects and preserves the constitutional rights and civil liberties of all person in the United States; and

WHEREAS, pursuant to 28 B.S.C. § 533, 28 COFFER. § 0.85, Executive Order 12333, Presidential Decision Directives (PD.D.) 39, PD.D. 62, and pending approval of National Security Presidential Decision Directive (NAP) 46 and Homeland Security Presidential Directive (HASP) 15, the FBI is authorized to coordinate an intelligence, investigative, and operation response to terrorism, and by virtue of that same authority, the FBI formed JTTFs composed of other federal, state, local, and tribal law enforcement agencies acting in support of the above listed statutory and regulatory provisions; and

WHEREAS, irrespective of the Attorney General guidelines and directives referenced above, or any FBI policy or directive, OPD officers participating in the proposed JTTF are subject to all applicable federal, state and local laws, and departmental policies, including but not limited to the following:

- The United States Constitution and applicable case law;
- The California Constitution and applicable case law;
- Applicable provisions of California’s Penal, Civil, Vehicle, and Health and Safety Codes;
- The California Public Records Act (Government Code Section 6254 et. seq.);
- California Sanctuary Law or “California Values Act” (Senate Bill (SB) 54)¹ codified as California Government Code Section 7284 et seq., which prohibits local and state law enforcement authorities from using resources, including personnel or facilities, to investigate or arrest people for federal immigration enforcement purposes;

¹ SB 54 (De Leon, 2017).

- California Religious Freedom Act (SB 31)² signed into law as California Government Code §8310.3 et seq., which prohibits a state or local agency or a public employee acting under color of law from providing or disclosing to the federal government personal information regarding a person's religious beliefs, practices, or affiliation;
- The City of Oakland's Sunshine Ordinance;
- Oakland Municipal Code (OMC) Chapter 9.64 (Regulations on the City's Acquisition of Surveillance Technology);
- OMC Chapter 9.72 (City Participation in federal Law Enforcement Agencies);
- OPD Department General Order (DGO) K-4 (Reporting and Investigating the Use of Force);
- OPD DGO M-17 (Criminal Intelligence) including but not limited to Section V "Professional Standards";
- OPD DGO M-19, including but not limited to Sections III and VIII;
- The Oakland Sanctuary City Ordinance, Ordinance 13515 C.M.S; and

WHEREAS, the proposed OPD FBI JTTF shall consist of a combined body of personnel from both OPD and the FBI; and

WHEREAS, the supervisor of the OPD FBI JTTF shall be the FBI Special Agent in Charge (SAIC) or Assistant Director in Charge (ADIC) from the FBI San Francisco Division; and

WHEREAS, participating OPD personnel shall remain OPD employees and all other JTTF participating personnel shall remain employees of their respective agencies; and

WHEREAS, Section 504(1) of the Oakland City Charter requires that the City Council approve all inter-governmental agreements, including the proposed JTTF MOU (*Attachment A*); and

WHEREAS, OPD previously signed an MOU authorizing OPD participation in the OPD FBI JTTF on April 4, 2007 but without Council approval; and

WHEREAS, Oakland Municipal Code Chapter 9.72 (Chapter 9.72), entitled Oakland's Transparency and Accountability for City Participation in Federal Surveillance Operations Ordinance provides in relevant part as follows: "Before execution of any Memorandum of Understanding or other written agreement, contract or arrangement (collectively, "MOU") between the Oakland Police Department and the FBI, or other federal law enforcement agency, regarding the Police Department's participation on the JTTF or other federal law enforcement agency task force, or any amendment to any such existing MOU, the Chief of Police shall submit the proposed MOU and any orders, policies, and procedures relevant to the subject matter of the MOU for discussion and

² SB 31 (Lara, 2017).

public comment at an open meeting of the Privacy Advisory Commission;” and

WHEREAS, Chapter 9.72 also requires that the Chief of Police shall provide to the Privacy Advisory Commission a public report with appropriate public information on the Police Department's work with the JTTF or other federal law enforcement agency task force in the prior year; and

WHEREAS, OPD began presenting the FBI JTTF MOU to the PAC when OPD first presented the required 2018 annual report and through several PAC meetings, ad-hoc meetings, and coordinated meetings with PAC commissions, FBI representatives, and OPD personnel throughout 2019; OPD believed, and still believes, that OPD and the PAC could find a compromise proposal for recommending the FBI JTTF MOU to the City Council; and

WHEREAS, a prior version of this resolution presented to the PAC for consideration contained language (still in this resolution) that, “OPD personnel participating in the OPD FBI JTTF shall remain subject to all OPD policies and procedures;” and

WHEREAS, the PAC voted at the December 5, 2019 PAC meeting to recommend to the City Council that OPD not participate in the FBI JTTF; and

WHEREAS, OPD and the City’s Chief Privacy Officer had not yet brought the PAC motion (recommending no OPD participation in the JTTF) to the City Council as OPD still hoped to negotiate an agreement between OPD and the FBI – for example, PAC Commissioners attended a meeting with OPD and FBI personnel at the Police Administration Building on June 15, 2020, and at this meeting the FBI expressed clearly that they updated the JTTF MOU document, and subsequent to this meeting the PAC Chair sent to OPD and the FBI specific language for incorporation into a new MOU; and

WHEREAS, the FBI explained to the PAC Chair that the FBI would incorporate new language into the MOU that addressed civil liberties concerns while not incorporating every aspect sought by the PAC subsequent to the June 15, 2020 meeting; and

WHEREAS, the PAC Chair communicated to OPD and the FBI that the PAC would no longer consider changes to the OPD FBI JTTF MOU; and

WHEREAS, the new FBI JTTF MOU document (*Attachment A*) includes the following language: “each JTTF member from participating agency detailed to the SF FBI JTTF will be subject to the personnel rules, guidelines, regulations, state laws, city ordinances, and policies applicable to the Participating Agency. Participating Agency employees assigned to the SF FBI JTTF will only participate in activities of the SF FBI JTTF that are consistent with the laws of the State of California, local city ordinances, Participating Agency policies, guidelines, procedures, and orders (collectively referred to as Participating Agency Guidelines”) and during the participat[ion] in a JTTF activity, there is an actual or perceived conflict between the investigative guidance in sub-

paragraph V(c) and applicable Participating Agency guidelines, the Participating JTTF member will decline participation in JTTF activity;” therefore be it

RESOLVED: that City Council does hereby authorize the City Administrator or designee to enter into a MOU with the FBI, as provided in *Attachment A*, to allow OPD to participate in the OPD FBI SF JTTF (JTTF MOU), to support antiterrorism investigation activities; and be it

FURTHER RESOLVED: that the proposed JTTF MOU as provided in *Attachment A* includes provisions including but not limited to the following:

- (1) that non-federal members of the JTTF, including OPD personnel, who are subject to a background inquiry prior to JTTF membership, shall be federally deputized while participating in the JTTF, so that they can assist fully in investigations and remain in compliance with federal statutes;
- (2) that OPD personnel participating in the JTTF are subject to the FBI’s ethical standards, and OPD personnel assigned to the JTTF are subject to the Supplemental Standards of Ethical Conduct for employees of the United States Department of Justice;
- (3) OPD personnel participating in the OPD FBI JTTF shall remain subject to all OPD policies and procedures;
- (4) That where this is a conflict between the standards or requirements of OPD and the FBI, OPD personnel will adhere to the standard or requirement that is the most restrictive standard;
- (5) That all OPD personnel participating in the OPD FBI JTTF shall undergo the
- (6) FBI Top Secret/Sensitive Compartmented Information Security Clearance process;
- (7) that OPD personnel participating in the OPD FBI JTTF shall not be permitted to discuss particular JTTF investigation details, but can provide summary information to OPD supervisors who are not members of the JTTF, unless these same supervisors possess the appropriate security clearance, and the information is specifically approved by the FBI JTTF Supervisor;
- (8) that any civil liability arising from the use of an FBI owned or leased vehicle by OPD personnel while engaged in any conduct other than his or her official duties and assignments under the proposed MOU, shall be the responsibly of OPD;
- (9) that any asset forfeitures attributable to the JTTF investigations may be distributed among participating JTTF agencies at the discretion of the FBI; however, the City shall comply with SB443, which among other things

prohibits local law enforcement agencies from: (1) transferring seized property to a federal agency seeking adoption by the federal agency of the seized property; and (2) from receiving an equitable share from a federal agency of specified seized property if a conviction for the underlying offenses is not obtained, except as specified; and be it

FURTHER RESOLVED: funds paid by the FBI to OPD will be deposited into Fund 2999, Org 102310, Account 46129, Project TBD, and Program PS03; and be it

FURTHER RESOLVED: That the City Administrator or designee is authorized to complete all required negotiations, certifications, assurances, and documentation required to execute the MOU without returning to the City Council; and be it

FURTHER RESOLVED: That in accordance Section 401(6) of the City Charter, the City Attorney shall approve the MOU authorized by this resolution as to form and legality before execution, and a copy of the fully executed agreement shall be placed on file with the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO-BAS, GALLO, KALB, GIBSON MCELHANEY, REID, TAYLOR, THAO, AND PRESIDENT KAPLAN

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

ASHA REED
City Clerk and Clerk of the Council
of the City of Oakland, California