

Last Night, First Right Police Surveillance of First Amendment Activity

Synopsis

In this post-9/11 era, it can be particularly difficult for law enforcement to find the proper balance between protecting the public and upholding our constitutional rights of freedom of speech and assembly. A case in point is the controversy that arose over the Santa Cruz Police Department's undercover surveillance of the planning by a citizen group for a New Year's Eve parade in December 2005. This investigation was conducted as a result of that incident and subsequent police department follow-up.

Parade organizers and other members of the public have questioned the need for the Santa Cruz Police Department's undercover surveillance of the planning for this event and have raised questions about the police department's review of the operation. However, the process ultimately worked out to the benefit of both residents and law enforcement. The city's independent police auditor conducted a thorough and balanced report of the surveillance operation and the thinking behind it. That opened a community dialogue on the issue of surveillance of groups involved in political speech and activity, which, in turn, led to the adoption by the police department of new rules to govern these types of investigations in the future.

Background

In October 2005, officers with the Santa Cruz Police Department (SCPD) learned that a group of people were meeting to plan a New Year's Eve parade in downtown Santa Cruz on Dec. 31, 2005. The group intended to hold an event titled, "The Last Night Santa Cruz DIY (Do It Yourself) Parade." The event was to be "a decentralized, collective, spontaneous, open, public New Year's Eve celebration in Santa Cruz."¹

For several years prior to New Year's Eve 2005, the City of Santa Cruz had officially sanctioned a "First Night" party whose organizers sought, paid for and received city permits, which allowed street closures, music, booths and increased police presence at the event. However, First Night was disbanded after the New Year's Eve 2004 event, and no city-authorized event was planned for New Year's Eve 2005. Organizers of the 2005 DIY parade did not apply for a parade permit because they neither wanted nor sought city involvement or approval. In addition to throwing a party, part of the purpose behind the event was to "reclaim"² the streets for the public by intentionally not involving city officials or police in the planning of or approval for the event and, in so doing they believed they were making a statement about the need to preserve individuals' rights of self-control and self-governance.

¹ http://www.seedwiki.com/wiki/last_night_diy/manifesto, Last Night Santa Cruz DIY Parade Manifesto.

² DIY Parade Manifesto.

When Santa Cruz police officers learned of the planning for the event in late October 2005, they briefly reviewed a “Last Night Santa Cruz DIY Parade” web site that was being used by the organizers to spread information about the upcoming event. Members of the Police Department, based on their experience with some previous public events downtown that got out of control, became concerned that such an uncontrolled event might cause a public safety traffic hazard or that people attending might become rowdy and dangerous. A decision was made to send two undercover police officers to the DIY Last Night group’s planning meeting on Oct. 29, 2005, to learn more about the event that was being planned and the people who were planning it. Two officers attended the meeting in plain clothes and gave false names when they identified themselves.

The two officers who attended the meeting were later recognized and identified by DIY parade organizers. In the days leading up to the New Year’s Eve DIY Last Night parade, organizers notified the Santa Cruz *Sentinel* that their meeting had been attended by undercover police officers and the *Sentinel* reported the story on Dec. 31, 2005.

In January 2006, in the wake of public sentiment that the use of undercover police surveillance amounted to a violation of the public’s right of free speech, the SCPD opened an internal investigation of the DIY Last Night Parade surveillance. An internal investigation was conducted by the police official who had authorized the undercover operation. His investigation determined that no laws or police policies had been violated by the operation.

In February 2006, the Independent Police Auditor for the City of Santa Cruz, initiated a review of the undercover operation. Aaronson issued his own report on the undercover operation on March 20, 2006, that included several conclusions:

- The undercover surveillance “more than likely ... violated the civil rights of the parade organizers.”³
- A permitless parade is a violation of the law, but it does not constitute much of a credible basis for intruding on anyone’s civil rights.⁴
- Police failed to recognize that the parade was intended as a form of civil disobedience and constituted political speech which should have prompted a higher level of scrutiny within the department of the validity of the undercover operation.⁵
- The department was obligated to attempt to collect information about the planned event, not to prevent it but to be in a position to respond to it as it unfolded.⁵
- The (Police) Department and its employees were entirely well-intentioned and acted without any recognition of how close the constitutional line was.⁶
- Neither Santa Cruz nor the vast majority of other law enforcement agencies, large or small, have explicit policies which adequately deal with this issue.⁷

³ Report by Robert H. Aaronson to Richard Wilson, Santa Cruz City Manager, p. 2, March 20, 2006.

⁴ Aaronson, p. 31.

⁵ Aaronson, p. 31.

⁶ Aaronson, p. 33-34.

⁷ Aaronson, p. 33.

In June 2006, following consultation with the Santa Cruz City Attorney, the City Council's Public Safety Committee and a representative of the American Civil Liberties Union, the Santa Cruz Police Department adopted Departmental Directive, Section 610, Undercover Operations—First Amendment Activity. The policy spells out the conditions necessary for the police department to initiate undercover operations of entities or activities that may be protected under the First Amendment of the U.S. Constitution. In considering whether to allow an undercover operation, and in reviewing it while it is ongoing and after it has concluded, the policy requires that:

- There be “reasonable suspicion to believe that the subject of the investigation is planning criminal activity.”⁸
- The Police Department first attempt “direct and open communication”⁹ with the subject, as well as less-intrusive investigatory techniques like reviewing information on the Internet, before resorting to undercover operations.
- The police chief authorize all undercover operations of events that may fall under First Amendment activities, and that the city attorney also review the reasons for undertaking the investigation.¹⁰
- The city annually issue a public report outlining how many First Amendment activity undercover operations were sought, how many were approved, and how many were denied, and if the city's independent police auditor believes any investigations violated the policy.¹¹

Scope

This investigation originated as a review of the Santa Cruz Police Department's undercover police surveillance of the parade planning activities, its subsequent investigation of that undercover surveillance, and its response. The investigation also incorporated a review of other law enforcement agencies in Santa Cruz County and their policies regarding undercover surveillance of activities that could be reasonably claimed as protected by the First Amendment and any policies directing such surveillance.

Findings

1. There is tension between the competing priorities of law enforcement's responsibility to ensure public safety while protecting constitutional rights of free speech and free assembly.
 - 1.1 Worldwide reports of terrorism, 9/11 and enactment of the U.S. Patriot Act have heightened public sensitivity toward criminal activity on every level, from the lowest local infraction to the most serious national acts. Similarly, the public's sensitivity to and awareness of incursions into

⁸ Santa Cruz Police Departmental Directive Section 610, p. 1, July, 2006.

⁹ S.C. Police Directive, p. 1.

¹⁰ S.C. Police Directive, p. 2.

¹¹ S.C. Police Directive, p. 3.

constitutionally protected freedom of speech and freedom of assembly is also heightened. Previous holiday-oriented gatherings downtown Santa Cruz had resulted in significant property damage and serious personal injury.

- 1.2 The officers involved in the undercover operation did not consider the political aims of the group they investigated, focusing instead on the public safety ramifications of the Last Night Parade.
- 1.3 Some Santa Cruz residents were eager to jump to the conclusion that the Last Night Santa Cruz DIY Parade surveillance was part of a larger conspiracy to squelch civil rights.
2. In addition to the police surveillance conducted by the Santa Cruz Police Department, there have been reports of law enforcement conducting surveillance of events that have subsequently been determined to be First Amendment-related activities in other areas across the country.
 - 2.1 In April 2005, students at the University of California, Santa Cruz, protested military recruiters' attendance at an on-campus career fair. It was learned eight months later that the Pentagon had classified the student protest as a "credible threat"¹² and Defense Department representatives had conducted undercover monitoring of the event.
 - 2.2 Monitoring of First Amendment-protected activities in recent years has occurred in Oakland, Fresno, Contra Costa County, San Francisco and New York City.¹³
 - 2.3 No evidence has been found that the Santa Cruz Police Department or other Santa Cruz County law enforcement agencies have engaged in undercover surveillance of First Amendment-protected political activity in recent years beyond the Last Night DIY parade.
3. Parade organizers broke the law, but there is no evidence that the organizers posed a serious threat to public safety.
 - 3.1 By publicly stating they did not intend to apply for a parade permit, the Last Night DIY organizers knowingly intended to break the law. The law broken was an infraction, the lowest level of violation, generally indicative of not being of a serious or threatening nature.
 - 3.2 On New Year's Eve 2005, the Last Night Santa Cruz DIY Parade was held as planned, and no major problems were reported.
 - 3.3 Following the direction of its new First Amendment policy, a city official contacted organizers of the Dec. 31, 2006, New Year's Eve's parade prior to the event and attempted to convince them to apply for a free Noncommercial Event permit. Organizers declined, and the police department did not pursue the matter further. A second Last Night Santa

¹² UC Santa Cruz Message from the Chancellor, Dec. 28, 2005.

¹³ ACLU-NC report, "The State of Surveillance," pp. 12-19, July 2006.

Cruz DIY Parade was held on Dec. 31, 2006, at which no serious problems were reported.

4. There were no clear policies in place in Santa Cruz in 2005 to provide guidance for this type of surveillance.
 - 4.1 There is little recent case law establishing what is permissible and what is not permissible in the area of police undercover surveillance of First Amendment-protected activities. Much of the case law that guides undercover infiltration of free speech groups dates to the 1960s and 1970s and is not entirely applicable to the civil rights and law enforcement issues that predominate in the post-9/11 world.
 - 4.2 The office of the California Attorney General in 2003 issued a report that provided a summary of state law regarding police intelligence collection operations titled "Criminal Intelligence Systems: A California Perspective," but local law enforcement have found it difficult to interpret.
 - 4.3 Prior to adoption of a new policy by the Santa Cruz Police Department regarding undercover operations of First Amendment-protected activities, only two cities, San Francisco and Washington, D.C., had explicit policies defining when and under what circumstances police may engage in undercover investigation of First Amendment-protected activities.
 - 4.4 Police officers receive minimal training in First Amendment and free-speech issues, usually prior to becoming an officer while they are in the police academy.
 - 4.5 None of the other local law enforcement agencies in Santa Cruz County have a policy in place regarding undercover surveillance of First Amendment activities. The Scott's Valley Police Department is reviewing its policies regarding surveillance and anticipates adopting changes this summer.
 - 4.6 The police official who authorized the undercover operation was also the one who conducted the department's internal investigation.
 - 4.7 The Santa Cruz Police Department was reluctant to address the issue to the public's satisfaction. What was and was not released to the public was also complicated by state-mandated limitations upon what can be legally disclosed regarding police personnel matters, not by obfuscation by the police department.
5. In the wake of the surveillance incident, the Santa Cruz Police Department has created new policies to guide it in the future when balancing public safety and constitutional protections for free speech and assembly.
 - 5.1 The City of Santa Cruz employs an independent police auditor, who reports to the city manager, not the police department. He reviews internal affairs investigations for accuracy and thoroughness.

- 5.2 No other law enforcement agencies in Santa Cruz County employ an independent police auditor as the City of Santa Cruz does.
- 5.3 The Santa Cruz City Council empowers a subcommittee of three council members to act as a Public Safety Committee and review police issues that come before the city, adding another layer of scrutiny of police actions beyond the independent auditor.
- 5.4 Santa Cruz Police Departmental Directive Section 610 establishes a minimum threshold of “reasonable suspicion” of anticipated criminal activity before police can initiate undercover surveillance of First Amendment-protected activity. However, there is no simple all-encompassing definition of what constitutes reasonable suspicion; it will be considered on a case-by-case basis.
- 5.5 The new Santa Cruz Police Departmental Directive Section 610 establishes a clear chain of command that includes the chief of police that must be followed in authorizing such undercover operations. Both the chief of police and the Santa Cruz city attorney must now review proposed undercover surveillance of First Amendment-protected activity.
- 5.6 Several sections of the Santa Cruz Police Department’s new policy regarding surveillance of political activities are now cited as “Best Practices Guidelines for First Amendment Activities,”¹⁴ including acknowledgement of citizens’ rights afforded under the U.S. Constitution; the chain of command to be followed in deciding whether to initiate a surveillance operation of political activity; and what police officers can and cannot do when investigating protected claims of political activity.
- 5.7 The Santa Cruz City Council Public Safety Committee has requested further review of the new policy regarding surveillance of First Amendment-protected activities by the city manager with regard to five additional points the American Civil Liberties Union of Northern California, recommends be included in the policy. The ACLU recommends that the new policy be expanded to add these protections: Add a reference to the California Constitution's Right of Privacy; narrow the scope of “reasonable suspicion” in determining when undercover operations may be allowed; clarify the meaning of less intrusive tactics in the new policy; add guidance regarding video surveillance; and expand provisions for auditing and reporting of undercover operations.

Conclusions

1. Every city has its own character which may influence where the appropriate balance lies between protecting free speech and guarding against possible threats of criminal acts, particularly in a post 9/11 world. The orientation of residents in the cities of Santa Cruz, Capitola, Watsonville, Scotts Valley, and the unincorporated areas of the

¹⁴ ACLU, pp. 26-30.

county vis-à-vis police are unique to each municipality. But overlaying every community's consideration of this issue are the protections provided in the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The fluid nature of interpretation of the First Amendment, and the lag time between shifts in public attitudes and the creation of new case law, make it difficult for police departments to create policies that are specific enough to anticipate every possible scenario and provide police officers with definitive guidelines as to whether a particular form of surveillance is proper.
3. Undercover surveillance is an important and legitimate tool in the investigation of gangs, drug violations and a host of other criminal activities.
4. The organizers of the Last Night Santa Cruz DIY Parade did not pose a threat or hazard to public welfare.
5. The likelihood of this type of scenario repeating itself appears slight due to the exposure this incident received. Other Santa Cruz County law enforcement agencies should learn from the Santa Cruz Police Department's experience. Having an established policy in place to guide such investigations could prevent other law enforcement agencies from facing the same exposure. Also, an established policy could provide law enforcement agencies with a positive public relations tool to show that the department is trying to anticipate problems. However, it is important to recognize that the relationship between a city's residents and its police department varies from city to city, and there is no "one size fits all" solution that will work for every law enforcement agency.
6. Police were not out of line in viewing the Last Night DIY Santa Cruz Parade as a potential threat to public safety, given the history of stabbings and violence at previous downtown events. The parade's organizers did not intend to cause property damage or personal injury, but large gatherings where people consume alcohol can create dangerous situations which are unanticipated by those planning the event.
7. The absence of police policy in the area of surveillance of politically protected speech and activity suggests that police are involved with more immediate public safety issues and that the Last Night Santa Cruz DIY Parade surveillance was an anomaly rather than "the tip of the iceberg" of wider police surveillance.
8. The rightness or wrongness of the Last Night Santa Cruz DIY Parade investigation hinges upon interpretations of law and competing priorities upon which reasonable people on both sides of the issue differ.
9. Not considering the political element inherent in the Last Night DIY Santa Cruz Parade hampered police from recognizing potential free speech and First Amendment issues that may have caused them to reconsider the necessity of the undercover operation.

10. Police officers working the streets must navigate a complex web of directives and guidelines in the performance of their duties and are responsible for upholding a wide array of laws. It is the responsibility of police department management to be aware of these developments so that when a situation arises, they can correctly advise their officers how to proceed.
11. The adoption of Santa Cruz Police Departmental Directive Section 610 and the exposure that police handling of the Last Night Santa Cruz DIY Parade received makes it unlikely that undercover operations of First Amendment-protected activities will be undertaken in the future without more extensive advance scrutiny.
12. Although the Santa Cruz Police Department conducted its own internal investigation, the independence of the investigation was compromised by the fact that the police official who conducted the internal investigation was also the police official who authorized the undercover operation causing suspicion of the findings by some members of the public.
13. The report issued by the city's independent auditor served a useful role and aided in preventing further deterioration of the relationship between the Santa Cruz Police Department and residents. The report enabled residents and the police department to come together in the wake of the controversy to try and find some mutually acceptable common ground.
14. The Santa Cruz Police Department's adoption of Departmental Directive Section 610 puts it ahead of almost all other cities in the state and the nation in addressing the potential legalities surrounding this type of investigation.
15. The Santa Cruz Police Departmental Directive Section 610 is a step forward in spelling out under what conditions undercover surveillance of First Amendment activity may occur.
16. The more straightforward and less legally complicated Santa Cruz Police Departmental Directive Section 610 is kept, the more likely it is to be understood and adhered to.
17. Citizens often interact only with their police department when something bad happens—they receive a traffic citation, are stopped for drunk driving, are told they cannot do something—creating a skewed view of police by some of the public, and of the public by some of the police.

Recommendations

1. Police chiefs and the county sheriff should ensure they are familiar with the most recent case law involving surveillance of activities involving free speech and freedom of assembly that are protected under the California and U.S. Constitutions.
2. Law enforcement must be cognizant of the wide range of activities that fall under the umbrella of the First Amendment when considering surveillance operations.
3. Every law enforcement agency in the county should establish procedures, tailored within constitutional limitations to meet their own unique identities, for authorizing

surveillance of groups or individuals that may be protected under the First Amendment. Any such approved surveillance operations should establish a clear chain of command for authorizing such surveillance and include provisions for review by the chief of police and legal counsel.

4. The City of Santa Cruz should carefully weigh recommendations by the American Civil Liberties Union (ACLU) that Santa Cruz Police Departmental Directive Section 610 be expanded against the desirability of keeping Departmental Directive Section 610 simple and easily understood.
5. The cities of Watsonville, Capitola and Scotts Valley, and the Santa Cruz County Sheriff's Department should consider contracting with an independent auditor who is not employed by the police department to review those grievances by the public that cannot be satisfactorily resolved within each department's internal affairs unit.
6. People taking part in protests and other public activities that claim protection under the First Amendment must recognize the potential for events to spin out of their control, and for criminal elements to attach themselves to those events, creating real public safety problems that police must address.
7. Residents should take advantage of community outreach programs provided by police departments, including ride-alongs, neighborhood watch programs, and jail tours. These provide opportunities to get to know how police work in non-emergency situations and can foster a positive rapport that will facilitate mutual trust between the public and law enforcement.

Commendations

1. The organizers of Last Night Santa Cruz for holding a peaceful event each of the past two New Year's Eves.
2. The City of Santa Cruz for employing an independent police auditor.
3. The Independent Police Auditor for conducting a thorough investigation.
4. The Santa Cruz Police Department for taking corrective action and being among the first municipalities in the nation to develop such a policy.

Responses Required

Entity	Findings	Recommendations	Respond Within
City of Santa Cruz Police Department	1.3, 2.1, 2.2, 4.1, 4.3-4.5, 5, 5.4-5.8	1-4	60 days September 1, 2007
City of Capitola Police Department	1.3, 2.1, 2.2, 4.1, 4.2, 4.3-4.5, 5, 5.1-5.8	1-3, 5	60 days September 1, 2007
City of Watsonville Police Department	1.3, 2.1, 2.2, 4.1, 4.2, 4.3-4.5, 5, 5.1-5.8	1-3, 5	60 days September 1, 2007
City of Scotts Valley Police Department	1.3, 2.1, 2.2, 4.1, 4.2, 4.3-4.5, 5, 5.1-5.8	1-3, 5	60 days September 1, 2007
Santa Cruz County Sheriff-Coroner	1.3, 2.1, 2.2, 4.1, 4.2, 4.3-4.5, 5, 5.1-5.8	1-3, 5	60 days September 1, 2007
Santa Cruz City Council	4.2, 5.4, 5.6-5.8	4	60 days September 1, 2007

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Documents

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- Thompson, A.C., San Francisco Weekly, Cops Who Spy, Sept. 27, 2006.

Web sites

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http://www.seedwiki.com/wiki/last_night_diy.
- The Last Night Santa Cruz DIY Parade online discussion group,
<http://lists.riseup.net/www/arc/lastnightdiy>.
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<http://messages.ucsc.edu/05-06/12-28.response.asp>.
- San Francisco Chronicle, <http://www.sfgate.com/>, Associated Press story, "Jury: WTO protesters' rights violated," Jan. 30, 2007.
- New York Times, <http://www.nytimes.com>, "Judge Restricts New York Police Surveillance," Feb. 15, 2007, and "Mayor Defends Spying by Police Before G.O.P. Convention," March 28, 2007.

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