



# The San Francisco Police Department Still Needs to Improve Policies and Practices Around Investigations Involving First Amendment Activities

Annual Audit of Department General Order 8.10 Compliance

December 30, 2022

Department of Police Accountability

Executive Director Paul Henderson

## Executive Summary

### What We Found

The Department of Police Accountability's (DPA) prior audit of the San Francisco Police Department's (SFPD) compliance with Department General Order 8.10 (DGO 8.10) made eight recommendations for SFPD to improve policies and practices around investigations involving First Amendment activities. SFPD concurred or partially concurred with all eight of the recommendations.

#### Audit Objective

Did SFPD implement recommendations made in DPA's prior audit of SFPD's compliance with DGO 8.10?

**As of October 2022, SFPD implemented four recommendations**—those on training Special Investigations Division (SID) members, assigning responsibility for the destruction of DGO 8.10 records, updating SID's file dissemination form, and sending the DGO 8.10 investigations log to the Police Commission. **Although SFPD concurred or partially concurred with the remaining recommendations, it:**



Did not clarify and provide examples of when DGO 8.10 applies to criminal investigations.



Did not destroy records and media governed by DGO 8.10.



Did not require members to document the source of First Amendment event information to show compliance with DGO 8.10's information collection requirements.

**Also, in 2021 DPA received one complaint alleging a violation of DGO 8.10.** DPA's investigation of this complaint exemplifies issues raised in DPA's prior audit. These issues include DGO 8.10's limited guidance for helping members determine when it applies to criminal investigations, the civil liberties implications of law enforcement accessing and using information from social media sites, and advances in video and photographic technology since SFPD last revised the policy. The investigation also raised the new issue of DGO 8.10's lack of training requirements for non-SID members.

### What We Recommend

We make two new recommendations—for SFPD to ensure that DGO 8.10 revisions address risks to First Amendment rights caused by changes in SFPD's operating environment, including their use of technology, and for SFPD to develop processes to ensure the timely resolution of audit recommendations.

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## Background

### **Department General Order 8.10 governs SFPD's First Amendment activity-related investigations and information collection.**

SFPD last revised DGO 8.10 *Guidelines for First Amendment Activities* in October 2008. This general order restricts SFPD to conducting criminal investigations involving First Amendment activities to when there is an articulable and reasonable suspicion that persons, groups, or organizations are planning or are engaged in criminal activity, and that the First Amendment activities are relevant to the criminal investigation.

### **DGO 8.10 expects SFPD's Special Investigations Division to initiate most investigations involving First Amendment activities.**

DGO 8.10 places the Special Investigations Division (SID) at the center of investigations involving First Amendment activities. Although the guidelines do not prevent other SFPD divisions from conducting these investigations, they do require that these divisions follow DGO 8.10 and conduct the investigations in consultation with SID. The officer-in-charge<sup>1</sup> of SID reports to the Deputy Chief of the Investigations Bureau. The Investigations Bureau is under the Assistant Chief of Operations, who reports to the Chief of Police. SID is SFPD's lead on DGO 8.10 audit matters, and the officer-in-charge of SID is also SFPD's subject matter expert for DGO 8.10 revisions.

### **DPA's prior audit of SFPD's compliance with DGO 8.10 made eight recommendations to SFPD to improve policies and practices related to First Amendment activities.**

In December 2021, DPA issued an audit report titled *The San Francisco Police Department and the Police Commission Can Improve Policies and Practices Around Investigations Related to First Amendment Activities*. This audit, on SFPD's compliance with DGO 8.10 for 2020 activities, resulted in six findings and eight recommendations to SFPD.<sup>2</sup> SFPD concurred with seven, and partially concurred with one, of the recommendations.

In March 2022, SFPD presented to the Police Commission on DPA's audit findings, including its responses to the audit recommendations and a DGO 8.10 revision timeline.

### **SFPD reported that it did not authorize or deny any investigations under DGO 8.10 in 2021.**

DGO 8.10 requires that DPA annually audit SFPD's files, records, and documents, and prepare a report to the Police Commission on SFPD's compliance with this general order.<sup>3</sup> As part of this

Under certain circumstances, protected First Amendment activity may generate legitimate law enforcement attention.

**The challenge for law enforcement is in finding the proper balance** between using investigative techniques to protect the public from harm while not unlawfully interfering with the exercise of constitutionally protected rights.

Source: Federal Bureau of Investigation, *Picketers, Protesters, and Police: The First Amendment and Investigative Activity*

<sup>1</sup> In the absence of a commanding officer, an officer-in-charge is the senior-ranking officer present for duty in a unit.

<sup>2</sup> See Appendix B for the full list of DPA's findings and recommendations from this report.

<sup>3</sup> This report fulfills that requirement for 2021.

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report, DPA must provide the Police Commission with information concerning SFPD activities governed by DGO 8.10.

SFPD reported to DPA that for 2021:

- ◆ It did not authorize or deny any investigations that involved First Amendment activities; therefore, it did not approve undercover officers to infiltrate or investigate First Amendment activities, no unlawful activities were investigated, and no arrests or prosecutions resulted from investigations conducted under the guidelines.
- ◆ No members of the public requested records governed by these guidelines.
- ◆ No outside agencies requested access to records of investigations conducted pursuant to these guidelines.
- ◆ There were no violations of the guidelines.

**Although SFPD reported that it did not authorize or deny any investigations subject to these guidelines, DPA received a complaint alleging a violation of DGO 8.10.**

In September 2021, DPA received a complaint alleging that officers did not follow DGO 8.10 and that the officers' actions violated an individual's First Amendment rights.

DPA's investigation concluded that the alleged conduct occurred and that it violated SFPD policy or procedure. SFPD did not agree with DPA's determination; in its August 2022 response to DPA, SFPD stated that the appropriate disposition of the investigation was **unfounded**. SFPD requested a meet and confer conference with DPA to discuss this case. The post-meet and confer disposition of the case is **policy failure**.<sup>4,5</sup>

The public summary of DPA's investigation is in Appendix C.

A **policy failure** is an investigation finding that means the evidence proves the conduct occurred but was justified by SFPD policy; however, the SFPD or DPA recommends that the policy be changed or modified.

**Unfounded** means the evidence proves that the alleged conduct did not happen or that the accused officer was not involved.

Source: DGO 2.04 *Complaints Against Officers*

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<sup>4</sup> SFPD and DPA track the disposition status of DPA-sustained cases on a spreadsheet to which DPA has access. This disposition comes from that document.

<sup>5</sup> DGO 2.04 *Complaints Against Officers* requires the Disciplinary Review Board (DRB) to review and discuss policy failures, and to report quarterly to the public and Police Commission those policy and training changes it recommends. The DRB consists of members of SFPD, with advisory roles for a member of the Police Commission and DPA's director.

## What We Found

SFPD implemented four recommendations we made in our prior audit report—those on training Special Investigations Division (SID) members, assigning responsibility for DGO 8.10 file destruction, updating SID’s file dissemination form, and sending the DGO 8.10 investigations log to the Police Commission.<sup>6</sup>

Although it concurred or partially concurred with the remaining recommendations, SFPD did not:

- ◆ Clarify and provide examples on when DGO 8.10 applies to criminal investigations.
- ◆ Destroy files and media governed by DGO 8.10.
- ◆ Document DGO 8.10 record destruction.
- ◆ Require members to document the source of First Amendment event information.

### **Finding 1 - SFPD did not clarify and provide examples on when DGO 8.10 applies to criminal investigations.**

SFPD did not implement DPA’s recommendation to work with the Police Commission to clarify and provide examples on when DGO 8.10 applies to criminal investigations.

In its December 2021 response to the recommendation, SFPD concurred and stated that it would work with the Police Commission and all other appropriate stakeholders in the revision of DGO 8.10. In its March 2022 presentation to the Police Commission, SFPD stated that it would form a working group<sup>7</sup> and restart the DGO 8.10 revision process between February and July 2022. However, this working group did not occur; the responsible officer stated that he submitted a memo through his chain of command requesting guidance on which entities should participate in the revision of DGO 8.10, but he did not have an approved copy of the memo.

#### **Despite its own commitments to do so, SFPD has not revised DGO 8.10 since 2008.**

SFPD has not revised DGO 8.10 since 2008, despite its own commitments, and calls from the Police Commission to do so.

The International Association of Chiefs of Police (IACP) states that law enforcement agencies have a responsibility to provide officers with sufficient and proper policy guidance, and that providing this guidance can help prevent allegations of employee misconduct. The IACP adds that, in this respect, policy development is not static, but a dynamic function subject to continued refinement as the agency’s environment and circumstances change.<sup>8</sup>

<sup>6</sup> Appendix B summarizes SFPD’s progress in implementing all eight of DPA’s prior audit recommendations.

<sup>7</sup> Working groups are established at the direction of the Police Commission or Chief of Police. The goal of these groups is to gain a balanced perspective from internal and external stakeholders before updating SFPD policies.

<sup>8</sup> IACP, *Standards of Conduct*, 2019.

The U.S. Department of Justice emphasizes how law enforcement has experienced one of its largest transformational changes over the last decade—an explosion of data—due, in part, to the introduction of technologies such as body-worn cameras, social media, and cell phone video.<sup>9</sup>

DPA’s investigation of the alleged DGO 8.10 violation exemplifies issues raised in our prior audit report as matters that warranted the attention of the Police Commission and SFPD—including the civil liberties implications caused by law enforcement accessing and using information from social media sites, and advances in video and photographic technology since SFPD last revised the policy. For example, although SFPD last revised DGO 8.10 in 2008, the section on video and photographic equipment is unchanged from the 1999 version of the order and predates SFPD’s 2016 adoption of body-worn cameras and the rise of internet-connected surveillance cameras.

Policies that do not reflect changes to SFPD’s operations—including changes in SFPD’s use of technology—do not help members identify and appropriately respond to situations, including those that may affect individuals’ First Amendment rights. Reviewing and updating DGO 8.10 to address risks caused by these changes may help ensure that the department protects the First Amendment rights of individuals and groups in the communities it serves, and may prevent future allegations of misconduct.

## **Finding 2 - SFPD did not destroy records and media governed by DGO 8.10.**

SFPD did not implement DPA’s recommendation to destroy records and media governed by DGO 8.10.<sup>10</sup> The prior audit cautioned that law enforcement agencies that do not destroy records timely risk creating the perception that they maintain files on groups or persons who engage in First Amendment protected activities.

SFPD concurred with DPA’s recommendations on file destruction and, in its presentation to the Police Commission, stated that it expected to complete the destruction of the files by March 31, 2022. However, as of October 2022, this did not occur; the responsible officer stated that he was awaiting SFPD command staff’s approval before destroying the records and media.

### **Despite its own commitments and calls from the Police Commission, SFPD has not revised DGO 8.10**

- ♦ **2017 February** – SFPD committed to revising DGO 8.10 when it suspended its participation with the Federal Bureau of Investigation’s Joint Terrorism Task Force.
- ♦ **2021 December** – DPA’s audit recommended that SFPD clarify when DGO 8.10 applies to criminal investigations.
- ♦ **2022 March** – SFPD stated it would restart the revision process by July.
- ♦ **2022 July** – Commissioner Walker called for a working group.
- ♦ **2022 October** – Vice President Carter-Oberstone also called for a working group.

Source: SFPD News Release, February 1, 2017 and Police Commission meeting recordings.

<sup>9</sup> U.S. Department of Justice, Office of Community Oriented Policing Services, *Law Enforcement Best Practices: Lessons Learned from the Field*, 2019.

<sup>10</sup> We discuss SFPD’s assignment of responsibility for the destruction of DGO 8.10 records in this report’s Other Observations section. We also recommended SFPD create a written chain of custody to document the destruction of these records, but SFPD did not yet implement this recommendation (see Appendix B).

The U.S. Government Accountability Office (GAO) recommends that organizations complete and document corrective actions taken, including the resolution of audit findings, on a timely basis. This process begins when audit results are reported to management and is completed only after action has been taken that either corrects the deficiencies, produces improvements, or demonstrates that the findings and recommendations do not warrant management action. The GAO also recommends that management assign responsibility and delegate authority to remediate the deficiencies and, with oversight, monitor the status of remediation efforts so they are completed on a timely basis.<sup>11</sup>

**SFPD's records destruction schedule allows for the retention of closed case files for six years, and intelligence video and audio recordings for two.**

During the prior audit, DPA inspected the file cabinet where SFPD stores records related to First Amendment activities and observed 13 investigation files, dated between 2008 and 2010, and video and audio tapes that, based on their labels, concern 2003 anti-war demonstrations.

Source: DPA's prior audit of SFPD's compliance with DGO 8.10.

### **Finding 3 - SFPD did not require members to document the source of First Amendment event information.**

SFPD did not implement DPA's recommendation to require members to reference the source of information collected for First Amendment event planning. SFPD partially concurred with DPA's recommendation.<sup>12</sup> In October 2022, the officer-in-charge of SID stated that he is awaiting direction from SFPD command staff as to which form of written directive this mandate should take.

**All publicly available information obtained should be properly referenced as to its source.**

**When publicly available information is used, the source should be evaluated as to its reliability before the information is utilized.**

**Generally, officers should not base their conclusions and findings on one source of information without further corroboration.**

Source: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies*, 2011

First Amendment event operations plans that do not reference the specific source of event information prevent the department from showing that it collected the information in compliance with DGO 8.10's requirements, and may impair the ability of operations plan reviewers and approvers to evaluate the reliability of the information before it is used for a law enforcement purpose, like allocating resources for public safety.

<sup>11</sup> GAO, *Standards for Internal Control in the Federal Government*, 2014.

<sup>12</sup> See Appendix B for SFPD's response to this recommendation.

## **What We Recommend**

We recommend that the San Francisco Police Department implement open recommendations from the prior audit of DGO 8.10 compliance and:

1. Ensure that revisions to DGO 8.10 address risks to First Amendment rights caused by changes in the department's operations including, but not limited to, the department's use of social media and video and photographic technologies.
2. Develop processes to timely resolve audit findings. These processes should consider the assignment of responsibility and delegation of authority to remediate deficiencies, the documentation necessary to show that the actions taken resolve the findings, and how to ensure that the Police Commission can monitor the status of remediation efforts so they are completed timely.



## Other Observations

During this audit, we observed opportunities to improve DGO 8.10's training requirements, SFPD's assignment of responsibility for the destruction of records governed by DGO 8.10, and SFPD's transmission of the DGO 8.10 investigation log to the Police Commission.

We believe that these other observations provide the Police Commission and SFPD with opportunities to reinforce standards of conduct, clarify responsibility for activities governed by DGO 8.10, and enhance the Police Commission's oversight of SFPD's compliance with this policy.

### **Observation 1 - Expanding DGO 8.10's training requirements to non-Special Investigations Division members may help SFPD reinforce department expectations about First Amendment activities.**

Despite officers from other divisions needing to respond to First Amendment events, DGO 8.10's training requirements only apply to members assigned to the Special Investigations Division (SID). Expanding DGO 8.10's training requirements beyond SID may help ensure that members in these other divisions have the knowledge, skills, and abilities to appropriately respond to and address situations, including criminal investigations, involving First Amendment activities.

SFPD expects its members to have a working knowledge of all information required for the proper performance of their duties, and training can help SFPD reinforce standards of conduct.<sup>13</sup> Named officers in the 2021 complaint alleging a violation of DGO 8.10 told DPA investigators that they read DGO 8.10 but did not receive training on the policy (see [Appendix C](#)). Further, SFPD's staffing analysis notes that Metro Division district stations have a large volume of events such as First Amendment demonstrations and parades<sup>14</sup>; however, DGO 8.10's training requirements do not apply to these members.<sup>15</sup>

The U.S. Department of Justice's Bureau of Justice Assistance offers two First Amendment training videos that address the role of state and local law enforcement officers in responding to First Amendment-protected events—one for roll call training, and another that offers a certificate to viewers upon completion. The officer-in-charge of SID reviewed the videos and stated that, while not specific to SFPD policies, the videos could be of significant value as training tools for SFPD members.

<sup>13</sup> GAO, *Standards for Internal Control in the Federal Government*, 2014.

<sup>14</sup> SFPD, *2021 Staffing Analysis of the San Francisco Police Department*, 2022.

<sup>15</sup> SFPD's Metro Division consists of the Central, Southern, Mission, Northern, and Tenderloin stations.

**Observation 2 - Assigning responsibility for the destruction of DGO 8.10 records in a written directive may help ensure SFPD's compliance with guideline requirements.**

SFPD, in its initial response to the 2020 audit recommendations, stated that it assigned responsibility for the destruction of records and media governed by DGO 8.10 to the SID commanding officer. However, DGO 3.01 *Written Communication System* does not recognize department responses to DPA audit recommendations as a written directive.<sup>16</sup> Designating responsibility for the destruction of records governed by DGO 8.10 in a written directive recognized by DGO 3.01 may help SFPD ensure that it follows record destruction requirements.

**Observation 3 - Using digital processes could improve the efficiency of SFPD and Police Commission communications on activities governed by DGO 8.10.**

SID now e-mails a scanned copy of the DGO 8.10 investigation log to the Police Commission secretary.<sup>17</sup> However, this process still requires the Police Commission secretary to print the document and bring it to a commissioner for review and signature.

Switching to a fully digital process may help the Police Commission and SFPD improve log review turnaround time, reduce costs in terms of the resources and time associated with printing, scanning, and obtaining a wet signature on the log, and improve the record keeping and retrieval of the investigation log.

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<sup>16</sup> DGO 3.01 recognizes DGOs, manuals, department notices, bureau and unit orders, department forms, and memoranda of understanding as written directives.

<sup>17</sup> During the prior audit, SID stated that it was their process to hand deliver this log to the Police Commission.

### **About the San Francisco Department of Police Accountability's Audit Division**

DPA is an oversight agency that investigates officer-involved shootings and complaints about SFPD officers, and audits SFPD practices. DPA recommends new policies and policy changes to the Police Commission and SFPD. DPA and SFPD are separate agencies that both report to the Police Commission. DPA's Audit Division is separate from its investigation and policy advisory functions.

San Francisco Charter mandates DPA to audit the San Francisco Police Department's use of force and handling of police misconduct every two years. The Charter also gives DPA the authority to conduct performance audits or reviews of whether SFPD followed laws, ordinances, and policies. The Charter grants DPA's executive director the discretion to decide the frequency, topics, and scope of the audits and reviews.

Steve Flaherty, Director of Audits  
Kat Scoggin, Audit Manager

Contact: (415) 241-7711 | [sfdpa@sfgov.org](mailto:sfdpa@sfgov.org)  
[sf.gov/dpa](https://sf.gov/dpa) |  @SF\_DPA |  @sf\_dpa

Department of Police Accountability  
Paul Henderson, Executive Director  
1 South Van Ness Avenue, 8<sup>th</sup> Floor  
San Francisco, CA 94103

## **Appendix A: Objective, Scope, & Methodology**

### **Objective**

To determine if SFPD implemented recommendations made in DPA's audit of SFPD's compliance with DGO 8.10 for 2020.

### **Scope**

This audit considered activities governed by the guidelines from 2021, and the status of audit recommendations, as of October 31, 2022.

### **Methodology**

To conduct this audit, DPA gathered evidence from a range of sources and using a variety of procedures, including those summarized below.

- ◆ Reviewed DGO 8.10 to understand its compliance requirements.
- ◆ Evaluated prior DPA audit reports for previously identified issues with SFPD's DGO 8.10 compliance.
- ◆ Contacted members of the San Francisco Police Commission including the commissioner chosen to monitor SFPD's compliance with DGO 8.10, to understand potential issues with SFPD's compliance with DGO 8.10 and issues concerning DGO 8.10 policy updates.
- ◆ Contacted personnel from SFPD's Special Investigations Division and SFPD personnel assigned to the San Francisco Police Commission to understand what actions SFPD has taken to implement prior audit recommendations.
- ◆ Examined the DGO 8.10 log that SFPD provides to the Police Commission for review for 2021 and part of 2022, training records for members assigned to the Special Investigations Division in 2021, and SFPD's updated agency assist form.

We assessed the significance of internal controls relevant to the audit's objective. We identified internal control components on risk assessment and monitoring as significant to the audit objective.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Appendix B: Summary of SFPD’s Progress on Implementing Prior DGO 8.10 Audit Recommendations

DPA’s prior audit of SFPD’s compliance with DGO 8.10 resulted in six findings and eight recommendations for the San Francisco Police Department to improve policies and practices around investigations involving First Amendment activities. SFPD concurred or partially concurred with all eight of the recommendations. The table below includes SFPD’s initial responses to that audit’s recommendations in December 2021, and the status of implementation as of October 31, 2022.

Finding	Recommendation	SFPD’s Initial Recommendation Responses in December 2021	SFPD Implementation Status as of October 31, 2022
1. DGO 8.10’s guidance to help members decide when the order applies to criminal investigations is limited.	1. Work with the Police Commission to clarify and provide examples on when DGO 8.10 applies to criminal investigations.	<b>Concur.</b> The Department will work with the Police Commission and all other appropriate stakeholders in the revision of DGO 8.10. Clarity on the application of this DGO in relation to criminal investigations will be considered. The DGO has not been revised since 2008. Update scheduled to be determined by the Police Commission.	Not implemented. See Finding 1.
2. Two officers did not receive required DGO 8.10 training until after starting at the Special Investigations Division (SID).	2. Ensure that members receive DGO 8.10 training before beginning work at SID.	<b>Concur.</b> The SID Commanding Officer will ensure that all sworn officers assigned to SID receive DGO 8.10 training prior to commencing SID related work. This has already been implemented.	Implemented. Two officers started at SID in 2021, and both received training on the first business day of their assignment. As discussed in the <a href="#">Other Observations</a> section, SFPD may benefit from expanding DGO 8.10 training requirements to non-SID members.
3. SFPD did not purge records as required by DGO 8.10.	3. Assign responsibility for the destruction of records and media governed by DGO 8.10.	<b>Concur.</b> The Department will assign responsibility for the destruction of records and media governed by the DGO to the SID Commanding Officer. This will occur at the end of December 2021.	Implemented. However, as discussed in <a href="#">Other Observations</a> , SFPD may benefit from documenting this assignment of responsibility in a written directive recognized by DGO 3.01 <i>Written Communication System</i> .
	4. Review the DGO 8.10 file cabinet and destroy any records and media as required by the records destruction schedule.	<b>Concur.</b> SID Commanding Officer will ensure the file cabinet is reviewed, appropriate records and media are destroyed, as required by the records destruction schedule. Expected timeline for completion by the first quarter of 2022.	Not implemented. See Finding 2.

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	5. Create a written chain of custody to document the destruction of DGO 8.10 records and media.	<b>Concur.</b> SID Commanding Officer will ensure that a written chain of custody document is created of the destruction of records and media. Expected completion of this task is in line with recommendation #4, by the first quarter of 2022.	Not implemented. SFPD stated that this will be conducted upon completion of the file destruction.
4. SFPD did not provide the Police Commission with timely confirmation that there were no requests for DGO 8.10 investigations.	6. Ensure that the Police Commission receives the DGO 8.10 investigations log monthly.	<b>Concur.</b> The Department and SID Commanding Officer will work with the Police Commission to create a process that is more efficient and effective in the delivery of the monthly logs. Although not required by the DGO to send the log to the Police Commission for review in months when there are no requests for investigations, SFPD will provide notice to the Police Commission moving forward. Expected implementation date is December 31, 2021, to begin in January 2022.	Implemented. SFPD now e-mails the investigations log to the Police Commission monthly. However, as discussed in <i>Other Observations</i> , there is an opportunity for SFPD and the Police Commission to streamline this process.
5. SFPD's file dissemination form does not align with DGO 8.10's compliance requirements.	7. Update the agency assist form to include fields for DGO 8.10's information request evaluation requirements.	<b>Concur.</b> The Department and SID Commanding Officer will ensure the agency assist form is updated so that it captures fields DGO 8.10's information request evaluation requires. Expected implementation is by the first quarter of 2022.	Implemented. SFPD updated the agency assist form to align with DGO 8.10's compliance requirements.
6. Operations plans do not consistently reference the source of First Amendment event information to show compliance with DGO 8.10.	8. Require members to reference the source of information collected for First Amendment event planning.	<b>Partially Concur.</b> When appropriate and determined by the Department that sharing this information will not jeopardize ongoing investigations, divulge federally protected information or compromise confidential informants, the Department will cite the source of the information collected. Members will state if the information was collected through open domain means or otherwise.	Not implemented. See <i>Finding 3</i> .

Source: Audit findings and recommendations, and SFPD's responses, are verbatim from the prior audit report.

## Appendix C: Case Summary of DPA's Investigation of an Alleged DGO 8.10 Violation

In September 2021, DPA received a complaint alleging that officers did not comply with DGO 8.10. DPA's investigation exemplifies issues raised in last year's audit report; specifically, DGO 8.10's limited guidance on when it applies to criminal investigations, and advances in technology since SFPD last revised the policy. The investigation also raises the new issue of non-SID member training. Below is DPA's public summary of the case.

### Case summary of DPA's investigation of an alleged DGO 8.10 violation in 2021.

The complainant stated that the actions taken by the named officers were in violation of the individual's First Amendment rights.

**Named Officer #4 stated that he was reviewing an undercover Instagram account and saw that an individual they were following was filming a music video in a nearby area.** Named Officer #4 stated that he did not see any illegal activity in that individual's post at the time. Named Officer #4 stated he went to the location in the post to provide violence reduction because, based on his training and experience, over 80% of the music videos he sees by rappers in that specific area have firearms involved. Named Officer #4 stated that he agreed that participating in the filming of a rap video is a protected First Amendment activity.

Named Officers #1, #2, and #3 reiterated the statement provided by Named Officer #4, that people filming music videos often have firearms. The named officers all received plainclothes training. The named officers all acknowledged reading DGO 8.10 but did not receive training on the policy.

DPA spoke to the SFPD's Subject Matter Expert (SME) on DGO 8.10. The SME stated that he conducts a training for members that join SID. The SME was presented with the named officers' belief that "people filming music videos are often in possession of firearms." He believed the investigation was "probably" relevant to the criminal investigation. **The SME stated that DGO 8.10 pre-dates social media, and that it does not address whether a fake social media account fits the definition of an infiltrator.**

**DPA spoke to a SME who teaches the social media investigations training. The SME stated that there are no current written policies right now on social media investigations. She stated that DGO 8.10 is not discussed during their trainings.**

The evidence showed that the individual, who was participating in the filming of a rap video, was participating in a First Amendment activity. Based on the Instagram post that alerted the named officers to that gathering, there was no evidence that showed that the individuals were planning or were engaged in criminal activity. However, the named officers believed that groups filming music videos often possess firearms. Based on that belief, the named officers went to the location to see if there was any criminal activity. **The First Amendment activity was relevant to the criminal investigation because it provided the basis for the named officers' investigation.** One named officer explained that an Instagram post from one year prior resulted in a shooting in the same location. Another named officer explained that they were responding to provide violence reduction. Therefore, the named officers believed that the criminal activity could reasonably be expected to result in bodily injury.

A preponderance of the evidence proves that the alleged conduct occurred and that the conduct violated SFPD policy or procedure.

## Appendix D: SFPD Response



**LONDON N. BREED**  
MAYOR

CITY AND COUNTY OF SAN FRANCISCO  
**POLICE DEPARTMENT**  
HEADQUARTERS  
1245 3<sup>RD</sup> Street  
San Francisco, California 94158



**WILLIAM SCOTT**  
CHIEF OF POLICE

December 29, 2022

Executive Director Paul Henderson  
Department of Police Accountability  
One South Van Ness Avenue, Suite 800  
San Francisco, CA 94103

Dear Mr. Henderson,

Thank you for the opportunity to review the Department of Police Accountability's annual audit on compliance with Department General Order 8.10. DGO 8.10 sets forth the requirements for criminal investigations involving First Amendment activities and mandates DPA to conduct an annual compliance audit and report their findings to the Police Commission.

The Department has received DPA's 2022 draft audit report and reviewed the findings and recommendations with Department subject matter experts.

DPA's audit states that three recommendations from last year's 2021 annual audit remain outstanding:

1. Clarify and provide examples of when 8.10 applies to criminal investigations;
2. Destroy records and media governed by 8.10; and
3. Require members to document the source of First Amendment event information.

Additionally, DPA has made two recommendations:

1. Ensure that the DGO 8.10 revision addresses changes in SFPD's operating environment, including advancements in technology; and
2. Develop a process to ensure the timely resolution of audit recommendations.

In striving to always uphold individuals' guaranteed constitutional rights, the Department welcomes DPA feedback and continued collaboration. As set forth below, the Department concurs with DPA's two recommendations and is in the process of revising DGO 8.10.



*Revision of DGO 8.10*

DGO 8.10 is currently being revised and Department subject matter experts are actively considering internal and external recommendations. Within the coming weeks, the Department will form a working group of stakeholders and community members and working group recommendations will be incorporated into the revised General Order.

Through the revision process, and in collaboration with DPA, the Department will ensure that the new draft of DGO 8.10 provides examples of when 8.10 applies to criminal investigations. The Department agrees that clarification and clear guidelines of when DGO 8.10 applies to criminal investigations is needed.

During the 2021 audit, the Department agreed that when appropriate, SFPD members should disclose the source of First Amendment event information. The Department will incorporate this recommendation into the new draft of DGO 8.10 to ensure SFPD members appropriately comply with information collection requirements.

The Department concurs with DPA's assessment and recommendation that DGO 8.10 be updated to address changes to SFPD's operating environment, particularly advancements in technology. Department subject matter experts are currently reviewing internal and external policies to ensure that DGO 8.10 is updated to adequately reflect the rapidly evolving digital age. The Department is mindful however, that DGO 8.10 deals with a very specific subset of criminal investigations and policies governing the use of many technologies might be better suited in separate Department policies.

The Department is committed to working with DPA during the revision to ensure these policy changes are thoroughly vetted and operationalized.

*Destruction of Records Governed by 8.10*

Throughout the last year, the Department has identified relevant records to be destroyed pursuant to DGO 8.10's destruction schedule. The records have been indexed, set aside, and secured pending final approval for destruction. The Department anticipates this process will be complete by March 2023.

*Timely Resolution of Audit Recommendations*

The Department concurs with DPA's recommendation that a process be established to ensure timely resolution of audit recommendations as neither DGO 8.10 nor SF Charter Section 4.136 require resolution or implementation of DPA's audit or policy recommendations, yet the Department recognizes the value of documenting and responding to DPA recommendations during the policy development or audit process. Department subject matter experts are actively considering how the Department can ensure that recommendations are addressed in a timely manner and may create or revise internal policy to ensure that agreed upon recommendations are implemented. This policy will develop concurrently with the DGO 8.10 revision process as response to audits may be broader than this DGO.

Lastly, I would like to thank DPA for their continued work and collaboration with SFPD to ensure compliance with DGO 8.10. I look forward to ongoing discussions and a strong partnership during the DGO 8.10 revision process.

Sincerely,



**WILLIAM SCOTT**  
Chief of Police

cc: Commissioner Cindy Elias, President, Police Commission  
Assistant Chief David Lazar, Operations  
Director Diana Oliva-Aroche, Policy & Public Affairs  
Acting Deputy Chief Nicole Jones, Administration  
Commander Paul Yep, Risk Management  
Executive Director Catherine McGuire, Strategic Management

## DPA Recommendations and SFPD Responses

For each recommendation, SFPD should indicate whether it concurs, does not concur, or partially concurs, and provide a brief explanation. If SFPD concurs with the recommendation, it should indicate the expected implementation date and implementation plan. If SFPD does not concur or partially concurs, it should provide an explanation and an alternate plan of action to address the identified issue.

Recommendation	SFPD Response
We recommend that the San Francisco Police Department implement open recommendations from the prior audit of DGO 8.10 compliance and:	
<p>1. Ensure that revisions to DGO 8.10 address risks to First Amendment rights caused by changes in the department’s operations including, but not limited to, the department’s use of social media and video and photographic technologies.</p>	<p><input checked="" type="checkbox"/> Concur   <input type="checkbox"/> Do Not Concur   <input type="checkbox"/> Partially Concur</p> <p>This will be addressed during the ongoing DGO 8.10 revision process.</p>
<p>2. Develop processes to timely resolve audit findings. These processes should consider the assignment of responsibility and delegation of authority to remediate deficiencies, the documentation necessary to show that the actions taken resolve the findings, and how to ensure that the Police Commission can monitor the status of remediation efforts so they are completed timely.</p>	<p><input checked="" type="checkbox"/> Concur   <input type="checkbox"/> Do Not Concur   <input type="checkbox"/> Partially Concur</p> <p>Department subject matter experts are actively considering how the Department can ensure that recommendations are addressed in a timely manner and may create or revise internal policy to ensure that agreed upon recommendations are implemented. This policy will develop concurrently with the DGO 8.10 revision process as response to audits may be broader than this DGO.</p>