

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ACLU OF TENNESSEE, Inc.)	
)	
Intervening Plaintiff,)	
)	
v.)	No. 2:17-cv-02120-JPM-jay
)	
THE CITY OF MEMPHIS,)	
)	
Defendant.)	
)	

**ACLU OF TENNESSEE, INC.’S COMMENTS ON
PROPOSED SOCIAL MEDIA POLICIES**

Pursuant to the Court’s Order Expanding Scope of the January 2, 2020 Conference (ECF No. 269), ACLU of Tennessee, Inc. (“ACLU-TN”) files its written comments to the proposed social media policies. ACLU-TN agrees with the Monitor’s comments contained in its December 16, 2019 letter to the City. In addition to the concerns raised by the Monitor, ACLU-TN raises the following issues for consideration by the Court:

When determining that the City violated the Consent Decree, this Court held that the City, among other things, “intercepted electronic communications and infiltrated groups through the ‘Bob Smith’ Facebook account;” and “[d]id not establish an approval process for lawful investigations into criminal conduct that might incidentally reveal information implicating First Amendment rights.”

(Opinion and Order, ECF No. 151, PAGE ID 6243). Part of the remedy imposed by the Court was the creation of policies that would ensure future compliance with the Consent Decree. (Id. at PAGE ID 6272-74). The revisions proposed by the City to the social media policy would weaken the rules and regulations that should serve to prevent the reoccurrence of this conduct.

The City's proposed revisions, based on the FBI policies, creates a new and complicated framework for investigations. These revisions establish different stages of investigation termed "pre-assessment," "assessment" and "predicated investigations." Pre-assessment investigations do not require authorization. Assessments require an "authorized purpose;" however, it is unclear whether such investigations require authorization from a supervising officer. Predicated investigations require supervisory approval. Each level of investigation allows the use of more invasive techniques and technology.

The next section of the revised policy is entitled "Online Investigations that May Relate to the Exercise of First Amendment Rights." This part of the policy invokes Section G of the Consent Decree. As the monitor pointed out in its letter, this section appears to redefine Section G. For example, Section G states that investigations must be "unavoidably necessary to the proper conduct of the investigation" and "every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights." (Consent Decree, Trial Ex. 6 at § G). The policy recasts the language used in

Section G, using more permissive language such as “logically related to an authorized investigative purpose.”

The new language also appears to allow pre-assessment investigations to proceed without authorization of any kind, even if those investigation would fall within those covered by Section G. This would clearly violate the Consent Decree and should not be allowed in a policy whose purpose is to ensure the City’s future compliance. Over all, the language in the City’s proposed policy is confusing with regard to when a particular type of investigation is authorized and what type of investigation requires pre-authorization under Section G.

The City has also removed the specific restrictions and explanations on the use of undercover or covert social media accounts. Because the use of the “Bob Smith” account was specifically found by this Court to violate the Consent Decree, ACLU-TN believes it is extremely important that the social media policy include specific discussion of and references to the use of covert or undercover social media accounts. Again, the purpose of this policy is to ensure compliance with the decree. Making sure that the policy is clear regarding the use of these covert accounts will help to avoid similar conduct in the future.

Respectfully Submitted,

/s/ Thomas H. Castelli

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2019, a true and correct copy of the foregoing document has been served via email to:

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