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AMERICAN CIVIL LIBERTIES UNION

FUSION CENTER UPDATE

JULY 2008 By Mike German and Jay Stanley

If the federal government announced it was creating a new domestic intelligence agency made up of over 800,000 operatives dispersed throughout every American city and town, filing reports on even the most common everyday behaviors, Americans would revolt. Yet this is exactly what the Bush administration is trying to do with its little-noticed National Strategy for Information Sharing, which establishes state, local and regional “fusion centers” as a primary mechanism for the collection and dissemination of domestic intelligence.¹

In November 2007, the American Civil Liberties Union issued a report entitled “What’s Wrong with Fusion Centers.”² Extrapolating from a few troublesome incidents and comments made by state and federal officials, and mindful of the nation’s long history of abuse with regard to domestic “intelligence” gathering at all levels of government, we warned about the potential dangers of these rising new institutions. We pointed out that, while diverse and often still in the early stages of formation, they often seem to be characterized by ambiguous lines of authority, excessive secrecy, troubling private-sector and military participation, and an apparent bent toward suspicionless information collection and data mining. We urged policymakers to examine this incipient network of institutions closely and, at a minimum, to put rigorous safeguards in place to ensure that fusion centers would not become the means for another wave of such abuses.

In the six months since our report, new press accounts have borne out many of our warnings. In just that short time, news accounts have reported overzealous intelligence gathering, the expansion of uncontrolled access to data on innocent people, hostility to open government laws, abusive entanglements between security agencies and the private sector, and lax protections for personally identifiable information.

Overall, it is becoming increasingly clear that fusion centers are part of a new domestic intelligence apparatus. The elements of this nascent domestic surveillance system include:

- Watching and recording the everyday activities of an ever-growing list of individuals
- Channeling the flow of the resulting reports into a centralized security agency
- Sifting through (“data mining”) these reports and databases with computers to identify individuals for closer scrutiny

Such a system, if allowed to permeate our society, would be nothing less than the creation of a total surveillance society.

Recent reports have confirmed each of these elements.

MONITORING EVERYDAY BEHAVIOR

In April 2008, the *Wall Street Journal* and the *Los Angeles Times* both reported on a new Los Angeles Police Department order that compels LAPD officers to begin reporting “suspicious behaviors” in addition to their other duties—creating a stream of “intelligence” about a host of everyday activities that, according to documents, will be fed to the local fusion center.³

LAPD Special Order #11, dated March 5, 2008, states that it is the policy of the LAPD to “gather, record, and analyze information of a criminal or *non-criminal nature*, that could indicate activity or intentions related to either foreign or domestic terrorism,” and includes a list of 65 behaviors LAPD officers “shall” report.⁴ The list includes such innocuous, clearly subjective, and First Amendment protected activities as:

- taking measurements
- using binoculars
- taking pictures or video footage “with no apparent esthetic value”
- abandoning vehicle
- drawing diagrams
- taking notes
- espousing extremist views

Most people engage in one or more of these activities on a routine, if not daily, basis. Terrorists eat, but it would be absurd to investigate everyone who eats. The behaviors identified by the LAPD are so commonplace and ordinary that the monitoring or reporting of them is scarcely any less absurd. This overbroad reporting authority gives law enforcement officers justification to harass practically anyone they choose, to collect personal information, and to pass such information along to the intelligence community.

Suspicious activity report (SAR) policing opens the door to racial profiling and other improper police behavior, and exposes law-abiding people to government prying into their private affairs without just cause. This concern is not just hypothetical; the Associated Press has reported that new, forthcoming Attorney General Guidelines for the FBI will authorize opening investigations without evidence of wrongdoing, based solely on terrorist profiles that use race and ethnicity as risk factors.⁵ No less an authority than former Attorney General John Ashcroft has called racial profiling “an unconstitutional deprivation of equal protection.”⁶

Moreover, the LAPD’s collection of “non-criminal” information runs afoul of Title 28, Part 23 of the Code of Federal Regulations, which states that law enforcement agencies:

shall collect and maintain criminal intelligence information concerning an individual *only if there is reasonable suspicion that the individual is involved in criminal conduct or activity* and the information is relevant to that criminal conduct or activity.⁷

And it isn’t just that SAR policing is illegal, it’s also ineffective and counterproductive. These orders, if taken seriously by LAPD officers on the beat, can yield only one outcome: an ocean of data about innocent individuals that will dominate the investigative resources of the authorities. The police should instead focus their efforts and resources where there is a reasonable indication of misconduct. The LAPD cannot maintain the support of the community it serves if the department is viewed as a collection of spies instead of peace officers.

TURNING LOCAL POLICE OFFICERS INTO NATIONAL DOMESTIC INTELLIGENCE AGENTS

Rather than criticize the LAPD efforts, the Office of the Director of National Intelligence said the LAPD program “should be a national model.”⁸ Not surprisingly, in June 2008 the Departments of Justice and Homeland Security teamed with the Major City Chiefs Association to issue a report recommending expanding the LAPD SAR program to other U.S. cities.⁹

In fact, just a few weeks before the LAPD order was issued, the Director of National Intelligence published new “functional standards” for suspicious activity reports that a program like the LAPD’s would generate.¹⁰ The sequential timing of the DNI’s functional standards, the LAPD SAR order and the Major City Chiefs’ recommendations creates more than a little suspicion that these efforts are closely coordinated.

The DNI standards actually encourage state and local law enforcement to report non-criminal suspicious activities to the intelligence community by defining the scope of suspicious activity as “observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention.”¹¹ What might constitute “other illicit intention” is not defined in the document but it is clearly something other than “criminal.” The Major City Chiefs’ report contains a diagram that illustrates the organizational processing of a SAR, which shows that information deemed “terrorist related” would be forwarded to fusion centers *before* “reasonable suspicion” is established.¹² This process clearly reflects the intent to retain information where no reasonable suspicion of criminal activity exists.

Defenders of these suspicious activity reports (SARs) claim they aren’t a privacy concern because they would not include “personally identifiable information.” But the DNI standards also re-work the term “personally identifiable information” to allow the collection and retention of specific data that could be used to distinguish or trace an individual’s identity.¹³ For instance, imagine a police officer stopping you for taking pictures and asking for identification to compile an SAR [see box]. Under the DNI functional standards your name and driver’s license number would be removed from the SAR before it was distributed—but your date of birth, height, weight, race, hair and eye color, driver’s license state, date of issue and date of expiration would all be reported. It is logical to conclude that this detailed information could be traced back to a particular individual. How this information could later be used, analyzed and mined by the intelligence community or private sector entities participating in fusion centers is completely unknown.

THE INCREASING COLLECTION OF DATA FOR DOMESTIC INTELLIGENCE

Rather than recognizing the dangers of fusion centers and taking measures to rein in domestic intelligence activities, fusion center proponents in federal, state and local government have expanded the nature and scope of information they collect.

The *Washington Post* reported in April of 2008 that fusion centers have increasing access to Americans’ private information through an array of databases.¹⁴ In addition to access to FBI and even CIA records, fusion centers often have subscriptions with private data brokers such as Accurint, ChoicePoint, Lexis-Nexus, and LocatePlus, a database containing cellphone numbers and unpublished telephone records. According to the article, fusion centers have access to millions of “suspicious activity reports” sent to the Treasury Department’s Financial Crimes Enforcement Network, as well as hundreds of thousands of identity theft reports kept by the Federal Trade Commission.

Some fusion centers appear to have unique access to particular databases or particular types of information, based perhaps on each individual state’s laws or guidelines:

Pennsylvania buys credit reports and uses face-recognition software to examine driver’s license photos, while analysts in Rhode Island have access to car-rental databases. In Maryland, authorities rely on a little-known data broker called Entersect, which claims it maintains 12 billion records about 98 percent of Americans... Massachusetts... taps a private system called ClaimSearch that includes a “nationwide database that provides information on insurance claims, including vehicles, casualty claims and property claims.”¹⁵

The fusion centers' access to these kinds of databases raises urgent questions about the lack of controls over law enforcement's use of large pools of data on innocent Americans. Because of the unfortunate history of abuse in which law enforcement and national security agencies kept files on the political activities of innocent Americans, the federal government adopted Title 28, Part 23 of the Code of Federal Regulations which bars those agencies from compiling dossiers on people not involved in wrongdoing. But commercial databases such as these, which collect as much information about as many Americans as they can, offer law enforcement an end-run around laws designed to protect privacy. The police don't "maintain" such dossiers anymore, but if they are just a few keystrokes away, the effect is the same—especially when all that innocent information is combined with Suspicious Activity Reports and other data that only government can access.

Even more troubling is the fact that these centers are networked together and seamlessly exchange information with the intelligence community through the Director of National Intelligence's Information Sharing Environment (ISE). The *Washington Post* report was based on a document produced from a survey of fusion centers, which shows their intent to maximize the access each of the fusion centers has to the various databases. This would allow a state fusion center that under state law or local policy is prohibited from buying credit reports, as an example, to circumvent its own restrictions by simply calling a fusion center in Pennsylvania to and asking Pennsylvania authorities to access the records it wants to analyze. This "policy shopping" process guts state and local privacy protections and gives the participating agencies, including the federal intelligence community, access to information they may not legally have on their own.

This outcome is not an accident, but rather the intended result of a national strategy. Fusion center proponents consciously regard the "800,000 plus law enforcement officers across the country... as 'the 'eyes and ears' of an extended national security community,'"¹⁶ and the Office of the Director of National Intelligence encourages the intelligence community to consider all state and local government officials as "the first line of defense in a very deep line of information assets."¹⁷

The federal government's increasing efforts to formalize, standardize, and network these state, local, and regional intelligence centers—and plug them directly into the intelligence community's Information Sharing Environment—are the functional equivalent of creating a new national domestic intelligence agency that deputizes a broad range of personnel from all levels of government, the private sector, and the military to spy on their fellow Americans.

THE PERFECT STORM: THE LOS ANGELES COUNTY TERRORISM EARLY WARNING CENTER

The *San Diego Union-Tribune* recently exposed a scandal linking a police task force called the Los Angeles County Terrorism Early Warning Center (LACTEW) to an intelligence fiasco that can only be described as a "perfect storm" of the problems identified in the ACLU's November 2007 fusion center report.¹⁸ This one has it all:

- Spying on religious groups in violation of the First Amendment
- Military involvement in domestic spying in violation of the Posse Comitatus Act
- Police officers and military personnel engaged in illegal activity to further their perceived intelligence mission
- A lack of security over classified material and a lack of oversight over the activities of "trusted" insiders
- The reported involvement of private defense contractors
- Excessive secrecy that shields all the other problems from public view

LACTEW, established in 1996, has often been described as the first fusion center. It has also been recommended as a model for others to emulate.¹⁹ FBI Supervisory Special Agent William A. Forsyth described the methods employed by the LACTEW in a Naval Postgraduate School thesis published before the scandal came to light: “[t]he TEW utilizes data-mining tools, as well as standardized “Intelligence Preparation for Operations (IPO)” products to build all-source situational awareness and a common operating picture for the interagency response community.”²⁰ According to 2006 congressional testimony, the LACTEW has now “evolved” into the Joint Regional Intelligence Center (JRIC) in Los Angeles.²¹

According to the *Union-Tribune* reports, a group of military reservists and law enforcement officers led by the co-founder of the LACTEW engaged in a years-long conspiracy to steal highly classified intelligence files from the Strategic Technical Operations Center (STOC) located at the U.S. Marine Corps Base at Camp Pendleton, California and secret surveillance reports from the U.S. Northern Command headquarters in Colorado Springs, Colorado. Some of the stolen files reportedly “pertained to surveillance of Muslim communities in Southern California,” including mosques in L.A. and San Diego, and revealed “a federal surveillance program targeting Muslim groups” in the United States. The scheme apparently began in 2001 when the LACTEW co-founder called a civilian analyst at U.S. Northern Command to ask that she surreptitiously supply the LACTEW with military surveillance reports. The National Security Agency’s involvement in the investigation hints that these records may relate to warrantless domestic surveillance operations conducted by the military.

Though some involved in the theft ring have claimed “patriotic” motives—the desire to share secret military intelligence with local law enforcement—the *Union-Tribune* reports indicate the possibility of financial motives for the crimes. Investigators are looking into allegations that the records were passed to defense contractors “in exchange for future employment” opportunities. Employees of one of the companies mentioned in the article, Kroll and Associates, a “risk assessment” firm, reportedly had ties to the LACTEW.²²

The thefts of intelligence files were not uncovered through internal oversight mechanisms at the LACTEW, the STOC or the JRIC, but rather by accident, through a military investigation into stolen Iraq war trophies. Search warrants executed at a Carlsbad, California apartment and storage lockers in Carlsbad and Manassas, Virginia located the war booty, along with boxes of highly classified FBI and Department of Defense intelligence files.

The easy circumvention of the security of these centers by corrupt insiders reveals what little protections are given to the data government is collecting about Americans. We may never know the nature of the surveillance these authorities conducted, with whom they shared the resulting information, or the risks associated with its unauthorized disclosure because the “[l]egal proceedings in the case will probably be conducted in private.”²³ LACTEW is a prime example of the combination of overzealous intelligence collection and inadequate oversight leading to “an intelligence nightmare.”²⁴ As we warned in our report, giving profit-driven entities access to valuable intelligence information poses a grave risk to security and to the privacy rights of those caught in the web of surveillance.

If LACTEW is to be a “model” for anything, it should be seen as a shining example of the need for policy makers to construct mechanisms for tight oversight over fusion centers, lest they continue to become centers for out-of-control public-private surveillance and data-collection abuses.

The threat that suspicious activity reporting poses to law-abiding people is not hypothetical. There have been numerous reports of police stopping, questioning, even arresting individuals based on nothing more than certain perfectly lawful activities listed in the LAPD order. Whether these specific reports have actually been shared with fusion centers or not, they are exactly the kind of “intelligence” that the centers are ostensibly being created to collect. These reports include:

Taking video footage

- Sheriff’s deputies in Texas stopped an Al-Jazeera television crew that was filming on a public road more than a mile away from a nuclear power plant and conducted “extensive background checks” on them. The police said they “found no criminal history or other problems.”²⁵

Taking pictures

- Mariam Jukaku, a 24-year old Muslim-American journalism student at Syracuse University, was stopped by Veterans Affairs police in New York for taking photographs of flags in front of a VA building as part of a class assignment. After taking her into an office for interrogation and taking her driver’s license the police deleted the photographs from her digital camera before releasing her.²⁶

- Shirley Scheier, a 54-year-old artist and Associate Professor of Fine Art at the University of Washington was stopped by police in Washington State for taking pictures of power lines as part of an art project. Police frisked and handcuffed Scheier, and placed her in the back of a police car for almost half an hour. She was eventually released, after officers photographed maps that Scheier used to find the power station. The officers also told her she would be contacted by the FBI about the incident.²⁷

- Neftaly Cruz, a 21-year-old senior at Penn State, was arrested in his own backyard in Philadelphia for snapping a picture of police activity in his neighborhood with a cell phone camera. He was taken down to the police station where police threatened to charge him with conspiracy, impeding police, and obstruction of justice, but he was later released without charge.²⁸

Expressing political and religious beliefs

- After making public comments criticizing the FBI’s treatment of Muslims in Pittsburgh, Dr. Moniem El-Ganayni, a nuclear physicist and naturalized American citizen had his security clearance improperly revoked by the U.S. Department of Energy (DOE) despite 18 years of dedicated service. Though they never told him the reason his clearance was revoked, during seven hours of interviews, representatives from the DOE and the FBI never alleged a breach of security but instead questioned El-Ganayni about his religious beliefs, his work as an imam in the Pennsylvania prison system, his political views about the U.S. war in Iraq, and the speeches he’d made in local mosques criticizing the FBI.²⁹

Taking measurements

- A Middle Eastern man in traditional clothing sparked a three-day police man-hunt in Chicago when a passenger on the bus he was riding notified the police that he was clicking a hand counter during the trip. A Joint Terrorism Task Force investigation into the episode revealed he was using the counter to keep track of his daily prayers, a common Muslim practice.³⁰

A ONE-WAY MIRROR?

Even as fusion centers are positioned to learn more and more about the American public, authorities are moving to ensure that the public knows less and less about fusion centers. In particular, there appears to be an effort by the federal government to coerce states into exempting their fusion centers from state open government laws.³¹ For those living in Virginia, it's already too late; the Virginia General Assembly passed a law in April 2008 exempting the state's fusion center from the Freedom of Information Act.³² According to comments by the commander of the Virginia State Police Criminal Intelligence Division and the administrative head of the center, the federal government pressured Virginia into passing the law, with the threat of withholding classified information if it didn't.³³ Such efforts suggest there is a real danger fusion centers will become a "one-way mirror" in which citizens are subject to ever-greater scrutiny by the authorities, even while the authorities are increasingly protected from scrutiny by the public.

Another example of the "one way mirror" emerged recently in Massachusetts, where the ACLU of Massachusetts recently obtained a copy of the Commonwealth Fusion Center's (CFC's) "Standard Operating Procedures."³⁴ The procedures allow undercover police officers to attend public meetings to gather intelligence even when there is no reasonable suspicion of illegal activity. These guidelines also authorize "inquiries and investigations" when "oral or written statements advocate unlawful or violent activity, to determine whether there exists a real threat," which is clearly First Amendment-protected activity. The hazards of such a policy were revealed in a recent incident at Harvard University, where a plain-clothes Harvard University detective was caught photographing people at a peaceful protest for "intelligence gathering" purposes.³⁵ HUPD officers are sworn special State Police officers with deputy sheriff powers, and they often work "in conjunction with other agencies, including the Massachusetts State Police, Boston Police, Cambridge Police, Somerville Police, and many federal agencies."³⁶ A university spokesman refused to say what the HUPD does with the photographs it takes for "intelligence gathering" purposes, so it is unknown whether this information was shared with the CFC. What is clear is that this type of unwarranted police surveillance of First Amendment-protected activity is exactly what the CFC Standard Operating Procedures explicitly authorize.

It is ironic that even as police increasingly challenge the right of regular citizens to take photographs in public places [see box], police themselves are busy photographing citizens peacefully exercising their First Amendment rights.

MISSION CREEP: MOVING FROM TERRORISTS TO PEACE ACTIVISTS

Police in Maryland appear to have followed practices similar to those authorized in the Massachusetts standard operating procedures. According to documents released in response to an ACLU lawsuit, the Maryland State Police (MSP) used undercover officers to spy on non-violent peace activists and anti-

death penalty groups. The undercover agents consistently reported that the activists acted legally at all times, yet the investigations continued for over 14 months. Information about the groups' political activities gathered during the investigations "was shared with seven different agencies, including the National Security Agency and an un-named military intelligence official."³⁷ A longtime peace activist who was an apparent target of the surveillance, Max Obuszewski, had his identifying information entered into a federal database under the "primary crime" heading of "Terrorism—anti-government," even though absolutely no violent activity was even alleged in the reports.³⁸ The information was uploaded into a federal drug task force database that is accessible by the Maryland fusion center, the Maryland Coordination and Analysis Center (MCAC).³⁹

We do not know whether the MCAC was aware of these MSP investigations or whether the "intelligence" the MSP gathered was shared through the fusion process, but fusion centers are clearly *intended* to be the central focal point for sharing terrorism-related information. If the MCAC was not aware of the information the state police collected over the 14 months of this supposed terrorism investigation, this fact would call into question whether the MCAC is accomplishing its mission. If the MCAC takes in information from its participating members, however, the fusion center itself should be responsible for determining whether the "intelligence" it receives is being appropriately collected. It can do that by, for example, enforcing strict guidelines and conditions of participation on its sources and participants.

For Mr. Obuszewski, in any case, the impact of being listed as a terrorist in a federal database is simply unknowable in the current climate of secrecy surrounding these intelligence programs.

Mr. Obuszewski's experience is all too typical of what we have seen in the United States for many decades—new police and surveillance powers, granted to the authorities out of fear of terrorism, end up being deployed against peace activists and other political dissenters. It has happened before—police departments employed "red squads" and the FBI ran a dirty-tricks program called COINTELPRO—and now it is happening yet again. It is a disturbing sign that our policy makers have not learned from that long history.

We can't afford to be in the dark about fusion centers. And just because the government isn't announcing this domestic surveillance program in grand style the way it has with other surveillance programs, doesn't mean we can ignore it. Given the broad scope of information fusion centers collect, process and disseminate, it would be irresponsible not to enforce vigorous public oversight. We have to make sure our Congress and our state legislatures know it's up to them to guard our privacy and to impose appropriate oversight controls and accountability standards on these out-of-control data-gathering monsters.

NOTES

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⁸ Gorman, *supra* note 3.

⁹ DEPARTMENT OF JUSTICE, GLOBAL JUSTICE INFORMATION SHARING INITIATIVE, MAJOR CITY CHIEFS ASSOCIATION AND DEPARTMENT OF HOMELAND SECURITY, FINDINGS AND RECOMMENDATIONS OF THE SUSPICIOUS ACTIVITY REPORT (June 2008), <http://online.wsj.com/public/resources/documents/mccarecommendation-06132008.pdf> [hereinafter the Major City Chiefs' report].

¹⁰ Ben Bain, *ODNI Releases Standards for Suspicious Activity Reporting*, FEDERAL COMPUTER WEEKLY, Jan. 30, 2008, <http://www.fcw.com/online/news/151462-1.html>.

¹¹ INFORMATION SHARING ENVIRONMENT (ISE) FUNCTIONAL STANDARD (FS) SUSPICIOUS ACTIVITY REPORTING (SAR) Version 1.0, ISE-FS-200, (Jan. 25, 2008) (on file with authors).

¹² Major City Chiefs' report, *supra* note 9, at 31.

¹³ The Government Accountability Office has previously defined the term "personally identifiable information" as "any information about an individual maintained by an agency, including any information that can be used to distinguish or trace an individual's identity, such as name, Social Security number, date and place of birth, mother's maiden name, biometric records, and any other personal information that is linked or linkable to an individual." See GOVERNMENT ACCOUNTABILITY OFFICE, GAO 08-343, REPORT TO CONGRESSIONAL REQUESTERS: INFORMATION SECURITY: PROTECTING PERSONALLY IDENTIFIABLE INFORMATION 5 (Jan. 2008), *available at* <http://www.gao.gov/new.items/d08343.pdf>.

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²² Rogers, *Records Detail Security Failure in Base File Theft*, *supra* note 18.

²³ *Id.*

²⁴ Rogers, *Marine Took Files as Part of Spy Ring*, *supra* note 18. The LACTEW evokes uncomfortable memories of a long line of similar California-based quasi-vigilante groups that involved the exchange of information about “subversives” between military and police agencies and private activists, including the “Western Goals Foundation” and the “San Diego Research Library.” See JAY STANLEY, *THE SURVEILLANCE INDUSTRIAL COMPLEX, AMERICAN CIVIL LIBERTIES UNION* 9 (2004), available at http://www.aclu.org/FilesPDFs/surveillance_report.pdf.

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²⁷ American Civil Liberties Union of Washington State, *Art Professor Detained for Taking Photos on Public Property*, November 15, 2007, <http://www.aclu-wa.org/detail.cfm?id=787>.

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³⁷ Shaun Waterman, *Documents Show Md. Police Spied on Anti-War, Death Penalty Protestors*, United Press International, Jul. 17, 2008, *available at*: http://www.upi.com/Emerging_Threats/2008/07/17/Documents_show_Md_police_spied_on_anti-war_death-penalty_protesters/UPI-74771216337696/

³⁸ American Civil Liberties Union of Maryland press release, *ACLU of Maryland Lawsuit Uncovers Maryland State Police Spying Against Peace and Anti-Death Penalty Groups*, July 17, 2008, *available at*: http://www.aclu-md.org/aPress/Press2008/071708_PeaceGroups.html

³⁹ The documents the ACLU received from the Maryland State Police (*available at*: http://www.aclu-md.org/aPress/Attachments/MSP_Documents.pdf) indicate the investigative records were entered into the Washington/Baltimore High Intensity Drug Trafficking Area (HIDTA) Case Explorer, an information management and sharing tool developed for law enforcement and public safety agencies. According to a presentation by Assistant United States Attorney Harvey E. Eisenberg at the 2007 Techno Forensics Conference on October 31, 2007, Case Explorer is one of the MCAC's "Primary Watch Center databases" and the Washington/Baltimore High Intensity Drug Trafficking Area task force is one of the federal, state, and local law enforcement agencies the MCAC "routinely networks and shares information with." See, Harvey Eisenberg, Maryland Coordination and Analysis Center Overview, slide 15, slide 17 and slide 18, revised Oct. 2007, *available at*: <http://www.technosecurity.com/pdf/Wednesday/MCAC%20PRES%20-%20Eisenburg.pdf>