



January 28, 2014

Via electronic mail only

Members of the Public Safety Committee
Oakland City Council
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re: Domain Awareness Center, Phase 2 Contract Award

Dear Honorable Members of the Public Safety Committee,

The American Civil Liberties Union of Northern California writes in regard to Item 6 on the January 28, 2014 Agenda of the Public Safety Committee, in which staff seeks authorization (1) to negotiate and execute a contract with Schneider Electric to build Phase 2 of the DAC, and (2) to select, negotiate with, and enter into a contract with a substitute contractor without returning to the City Council, if negotiations with Schneider Electric fail. We urge you not to approve this item as currently proposed. Given the enormous privacy and other urgent public policy implications of the Domain Awareness Center, we urge you to demand greater transparency about and to exercise meaningful oversight over the DAC. Unfortunately, the staff report submitted in connection with this agenda item leaves the public and the City Council in the dark about essential aspects of the proposed contract with Schneider Electric that have significant civil liberties impacts. In addition, the proposed resolution would prevent the City Council from exercising oversight over the selection of a substitute contractor. The City Council should demand greater information about the project, and it certainly should not cede its oversight role.

We have previously expressed to you our concerns about the vast privacy implications of the DAC. The DAC has the potential to collect and stockpile comprehensive information about Oakland residents who have engaged in no wrongdoing whatsoever. This offends basic privacy norms, as well as state and constitutional principles. It is essential that the public and the City Council have a complete picture of the intended and potential uses of the DAC. This is necessary for meaningful evaluation and oversight of the DAC by the City Council.

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Lack of transparency. We are troubled by what we see as a recurring lack of sufficient transparency about the DAC. Staff seeks a blank check to negotiate and execute a contract with Schneider Electric, even though the public and the City Council remain in the dark about the true purpose, cost, and technological capabilities of the DAC. The DAC's purpose and its technological capabilities have significant civil liberties implications. Cost is also a significant public policy issue and a matter of public interest. The public has a right to information about all of these aspects of the DAC before it goes forward. "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process." *CBS, Inc. v. Block*, 42 Cal.3d 646, 651-652 (1986); *see also* Gov. Code §6250 ("access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state").

One of our many concerns about the DAC is that its intended purposes are not entirely clear. Is the DAC merely intended to enhance Port security by providing Oakland first responders with access to the Port's surveillance systems? Or is it intended to entail more comprehensive surveillance of Oakland residents? If so, what communities will the DAC target for surveillance, and for what purposes? While the answers to such basic questions remain opaque, they have a dramatic impact on civil liberties. The purposes of the DAC should be clearly articulated in grant documents pertaining to federal funding. Our understanding, however, is that Port and Office of Emergency Services staff have refused to disclose to the public any such grant documents. This refusal is troubling as a matter of public policy and baseless as a matter of law. Grant applications should be disclosed to the public under the Public Records Act. That statute was enacted "to ensure public access to vital information about the government's conduct of its business." *CBS*, 42 Cal.3d at 651-652 (1986). Courts have recognized the public interest in disclosure of documents that shed light on how public resources are expended. *See, e.g., California State University v. Superior Court*, 90 Cal. App. 4th 810, 833 (2001). Grant applications relating to the DAC would set forth the project's intended purposes and highlight any federal conditions attached to receipt of funds. This is all critical information that sheds light on "the government's conduct of its business." *CBS*, 42 Cal.3d at 652.¹

We have also seen a lack of transparency with respect to cost. The most recent staff report related to the DAC states, like earlier staff reports, that there is no fiscal impact to the

¹ The Port and Office of Emergency Services are likely to contend that the information may be withheld under the Public Records Act's exemption for investigatory, intelligence, or security files. *See* Gov. Code §6254(f). Any such argument is meritless. Documents fall under this exemption only if the "primary purpose" for which they were compiled was "correctional, law enforcement, or licensing." *See Uribe v. Howie*, 19 Cal.App.3d 194, 212-13 (1971). Grant application materials were compiled for the primary and exclusive purpose of obtaining funding, not for investigative or intelligence-related activity. *See id.* at 213. Moreover, even if some portions of the grant materials could be deemed sensitive intelligence information, this would justify at most withholding selected portions of the grant materials and disclosing the remainder. *See* Gov. Code §6257 (stating that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law"). No intelligence or security purpose would be compromised by disclosing the overall purposes of the DAC or federal conditions on grant funding.

General Fund, pointing instead to federal grant funds. But the staff report omits the fact that staff have long been aware of the need for the City of Oakland to commit to ongoing support costs for the DAC, to the tune of potentially \$1.2 million a year. *See Darwin BondGraham & Ali Winston, “The Hidden Costs Of Oakland’s Surveillance Center,” East Bay Express (Jan. 22, 2014).* Another cost issue that is not addressed is the potential impact on the City’s coffers if the work by the contractor is not completed by June 2014. The staff report states: “Because of the grant performance deadlines, all this work needs to be completed by June 2014 for invoices processing and reconciliation.” (See Staff Report, dated January 20, 2014, approved by City Administrator January 16, 2014, filed January 16, 2014, at page 4.) The report fails to address the impact on the City if the contractor does not complete the work in the time allotted. In a worst case scenario, the contractor (either due to its own fault or perhaps due to circumstances beyond its control) is unable to complete the work by June 2014 but finishes sometime thereafter. Will the City be unable to recover federal grant reimbursement because of the missed June 2014 deadline, but still on the hook to the contractor for services rendered? Or will the contract be drafted to provide that the City is not liable to the contractor for any work performed and for which the City is unable to recover federal grant reimbursement? Critical fiscal impact issues such as this are unaddressed.

Finally, there is insufficient information about the technological capabilities of the DAC. This is important information that sheds light on the manner and extent of privacy intrusions posed by the DAC. An understanding of “the technology involved” in a particular surveillance method is necessary to “appreciate [its] constitutional implications.” *In re Order Pursuant to 18 U.S.C. Section 2703(d)*, 930 F.Supp.2d 698, 702 (S.D. Tex 2012) (denying government’s request for information about all telephones that registered with four cell towers because request, while potentially identifying robber at crime scene, would also identify “innocent subscribers whose information will [also] be compromised”). In addition, a clear understanding of the DAC’s capacity is necessary in order to understand the functions that need to be regulated. In other words, the City Council cannot provide meaningful oversight over an entity, if it does not understand what the entity is capable of doing. The Request for Proposal should presumably describe in broad brushes the DAC’s intended capabilities – the purpose of the RFP, after all, is to retain a contractor that can build out these functions. But staff has refused to disclose key portions of the RFP. (See Staff Report, dated January 20, 2014, approved by City Administrator January 16, 2014, filed January 16, 2014, at page 4.)

We remain concerned that the City Council lacks essential information about key aspects of the DAC. This lack of transparency on crucial issues such as the DAC’s purpose, cost, and technological capabilities runs afoul of basic notions of open government and impairs the Council’s ability to engage in any kind of meaningful evaluation or oversight of a project that has the potential to be used for warrantless mass surveillance of Oakland residents. The City Council should demand more information with respect to all of these issues before granting staff unfettered discretion to negotiate and execute a contract with Schneider Electric.

Oversight. In addition to authorizing the City Manager to negotiate and execute a contract with Schneider Electric, the proposed resolution would also delegate to the City Manager authority to select, negotiate, and execute a contract with a substitute contractor *without*

returning to the City Council, if the negotiations with Schneider Electric are unsuccessful. The lack of transparency has already significantly impaired the City Council's ability to exercise its critical oversight function. It should not expressly give up its oversight role. The present agenda item is only in front of the City Council because staff did not determine that the prior contractor was out of compliance with Oakland's Nuclear Free Zone Ordinance. We understand that members of the community have raised concrete concerns that Schneider Electric is similarly out of compliance. Any substitute contractor should certainly come back to the City Council for approval. This is especially so given the information attached to the staff report about possible alternative contractors. *See Staff Report, Attachment B* (Britain's attorney general found that G4S Technology LLC "charged ... millions for people they were not actually monitoring" and company faced "further investigation by the Serious Fraud Office"; County Executive of Santa Clara requested investigation into Motorola Solutions, Inc., for misrepresentations regarding project readiness).

While the ACLU of Northern California takes no position on the suitability of any of these particular contractors, we do believe it is essential for the City Council to take an active role in reviewing contractors. Particularly on a project with significant civil liberties implications, oversight by the legislative branch is an essential check in our system of government.

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In conclusion, we urge you not to approve the agenda item as currently proposed. The City Council should first demand greater transparency, and at no juncture should it surrender its oversight of the contractor, as contemplated by the proposed resolution.

Sincerely,



Linda Lye
Staff Attorney
ACLU of Northern California