



MUSLIM BAR  
ASSOCIATION  
OF NEW YORK

Officers:

P.O. Box 2244, New York, New York 10185 – www.mubany.org

*President*  
Atif Rehman

*Vice-President*  
Madiha Zuberi

*Secretary*  
Saira Hussain

*Treasurer*  
Nehal Siddiqui

Board of  
Directors:

Shabbir  
Chaudhury

Sabila Khan

Umair Khan

Merium Malik

Adeel Mangi

June 1, 2016

**Via Email and Hand Delivery**

The Honorable Charles S. Haight  
Senior United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, NY 10007

**Testimony of the Muslim Bar Association of New York  
re: Proposed *Handschu* Settlement**

Your honor, my name is Atif Rehman, and I am here as President of the Muslim Bar Association of New York (MuBANY).

MuBANY is a member-based professional association serving the educational, professional, and social needs of Muslim lawyers and law students living and working in the New York metropolitan area. In order to advance and protect the rights of Muslims in America and to create an environment that helps guarantee the full, fair and equal representation of Muslims in American society, MuBANY works actively to combat anti-Muslim and anti-Islamic stereotypes in the media, in the courts, with law enforcement, and in the greater community. We seek to educate the Muslim community about legal matters affecting the Muslim community; engage in various efforts to promote diversity within the legal and judicial professions; and encourage greater civic participation among Muslim Americans.

We count over 600 attorneys and law students as part of our network. MuBANY members can be found throughout New York City's large law firms, as counsel at major corporations, professors at law schools, public servants, leaders in not-for-profits, and everything in between.

We thank you for the opportunity to participate at today's fairness hearing on the proposed *Handschu* settlement. We also thank counsel for the *Handschu* class, the attorneys representing the *Raza* plaintiffs, and the City for their efforts in reaching the proposed settlement.

For many years members of our organization heard rumors of a police surveillance program that targeted the Muslim community in New York City. These troubling suspicions were confirmed by the reporting of Matt Apuzzo and Adam Goldman of the Associated Press that laid bare the New York City Police Department's massive dragnet surveillance of Muslims in New York City and beyond. MuBANY responded by holding Know Your Rights workshops, CLE programs to educate attorneys and community members on the surveillance program, wrote to Attorney General Eric Schneiderman to investigate, and filed an amicus brief in *Hassan v. City of New York* before the Third Circuit.

Today, we are here to raise concerns and recommend clarifications to the proposed *Handschu* guidelines. As you are aware, this systematic program was not predicated upon evidence of wrongdoing or suspicion of criminality. The sheer fact that they were Muslims from 28 Ancestries of Interest was sufficient for the NYPD to record and make notes of their conversations.

According to Assistant Chief Thomas Galati, the police are permitted to record conversations simply based upon language. During a deposition in this case he stated "I'm seeing Urdu. I'm seeing them identify the individuals involved in that are Pakistani.... "I'm using that information for me to determine that this would be a kind of place that a terrorist would be comfortable in."<sup>1</sup> He continued "[m]ost Urdu speakers from that region would be of concern, so that's why it's important to me."

Your honor, I speak Urdu. According to Chief Galati that fact alone makes me a threat worthy of surveillance.

One of our members, his younger brother's Muslim Student Association at Hunter College placed a sign outside their prayer space, "[p]lease refrain from having political conversations in MSA." These students were afraid for their safety and believed that conversations about the Arab Spring would place them in danger.<sup>2</sup> The disturbing irony is that these young minds were afraid of the Police Department.

And yet, according to the NYPD, all of this was done consistent with the Handschu Guidelines and did not violate the constitutional rights of New Yorkers. We believe the proposed settlement is fair and reasonable. However, we have reservations concerning its adequacy given the permissibility and magnitude of the NYPD's Muslim surveillance program under the existing Guidelines.

---

<sup>1</sup> *NYPD: Muslim spying led to no leads, terror cases*, Aug. 21, 2012, <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases>.

<sup>2</sup> *Muslim Student Monitored by the NYPD: "It Just Brings Everything Home,"* Feb. 22, 2012, <http://www.theguardian.com/world/2012/feb/22/nypd-surveillance-muslim-student-groups>.

## **I. Separate Set of Rules for Counterterrorism Investigations**

Pursuant to Section IX, the Proposed Guidelines do not constrain the New York City Police Department's surveillance activities for intelligence gathering purposes. The stark contrast between criminal investigative activities and intelligence gathering activities is evident. The rest of the Guidelines refer to (criminal) investigative activities, including the new language adding equal protection guarantees (§1), levels of investigation (§5), the new Handschu Committee (§6), and investigative techniques (§7). The Counterterrorism section, however, "identifies a number of authorized activities which further this end [prevention of terrorism], and which can be carried out even in the absence of a checking of leads, Preliminary Inquiry, or Full Investigation as described in these guidelines." (Emphasis added). The section further provides that the "authorizations include both activities that are specifically focused on terrorism and activities that are useful for law enforcement purposes in both terrorism and non-terrorism contexts," (emphasis added) which permits the NYPD the ability to do anything that is not otherwise expressly prohibited or regulated by the Guidelines.

The entire Counterterrorism section is unchanged by this settlement, the NYPD has maintained all along that its surveillance activities are permissible under the existing Guidelines; this was and continues to be a plausible assertion.

We request that Counterterrorism and other so-called activities be treated akin to other criminal activities. The Proposed Guidelines provide ample latitude to the NYPD to engage and protect our communities.

## **II. Strengthening Handschu Committee and Authority of Civilian Representative**

We welcome the creation of the Handschu Committee with the Civilian Representative (CR). In the absence of any meaningful legislative oversight a robust CR will be critical to ensuring that the NYPD does not overstep its authority. We make recommendations and seek some clarifications, to reduce any ambiguities in this very important addition.

First, the CR is required to bring investigatory violations to the Police Commissioner and may only elevate matters to this Court if the "NYPD is systematically and repeatedly violating the Modified Handschu Guidelines to a degree sufficient to show a NYPD policy to act in such a fashion." This creates a number of serious concerns. The language provides for no remedy if the Police Commissioner is not responsive to the issues raised by the CR. Nor may the CR petition this court unless the Guidelines are so violated that it is systematic and a matter of department policy. This structure runs the risk of potentially neutering any positive role of the CR.

In addition, we seek to clarify whether the Civilian Representative (CR) will have access or be able to request statistics for reporting the number of active Terrorism Enterprise Investigations, Full Investigations, Preliminary Inquiries, and Checking of Leads? Will the NYPD provide data/information as to the basis of the investigation? If not, then the CR will not know the magnitude or scope of the types First Amendment activities being monitored. This information is critical for the CR and this court to understand.

Furthermore, as currently proposed, the existence of the CR is limited to five years and this person is appointed by the Mayor upon consultation with the Police Commissioner. Furthermore, the Mayor may also remove the CR with 14 days' notice. Although we may have a Mayor and Police Commissioner who recognize that Constitutional rights apply to all New Yorkers, this may not always be case. We do not believe the current Mayor will appoint a "complaisant, silent boob."<sup>3</sup> However, that may not be guaranteed in the future. Consequently, the CR must be politically insulated and independent. Thus we recommend this individual be judicially appointed.

With regards to the operations and structure of the Handschu Committee, we recommend the settlement include language to clarify: what constitutes quorum, who will chair the committee, and notice to committee members prior to the meeting. Finally, we request that the CR be required to attend as opposed to "may attend" the meetings.

### **III. Review and Destruction of Non-Criminal Records Pursuant to 28 CFR, Part 23**

The Proposed settlement is virtually silent on the issue of non-criminal records retained. We are mindful of balance of interests between retaining records and destroying records. However, in the thirty plus years since the 1985 consent decree, the pervasive use of technology and collection of vast amounts of data pose a greater risk to the invasion of privacy. We are no longer in an era of index cards but rather one of advanced computing that permits the NYPD to retain and share information that may have been obtained through unconstitutional means or policies.

Arguments made in the past rested on the public accessing records through New York's Freedom of Information Law. The City of New York in recent years began asserting a federal doctrine known as Glomar.<sup>4</sup> Never before applied by any state or local government entity, this doctrine nullifies FOIL by permitting the government to "neither confirm nor deny" the existence of records.

---

<sup>3</sup> *Handschu v. Special Services Div.*, 605 F. Supp. 1384, 1410 (S.D.N.Y. 1985).

<sup>4</sup> *Phillippi v. CIA*, 546 F.2d 1009 (D.C.Cir. 1976). There are two cases are before the First Department Appellate Division, *Samir Hashmi v. New York City Police Department* and *Talib Abdul Rashid v. New York City Police Department*.

We thus recommend the NYPD comport with 28 CFR, Part 23, the Criminal Intelligence Systems Operating Policies. In 1980, the Department of Justice recognized the importance of ensuring the quality of information collected and distributed, while protecting the rights of Americans. The Justice Department promulgated, 28 CFR, Part 23, to prohibit the collection and retention of information about First Amendment activities “unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.”<sup>5</sup>

The regulation also mandates that data collected by these agencies be periodically evaluated and destroyed. Specifically, information that is “misleading, obsolete or otherwise unreliable” must be purged.<sup>6</sup> Furthermore, the regulation establishes that in order to retain the data, it must be evaluated at least every five years.<sup>7</sup>

We recommend these best practices be applied to databases controlled by this settlement.

\* \* \*

In conclusion, our comments seek to provide clarity and strengthen the proposed Guidelines. We thank you for the opportunity to share our views.

Respectfully submitted,



Atif Rehman, Esq.  
President  
Muslim Bar Association of New York

---

<sup>5</sup> 28 C.F.R. § 23.30(b).

<sup>6</sup> *Id.* at § 23.30(h).

<sup>7</sup> *Id.*