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ADMITTED: NEW YORK, EIGHTH CIRCUIT
SECOND CIRCUIT, ALGERIAN BAR
US COURT ON INTERNATIONAL TRADE

May 24, 2016

VIA HAND DELIVERY & ELECTRONIC MAIL

Hon. Charles S. Haight
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Email: Lori_Dorais@ctd.uscourts.gov

Re: Handschu v. Special Servs. Div., No. 71 Civ. 2203 (CSH) and Raza, et al v. City of New York, et al, 13 CV 3448 (PKC) (JO) - Settlement

Dear Judge Haight:

As per your Honor's direction, we are making this submission to inform this Court if the proposed Handschu Guidelines in the above-captioned matter, negotiated and agreed upon, are fair and reasonable. We are attaching affidavits from two of our clients. These Muslim individuals have been directly impacted by the New York Police Department's ("NYPD") and have active cases pending before the New York Appellate Division.

The NYPD has targeted the Muslim community, including our clients, with discriminatory surveillance program for the past fourteen (14) years. The Statement of Policy in the proposed guidelines requires the NYPD to consider the impact of its actions on the communities they investigate. We ask this Court to consider the impact that the NYPD's conduct and this settlement will have on the community in deciding whether to approve it.

While the new proposed Handschu Guidelines are a step in the right direction, our clients, ourselves, and the Muslim community have a legitimate concern that a settlement like this raises a lot of issues, especially when the substance of the Guidelines do not seem to provide a clear investigatory process by an independent authority and lacks a strong enforcement mechanism.

In our professional career, we have spent decades representing minorities against the NYPD's civil rights violations including handling the Amadou Diallo case. In the Diallo and related cases, reforms were enacted to monitor and curtail the NYPD's abuse of power such as the disbandment of the Street Crimes Unit following a State Attorney General report documenting systematic abuse against African-Americans and Hispanics in stop and frisk encounters.¹

Recently, the undersigned argued two FOIL cases before the Appellate Division, First Department. The FOIL cases are directly related to the NYPD illegal surveillance of the Muslim community. In those cases, the Petitioners (two Muslim men) requested documents from the NYPD related to the NYPD's surveillance of them. We are attaching the affidavits of those two men, Imam Abdur-Rashid and Samir Hashmi. The individuals and their institutions have been detrimentally impacted by the illegal NYPD spying and their refusals to even confirm if they have records related to the illegal surveillance.

The first affiant, Imam Abdur-Rashid is a reputable civil rights activist and an Imam leading his congregation at The Mosque of Islamic Brotherhood. The second affiant Samir Hashmi was member of the Muslim Students Association at Rutgers University, on which the NYPD spied, and continues to be a community activist, as well as working to foster good relations between law enforcement and the Muslim community.

The two individuals are members of the class and are very concerned that the Handschu Guidelines are not strong enough to curtail the NYPD from continuing to spy on them and their institutions, especially since Section IX of the guidelines, entitled Counter Terrorism Activities and Other Authorizations, appears to allow the NYPD to continue to do the very things complained of here, such as infiltrating mosques and Muslim social organizations when no evidence of criminality exists. They are still permitted to surveil Muslims in cafes and book stores for no reason other than that they are Muslim. These guidelines do not address or correct the very conduct that created the need for Class Counsel to file for an Injunction or the Raza Plaintiffs to file an action.²

According to a series of Pulitzer Prize winning investigative articles published by the Associated Press,³ since 2002 the NYPD has engaged in a domestic surveillance program and the practice of religious profiling that targeted

¹ *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General*: December 1, 1999.

² Section IX of the proposed guidelines which did not change from 2003 version permits the NYPD to surveil individuals in public places, including mosques, even in the absence of the vague evidentiary standards outlined in Section V. In classifying their activities as counterterrorism investigations, the NYPD can continue to engage in the same illegal spying against the Muslim community without any oversight by the Handschu Committee or so-called protections created by the guidelines.

³ AP's Probe Into NYPD Intelligence Operations, Associated Press, available at <http://www.ap.org/Index/AP-In-The-News/NYPD>.

Muslim individuals, places of worship, businesses, schools, student groups, and other establishments located in and throughout New York, New Jersey and Connecticut. Such surveillance included the widespread use of informants in Muslim communities without any evidence of wrongdoing.

We would like to refer the Court to a report entitled *CountertERRORism Policy* issued by The Muslim American Civil Liberties Coalition in 2008 (attached as Exhibit 1). The report discusses how the conduct of the NYPD has alienated the Muslim community, thereby placing it in even more danger by eliminating potential sources of good intelligence.

The NYPD's wrongful actions against the Muslim community were extensively highlighted in the award winning Associated Press articles referred to in footnote 3. As documented extensively in the NYPD's own records and in reporting by the Associated Press, NYPD officers and informants have routinely monitored mosques and businesses frequented by Muslims, including restaurants and bookstores.⁴ The NYPD built databases tracking where Muslims lived, shopped, ate, and gathered.⁵ The NYPD paid infiltrators to surveil people, taking photos and keeping notes on their activities, simply because they are Muslims.⁶ The NYPD also instructed officers and informants to spy on and record the First Amendment-protected speech and activities of Muslim religious and community leaders and members, including students and activists.⁷ As the then-Assistant Chief Galati testified under oath at his June 2012 deposition, none of the information gathered by the NYPD has led to a criminal investigation, the commencement of criminal proceedings, or any evidence of terrorist activity in the Muslim community.⁸ Despite this lack of evidence, the NYPD continued its illegal and invasive behavior for fourteen years. To date, as this Court is considering to approve the proposed Handschu Guidelines the NYPD continues to claim that it did not do any wrong against the Muslim community.

The Raza case (*Raza, et al v. City of New York, et al*, 13 CV 3448 (PKC)(JO)) was filed in the United States District Court for the Eastern District

⁴ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011, available at <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

⁵ Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-infiltration-of-colleges-raises-privacy-fears>.

⁶ Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, *supra* note 3.

⁷ *Id.*

⁸ Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, available at <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases>.

of New York to seek remedies for the illegal surveillance against Plaintiffs.⁹ The Muslim community was instrumental in causing the Raza Complaint to be filed. The lawsuit was filed following wide reporting on the NYPD spying operations against the Muslim community.

Via a joint application, the Handschu Class Counsel and the Raza Plaintiffs decided to settle the case under Handschu. The Proposed Settlement was offered for comment pursuant to Fed. R. Civ. P Rule 23(e). While the proposed Handschu Guidelines are a step in the right direction, the two Muslim individuals fling the attached affidavits, the Muslim community and we express reservation about the weakness of many provisions. These reservations are discussed in details below:

Section IX. Counter Terrorism Activities

The proposed guidelines, in Section V, identify the levels of investigation and provide vague legal standards required to initiate and maintain investigations at each level. However Section IX, which is unchanged from the 2003 guidelines, negates all of the protections and review requirements, as weak as they are, when the NYPD is conducting counter terrorism activities. In other words, there are no rules, no standards, and no review by the Handschu Committee with regard to counter terrorism investigations. For this reason, the proposed guidelines do nothing to prevent the NYPD from engaging in the same activity that led to the filing of these actions. Additionally, vague legal standards regarding the types of unlawful activity that would subject an individual to investigation will continue to lead to abuse by the NYPD. These standards must be more clearly identified.

It is under the guise of counter terrorism investigations that the NYPD surveilled innocent Muslims for the past 14 years and nothing in these guidelines will prevent the NYPD from continuing this activity. Based on this section of the guidelines, the NYPD will still be permitted to infiltrate mosques, social groups and surveil Muslims in stores, cafes and restaurants merely because the individuals who frequent those locations are Muslim. None of the standards outlined in Section V of the guidelines, i.e., a reasonable indication of unlawful activity, apply to counter terrorism activities. In addition, the internal NYPD review and approval, as well as a review by the Handschu Committee do not apply to these types of investigations.

It is clear from the Galati Affidavit, obtained in the case we filed on behalf of the two individuals whose Affidavits are attached hereto, the NYPD argued against our clients that because some Muslims may have been involved in unlawful activity, all

⁹ The Complaint in the Raza case provides definitive proof that the Plaintiffs were under surveillance by the NYPD and that the NYPD paid at least one informant to spy on them. The informant, Shamiur Rahman, later revealed himself in a Facebook post. The Complaint details constant visits by police officers, as well as the distrust created by the knowledge that NYPD was sending informants and undercover officers into the Mosque. Mosque leaders and congregants distanced themselves from new members and congregants even stopped coming to the Mosque.

Muslims are suspected of terror activities. Section IX of the proposed guidelines will permit the NYPD to continue the very conduct that necessitated the filing of the suits being considered by the Court. Under these circumstances, the proposed guidelines do nothing to assist the very community they are meant to protect, nor do they address the very reasons for filing the law suits currently under consideration; therefore, the parties should be required to create more appropriate guidelines for this section.

Private Law Suits

Virtually every resident of and visitor to New York City is a member of the class of individuals covered by the proposed Handschu Guidelines. Members of the community, particularly the religious community, are concerned about the impact this settlement would have on their ability to bring a private action against the NYPD for illegal surveillance, especially when they have no opt out option.

As attorneys who represent many members of the Muslim community against the NYPD, such as the Affiants in this submission have concerns that the NYPD may use the proposed guidelines as a shield against members of the class asserting affirmative or any other defenses claiming the Handschu Guidelines. This is especially when on January 16, 2016, the City of New York used the yet to be approved proposed Handschu Guidelines as a defense in *Hassan v. City of New York*, Civ. No. 2:12-3401 (WJM); filed in the United States District Court in the District of New Jersey. A copy of their answer to the Complaint is attached. The Stipulation of Settlement in this matter was filed on January 7, 2016 and this this Court has not even decided whether to accept the settlement, yet the Corporation Counsel, in its defense of the NYPD, is already attempting to use the proposed guidelines as a shield to prevent Muslim citizens from exercising their legal rights.

Our clients, as stated in their Affidavits attached hereto, are very concerned that their rights will be adversely affected by these guidelines, should they choose to pursue their legal claims for the damages they suffered as a result of the illegal spying by the NYPD. Considering the weak nature of these Guidelines, having them as the sole remedy to correct NYPD violations may expose the class to a violation of their due process rights under the constitution. We suggest that the settlement contain a clear statement that a language should be added to the Handschu Guidelines to state that the NYPD would not use the Handschu Guidelines as a defense against members of the class who choose to file a private lawsuit against the NYPD for illegal spying.

The Handschu Committee

- Mayoral Appointment

The Mayor appoints the Police Commissioner. Allowing the Mayor to also appoint the Civilian Representative to the Handschu Committee, whose job is to monitor police investigations, creates the appearance that the Civilian

Representative will be under the control of the Mayor and Police Department. Such an arrangement diminishes the value of the Civilian Representative in the eyes of the community and does nothing to rebuild the trust destroyed by the abuses that were permitted over the past fourteen (14) years. Ideally, the Court should appoint an independent monitor with investigatory authority; however, at the very least, we suggest that the Public Advocate also have a role in the appointment of the Civilian Representative.

Under the proposed amendments to the Handschu Guidelines, the Civilian Representative is appointed for a term of five (5) years and may be replaced by the Mayor for good cause. Additionally, the Mayor may abolish the position after five years. Dismissal of the Civilian Representative and abolishment of the position requires notice to the Class Counsel.

The Civilian Representative should not be at the mercy of the whim of the Mayor to determine whether to dismiss him or her. Under these conditions, the appointment of the Civilian Representative is self-serving and offers no benefit to the community these guidelines are meant to protect.

Considering that certain investigations under the guidelines are anticipated to last up to five (5) years, and that others can be extended up to and in excess of five (5) years; a five-year term for the Civilian Representative is too short. Ideally, the Court should appoint a monitor with investigatory power and responsibilities to serve.

Power of the Civilian Representative

Under the proposed guidelines, the Civilian Representative is not a monitor and does not have investigatory responsibilities. S/He has no access to documents except for the investigatory statement s/he may have access to during the monthly committee meetings. S/He has no power to initiate an investigation. S/He is required to report violations of the guidelines to the Police Commissioner without access to supporting documentation and complete information (even though the Police Commissioner has up to eleven (11) high-ranking officers sitting on the Committee and is presumably already aware of what his department is doing). In addition, s/he is required to give the Police Commissioner seven (7) days-notice before reporting violations to the Court. These provisions add support to the perception that the Civilian Representative will be controlled by the Police Department and the Mayor. The solution would be to allow the Civilian Representative (or preferably the Court-Appointed Monitor) to have access to all investigatory paperwork and bring all violations directly to the Court.

- Make-up of the Handschu Committee

Under the proposed guidelines, the imbalance of power is compounded by the fact that the NYPD may have up to eleven (11) high-ranking police officers present at

committee meetings, compared to one (1) civilian Representative. We suggest that the Police Department be limited to three (3) participants at any meeting.

An independent, court-appointed monitor with investigatory powers would be the best option. In the alternative, a limited lower number in the committee should be designated and the Civil Representative should be appointed by the Mayor and approved by the Public Advocate.

- Dossiers on the Muslim community

When the committee was abolished in 2003, it offered the opportunity for the NYPD to illegally spy on the Muslim community. Nothing has been done to uncover the information on the illegal surveillance and the community has no remedy through the guidelines to obtain that information. The NYPD's practice of taking years to respond to FOIL requests and the recent invocation of the Glomar Doctrine in response to a state FOIL request necessitates that the guidelines specifically reference access to these documents. The proposed guidelines offer no assurance that a Court will not again suspend even the limited protections offered by the proposed guidelines.

- The Meetings

The proposed guidelines call for monthly meetings that the Handschu Committee members **may** attend. There are no provisions related to scheduling or notice of the meetings. Nor is there a provision that meetings should be scheduled with a preference to the availability of the Civilian Representative. The extremely limited power of the Civilian Representative under the proposed guidelines is based entirely on his/her presence at these meetings. If the meetings are scheduled in a manner to exclude the Civilian Representative, this much touted benefit of the settlement is rendered useless.

- Investigative Statements

Under the proposed guidelines, the Handschu Committee members present at a monthly committee meeting will be provided with an investigative statement pertaining to each opening, extension or closing of an investigation being considered at the meeting. It is not clear whether this statement will be written or oral.

What information will this Investigative Statement contain?

Who will create the Investigative Statement?

Who insures the accuracy and completeness of the Investigative Statement?

All other committee members will be high ranking members of the New York City Police Department, the Civilian Representative will be the only committee member who does not have access to the investigative file and actual DD-5 reports of the

investigation.¹⁰ The Civilian Representative has no role and does not participate in the approval or opening of the investigation. All the other NYPD members of the Handschu Committee will be reviewing the police reports and investigatory files of these investigations as part of their duties. The Civilian Representative will be the only member of the Handschu Committee whose information is limited to the investigatory statement which compounds the power imbalance presently in the committee. The Civilian Representative has no investigatory power and cannot initiate an investigation into violations of the guidelines. We are concerned that the NYPD will continue to conduct its illegal spying and use the Civilian Representative as a token to argue that there is an oversight while in fact there is none considering the weakness of the Civilian Representative's power.

The best solution would be to appoint an independent monitor with investigative authority; however, at the very least, the Civilian Representative should have access to the same documents as the other members of the committee, and be provided with the same opportunity to review the documents as the other members. If the parties to the agreement were serious about rebuilding the trust of the Muslim community, the Civilian Representative would have investigative powers.

- Review of Investigations

It is not clear from the proposed settlement whether the Handschu Committee will review all investigations conducted by the NYPD, or just those that impact the issues covered by the Handschu Guidelines.

To be effective, the Civilian Representative needs to have access to all investigations in order to have a context for evaluating the investigations covered by the Proposed Handschu Guidelines. For example, if the NYPD closes a narcotics investigation based on an anonymous tip after two hours of surveillance without observing criminal activity, it might be relevant that they continued the surveillance of an Imam for 180 days without observing criminal activity based on a similar anonymous tip. Without being able to review all investigations, the Civilian Representative will lack the context necessary to determine whether violations of the guidelines have occurred.

- Term of Appointment

Under the proposed amendments to the Handschu Guidelines, the Civilian Representative is appointed for a term of five (5) years and may be replaced by the Mayor for good cause. Additionally, the Mayor may abolish the position after

¹⁰ The Deputy Commissioner of the Intelligence Bureau, the Chief of the Intelligence Bureau and the Executive Officer of the Intelligence Bureau are all named members of the Handschu Committee. In addition to directly supervising the officers who are conducting the investigations, Section V of the guidelines requires these individuals to be notified and/or approve the opening and extension of these investigations separate and apart from the Handschu Committee.

five years. Dismissal of the Civilian Representative and abolishment of the position requires notice to the Class Counsel.

The Civilian Representative should not be at the mercy of the whim of the Mayor to determine whether to dismiss him or her. The appointment of the Civilian Representative is self-serving and offers no benefit to the community these guidelines are meant to protect.

Considering that certain investigations under the guidelines are anticipated to last up to five (5) years, and that others can be extended up to and in excess of five (5) years; a five-year term for the Civilian Representative is too short. We suggest a permanent position or at least ten (10) years, with Court approval required to dismiss the Civilian Representative or abolish the position.

Equal Protection Clause

The Proposed Guidelines, in the Statement of Policy, have inserted the words “including the guarantee of equal protection.” There is no specific mention, either in the original or the proposed guidelines, of other constitutionally protected rights. The concern is that the inclusion of additional protections that did not exist in 1985 alters the original settlement, thereby necessitating a new class certification, new notice and a new opportunity for potential class members to opt out. Such an inclusion subjects the proposed guidelines to a legal challenge and the potential that a Court may determine them to be invalid. *See*, Fed. R. Civ. P Rule 23.

Record Retention

The proposed guidelines are silent with regard to record retention, except to say that they will be kept for no less than five years. This is particularly important where the investigation did not result in uncovering criminal activity. We know the NYPD was conducting surveillance in Muslim communities for 14 years. We also know, based on the Affidavit of Chief Galati, the activities did not result in criminal charges. That means that there are 14 years of documents relating to surveillance of innocent people by the NYPD. Records of illegal surveillance against innocent people should not be in the NYPD possession. The Civilian Representative could play a major role in insuring that the NYPD complies with record retention and FOIL rules if allowed to access the NYPD records and initiate investigations of possible violations.

The NYPD has a history of skirting the rules regarding records. FOIL requests are delayed for years and, as stated above, they recently used a Glomar response in reply to a NYS FOIL request on behalf of our clients Mr. Hashmi and Imam Abdur-Rashid; FOIL matters which are currently pending before the Appellate Division. Clearly, left to their own devices, the NYPD has demonstrated that they cannot be trusted to follow the law or the rules. Under these circumstances, strict oversight by a court appointed monitor with investigatory powers is the most prudent course of action. At the very least, the Civilian Representative should have authority to review all records related to investigations

conducted by the NYPD relevant to Handschu violations. Again, this settlement and these guidelines should work to repair the lack of trust created by the NYPD actions, not enhance the distrust.

The guidelines should contain a clear statement regarding the retention, production and destruction of documents created during investigations covered by the Handschu Guidelines. These policies should be distinct from the Department's normal retention policies. The statement should also distinguish between records where the investigation resulted in criminal, or terrorism charges and those that did not. The Handschu Committee, including the Civilian Representative, should have the authority to oversee and investigate the retention policies to insure that the NYPD is following the document retention policies.

For the above-stated reasons, we respectfully request that this Court ask the parties to strengthen the settlement and encourage the parties to strengthen the guidelines so that they actually address the conduct that caused the Raza/Handschu lawsuits currently being considered for settlement.

Respectfully Submitted,



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