

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA HANDSCHU, RALPH DiGIA, ALEX
McKEIVER, SHABA OM, CURTIS M. POWELL,
ABBIE HOFFMAN, MARK A. SEGAL, MICHAEL
ZUMOFF, KENNETH THOMAS, ROBERT RUSCH,
ANNETTE T. RUBENSTEIN, MICKEY SHERIDAN,
JOE SUCHER, STEVEN FISCHLER, HOWARD
BLATT, ELLIE BENZONI, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

-against-

SPECIAL SERVICES DIVISION, a/k/a
Bureau of Special Services; WILLIAM
H.T. SMITH; ARTHUR GRUBERT; MICHAEL
WILLIS; WILLIAM KNAPP; PATRICK
MURPHY; POLICE DEPARTMENT OF THE
CITY OF NEW YORK; JOHN V. LINDSAY;
and various unknown employees of the
Police Department acting as
undercover operators and informers,

Defendants.

JETHRO M. EISENSTEIN, for his declaration pursuant to
28 U.S.C. 1746, states as follows:

1. I am one of the attorneys for the plaintiff class
in the above-captioned action, hereinafter collectively
referred to as "Class Counsel". Under the terms of the
consent decree, the Guidelines for Investigations involving
Political Activity (hereinafter "Modified Handschu
Guidelines") and the orders that have been made in this

71 Civ. 2203 (CSH)

DECLARATION OF
JETHRO M.
EISENSTEIN

action, Class Counsel are empowered to bring to the Court's attention policies of the defendants (hereinafter collectively referred to as "the NYPD") that violate the Modified Handschu Guidelines. This application is an invocation of that authority.

2. As shown below, class counsel have reason to believe that the NYPD, in its investigation of the Muslim communities that form a part of the plaintiff class, as a matter of policy retains information about class members' political activity that does not relate to potential unlawful or terrorist activity. Such a policy violates §VIII(A)(2) of the Modified Handschu Guidelines.

3. In a series of published articles dated August 24, 2011 (Exhibit 1), September 5, 2011 (Exhibit 2), September 19, 2011 (Exhibit 3) and September 22, 2011 (Exhibit 4), based on interviews with more than 40 present and former members of the New York City Police Department, an investigative unit at the Associated Press and journalist Leonard Levitt have described an NYPD policy of using undercover officers and confidential informants to gather information about political activity in circumstances where there is no indication of criminal activity. According to these articles the operatives, who target the Muslim communities in New York, are referred to

as "rakers"¹ assigned to identify "hotspots" ("raking the coals")², which include mosques, social gathering places and student organizations based on college campuses.³

4. The breadth of these operations is reflected in testimony given by NYPD Assistant Commissioner Lawrence Sanchez, a veteran of the CIA, who told the U.S. Senate Homeland Security Committee on October 30, 2007 that the guiding principle of these NYPD operations was to view innocuous activity, including behavior that might be protected by the First Amendment to the United States Constitution, as "potential precursors to terrorism."⁴

5. The surveillance of political activity that these operations represent may not violate the modified Handschu Guidelines, which provide that "[f]or the purpose of protecting or preventing terrorist activities, NYPD is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." Modified Handschu

¹ Exhibit 1, page 1.

² Exhibit 1, page 3.

³ Exhibit 2, page 1.

⁴ The full quote is as follows:

"The key to it was . . . to start appreciating what most people would say would be non-criminal would be innocuous looking behaviors that could easily be argued in a Western Democracy especially in the United States to be protected by First and Fourth Amendment Rights but not to look at them in the vacuum but to look across to them as potential precursors to terrorism."

The testimony of Assistant Commissioner Sanchez can be viewed at http://hsgac.senate.gov/public/audio_video/103007video.ram

Guidelines §VIII(A)(2), 288 F.Supp.2d 411 at 429. However, retaining records about protected speech and behavior heard and seen during those operations is a violation of the modified Handschu Guidelines, as “[n]o information obtained from such visits shall be retained unless it relates to potential unlawful or terrorist activity.” Id.

6. The articles, as well as NYPD documents that have been published in conjunction with them, strongly suggest that the NYPD retains such records as a matter of policy. For example, an NYPD powerpoint presentation about the NYPD Demographics Unit, which conducts these operations (Exhibit 5), includes a screen entitled “DAILY OPERATIONS AND RECORD KEEPING” that lists the following set of tasks: “gather intelligence and report activity of individual visits on a daily activity report focusing on key indicators.” (emphasis supplied). The preparation of daily activity reports obviously means that records are being created of what the NYPD operatives have seen and heard. Similarly, a police department memo from the Demographics Unit (Exhibit 6) records the evaluation of a detective assigned to the unit, which included criticism for his failure to include accounts of “rhetoric” heard in cafes and hotspot

locations in his daily reports.⁵

7. The articles report that the intelligence is passed to a team of analysts for review, and this is further evidence that records are prepared and maintained about what the NYPD operatives see and hear. Finally, interviews with NYPD personnel were reported to have revealed the following:

"Some in the department, including lawyers, have privately expressed concerns about the raking program and how police use the information, current and former officials said. Part of the concern was that it might appear that police were building dossiers on innocent people, officials said. Another concern was that, if a case went to court, the department could be forced to reveal details about the program, putting the entire operation in jeopardy. That's why, former officials said, police regularly shredded documents discussing rakers." (Exhibit 1, page 4; emphasis added).

8. These articles, and the accompanying documents, have given class counsel a good faith basis to apply for the relief sought in this motion: discovery to determine whether the NYPD, as a matter of policy, retains information about political activity obtained from visits

⁵ It is noteworthy that NYPD Spokesman Paul Browne initially denied that the Demographic Unit even existed. See Exhibits 1 and 2. After the AP obtained police documents describing the unit as a team of 16 officers with a mission to map and monitor ethnic neighborhoods, the NYPD said that the Demographics Unit used to exist, but actually never had been more than eight officers. See Exhibit 4.

to public places and events when such information does not relate to potential unlawful or terrorist activity, in violation of §VIII(A)(2) of the modified Handschu Guidelines.

9. The articles also provide a good faith basis for the application for a restraining order, as there is evidence that the NYPD has been shredding documents in order to prevent the exposure in court of the dimensions of this program. Pending a determination of class counsel's application for the discovery sought, class counsel also seek an order directing the NYPD to preserve the records in their possession so that they are available for review if the application of the plaintiff class is granted.

10. As shown in the accompanying Memorandum of Law, there is precedent for the relief sought by class counsel. In the setting of a consent decree discovery has been permitted, where good cause is shown, to determine whether the terms of the decree have been violated. This Court ordered discovery to shed light on disputed factual issues as to whether the NYPD's implementation of Interim Order 47 violated the Modified Handschu Guidelines. See 2008 WL 515695 (2/27/08) at p.7.

11. There is also precedent in case law and in this case for the restraint sought. In 1989, this Court entered

an order temporarily restraining the NYPD from destroying documents concerning allegedly unlawful NYPD conduct in connection with the monitoring of WLIB broadcasts. See 737 F.Supp. 1289, 1292 (1989). That order was made on consent, and we would hope that a similarly agreed restraint could be achieved now.

12. On the basis of the presentation set forth above, class counsel pray that the relief sought herein be granted.

13. No previous application has been made for the relief sought herein.


JETHRO M. EISENSTEIN

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2011.