

Pointers on proposed guidelines to restrict NYPD spying: How to file comments on a rare settlement agreement and why it's important

In a rare move, the federal court has invited NYC residents and visitors to comment on restrictions to New York Police Department (NYPD) surveillance and infiltration efforts.

After exposure in 2011 of widespread, years-long surveillance and infiltration against Muslims, multiple lawsuits were filed. The plaintiffs of two lawsuits, *Raza v. City of New York* and *Handschu v. Special Services Division*, have agreed to a proposed settlement, which includes modifications to a set of restrictions referred to as the "Handschu Guidelines." The court is currently inviting public comment on whether the proposed modifications to the Handschu Guidelines are "fair" and "reasonable."

However, the more relevant question is whether the proposed Guidelines modifications are likely to prevent the kind of abusive surveillance and infiltration that resulted in *Raza* and *Handschu* lawsuits.

The following information focuses on certain sections of the proposed modifications and provides recommendations for improvement. You may use this information to assist you in better understanding the proposed settlement agreement and to file comments of your own.

Deadline to file comments & register to be heard at Fairness hearing: Thursday, May 26, 2016

How to File comments: Email handschusettlement@gmail.com or mail the courthouse at address below

Fairness hearing: Wednesday, June 1, 2016 at 10am in the U.S. Courthouse, 500 Pearl Street, NYC

The Handschu Guidelines have been in place since the mid-1980s and are part of a consent decree attempting to curb NYPD spying on individuals and groups engaging in First Amendment-protected activity. However, the Guidelines have been severely curtailed since 9/11 and we now have a rare opportunity to look at: **(1) NYPD access to and retention of personal information, (2) how NYPD opens and renews investigations involving surveillance and infiltration, (3) oversight of surveillance and infiltration, and (4) the composition and authority of the Handschu Committee.**

1. Information collection and retention

The proposed settlement agreement is silent on what the NYPD will do with the records collected under its prior surveillance regime (Demographics Unit). The proposed Handschu Guidelines modifications continue to give police sweeping authority to collect immense amounts of personal data, which left unchecked could easily continue to be abused.

- Records collected under the prior surveillance regime should be destroyed
- Restrictions are needed on production, use, destruction, and retention of records
- Civilian Representative should have authority to oversee record use and retention

2. Opening and maintaining investigations

The proposed settlement agreement would give NYPD authority to open a Preliminary Inquiry on the "possibility of unlawful activity" that need not be "verified as true or accurate." A Full Investigation can be opened when "facts or circumstances reasonably indicate that an unlawful act has been, is being, or will be committed." The standards of "reasonable indication" and "unlawful act" are too vague, which could result in continued arbitrary abuse of NYPD authority. The limit on a Full Investigation is 3 years, but can be exceeded at the sole discretion of the Deputy Commissioner of Intelligence.

- “Reasonable indication of unlawful activity” standard for opening an investigation should be raised to “specific evidence of unlawful activity”
- “Unlawful activity” should exclude minor crimes such as misdemeanors and lesser charges, especially protest-related charges like disorderly conduct or offenses related to civil disobedience
- Presumptive limit on a Full Investigation should be shortened and should not be at the sole discretion of the Deputy Commissioner of Intelligence
- More restrictive language on investigative practices is needed to prevent continued abusive spying and use of invasive technology (i.e. Stingray-type devices)

3. Composition and authority of the Handschu Committee

Although formation of the Handschu Committee represents an attempt at re-establishing a mechanism for civilian review and oversight, it is wholly inadequate. Out of a dozen committee members, only one is designated as Civilian Representative (CR). The rest of the members are high-level intelligence officials and legal counsel. The CR is appointed by the mayor in consultation with the police commissioner. The mayor can replace the CR and after five years modify or abolish the position. The CR must bring alleged violations to the police commissioner for review, but no corrective action is required. Only when the CR can establish that the NYPD is “systematically and repeatedly violating” the Guidelines can they report it to the court, information which is under seal hidden from the public.

The Guidelines should establish an oversight body with impartial judgment, able to effectively investigate violations and act on violations when they occur, thereby holding the NYPD accountable for unlawful conduct.

- Handschu Committee should include an independent monitor with investigatory power
- At minimum, the role of Civilian Representative should be made permanent
- Mayoral appointment of Civilian Representative should also happen in consultation with City’s Public Advocate
- Civilian Representative should have authority to bring all alleged violations directly to the court regardless of whether there is evidence of systemic and repeated violations

4. Oversight and discretionary use of infiltration

The proposed settlement agreement would continue to give NYPD sweeping discretion to use undercover police and confidential informants to infiltrate religious and political groups based on the low-threshold determination that “the information sought could not be reasonably obtained in a timely and effective way by a less intrusive means.” The use of undercover police and confidential informants can be very disruptive and damaging to individuals and groups engaging in First Amendment-protected activity, but falls outside the scope of the Handschu Committee’s oversight.

- The clause allowing undercover operations if “the information sought could not be reasonably obtained in a timely and effective way by a less intrusive means” should be stricken
- The Handschu Committee and the Civilian Representative in particular, should have authority over decisions to use undercover police and confidential informants