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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 BARBARA HANDSCHU, et al.,

4 Plaintiffs,

5 v.

71 Cv. 2203 (CSH)

6 SPECIAL SERVICES DIVISION, et al.,

7 Defendants.

8 -----X

October 1, 2013
10:30 a.m.

9
10 Before:

11 HON. CHARLES S. HAIGHT

12 District Judge

13 APPEARANCES

14 PAUL G. CHEVIGNY
NYU School of Law
15 Attorney for Plaintiff Class

-and-

16 PROFETA & EISENSTEIN
BY: JETHRO M. EISENSTEIN

17 -and-

MARTIN R. STOLAR

18 -and-

FRANKLIN SIEGEL

19 -and-

ARTHUR N. EISENBERG

20 New York Civil Liberties Union

21 MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

22 PETER G. FARRELL

ALEXIS LEIST

23 CELESTE KOELEVELD

24 Assistant Corporation Counsel

25

DA18HANA1

1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your name for
3 the record.

4 MR. CHEVIGNY: Paul Chevigny.

5 MR. EISENSTEIN: Jethro Eisenstein.

6 MR. STOLAR: Martin R. Stolar.

7 MR. SIEGEL: Franklin Siegel.

8 MR. EISENBERG: Arthur Eisenberg.

9 MR. FARRELL: Peter Farrell.

10 MS. LEIST: Alexis Leist.

11 MS. KOELEVELD: Celeste Koeleveld.

12 THE COURT: Well, good morning, everyone. I am glad
13 to see you all again. I am glad to observe that the fountain
14 of youth from which we have all been drinking since 1976 in
15 this case has not lost its magic. You all look the same. I
16 hope you all feel the same. I don't really look the same, and
17 I don't feel the same, but we won't go down that path any
18 further. I am glad to be again in this distinguished company
19 and in this very important case.

20 There has been a Handschu class since the mid-1980s.
21 It was interesting and even entertaining to observe from the
22 declaration of Mr. Jenkins, Brian Michael Jenkins, that even a
23 highly placed person in the RAND Corporation can get basic
24 facts wrong. In paragraph 33 of Mr. Jenkins' affidavit he
25 says, "Since 1971 the department has operated under the

DA18HANA1

1 Handschu guidelines." Well, that's not quite right. I think
2 that what Mr. Jenkins did was see the case began in 1971 and
3 left immediately to an academic and inaccurate inference.

4 1971, of course, is when the case began, and it began
5 when the constitutional claim on behalf of the several named
6 plaintiffs was filed and was assigned to Judge Weinfeld, who
7 wrote some very important opinions in the earlier stages of the
8 case. In 1976, I came to this court and Judge Weinfeld thought
9 this would be a good thing for me to get started on. So he had
10 it transferred to me, and I have been there ever since.

11 It was, I think in the mid-80s, 1986 or whatever, that
12 a class was certified, and if I am wrong in my facts, and I may
13 be, with apologies to the RAND Corporation, I know that in or
14 about that time, the original Handschu guidelines were
15 promulgated, and those original Handschu guidelines were
16 promulgated at the conclusion of some negotiations and
17 settlement discussions between the corporation counsel on the
18 one hand and counsel for the class on the other. And those
19 discussions and negotiations were conducted by very able
20 attorneys in an atmosphere of mutual respect and good will,
21 while at all times counsel did what they felt they should do to
22 protect the interests of the people for whom they spoke,
23 members of the class, and it's a large class, on the one hand,
24 counsel for the City of New York and the police department on
25 the other.

DA18HANA1

1 Those guidelines were part of the negotiated and
2 recommended settlement between the parties. There had to be a
3 fairness hearing, and there was. And what was striking about
4 that was that a number of prominent attorneys for the civil
5 rights bar, who represented individuals, who were class members
6 by definition, appeared at that hearing and objected to it
7 strenuously on the ground that class counsel had not achieved
8 enough to protect the class in the original Handschu
9 guidelines. And there was a time when class counsel, those who
10 are present here today, were sitting in the jury box, as I
11 recall, and heard their handiwork and the settlement they
12 negotiated criticized as entirely inadequate by people who up
13 until then I imagine they thought were friends rather than
14 foes. And it went back and forth. The settlement was approved
15 and was affirmed by the Second Circuit.

16 Then, of course, came 9/11. The rules were modified.
17 The city asked that it be modified. There was opposition from
18 class counsel. What emerged was a decision of this Court,
19 which allowed the guidelines to be modified, and they were
20 modified and the full text of them appears as an appendix to
21 one of the several dozen, I think, opinions now in the Handschu
22 case, the one which is reported at 288 F.Supp. 411.

23 So those guidelines, the modified guidelines, came
24 into effect in 2003. And I think it's fair to say that for
25 most of the time since then, for most of the time during the

DA18HANA1

1 decade between 2003 and the present here, 2013, the so-called
2 Handschu case was always present, but remained relatively
3 quiet. I have come to think of the case as a volcano asleep
4 most of the time, emitting the occasional wisp of steam, but
5 every now and then blowing up, and out emerges the customary
6 lava streams of advocates' arguments. I am dealing with some
7 streams right now. And they emerge because of a perception
8 that the Muslim community may have come under degrees of
9 attention, inquiry, observation, surveillance, if you will, to
10 use that word, in recent years, which class counsel suggests in
11 the present pending motion may very well -- no, they say they
12 do, what is going on, violate the modified Handschu guidelines.

13 The answer that the Corporation Counsel's Office on
14 behalf of the NYPD makes is, on the contrary, the modified
15 Handschu guidelines are scrupulously complied with by the NYPD,
16 and the sort of investigations contemplated and authorized
17 under certain circumstances by the guidelines are very
18 carefully observed, and there are layers of highly trained
19 people in the NYPD who examine all of the things that are going
20 on and make sure that the modified Handschu guidelines are not
21 violated.

22 I am asked by class counsel to enter an injunction
23 stopping the NYPD from doing certain things and requiring them
24 to do other things, all with a view towards curing or
25 preventing or adequately dealing with the perceived violations

DA18HANA1

1 of the guidelines, including the appointment of a monitor or
2 auditor to oversee what goes on in response to and, one would
3 hope, in obedience to the next order that the class asks me to
4 pass.

5 The response from the NYPD is granting any of that
6 relief in any form whatsoever would be terribly dangerous,
7 raise the level of danger of future attacks. It stops a little
8 short of saying the republic will fall, but that is the sort of
9 lava stream which this case has on occasion generated in the
10 past and then has again.

11 So I am going on a little bit longer than I ordinarily
12 would because there are a number of people in court. I don't
13 know who they are. I don't know who you are. You are all
14 welcome in this place because this is the place where you
15 should be. And you are going to hear lawyers make arguments
16 and observations that you should hear. You may even see me do
17 things which you should be present to observe and listen to.
18 And if I ever stop talking, we will get to it.

19 I have extended these remarks a bit because of the
20 presence of the public. And it's good that you're here. What
21 you will be seeing is the efforts of counsel and the Court at
22 the end of the day to ensure that the rule of law operates
23 properly and justly and fairly in this case, a case which
24 touches the lives of people, and is also intended to protect
25 and preserve the lives of people. And between those two poles

DA18HANA1

1 tensions arise. They have since the beginning of the case and
2 will probably go on doing so.

3 So what I am going to do now is to ask counsel to
4 simply give me their perceptions of what this motion is about
5 and what should be done with it.

6 The last preliminary statement I will make is that a
7 month or so ago I issued a brief order suggesting that counsel
8 should confer among themselves with respect to the manner and
9 the extent to which a particular document called an
10 investigative statement should be the subject of further
11 discovery and discussion. I will simply say, for the benefit
12 of those here, that what seems to emerge from the most recent
13 papers, briefs and so forth, is the contention of the city that
14 nothing is done in respect of an inquiry of the sort sanctioned
15 by the Handschu guidelines unless there has first been an
16 investigative statement, which is prepared at lower levels of
17 the NYPD and then goes up and is vetted by everybody. I asked
18 counsel to consider to what extent those investigative
19 statements could be examined by counsel and the Court to see
20 whether or not they demonstrate, as the city says in its
21 papers, that there has been full compliance with the
22 guidelines. And you may hear some references about that today.

23 So because there has been some discussions back and
24 forth, I will ask counsel to bring me up-to-date on that, but
25 even if full agreement on that had been reached, and it has not

DA18HANA1

1 been, I doubt very much that it would have fully resolved all
2 of the issues that arise out of this most recent motion.

3 So these are the sort of questions and concerns that
4 bring us here, and I now will stop talking and hand it over to
5 counsel. And I am going to hear first from counsel for the
6 class. And we have the usual distinguished and ageless team,
7 and they will address me in whatever order they prefer. And
8 then when class counsel have said all they wish to at this
9 stage, then we will hear from counsel for the city, Mr. Farrell
10 I guess.

11 In the old days it was Ms. Donoghue. Do you remember
12 Gail Donoghue?

13 MR. FARRELL: Yes, your Honor.

14 THE COURT: She was a very fine lawyer, and in those
15 early days, when the negotiations were hot and heavy, she
16 played an important part in it, and it's worth remembering her
17 I think.

18 Let me hear from counsel for the class, whatever
19 contentions or arguments you want to make to me this morning.

20 MR. CHEVIGNY: Thank you, your Honor.

21 May it please the Court, I am Paul Chevigny. I am one
22 of the counsel for the class.

23 As you say, you asked us to talk about the character
24 of the motion and then the character of the problems which
25 arise in connection with your recent order. This is

DA18HANA1

1 principally, of course, about how to comply with that order,
2 but I will say a few words about the motion.

3 The motion is a big motion. It is a motion to enjoin
4 these surveillance practices, both through infiltration of
5 organizations and surveillance over persons and through
6 visiting public places and keeping records. But this aspect
7 that we are talking about now is chiefly about the surveillance
8 of the organizations and the persons, the use of confidential
9 informants and detectives and the like to obtain records and
10 attend meetings and follow persons.

11 Now, the motion is a motion to enjoin the practices on
12 the basis that they are too broad with respect to the Muslim
13 community and they violate the guidelines because they are not
14 rooted in a criminal predicate; they are rooted in the fact
15 that the targets of the investigations are Muslims, perhaps
16 conservative Muslims.

17 I won't say a great deal more about that, except that
18 one of the big points is, in order to prevail on such a strong
19 motion and obtain the sort of strong relief that we seek, we
20 have to, as the city says, show that there is a pattern and
21 practice with respect to this, if this occurs. The fact that
22 it occurred once or twice and that an error might have been
23 made by some policeman or a confidential informant might not
24 give enough support for us to obtain injunctive relief. We
25 would have to show that the guidelines are through a pattern

DA18HANA1

1 and practice or through a stated policy being violated.

2 Now, with respect to that, that brings us to your
3 order.

4 THE COURT: Hold on just a minute.

5 I beg your pardon. Go ahead. Please go ahead.

6 MR. CHEVIGNY: Now, accordingly, in order to approach
7 establishing our burden of proof with respect to that standard,
8 we would have to examine a great many investigative statements,
9 according to the city's position, with respect to this motion.
10 The city said, as you know, that the rather, we thought,
11 astounding documents that had been produced by the press and
12 that showed that there was close surveillance over many Islamic
13 institutions were, in fact, just the mere flotsam and jetsam of
14 the investigation, that the investigations in fact were rooted
15 in good cause to believe that there was a possibility or a
16 reasonable indication of crime, and that those underlying
17 reasons were established through the investigative statements
18 and couldn't be established through anything else. So we felt
19 that we would have to examine a number of investigative
20 statements in order to be able to approach carrying the burden
21 of proof.

22 Now, you asked us for the course of the negotiations
23 with respect to this, and this is the meat of what this is
24 about. This is a practical discussion with respect to
25 discovery in our effort to build up a record which would

DA18HANA1

1 support our contentions in the motion.

2 So your order was on August 29, and on the 10th of
3 September, we wrote to corporation counsel and asked to examine
4 the investigative statements with respect to all Muslim
5 institutions and individuals in the City of New York. We are
6 not sure how large a number that is. In all the documents that
7 we studied, including the strategic posture which set forth a
8 panoply of organizations for an investigation, there is about
9 100 names. We weren't sure how many more there were than that,
10 perhaps twice as many. That was a broad request, no doubt, but
11 our feeling was that it was necessary because we didn't know
12 what the pattern or the number of the investigative statements
13 was going to be.

14 The city responded two and a half weeks later by phone
15 to Mr. Eisenstein, and the proposal that the city made, that
16 Mr. Farrell made, was to give us two documents from the group
17 that was initially set forth in our declaration and memorandum
18 of law. There were a group of exhibits concerning the Danish
19 cartoon controversy, the plane crash controversy, and the Sean
20 Bell controversy, as we might call them. And the city was
21 ready to let us look at two of those, of which there was some
22 21, I believe.

23 They were also willing to let us look at two
24 investigative statements that we would select, as I may say
25 blind because we are not going to know which ones would be most

DA18HANA1

1 promising, two out of all the names that were contained in the
2 strategic posture, which was about 120 names. Then with
3 respect to the informant, Shamiur Rahman, they would give us
4 investigative statements to establish the reasons that he had
5 been assigned and the matters that he had. That amounted to
6 five or six documents, depending on how many they were for
7 Shamiur Rahman. So not to put it too strongly, we thought that
8 was not even the beginning of an adequate investigation of
9 this.

10 So two days later, Mr. Eisenstein wrote to Mr. Farrell
11 to say, that's completely inadequate. In our view, we would
12 back off to be willing to -- now this brings us up to last
13 weekend -- we would back off to be willing at the outset to
14 look at the investigative statements with respect to all of the
15 organizations that are included in the declarations, in other,
16 words, that arise under the exhibits that we submitted that
17 arose with respect to Shamiur Rahman and that appear in the
18 strategic posture. That amounts to, as I said, in the
19 neighborhood of 100 names, some of them overlap.
20 Understandably, we didn't receive a response. That was at the
21 end of last week. We offered to give Mr. Farrell's office a
22 list that we would derive from those exhibits, and we have
23 prepared it, but that's where the negotiations came to an end.
24 Now, I don't know what the city wants to say in
25 response to this. This is really a description of a

DA18HANA1

1 negotiation, and I don't want to put it too strongly, but
2 our -- well, I will put it strongly. In our view, this has not
3 been a bona fide set of responses with respect to this. Your
4 order was that counsel and the Court should be able to look at
5 the investigative statements in order to determine whether
6 indeed there was a criminal predicate with respect to Muslim
7 institutions and organizations that were being surveilled, as
8 indeed there was no controversy that they were being surveilled
9 by infiltration. In our view, for the city to come back such a
10 long time later and say, well, we will let you look at five or
11 six documents that you will have to pick blind doesn't respond
12 adequately, as we believe, to the character of your Honor's
13 order, which is really to enable both yourself and counsel to
14 understand whether there is a justification under the
15 guidelines.

16 THE COURT: You correctly described the thrust of the
17 order, but I should add, I think, I composed that order after
18 reading the briefs.

19 MR. CHEVIGNY: Yes, sir.

20 THE COURT: And in the briefs and in the arguments
21 back and forth, this phrase "investigative statement" emerged,
22 and Commissioner Cohen in his declaration went on at some
23 length describing what it was and who looked at it. But that
24 was all I had to go by, and so it seemed to me, put it no
25 higher than that, that the investigative statement might be a

DA18HANA1

1 probative and useful thing to learn a little bit more about.

2 But at the end of that, my most recent order we have
3 been talking about, I closed the order, you will recall, but to
4 be regarded, I suppose, as an unusual expression of judicial
5 humility, I said, I don't know if this makes any sense or not.
6 It's up to counsel to think it over. And if you think, either
7 side, that this is foolishness, this kind of document has no
8 probative value, don't hesitate to say so. This is just my
9 preliminary view of what might be significant on the basis of
10 just reading the briefs.

11 I think it's useful to say that because, yes, I said
12 what I said, but it shouldn't be over-interpreted or
13 overstated. But I don't retreat from it. I simply would
14 reiterate that it seems to me that, particularly when one
15 considers the central role of the investigative statement that
16 corporation counsel assigns to that kind of document, we ought
17 to look at it some more, or see if we can. And that brings us
18 back to where you just stopped, telling me what the efforts
19 have been up till now and you were not satisfied with it. The
20 city, of course, will eventually speak for itself.

21 MR. CHEVIGNY: Well, counsel for the class actually
22 don't know exactly what probative value these investigative
23 statements would have. Under the framework of the guidelines,
24 of course, we are not entitled to see the secret documents,
25 subject to security of the police, that justify their

DA18HANA1

1 investigations. We got to this point only by some person or
2 persons associated with the police having given them to the
3 press and the press having published them. And so it appeared
4 to us that there simply wasn't enough justification under the
5 terms of the guidelines.

6 The city says that the investigative statements would
7 show that there was. We don't know whether that is true or
8 not, but there isn't any way to resolve that without looking at
9 them. And there are two questions. One of them I talked about
10 here at length. What scope, how many, which ones? The other
11 one that I haven't mentioned, and I ought to mention, would be
12 security. The police do not want to give them to us because we
13 are the folks who in connection with the class represent the
14 persons being spied upon.

15 Now, with respect to that, as I understand it, Mr.
16 Farrell said that whatever we examine, we would have to examine
17 at the Corporation Counsel's Office, in private with a person
18 present. We wouldn't be able to make copies. And the initial
19 cut, whatever the scope of the discovery is to be, we would
20 have to sit down and read the documents, and we would be
21 permitted to take notes, but we wouldn't be permitted to do
22 anything else with the documents.

23 We don't like that, but we would be willing to accede
24 to it for purposes of the initial discovery in order to find
25 out what is going on here insofar as we can understand. And

DA18HANA1

1 then following that, of course, depending on whatever is found,
2 we would have to request that the city prepare the documents
3 and redact them, according to some standards that would be set,
4 and present some of them to the Court in an effort to complete
5 the proof.

6 So with respect to the security, the importance of
7 which we recognize, we are willing to do that. But what we
8 seem to disagree about is what it is we are going to look at.
9 I don't know if my co-counsel want to say something in addition
10 to that or whether we ought to pass it to the city at this
11 point.

12 Does anyone want to talk further?

13 MR. EISENSTEIN: Your Honor, there is one other area
14 of our motion which I think ought to be addressed. It relates
15 to the activities of what started out being called the
16 demographics unit and came to known as the zone assessment
17 unit. I am not going to repeat the arguments that we have made
18 comparing the deposition of now Chief Inspector Galati with the
19 description made by Mitchell Silber of what it is that the
20 demographics unit was doing. But what is clear from what we
21 saw is that the demographics unit was going around and
22 listening to conversations and recording them at the rate,
23 according to our reading of the statistics in Chief Galati's
24 declaration, certainly at the rate of about once a week over
25 the last three years.

DA18HANA1

1 What needs to be pointed out in relation to this is
2 that unlike the investigative statements, where we have a
3 genuine dispute, and we suggest to the Court that we have shown
4 enough to entitle us to the kind of discovery that you
5 suggested in your August 29 order, in contrast to that, with
6 respect to the activities of the demographics unit, there is a
7 specific provision in the modified guidelines that says the
8 police can visit public places on the same terms as members of
9 the public generally. But then goes on to say that they cannot
10 keep records with respect to that unless they relate to
11 terrorism or criminal activity.

12 What I think we have already established in the papers
13 before the Court is that that specific prohibition that is
14 contained in the modified guidelines has been violated, and is
15 being violated as a matter of policy, because Chief Galati told
16 us that whatever is in the reports submitted by police officers
17 who are involved in demographic/zone assessment, whatever is in
18 there stays there. In other words, there is no removal of that
19 material. There is no editing of that material. Whatever they
20 choose to say or record, write down, in way of conversations
21 overheard, remains in the records of that unit.

22 So I think that at the very least we have established
23 with respect to that branch of the motion that there is a
24 violation of the modified guidelines and that that violation is
25 not aberrational, but, rather, is a matter of police department

DA18HANA1

1 policy.

2 THE COURT: Well, what I believe that Mr. Galati is
3 saying, and I have looked at his declaration, which came after
4 the deposition that he gave and he comments on it, but what he
5 says in his declaration at paragraph 6, among other things, is,
6 "While the zone assessment unit collected publicly available
7 information about the ethnic concentration within that area, it
8 did not and its mission never was to conduct criminal
9 investigations or conduct investigations as set out in Section
10 V of the modified Handschu guidelines."

11 Then that theme is amplified a bit later on. In
12 paragraph 11, Chief Galati says, "Class counsel attempts to
13 make much of the fact that I testified at my deposition that
14 since my time as commanding officer of the NYPD intelligence
15 division in 2006, none of the visits conducted by the zone
16 assessment unit resulted in an investigation."

17 Then his declaration continues, "While that fact is
18 true, the critical point is that the zone assessment unit was
19 not created to trigger investigations or otherwise generate
20 leads."

21 Then in paragraph 12, Mr. Galati says, "While most of
22 the activities of the zone assessment unit do not concern the
23 'investigation' of 'political activity,' as those terms are
24 defined under the modified Handschu guidelines, when the zone
25 assessment unit's activities arguably fall within the scope of

DA18HANA1

1 those terms, the zone assessment unit is authorized under
2 Section VIII(A)(2) of the modified Handschu guidelines to carry
3 out its mission by such visits."

4 Now, what seems to me to emerge from that is a
5 suggested, and, of course, if this is one of the arguments that
6 corporation counsel is making I will hear it from them shortly,
7 but the sense I get is that, yes, there is a zone assessment
8 unit, yes, it does things, but the things that it's doing are
9 not investigations of "political activity."

10 Mr. Galati says, political activities, that term is
11 defined in the guidelines. I am not sure it's defined anywhere
12 in the guidelines, but political activity is something we are
13 familiar with. But the sense I get is he is saying the zone
14 assessment unit is doing things which are useful from a police
15 republic point of view, but they are not doing what the
16 guidelines are talking about. That's not part of their job.

17 One of the questions we may have to deal with is, what
18 are the political boundaries of the guidelines themselves?
19 Section III of the modified guidelines says, "These guidelines
20 apply only to investigations which involve political activity.
21 They do not apply to or limit other activities of the NYPD in
22 the investigation or detection of unlawful conduct, the
23 preservation of the peace and public safety, or other
24 legitimate law enforcement activities which do not involve
25 political activity." And then the three kinds of

DA18HANA1

1 investigations that are to be entered into.

2 What Chief Galati may be saying is that the zone
3 assessment unit is not in the least concerned with political
4 activity and isn't doing any investigations under the three
5 level form of investigations, all spelled out in the
6 guidelines. The argument may be, in other words, that it
7 certainly is possible to imagine that not everything that the
8 police department does to anybody at any time in anyplace falls
9 within the guidelines. And if what they are doing does not
10 fall within the guidelines, because it's not that kind of
11 activity, then such conduct is not relevant to the question of
12 whether or not the guidelines have been violated.

13 I don't know if that's what corporation counsel is
14 going to argue or not. If he wasn't planning on doing it,
15 maybe he will.

16 MR. EISENSTEIN: Since it's on your mind.

17 THE COURT: It is on my mind, and this is what we call
18 full disclosure in the law, because I thought it is on my mind,
19 and I wanted to share that with you because I want to know what
20 is in your mind, and you can do a better job of telling me what
21 is on your mind if you can get some dim notion of what is in
22 the judge's mind. It's not always easy, but that's why I said
23 it.

24 MR. EISENSTEIN: That's one of the reasons why it's
25 such a pleasure to appear before you because you do tell us

DA18HANA1

1 what is on your mind.

2 The two things that haven't changed under the original
3 guidelines and the modified are the definition of political
4 activity and the definition of an investigation. Political
5 activity is the exercise of a right of expression or
6 association for the purpose of maintaining or changing
7 governmental policies or social conditions. An investigation
8 is a police activity undertaken to obtain information or
9 evidence.

10 Now, your Honor may recall that in probably Handschu
11 VII, you encountered the somewhat metaphysical argument from
12 the defendants that, if our heart is pure, the fact that we are
13 engaged in an activity to gather information, and the
14 information is political, does not make that an investigation
15 of political activity. And I would say that the Court rejected
16 the notion that it can so totally turn on what is in the mind
17 of the police. Obviously, there is an element of
18 intentionality that is there, but it isn't simply that they can
19 say, yes, we gathered information, yes, it's about things that
20 are political, but our intention was not to investigate
21 political activity, therefore it's not covered by the
22 guidelines. That can't be the case, and I think your Honor
23 rejected that in Handschu VII or VIII.

24 But passing that, I don't see how anyone can say with
25 a straight face that sending a police officer out to a public

DA18HANA1

1 place, having him -- and I think they are all him in this
2 situation -- listen to conversations that people are having
3 about their political views, like, what a shame it was that
4 this worker, who was fired for burning the Koran, was rehired
5 and given back pay. Can you imagine what would happen if he
6 had burned the bible? That's an expression of political views
7 and the police officer who brought that back to the office and
8 reported that was gathering information about politics, and I
9 don't see how it is possible to say, and I don't think I said
10 this before, but maybe I did, to say with a straight face that
11 that is not an investigation of political activity.

12 Finally, it is specifically prohibited by the modified
13 guidelines. The modified guidelines contemplated and gave the
14 police the power to go to public places on the same terms as
15 members of the public generally and then limited that power.
16 And it's in that respect, your Honor, that we believe that
17 there is almost a conceded violation of the modified
18 guidelines. Because that's bright-line rules. That has
19 nothing to do with intention. That has to do with gathering
20 information and recording it when the source was a visit to a
21 public place and the rules themselves say that that kind of
22 information gathered in that setting can't be recorded unless
23 it relates to crime or terrorism.

24 THE COURT: And you think that that particular
25 violation, the retention aspect of Section VIII(A) (2) has been

DA18HANA1

1 established on the present record, is that your view?

2 MR. EISENSTEIN: Yes.

3 THE COURT: How is that? Is it through the
4 deposition?

5 MR. EISENSTEIN: It's through the deposition of Chief
6 Galati, who when asked whether the reports, such as the report
7 that I just summarized, are brought in by the police officers,
8 whether anything is removed from them, in other words, whether
9 that which relates not to crime or terrorism but, rather, is a
10 discussion of views, whether that's ever removed, he said, no,
11 what is in there is in there. It's dealt with, I think he
12 said, as a matter of training. I'm not sure what that means,
13 but it is not removed in any way.

14 Further to that, the description of what they are out
15 there to do is to be a listening post, is to listen for the
16 reactions of people. And if they are recording the reactions
17 of people that are peaceable reactions, that are political
18 reactions, it seems to me that that's what the rule said they
19 could not do, and I think that that is established not just
20 anecdotally, but established as a matter of policy on the
21 record that's already before you.

22 THE COURT: So that underlies the first of the relief
23 you are asking me for, paragraph 8(a) of, I think it's
24 Professor Chevigny's declaration.

25 MR. EISENSTEIN: Correct.

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1 THE COURT: I am asked to enter "an injunction against
2 continuing the practice of retaining records concerning visits
3 to public places, for purposes of intelligence through the zone
4 assessment unit, the demographics unit, or any other unit of
5 the NYPD where no information has been obtained that relates to
6 potential unlawful or terrorist activity."

7 That's what you say the second paragraph of that
8 particular provision prohibits.

9 MR. EISENSTEIN: Correct.

10 THE COURT: And you say they are doing it and you want
11 an injunction to make them stop doing that, retaining records
12 concerning visits to public places for purposes of
13 intelligence, at which point the city may raise up and say,
14 well, that's not for purpose of intelligence. And we may get
15 back into some of the philosophical questions we have explored
16 in the past.

17 What would you do if they say that? You're asking for
18 an injunction against continuing the practice of retaining
19 records concerning visits to public places for purposes of
20 intelligence through the zone assessment unit. The answer may
21 be the zone assessment unit isn't concerned with intelligence
22 and doesn't participate in that function. Therefore, that
23 particular branch of the injunction prayed for has no office to
24 perform.

25 MR. EISENSTEIN: They clearly are involved in

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1 intelligence. Both Galati and Silber said they are out there
2 listening in order to gather information about how people are
3 reacting to things. That strikes me as intelligence gathering.
4 So the notion that they are not gathering intelligence is
5 contradicted by their own words.

6 THE COURT: And you say that's established by the
7 present record?

8 MR. EISENSTEIN: Correct.

9 I will simply say one other thing. Your Honor said we
10 are here, as we always have been, about the tension between the
11 two poles, between people's right to be free from intrusive
12 government oversight and the safety of the people of New York
13 City.

14 The balance that was struck in this particular regard
15 was that the police were given a certain power under the
16 modified guidelines to go to places, and the limitation of that
17 power was that what they could bring away from those places was
18 limited to information about crime or terrorism. They could
19 go, they could listen, but they could not record unless it's
20 about crime or terrorism. That's the balance that these rules
21 struck. These rules are binding on them, and they have been
22 violated, and I think that's the core of our argument on that
23 point.

24 (Continued on next page)

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1 THE COURT: All right. Thank you.

2 Mr. Stolar.

3 MR. STOLAR: Good morning, Judge.

4 I just wanted to briefly add back on the question of
5 what the scope of discovery might be.

6 THE COURT: Yes.

7 MR. STOLAR: If you had not issued your order in
8 August, we would have been up here basically arguing to you
9 that the next stage of this proceeding is discovery,
10 essentially looking for the investigation statements that
11 govern the class of people who we are complaining about.

12 Our initial request of the city was, all right, we
13 think there's a pattern and practice. We want to see every
14 single investigation statement since the new guidelines were
15 adopted in 2003 that deals with the Muslim community,
16 individuals and institutions.

17 Their response was, we'll let you see two or three of
18 them, as was summarized by Professor Chevigny. Our response to
19 that was, I'll tell you what, we will limit the scope of what
20 we are seeking to the individuals, organizations and
21 institutions which are laid out in the papers that we have
22 filed with the Court, and we have prepared a list of about 100
23 or 120 such things that we're prepared to give the city.

24 What I'm standing up here to do is to bring to the
25 Court's attention that there are a number of other individuals

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1 and institutions which have come to our attention since we
2 filed papers with the Court in early September. The AP
3 reporters who had given us some early information wrote a book,
4 and in connection with their book that was released were a
5 number of other documents that had come from inside the New
6 York City Police Department. Those are not part of the record
7 yet, but I want to let the Court know that they exist.

8 In addition, in late August the same two reporters
9 wrote another story concerning how there are roughly at least
10 16 mosques that were designated, just by virtue of being
11 mosques, as the subjects of terrorism enterprise
12 investigations. All 16 mosques are not necessarily listed in
13 the papers that we filed with you. And a whole other series of
14 documents also from within the NYPD were also publicly released
15 which are not before you yet.

16 So, I just want to let you know that there are other
17 things out there that have come out since the papers were filed
18 which consist essentially of documents that have been released
19 by the AP reporters into the public realm, and we'll figure out
20 a way to supplement the record with you when we finally get
21 some kind of a ruling as to what the scope of the discovery and
22 the view of the investigation statements would be.

23 I think that it is a review of the investigation
24 statements -- preliminary, full and terrorist enterprise --
25 that will rise or fall with this motion. We'll see them.

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1 You'll see them. The city will see them. And we'll all make a
2 decision based upon what we see there. But some mechanism has
3 to be established that allows us to look at them and look at a
4 full scope of them, not just a limited number that the city has
5 offered.

6 THE COURT: Let me ask you this: It doesn't directly
7 bear on these issues, but you were giving me some additional
8 information, and I wanted to ask you for a little bit more.

9 I have a sense that there is currently pending,
10 perhaps in the Eastern District, some, quite separate and
11 different, lawsuits brought by members of the Muslim community
12 or people within that general area against the police
13 complaining that things have been done. Am I right in that?

14 Just occasionally I read about it in the newspaper, I
15 think.

16 MR. STOLAR: Yes, you are. And if you'd like a fuller
17 explanation, I think Arthur Eisenberg, who is with the New York
18 Civil Liberties Union, might be able to give you that.

19 THE COURT: Yes, that's right. I remember reading his
20 name, and I said to myself, "I know that man." But, you know,
21 I think it's a question which is related to part of the
22 problems that are going on now, although not probative, I
23 shouldn't think, of what is being specifically considered in
24 this case, or vice versa for that matter. But I did want to
25 put on my own agenda just an inquiry about what's going on

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1 there, and I'll welcome information from any source.

2 MR. STOLAR: (Indicating)

3 MR. EISENBERG: Yes, your Honor. Good morning.

4 There is a separate lawsuit in the Eastern District of
5 New York before Judge Chen. It is unlike this case, which
6 rests upon the claim that two provisions of the Handschu decree
7 are being violated by the practices at issue.

8 The case in the Eastern District is driven by
9 constitutional arguments. There is no argument in that case
10 that the Handschu guidelines are being violated. The lawsuit
11 in that case is purely based on constitutional claims.

12 In terms of the status, the city answered, I think,
13 the first week in September. There is a procedural discovery
14 dispute now on the issue of whether the matter should be
15 bifurcated and the Monell issues separated out that the
16 magistrate judge is considering, and the parties are also in
17 the process of developing a protective order for purposes of
18 discovery.

19 THE COURT: Fine. I don't want that case, so don't
20 misunderstand me. It's sufficient unto the day, but I wondered
21 about it. And now I know more.

22 Anything else from the plaintiff's side?

23 MR. STOLAR: Not from me.

24 THE COURT: Then would the city like a brief recess?
25 I'll give it to you if you want it, although if you are ready

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1 to go now, that will be fine too.

2 MR. FARRELL: I think we're ready, your Honor.

3 THE COURT: Very well, Mr Farrell, the city may
4 proceed.

5 MR. FARRELL: Good morning, your Honor. Peter Farrell
6 on behalf of defendants. I had appeared before you several
7 years ago as part of the dispute over what was the videotaping
8 of demonstrations, and at that time my colleague was Gail
9 Donoghue, who you had mentioned earlier. As you know, Gail has
10 since retired.

11 THE COURT: Yes.

12 MR. FARRELL: So we have inherited the defense of this
13 case.

14 So I want to start out, your Honor, by addressing and
15 putting into context class counsel's claim in this case. Class
16 counsel's claim in this case is that the New York City Police
17 Department investigates Muslims based solely on their religion.
18 Their claim is that is the only reason whatsoever that the
19 police department takes any actions with respect to
20 investigations that involve people of the Muslim faith. That's
21 a very serious allegation. The department takes it very
22 seriously.

23 I think that if you step back and think about that
24 allegation and ask oneself, is that allegation plausible? I
25 think the answer to that is no, just based upon the history of

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1 what has taken place around the world for the past many years,
2 and certainly in New York City since 9/11 with the terror
3 attacks on the World Trade Center.

4 . You know, it's undeniable that those attacks were
5 carried out by Islamists who were radicalized to violence.
6 It's undeniable that New York City remains at the center of the
7 threat by Islamists who are radicalized to violence. You can
8 turn on the news almost any night, as I do, and you can see
9 that there is coverage about Islamists who are radicalized to
10 violence carrying out terror throughout the world. And yet,
11 class counsel come in here and ask this Court to find that the
12 NYPD's actions with respect to investigations that it's
13 conducting is driven solely -- and I emphasize that solely --
14 on the basis of a person's faith as a Muslim.

15 I would posit to the Court that that position is just
16 not plausible, and that when you look at Supreme Court
17 precedent -- and I know under the modified Handschu guidelines
18 they're not arguing constitutional violations -- but on Supreme
19 Court precedent, there's a case that came out not too long ago,
20 *Ashcroft v. Iqbal*, and the court says when you're presented
21 with a claim in the case, the first thing the court should say
22 to itself, is this claim plausible? And the *Ashcroft v. Iqbal*
23 is 556 U.S. 662. In that case, it, in fact, involved the
24 federal government taking certain action with respect to people
25 of the Muslim faith, and the court in that case found that the

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1 claims in that case just were not plausible.

2 So I think that as we're going to get into the
3 specifics of this case, it's important that the context of what
4 is taking place in the world and what is taking place with
5 respect to the threats against New York City, which, you know,
6 is laid out in detail in Commissioner Cohen's declaration --
7 but there have been significant plots against New York City by
8 Islamists who have been radicalized to violence. Fortunately,
9 those have been thwarted, but those include plots against the
10 Brooklyn Bridge, against Times Square, against the Herald
11 Square subway station, the subway system and many others that
12 are listed in Commissioner Cohen's declaration.

13 That's the backdrop with which I stand here today
14 addressing their claims. Now, let's look at specific claims
15 that they make. Their lead piece of evidence in support of
16 this claim is the declaration and reliance upon a former
17 confidential informant of the NYPD Shamuir Rahman. And they
18 say that that declaration and that evidence that he provided is
19 part of their substantial proof that they put before the Court
20 to show that there is this policy of investigating Muslims
21 based solely upon their religion.

22 We have put in evidence which is indisputable with
23 respect to the confidential informant Rahman that he was, in
24 fact, utilized as part of an investigation into several
25 individuals, and one of those individuals has since in fact

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1 pled guilty earlier this year to attempting to provide material
2 support to al Qaeda affiliates. That is issued in a press
3 release June 26, 2013 by the Eastern District of New York, and
4 that person who pled guilty is known as Justin Kaliebe.

5 So their lead piece of evidence in this case, which
6 they relied upon and say, this shows it, your Honor. They're
7 saying to the Court, this shows it. We have this confidential
8 informant who told me "I was told to go out there and just" --
9 quote, their words -- "spy on Muslims and to surveil them just
10 because they're Muslims" is one hundred percent without
11 equivocation refuted by the fact that the persons, one of which
12 the investigation involved, has pled guilty to support of
13 terrorism.

14 So, you take that piece of information and then you
15 look at their papers here, your Honor, they said, here it is,
16 here is all of our evidence. And I'm quoting from their brief
17 at page 4, "substantial persuasive evidence." In fact, what
18 they did do when they brought this motion in a letter to the
19 Court, with a cover letter dated February 4, 2013, class
20 counsel said to this Court in addition to the fact that here's
21 the substantial persuasive evidence to show this policy and
22 practice claim that we're alleging, they withdrew their motion
23 for leave to conduct discovery which they had earlier brought
24 on October 25, 2011. That's in their letter dated February 4,
25 2013 to this Court.

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1 So, the city comes in, and we put in the evidence
2 that's now in the record, including refuting their reliance
3 upon the former confidential informant Shamuir Rahman. Now
4 they say, oh, well, now we want additional discovery.

5 It kind of reminds me of a case, your Honor. I was on
6 trial recently here in the Southern District. It's as if you
7 went to trial, plaintiffs put on their case, defendants get up,
8 put on their case, and then in the middle of trial plaintiffs
9 say, that sounds like a pretty strong case the defendants have.
10 I'd like to take an adjournment to conduct some more discovery.

11 They made a strategic decision to bring the motion, to
12 withdraw their motion for discovery, to bring this current
13 motion, and they believed that the evidence they were putting
14 in before the Court was substantial and persuasive to prove
15 their claim that the New York City Police Department had a
16 policy or practice of surveilling Muslims based solely upon
17 religion.

18 THE COURT: Well, it may be my fault, Mr. Farrell.
19 They may be doing this because I jumped on the investigative
20 statement horse and ran away with it.

21 MR. FARRELL: Your order raised the issue, your Honor,
22 which they may be trying to take advantage of at this point in
23 time. My argument to you is, they made a choice to withdraw
24 their motion for discovery, to bring the current motion for
25 injunctive relief and, pivotally, the key point is that they

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1 said, here is the substantial persuasive evidence.

2 The city has shown you, taking each of those
3 allegations -- and you really don't need to go any further than
4 the Rahman allegation because that's the one that they held up
5 as being kind of the smoking gun. Here it is. Here's our
6 proof that the city is employing confidential informants in
7 this non-willy-nilly way just to go out and spy on Muslims, and
8 that's refuted.

9 That takes us to the question, your Honor, then if --
10 so the first point that I am making is that they really should
11 not be entitled to any other discovery because they made
12 certain choices. They put the record in before your Honor.
13 They took their position, and they should live by that.

14 The second thing I would say is if your Honor is
15 inclined to have discovery, we did engage in conversations with
16 class counsel with respect to discovery, but we think the
17 discovery based upon the record that they put in and the
18 allegations that we refuted, that they shouldn't just get
19 open-ended discovery into the intelligence division's
20 investigative statements.

21 In terms of context of where the discovery was at, the
22 discussions we had, the city had offered -- first, their
23 request was, we want every investigative statement that
24 involves Muslims in any way, shape or form. They said our
25 response was not reasonable. I would say that request really

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1 isn't reasonable in the first instance. But they made that
2 request.

3 We came back to them and said, OK, we are willing to
4 show you investigative statements, and we'll pick two
5 investigative statements from each category of the ones that
6 you raised in your motion -- investigative statements about
7 where Danish cartoon reporting came from. We said we'll give
8 you all the investigative statements relating to the
9 confidential informant Shamuir Rahman. So that wasn't limited
10 in any way, shape or form. The department was prepared to give
11 all of the investigative statements related to Shamuir Rahman.
12 It also said it would give -- you know, that class counsel
13 could choose, and it was in no way intended to be detrimental
14 to them. So that we weren't guiding them in any way, shape or
15 form, they could pick two of the entities or people that were
16 identified in several of their various exhibits. They could
17 pick those out, and then we would produce the investigative
18 statements with respect to two of them in each of the
19 categories.

20 We believe that on the present record where defendants
21 have refuted their claims and where they brought this motion
22 and were not seeking any additional discovery, that that
23 proposal is fair and appropriate in this instance.

24 We also have to remember -- there are two other points
25 I'd like to make on this, your Honor -- that discovery poses

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1 significant risks when you're dealing with confidential
2 information that can implicate ways of undercovers or
3 confidential informants. I was involved in a case in the past
4 several years where there was an issue about discovery about
5 the field intelligence reports that the intelligence division
6 had. In that case, the district court had ordered that the
7 department disclose under a protective order the field
8 intelligence reports. Because that issue was so important, we
9 took an appeal to the Second Circuit, and the circuit granted
10 our writ of mandamus and quashed the discovery request for
11 those field intelligence reports. That case, your Honor, is
12 titled In Re: City of New York. The citation for that is
13 607--

14 THE COURT: You're giving me that, I gather, because
15 it's not in your brief. Is that so?

16 MR. FARRELL: I would have to check to see whether
17 we've cited it.

18 THE COURT: Whether we have it or not, give it to me
19 again.

20 MR. FARRELL: The citation is 607 F.3d 923. The
21 reason, your Honor, that wasn't in the brief, if it's not in
22 there, is because the city understood, and as it was explicitly
23 stated by class counsel, that they weren't seeking discovery.
24 They had withdrawn that motion and they had put before your
25 Honor the substantial persuasive evidence. So it would not

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1 have come to defendant's position to start arguing about
2 discovery in that briefing. So it probably is not in there.

3 THE COURT: Then I ran off the reservation, and here
4 you are.

5 MR. FARRELL: In that decision, your Honor, as I say,
6 the discovery that was sought, it was a question of first
7 impression on the law enforcement privilege. The court went
8 through the analysis, and as part of that analysis, it also
9 found not only weren't the plaintiffs entitled to the documents
10 that were sought the field intelligence reports, but the court
11 addressed the inadequacies and the potential concerns of
12 attorneys' eyes only protective orders noting that when you
13 have this type of information that is sensitive, confidential
14 and can impinge upon the public safety, that an attorneys' eyes
15 only protective order is not the panacea that resolves those
16 concerns.

17 THE COURT: So what's your bottom line, Mr. Farrell?
18 Is it that on the present record, what it contains and what it
19 doesn't contain, and the various reasons why the present record
20 is the way it is, the present motion on behalf of the class
21 should be denied in its entirety on the present motion; no
22 further discovery required. Is that your bottom line? And if
23 it isn't, for heaven's sakes, tell me so; but I just want to
24 make sure I'm following your thread.

25 MR. FARRELL: Your Honor, the position is that our

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1 defense of their motion, as they put it, defeats their motion.
2 They haven't put in evidence, certainly substantial persuasive
3 evidence, that shows there was a policy or practice of
4 surveilling Muslims based solely upon religion. They have not
5 carried that burden of proof on the present motion, and they
6 had withdrawn their motion for discovery. So their motion
7 should be denied in its entirety.

8 If your Honor is inclined to grant plaintiff's counsel
9 discovery despite that record, then it's our position that it
10 should be limited for all the reasons I've already stated to a
11 select subset of the investigative statements that their motion
12 papers put in issue. The offer that we had made to them was
13 take to two of each of those categories. That's articulated in
14 letters and correspondence between myself and Mr. Eisenstein.

15 I will say that the last thing on that, your Honor, is
16 that we had spoken last week, and plaintiff's counsel was going
17 to send the defendants a list of the entities or organizations
18 for whom it wanted, if there were any, investigative statements
19 for, and we were in fact waiting for that list. So, it was my
20 understanding that they were going to send us that list before
21 we responded further to it, and I just want to clarify the
22 record that we were -- I don't think class counsel was waiting
23 for us to give them a response to their initial proposal. I
24 think Mr. Eisenstein and I in good faith had discussions about
25 that, and we're still discussing it, which is why we had sent

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1 that letter to the Court or the email to the Court that
2 prompted that over the weekend.

3 The next thing I'd like to turn to, your Honor, is
4 what's been called the Section VIII(A)(2) dispute. Now,
5 Section VIII(A)(2), your Honor -- well, two things: One is
6 that, as your Honor is well aware, when the guidelines were
7 modified in 2003, the purpose behind the modification was to
8 allow the department to gather or collect intelligence prior to
9 an unlawful act being committed. We cite those sections that
10 are laid out in the Modified Handschu Guidelines that
11 explicitly state that.

12 When I think of the Modified Handschu Guidelines, I
13 think of them in two ways. You have the first part which is
14 that first half, and that's Section V, where you need some
15 level of unlawful activity, the possibility of unlawful
16 activity or a reasonable indication of unlawful activity. And
17 then there's what I kind of think of as the back half, which is
18 the Section VIII(A)(2) where you don't need any of that. It
19 specifically authorizes the department to go out and visit
20 public places on the same terms and conditions as the public.
21 This is the second half of their motion. I have addressed the
22 first half of their motion with respect to investigations.

23 I'm now going to respond to what Mr. Eisenstein was
24 discussing with you about Section VIII(A)(2). In Section
25 VIII(A)(2), as I say, you don't need any predicate of unlawful

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1 activity, not even the possibility of unlawful activity. The
2 NYPD is entitled to go out and visit any place and attend any
3 event that is open to the public on the same terms and
4 conditions as members of the public.

5 Now, class counsel complain about conversations. And
6 it's important, I think, analytically just so we can frame
7 this, that the zone assessment unit goes out and gathers
8 information, as is stated in our papers, but, for example, it
9 would have the name and address of a business. It would have
10 the type of building it may be in. And as part of the
11 voluntary discovery we had shown them when they first brought
12 that motion for some discovery, we had made available to them
13 samples of the reports that are generated by the zone
14 assessment visits.

15 They picked the years. They picked the dates of a
16 certain amount that we had agreed to, and then we made those
17 available to class counsel to come in and look at. So, they
18 looked at those reports. And their argument, the way they word
19 it in the papers seems to try to want to enjoin everything that
20 the zone assessment unit does. It's saying you have to stop,
21 and they call it intel. But I think what is the difference
22 between the two sides of this is the first part about going out
23 and finding out where a business is located, what the name of
24 it is and the type of building it is, and that type of what I
25 call like phone book information, is two things.

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1 One is, in our opposition we said, we don't -- it
2 doesn't appear that they're taking issue with that type of
3 information that's being retained. When they responded, they
4 never responded and said, yes, by the way, we're not taking
5 issue with that type of information retained. They keep coming
6 back and focusing on conversations that are retained as part of
7 those visits.

8 There are two things there. One is, I think, for
9 purposes of the Court in terms of analyzing this, we need to
10 know definitively whether class counsel is, in fact, claiming
11 that that type of phone book information that is collected is a
12 violation of the Modified Handschu Guidelines.

13 We show that it is not for two reasons. One is, we
14 agree with the Court, and the Court's perception, that that act
15 of noting where a business is or the location is not the
16 investigation of political activity.

17 THE COURT: Is that my perception?

18 MR. FARRELL: I thought it might have been, but
19 perhaps -- that was what I thought I heard you saying, and we
20 made that argument, your Honor, in our opposition brief on page
21 25. We said on page 25 of our opposition brief that this type
22 of -- I'm going to use the shorthand phone book information --
23 is not subject to the Modified Handschu Guidelines. But we
24 also added that even if the Court found that it was subject to
25 the Modified Handschu Guidelines, we articulated in the

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1 declarations and in our brief as to the reasons why it is that
2 that type of information is potentially related to unlawful or
3 terrorist activity.

4 The reason that is, your Honor, without going into all
5 the details is, if you need to respond to a threat of a
6 terrorist coming from an incubator country from where
7 terrorists have been identified as coming from, and you find
8 out it's a person from this country speaking this dialect and
9 doing this thing, you would want to know where that person may
10 try to go to blend into the community so as not to be detected.
11 That would be one reason.

12 Another reason would be that you'd want to go and find
13 out that perhaps that person might try and recruit somebody who
14 has a similar background and characteristics as him. And we
15 identified these various reasons in our papers.

16 So, either way, I think the two points that we take
17 away from that is (A) that type of information is not covered
18 under the Modified Handschu Guidelines; and even if the Court
19 disagrees with us, we have put forward in our opposition papers
20 the reasons why that type of information and the test in
21 Section VIII(A)(2) is potentially related to unlawful or
22 terrorist activity. I'll stop there on that point.

23 Then you get to the focus of what class counsel's
24 papers appears to be, and that has to do with the conversations
25 that are retained. The first thing that strikes me, your

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1 Honor -- and I'm not sure that they disputed this -- is that,
2 as your Honor knows, and I was part of this from the prior
3 years of our litigation before the Court, in order to bring a
4 claim to violate the Modified Handschu Guidelines when there is
5 no constitutional violation, they have to show it's a policy or
6 practice and has to be a systemic practice and has to be
7 widespread. That's what your Honor found as part of our
8 litigation over the past several years, and that's articulated
9 in your decision.

10 They're not claiming a constitutional violation here.
11 So they have to show that a systemic practice, a widespread
12 practice that's prevalent. I would note that one of the
13 reasons they're not claiming it's a constitutional violation is
14 because under the Supreme Court precedent *Laird v. Tatum* and
15 Second Circuit progeny that you have cited in your decisions,
16 that collection and retention of information based upon visits
17 to public places does not violate the First Amendment. So that
18 is noted. You said that in your prior decision. We've argued
19 that. You've accepted that position and cited the law on that
20 point. In fact, plaintiff's counsel is not making a
21 constitutional violation.

22 The only claim at issue here in this case is a
23 systemic practice of the Modified Handschu Guidelines. Now,
24 when we get to conversations, we have put in and gone through
25 the document that they looked at, and it turns out that out of

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1 the sample set that class counsel reviewed, there were 346
2 visits to public places in those documents. Only 31 of those
3 visits contained conversations. 31 out of 346; that's
4 8.9 percent. That, in our opinion, is not systemic. Even if
5 you assume that it was being retained in violation of the
6 Handschu guidelines, which we do not -- and there are reasons
7 why it is important and is related to potential terrorist and
8 unlawful activity -- it's 8.9 percent of the conversations.
9 That is not a systemic practice.

10 Additionally, in part of this motion, the defendants
11 went through and looked at the past three years, 2010 to 2013,
12 and they reviewed all the reports that were generated by the
13 zone assessment unit. These numbers are laid out in our brief,
14 your Honor. They're also laid out in Chief Galati's
15 declaration. In the past three years, there were 4,247 visits
16 made by the zone assessment unit; and of those visits, there
17 were only 207 conversations recorded. When you do that math,
18 that comes -- I'm not a statistician -- but it comes to
19 4.9 percent conversations.

20 So, the sample set that they looked at, 8.9 percent of
21 conversations recorded compared to the number of visits, and
22 the last three years which had over 4,000 visits, you're at
23 4.9 percent. That is not a systemic practice under any
24 analysis.

25 I would also note that it's not the department's

DalQhan2

1 practice either to be taking down or recording names of the
2 individuals who have conversations. It's only in a limited
3 instance where a name is taken, and sometimes it's an instance
4 of just a first name taken. Other times it's just a
5 conversation that's heard with no names that are associated or
6 tied to the conversation.

7 So, it's defendant's position that based upon those
8 indisputable facts -- that's the number of conversations versus
9 the number of visits -- that plaintiff's counsel cannot, and
10 has not met, its burden to show it's a systemic and widespread
11 practice of violating the Handschu guidelines.

12 THE COURT: Well, let me turn on what the numbers
13 actually show and what they actually mean. If every
14 conversation that was overheard was recorded and retained, that
15 could be a practice of recording statements from a group of
16 people who were unusually taciturn, who, for the most part,
17 just sat there in stony silence, but whenever they said
18 something, it was recorded and retained. That's a practice.
19 It's just they didn't talk much. I mean, that may be not a
20 plausible -- to use that word -- interpretation of the numbers,
21 but how can one be certain in this area? And if one cannot be,
22 then that leads to the question of who has to show what in a
23 matter like this.

24 But do you see why I have some misgivings about the
25 argument I think you're making from the numbers? If I'm going

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1 wrong in that regard, you should show me how. I don't quite to
2 know what to make of those numbers, frankly. I didn't quite
3 know what to make of them when I read them, and now you've
4 called my attention to them, and I still don't know what to
5 make of them. What should I make of them?

6 MR. FARRELL: I think that the numbers should be
7 accepted as the maximum because common sense and plausibility
8 dictate that when you go into a business, into a store and
9 people are buying and selling things, and there's people
10 sitting around and conversing, that the common sense and the
11 likelihood is that there are a lot more conversations that -- I
12 mean, when you go out into public, and there's a lot more
13 conversations that are going on that were not recorded. So,
14 that while I hear what your Honor is saying, I think that that
15 can be disposed of by taking a common sense kind of practical
16 approach to going in and thinking about when you walk into a
17 business, what you hear and what's happening. So I understand
18 it, but I think our papers and those numbers are powerful and
19 do not show a systemic practice.

20 In addition to that, even if the Court had some
21 concerns over those numbers or wanted to focus on the question
22 that your Honor just raised, the fact of the matter is that the
23 conversations, the overwhelming majority of the conversations
24 that were noted and retained, are related or were related to
25 potential unlawful or terrorist activity. Again, these facts

DalQhan2

1 are laid out in detail in Commissioner Galati's declaration.

2 For example, in the sample set of conversations
3 that -- I'm sorry -- in the sample set of reports that class
4 counsel reviewed, out of those conversations, most were taken
5 at a time when the current events that were taking place in the
6 world raised the New York City Police Department concerns for
7 the safety of New York City. I mean, an example of that would
8 be the Danish cartoon. You had a Danish cartoon be published.
9 People of Muslim faith took great issue with that because it
10 depicted the prophet Mohammed. There was a violent reaction
11 throughout the world. Two embassies were burned in, I believe,
12 in Damascus. I believe the Danish Embassy was one of those
13 that was burned. It was a world-wide reaction by the Muslim
14 community to that Danish cartoon depicted the prophet Mohammed.

15 So, prudence and common sense, quite frankly, dictates
16 to find out is there a potential for ricochet violence here in
17 New York City? Because these things are happening world-wide.
18 And the department deploys and finds out what's being said
19 about the Danish cartoon. Those conversations, your Honor,
20 could be both conversations that say, hey, let's go do
21 something in reaction to the Danish cartoon, and those
22 conversations could also be, hey, you know what? There's
23 nothing wrong with that. We don't want to do anything.

24 Here is the crux of the situation: Both
25 conversations, whether it promotes violent behavior or does not

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1 promote violent behavior, relates to the potential for unlawful
2 activity. The department needs to have an understanding of
3 what is the likelihood of a violent reaction occurring. So, in
4 order to make that assessment, one needs to know what is being
5 said about it. As part of that analysis and calculation, it's
6 important to know, are people talking about committing violence
7 or are they talking about not committing violence?

8 So, while the class counsel want to just point to,
9 well, if the conversation itself doesn't have the words "let's
10 go commit some violence" in it or some unlawful activity, that
11 that automatically per se means it's not related to a potential
12 unlawful terrorist activity. We don't agree with that.

13 It's defendant's position that you obviously need to
14 know both sides of the equation to make an assessment, which is
15 what the intelligence department is trying to do, or the New
16 York City Police Department is trying to do in determining
17 whether there is a possibility of unlawful conduct. Again,
18 this has to do with the retention of the conversations.

19 They are not disputing that you can go out and note
20 the conversation in the first instance, right. Under
21 VIII(A)(2), everything the department did in terms of
22 collecting and gathering information, they do not take dispute
23 with. The papers are not saying, their position is not that
24 the department couldn't go out and do it initially. The only
25 argument they're making under VIII(A)(2) is, while it was

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1 authorized under Handschu to go out and collect all that
2 information and bring it back, you weren't supposed to retain
3 these conversations.

4 They haven't articulated a basis for not retaining all
5 the other pieces of what I call cataloging the phone book
6 information, but the conversation they're saying you shouldn't
7 retain. What they point to is the conversation itself doesn't
8 contain a statement for unlawful activity. As we've said in
9 our papers, and as articulated by intelligence professionals
10 who have more knowledge and experience than I do, that is, it's
11 important to know both sides of the equation.

12 The last point on conversations, your Honor, is if you
13 didn't note the conversation and the people who are making the
14 assessments, that you would have to go out the very next day
15 and/or the next week and keep checking on the conversations,
16 and giving updates because you wouldn't have had anything in
17 the records to go look at and say, hey, what was the status of
18 whether there was conversation to promote violence or not to
19 promote violence. So I think that's the point or the couple of
20 salient points under the VIII(A)(2) analysis.

21 Before I check with my colleagues, is there anything
22 that the Court has not addressed that was raised by class
23 counsel that I haven't addressed in this response?

24 THE COURT: Well, I do have one comment or question
25 for you, and it fits sensibly with the VIII(A)(2) subject we've

DalQhan2

1 been discussing. There are these two sentences in VIII(A)(2).
2 The first one says that "NYPD is authorized to visit any place
3 and attend any event that is open to the public of the same
4 terms and conditions as members of the public generally,"
5 period. End of first sentence.

6 Class counsel's briefs make something of a point that
7 when, for example, Commissioner Kelly made a speech at Fordham,
8 he quoted that sentence and then moved on seamlessly with his
9 remarks but didn't mention the second sentence, which is what
10 we're really been speaking about here most recently, and says,
11 yes, the NYPD can visit any place, attend any event open to the
12 public on the same terms and conditions as members of the
13 public generally, period, full stop.

14 Second sentence: "No information obtained from such
15 visits shall be retained unless it relates to potential
16 unlawful or terrorist activity."

17 Now, I think the present evidentiary record raises
18 potential questions and issues, not just with respect to
19 VIII(A)(2), but also with respect to some of the more general
20 issues that counsel have been discussing.

21 I want to tell you why I say that. I want to put this
22 to you: Exhibit 7 to the class counsel's initial presentation,
23 is a long, large document. It's captioned "NYPD Intelligence
24 Division Strategic Posture 2006." The distribution appearing
25 on the first page is NYPD and the police commissioner, and then

DalQhan2

1 it's stamped secret. Well, that distribution list has been
2 expanded somewhat, it would seem.

3 I look at it, and on page 86, 87 and 88, there is a
4 tabular breakdown. I didn't include all the pages. It begins
5 with page 85, 86, 87 and 88. It's a tabular recitation or a
6 summary of whether or not the NYPD is maintaining undercovers
7 and informants. We all know that those are two kinds of
8 people. There's an undercover and there's an informant. They
9 are both familiar creatures in law enforcement. They, of
10 course, do different things.

11 Well, there are lists of whether or not there's an
12 undercover or an informant, and you can say yes or no as to
13 each, at least four pages involved mosques, a list of mosques,
14 and indications of whether this mosque or that mosque has an
15 undercover or an informant or both or one or the other or
16 neither.

17 Then page 89, 90, and 89 refers to Muslim student
18 associations. Page 90 is Islamic schools of concern, it said,
19 and there's a reference to whether there is an undercover or
20 informant at each one of those.

21 Now, this would seem to be a little different from
22 attending an event or a place on the same terms and conditions
23 as members of the public generally. The use of informants and
24 undercovers one does not readily associate with the public
25 generally. It's a special entity of the public here, in this

DalQhan2

1 case, the NYPD.

2 This is evidence, for what it's worth, which is in the
3 present record. Now, I think I would be interested in your
4 telling me -- in referring to the papers or whatever -- but I
5 think when you see something like that, it's natural enough to
6 wonder within the general context of the tension between
7 privacy and protecting the public, what is or what can you tell
8 me or point me to so that I can -- withdrawn.

9 I would be interested in your telling me, if you can,
10 what the NYPD is doing these days with mosques and student
11 associations, because the possibility -- putting it no higher
12 than that -- that emerges from evidence in this record is that
13 there might be some legitimate areas of concern, you see, which
14 would not be fully met or answered by that provision in
15 VIII(A) (2) attending a place on the same terms and conditions
16 of the public generally.

17 Now, you may regard that question I put to you asking
18 for your comment on it as entirely unfair or completely outside
19 the scope of this hearing or a stupid question, any one of
20 which or all of them, you have a First Amendment right to say
21 to me; you know that. But in part of a full disclosure of
22 what's in the judicial mind, if I may put it that way, I would
23 be interested in the -- you see, it's a question that emerges
24 from the present record. Should I be concerned about this? If
25 not, why not? Tell me your own views on this aspect of it.

DalQhan2

1 MR. FARRELL: Your Honor, let me address that. I
2 think that what may be a point of confusion is that Section
3 VIII(A)(2) talks about going to public places on the same terms
4 and conditions of the public --

5 THE COURT: Yes.

6 MR. FARRELL: -- that is not at issue in what you have
7 just pointed to. The police department doesn't use
8 confidential informants and undercovers in the sense of
9 investigative statements and investigations of the Section V of
10 the Handschu guidelines. Section V of the Handschu guidelines
11 authorizes undercovers and use of confidential informants for
12 various levels of investigation. Section VIII(A)(2) is about
13 going out just to public places without any prerequisite or
14 indication of unlawful activity.

15 So the department is not using undercovers and
16 confidential informants as contemplated in Section V for levels
17 of investigation to carry out Section VIII(A)(2) types of
18 activities. This was made clear to class counsel and in the
19 deposition of Chief Galati, which was part of the voluntary
20 discovery that we provided, and, quite frankly, part of the
21 reason defendants wanted to provide that voluntary discovery
22 was so that class counsel understood what was happening under
23 Section VIII(A)(2) within the department, and you cited the
24 salient part of Chief Galati's declaration where he said that
25 the demographics unit, or the zone assessment unit as it's

DalQhan2

1 known today, is not involved as part of making investigations.

2 So, there is a clear line of demarcation between the
3 VIII(A)(2) material we're talking about and what you've
4 referenced as Exhibit 7. So Exhibit 7 is on one side of the
5 equation in terms of you pointing to undercovers and
6 confidential informants, and then the VIII(A)(2) material is
7 the material that is gathered without the use of confidential
8 informants and undercovers. I don't know if that clarifies it
9 for your Honor.

10 THE COURT: Yes, it does. I think that's where you
11 started off, as I recall, by saying you viewed the guidelines,
12 this is the first half and then the second half.

13 MR. FARRELL: Yes, your Honor, that's right. That's
14 right. That's why I think, your Honor, that I don't believe
15 there is any question under the Section VIII(A)(2) -- let me
16 restate that. For VIII(A)(2), the evidence in the record -- no
17 one, as I understand it, not even class counsel, is now seeking
18 discovery under Section VIII(A)(2). I heard Mr. Eisenstein say
19 to you that under VIII(A)(2) the record before your Honor is
20 submitted, they're not seeking any discovery.

21 The other point, your Honor, just so it's clear, that
22 you don't have any investigative statements being created for
23 VIII(A)(2) types of activities. I think that helps put it in
24 context perhaps to understand the difference between VIII(A)(2)
25 information and levels of investigation under Section V.

DalQhan2

1 THE COURT: Yes, that's useful. Confer with your
2 colleagues and see if there is any further assistance you want
3 to give me.

4 MR. FARRELL: Yes.

5 (Pause)

6 THE COURT: Let me say this to counsel -- class
7 counsel because they have the burden of persuasion -- you have
8 the right to reply to what's been said and would retain the
9 right for the last word if counsel for the class do -- oh,
10 you're still there Mr. Farrell. Forgive me.

11 MR. FARRELL: That's OK, your Honor. It took me a
12 moment longer to confer. I just wanted to wait until your
13 Honor was finished.

14 THE COURT: I have finished except to apologize again.
15 I was going ahead, and suddenly, I looked up, and there you
16 were. Say something.

17 MR. FARRELL: So, the last point I wanted to add, your
18 Honor, was that in the pages of that Exhibit 7 that you had
19 pointed to, the first column about the undercover and
20 informant, as I said, had to do with the Section V
21 investigation whereas the demographics listing was under that
22 Section VIII(A)(2) distinction.

23 Then the last thing I would add, your Honor -- this is
24 just an observation that once again goes to the systemic
25 practice. I know your Honor was looking at this in terms of

DalQhan2

1 the mosques that were listed here, and the numbers in our
2 paper, I believe in the mosques, there were 53 -- and this is
3 2006, I also wanted to point out; the document you were
4 referring to is a 2006 document, which was not an investigative
5 statement and was not used for that purpose. So the
6 information contained in this document is looking at
7 information prior to the date of the document, obviously, 2006
8 or earlier. And of the concerned mosques, there's 53
9 identified in that document, when you add them up, and the
10 document also notes that there are over 250 mosques in, I
11 believe, the New York City or the greater New York City area.

12 I do think that, once again, when you look at it, that
13 if what they're alleging is a systemic and widespread practice
14 of investigating Muslims solely on the basis of one's religion,
15 and no other reason, then it would be arguable that you would
16 have 250 mosques or more listed in this document and that is
17 not what the document has contained in it.

18 MR. STOLAR: Judge, would you consider a ten minute
19 break at this point? We do have some things to say.

20 THE COURT: Yes. Off the record, please, just for
21 scheduling purposes.

22 (Discussion off the record)

23 Then we will continue this case at 2:30, and we will
24 wrap the case up during the course of the afternoon.

25 (Recess until 2:30)

DA17HAN3

AFTERNOON SESSION

2:30 p.m.

THE COURT: Please be seated. Well, I hope that lunch fortified you all. It can sometimes. I found myself reflecting on one of the first cases I ever tried. I represented the United States government. A naval ship had sunk in the Delaware Bay and given rise to all sorts of litigation. We were on trial, and an expert witness called for the other side testified, and I thought he was brilliant. He just wiped my whole theory of the case out, and thank goodness Judge Thompson at that point said we'll break for lunch now, and the Navy commander who was my solicitor on the case, and other people, we all went to lunch. They seemed perfectly relaxed. I was destroyed. And we ordered. As the lunch came, and they started talking about what the expert had said and what was wrong with it, and how vulnerable it was, I listened, and I ate some lunch, and by the end of it I was pretty well satisfied that this expert witness was a charlatan and a fraud, and I went back and cross-examined him and proceeded to demonstrate that. But it was the lunch hour which helped. And I hope it helped you -- not that you were in the need of it, I'm sure.

But having said all that, do counsel for the plaintiff class wish to be heard in reply?

MR. CHEVIGNY: Yes, your Honor.

DA17HAN3

1 MR. FARRELL: Your Honor, plaintiff's counsel has
2 graciously given me one minute to address the court.

3 THE COURT: Oh, yes, you keep popping up, Mr. Farrell.
4 Go ahead. Go ahead.

5 MR. FARRELL: Your Honor, you asked me what has the
6 NYPD been doing with respect to today investigations of mosques
7 and Muslim student associations. And, you know, the answer to
8 that is that they are following leads. Where they have
9 information about the possible unlawful activity, or a
10 reasonable indication, they follow those leads, and that's
11 demonstrated in these papers.

12 The papers are the confidential informant Rahman, he
13 was part of an investigation, and in the declaration that the
14 defendant submitted it's stated that as part of his assignment
15 of that investigation he would go to where the subjects of the
16 investigation would go. And two of the places that Rahman went
17 to as part of that investigation was to the Muslim student
18 association events that John Jay College was sponsoring -- or
19 it's Muslim student association was sponsoring -- as well as
20 mosques. So, the investigation of the individual led him to
21 those places.

22 I wanted to make sure that if I wasn't clear about
23 that earlier, that I'm certainly clear about it now. And this
24 ties in with one other -- this is demonstrated one other way.

25 In the case that you raised, and in which

DA17HAN3

1 Mr. Eisenberg is cocounsel on in the Eastern District of New
2 York, there there are five or six plaintiffs who are suing for
3 constitutional violations. Two of those are mosques. And the
4 defendants in response to the answer in part of the initial
5 conference submitted a letter to the court in the Eastern
6 District laying out the reasons why the particular mosque
7 plaintiff in that case -- some of the reasons that support the
8 investigation that are at issue in that case.

9 So, I have a copy of that letter. If your Honor would
10 like, and I would be happy to pass it up, so you can see those
11 reasons that were articulated in that instance.

12 I would also refer the court back to the record in
13 this case which is the Rahman issue, and specifically the
14 declarations that defendants put in by Detective Hoban and
15 Chief Galati and Commissioner Cohen which articulates that the
16 NYPD follow the guidelines and pursue those matters when they
17 have a lead, and that's how -- that's the state and has been
18 the state of the NYPD's investigations.

19 The last thing I would raise -- and they're related --
20 and if your Honor has any questions on that, I will be happy to
21 answer on what I've said so far before I quickly switch gears.

22 THE COURT: You had a chance to talk about it with
23 your colleagues during lunch too, didn't you?

24 MR. FARRELL: Actually, your Honor, it's in our
25 papers. I just didn't emphasize it to the court as I had

DA17HAN3

1 wanted to initially, so I wanted to take the opportunity to do
2 it now.

3 The other part of this is that with respect to the
4 investigative statements that defendants were in discussions to
5 show class counsel in this case, again our position is they're
6 not necessary for all the reasons I said. But they
7 characterize it as a handful four or so. I just want to be
8 clear that the record was the latest exchange of communications
9 as to what we would make available to show them were two
10 investigative statements from each of what I will call issues
11 or exhibits that they listed in their papers, and those were
12 Exhibits 7, 9, 10 and 11. So, that would be eight there. And
13 then we -- as I told Mr. Eisenstein -- that defendants would
14 similarly put forward two -- they would pick by random their
15 choice -- no influence by us -- two ISs for each of their
16 categories, and then we would similarly choose two of each of
17 those categories, for eight more, which would meet the 16.

18 Plus we were willing to give or make available -- not
19 give -- make available and show them the ISs related to the
20 confidential informant Rahman, which were three additional ISs.
21 So that was 19 in total.

22 I just wanted to make sure the record was clear as to
23 what we had offered, because I don't believe it was
24 characterized correctly initially.

25 Then my final point is -- and this dovetails with what

DA17HAN3

1 I said earlier -- is that these investigative statements are
2 extremely sensitive; they contain information about ongoing
3 investigations; they have information about confidential
4 informants and undercovers, about people under investigation.
5 There are privacy interests that are at issue, and in class
6 counsel's most recent correspondence to me, or a phone
7 discussion, they indicated they weren't even willing to have
8 redactions made in the investigative statements when they were
9 shown to them, to protect those interests. They wanted them to
10 be shown in their entirety, which for all of the reasons I
11 previously have set forth would just be unacceptable and not
12 warranted under these circumstances.

13 So, I appreciate the court's indulgence of hearing me
14 again, and I thank class counsel for giving me a few minutes of
15 their time.

16 THE COURT: Very good.

17 Now, if counsel for class wish to be heard in reply,
18 now is the time.

19 MR. CHEVIGNY: Thank you, your Honor.

20 With respect to some of the things I have just been
21 said, I'm going to leave it to Mr. Eisenstein to comment,
22 because he had the telephone calls with Mr. Farrell, and I did
23 not.

24 MR. CHEVIGNY: I'm going to talk primarily about the
25 matters that were mentioned before lunch. The chief point that

DA17HAN3

1 the corporation counsel made is that the plaintiff class has
2 not made out a case with respect to the investigations by the
3 police. I'm not talking now about the visits under VIII(A)(2);
4 I'm talking about the investigations which involve undercovers
5 and infiltrators.

6 The corporation counsel's argument essentially is that
7 in the first place they say that the evidence that we produced
8 is insufficient to support our case that there are
9 investigations that are not authorized by the guidelines.

10 And Mr. Farrell says that our chief piece of evidence
11 is the statements of Rahman, who is the informant. Well, I
12 mean whether a piece of evidence is chief or isn't chief is a
13 matter of opinion, of course. That isn't our chief piece of
14 evidence. But with respect to it, Mr. Farrell claims that it
15 has been indisputably refuted by the statements of the police.
16 Now, therein lies the key to much of their argument. In fact,
17 everything about the facts with respect to Rahman is disputed.
18 It is disputed by Rahman and it is disputed by the police. The
19 City is taking a position that because a statement was advanced
20 by a policeman it is, therefore, irrefutable, as I understand
21 it. And that type of thinking runs through their work.

22 Commissioner Cohen tells us that there are
23 investigative statements that would justify all the
24 investigations that appear upon the documents that we have
25 submitted. And I take it from the tenor of this argument that

DA17HAN3

1 that is supposed to be sufficient, that Commissioner Cohen said
2 it was so, and that they were justified under the guidelines,
3 and, therefore, that is sufficient evidence for them to say
4 that we do not have a case.

5 Now, I don't think I need to say a great deal more
6 about that, because I think your Honor has essentially in his
7 order of August 29th signaled that you think there is a
8 legitimate dispute as to whether there was a justification for
9 these investigations or not; and there ought to be discovery
10 with respect to that.

11 And so essentially the argument that the City has been
12 making is that they disagree with your Honor's order; they
13 don't think that there ought to be any discovery; and that that
14 is the reason why, in fact, that they paltered with us about
15 whether they were going to give us information or they weren't,
16 because they didn't think there ought to be any such discovery.
17 Mr. Farrell as much as said that.

18 For the reasons I have advanced, I think that we are
19 entitled to discovery. I think there is a dispute. I think
20 that the matters that are advanced particularly at this
21 strategic posture show that there is a dispute with respect to
22 the justifications for the investigation.

23 In addition, Mr. Farrell brought in the argument that
24 materials are privileged.

25 There isn't a syllable about law enforcement privilege

DA17HAN3

1 in the City's papers. Mr. Farrell advanced this case, which is
2 indeed a leading case in the Second Circuit, but if in fact the
3 City wants to make that argument, I think they ought to make
4 it, and it ought to be laid out. I hope it won't be, because
5 it would prolong this matter a great deal.

6 I'm not going to attempt to argue the law enforcement
7 privilege point now, but this is an entirely new matter. As
8 far as I had known, there was nothing raised about law
9 enforcement privilege. I had understood that the city was
10 ready to discuss what sort of discovery there would be, not
11 that there ought not to be any as a matter of principle.

12 Now, I don't want to try to discuss every single
13 matter raised by Mr. Farrell. Many of them I would defer to
14 Mr. Eisenstein to discuss, particularly with respect to the
15 visits by the police to public places.

16 But Mr. Farrell made the point at the beginning and at
17 the end of his argument that we did not make a plausible case
18 for the way in which the police conducted their investigations.
19 He said it was not plausible that the police were conducting
20 their investigations because the subjects of the investigation
21 were Muslims. But in fact Mr. Farrell's argument shows -- I
22 mean not only do the police documents show -- but Mr. Farrell's
23 argument shows that that is the way the police and the
24 defendants think about this. Because he opened his argument by
25 discussing a panoply of recent threats of terrorism or acts of

DA17HAN3

1 terrorism in the city, and said in effect that these
2 incidents -- regardless of the police investigation -- give
3 rise to an inference that those who commit terrorist acts will
4 be Muslims, and that in the reverse if we think about Muslims,
5 we can, therefore, think about their propensity to commit
6 terrorist acts.

7 Then at the end of his argument he discussed the
8 Danes' cartoon controversy, and in that connection he advanced
9 the argument, as I understood it, that there was a
10 justification pursuant to the guidelines, in other words an
11 indication of crime in the mere fact that Muslims discussed the
12 Danish cartoon controversy, because if they discussed it, they
13 were to urge that there be acts of violence, then of course
14 that could be characterized as terrorism; but if they discussed
15 it and repudiated acts of violence, that would be a political
16 act by a Muslim, and that would point toward that Muslim
17 thinking about terrorism, and that, therefore, that would be an
18 indication of terrorism, and that would justify an
19 investigation.

20 Now, this is exactly what we thought they thought.
21 They believe that because persons who are Muslims discuss
22 politics, however passively, they are giving the police
23 department an indication of crime, which would be sufficient to
24 justify a preliminary investigation or an investigation.

25 We believe that that type of argument, taken together

DA17HAN3

1 with the documents, shows that there is a basis for this
2 discovery and for your Honor's order, because we believe that
3 if the investigative statements are examined, they will show
4 that type of thinking, they will show that those who made
5 decisions to infiltrate organizations and to intrude upon the
6 lives of persons, believe that those persons' activities which
7 maybe touched upon politics were in themselves going to be
8 sufficient for a reason to suspect crime.

9 Mr. Farrell came back after lunch to say that what the
10 police department has been doing is following leads. And
11 Commissioner Kelly's speech harped upon the fact that they are
12 following leads. Well, this seems to be what they think
13 following a lead is, is to follow up on the thinking of a
14 Muslim with respect to politics. And he also said that
15 contemporaneously this is the work that the police department
16 is doing. And of course we believe so too.

17 Other documents that have been mentioned have come to
18 us since the time the motion was made, which is now many months
19 ago, and those documents suggest that precisely that is going
20 on.

21 So, for example, we received from the e-mail in the
22 last few weeks a communication, a debriefing initiative with
23 respect to confidential informants, and it is not dated, but
24 internal evidence suggests it's about 2009. And with respect
25 to each of Palestine and Jordan, one of the goals of using a

DA17HAN3

1 confidential informant, for example, was to get a CI,
2 confidential informant, onto the board of both the Islamic
3 Center and the Arab American Association of New York.

4 So, here is a case where the police just want to put
5 an informant on the board of organizations -- which we will
6 show are otherwise innocent, and for which there is no
7 substantial reason, or perhaps no reason to be suspicious -- so
8 that they may intrude upon the affairs of those organizations.

9 So this is, we believe, investigation rooted in the
10 police's attitude with respect to the political activities of
11 persons who are connected to the Muslim community.

12 So, for the reasons that are advanced in the papers,
13 and the reasons that are in fact advanced by Mr. Farrell, we
14 submit that your order is precisely what it ought to be. It is
15 an order to the police to afford a reasonable degree of
16 discovery with respect to what their underlying thinking was
17 about these investigations, and we feel that you should insist
18 upon it being obeyed and not permit the police department to
19 say, well, it's just a flimsy argument, there is no support for
20 it, and there ought not to be such discovery.

21 I think that's all I want to say. At this point I
22 pass it to Mr. Eisenstein to talk about the visits to public
23 places and the other matters that were raised by Mr. Farrell.

24 THE COURT: The torch is being passed in your
25 direction, sir. Do you pick it up?

DA17HAN3

1 MR. EISENSTEIN: I pick it up, your Honor, with
2 enthusiasm.

3 I want to start by springing off of something that my
4 colleague said about the "related to terrorism" and that
5 phrase, which is of great significance both with respect to
6 Section V of the guidelines having to do with investigations
7 based on an indication of criminal activity, and Section
8 VIII(A)(2).

9 VIII(A)(2), as you will recall, says you can't keep
10 material unless it relates to potential terrorism or crime.
11 Mr. Farrell espoused what to me is a remarkable notion that if
12 people are talking peaceably, that if Muslims are talking
13 peaceably, that also relates to potential terrorism because it
14 tells you that there is not any in that situation, and that
15 it's therefore appropriate to keep records of that which shows
16 that that particular location does not have any terrorism, that
17 that's related to potential terrorism. And I suggest to the
18 court that that interpretation drains the limiting phrase in
19 VIII(A)(2) of any meaning, because it means if you breathe in
20 and out and you're a Muslim, it is information that the police
21 department needs to maintain because it may indicate that
22 you're not engaged in terrorism, and that's about potential
23 terrorism. It totally takes meaning out of that limiting
24 phrase.

25 And the same thing is apparently being asserted with

DA17HAN3

1 respect to the, for example, the cartoons compilation, which is
2 a compilation of person after person by name saying terrible
3 things have happened overseas in reaction to these cartoons, we
4 should not do that here, we should protest, we should go to the
5 Danish embassy.

6 Commissioner Cohen is reduced to saying that that
7 compilation does indicate something about potential crime
8 because it talks about burning a flag. Apparently,
9 Commissioner Cohen does not know that the Supreme Court has
10 held that burning a flag -- burning the United States flag,
11 even -- is expressive activity and is protected activity.

12 So, there is an effort to create a situation in which
13 anything that Muslims do, particularly religious Muslims, is an
14 indication or relates to potential terrorism, whether it shows
15 that they are or that they are not, and so it's perfectly
16 appropriate to keep records in both situations.

17 Now, the second thing that I want to say is with
18 respect to the letter that Mr. Farrell referred to that was
19 submitted to the court in the Eastern District, again this is
20 a -- there either are or there are not investigation statements
21 underlying the investigations that are involved there, as they
22 are here.

23 What Mr. Farrell wants to present to the court is a
24 lawyer's letter that purports to summarize the investigation
25 status. And as your Honor pointed out in the August 29 order,

DA17HAN3

1 it is very clear from these papers that the best evidence,
2 perhaps the only probative evidence of whether these modified
3 Handschu guidelines have been complied with is the
4 investigation statements, because as Commissioner Cohen has
5 said, that is where the information on which a decision to go
6 forward with an investigation resides. And that's the only
7 place. No paraphrase, no lawyer's letter, no secondhand
8 information about that is sufficient proof to say we're
9 following the guidelines, leave us alone.

10 There are investigation statements, and there's got to
11 be a way under which they can be shown and the court can assess
12 whether in fact these investigations are on the basis of a
13 reasonable indication of criminal activity.

14 And if I may add one thing on that subject, it is by
15 that process, by the court looking at these investigation
16 statements, that meat is going to be put on the bones of the
17 phrases in the guidelines like "reasonable indication". In
18 other words, it's perhaps a recapitulation of the common-law
19 accretion of what probable cause means.

20 Unless the court sees some of these, sees what they're
21 saying and what the reasonable indication is, and is able to
22 say this is but this is not, this administrative process is
23 just a bunch of words. And that's one of the reasons why we
24 think it is important to do exactly what you proposed or
25 broached -- let me say broached -- in your August 29

DA17HAN3

1 memorandum.

2 Now, with respect to VIII(A)(2), again echoing what
3 Paul Chevigny said, it is not the case that either Chief Galati
4 or Commissioner Cohen saying that we follow the guidelines
5 ought to be sufficient. There is evidence to the contrary.
6 There is evidence from the police department, from within the
7 police department, with respect to VIII(A)(2), that what Galati
8 says, what Chief Galati says, is not the gospel. Because
9 Mitchell Silber, who was the chief analyst in the intelligence
10 division, says that the demographics unit was looking for hot
11 spots, was out investigating.

12 And, you know, if you talk about the mapping
13 function -- and there is obviously a core of information that
14 is geographic mapping kind of information -- but that could be
15 done by a police officer in uniform or a police officer who
16 identifies himself as such.

17 You know, where are the people who come here, come
18 from what language is spoken? The very act of hanging around,
19 looking at posters on the wall and recording that, looking at
20 petitions, looking at what is being watched on television, and
21 recording conversations, all of those things are efforts to get
22 a sense of the politics of the political views of the people in
23 a place. And that's an investigation of political activity.
24 That's an investigation of expressive stuff, the kind of thing
25 that's protected by the guidelines.

DA17HAN3

1 If they want to go and listen, and they get a lead,
2 they hear conversations that are suggestive of illegal or
3 terrorist activity, by all means the investigation should
4 proceed. But the notion that they can similarly record when
5 there is no such indication, because that is somehow also an
6 indication of potential terrorism, or an indication of the
7 absence of potential terrorism, means that the limitation that
8 was built into the rule, the rule of law, the balance that this
9 court struck between privacy and security, is simply being
10 drained of meaning.

11 Now, one other thing that I think that needs to be
12 said is your Honor brought up the chart on pages 85 through
13 something of the strategic posture, which is a compilation of
14 all of the mosques that are of interest or of concern, first
15 tier, second tier, third tier, and there are columns:
16 Undercover, confidential informant. Then there is a column
17 demographics for the mosques. And it says, yes, yes, yes, yes,
18 down in every single mosque that's of concern.

19 And I suggest to the court that that is an indication
20 that the demographics unit -- contrary to the suggestion by
21 Mr. Farrell, and the contention by Chief Galati -- is engaged
22 in investigation, is going to mosques, listening to sermons,
23 listening to people talk, and bringing back information about
24 that. And that's where demographics unit is shown to be
25 engaging in what Mitchell Silber describes, not in the mapping

DA17HAN3

1 function that Chief Galati has claimed.

2 Your Honor, what I would like to do is -- oh, one
3 other thing.

4 According to Chief Galati, there are 200 plus
5 conversations recorded in the demographics unit reports that
6 they went through for the last three years. That's more than
7 one every week.

8 Now, what we're required to prove is that there is a
9 policy, not that it's widespread, but that it is done as a
10 matter of policy. If it's done as a matter of policy, and it
11 violates the guidelines, under this court's decisions through
12 Handschu 10 or 11 -- I've lost track -- we are entitled to come
13 before the court and seek injunctive relief. There is nothing
14 about widespread. It's a policy.

15 And I suggest that if there are 200 conversations
16 being recorded, in addition to all the posters and bulletin
17 boards and what channel they're watching, there is a lot of
18 expressive information being retained.

19 The final thing I would like to do, your Honor, is I
20 would like to hand up to the court my letter to Mr. Farrell,
21 which I believe accurately summarizes our discussions about
22 what should be disclosed in way of discovery, so that your
23 Honor at least knows where we stand at this point.

24 THE COURT: That might be useful. Is that objected to
25 in principle, Mr. Farrell?

DA17HAN3

1 MR. FARRELL: Not in principle, your Honor. I guess I
2 would have to look at it again. I am just not sure it captures
3 the part about defendants putting in their -- you know -- in
4 addition to class counsel picking their investigative
5 statements, as we've indicated, also that we were going to make
6 available two investigative statements from each category as
7 well. If that's in there, then I have no objection to it. If
8 it's not in there, I would like, if it goes in, I would have to
9 submit a response to this, which I haven't yet had a chance to
10 do.

11 THE COURT: Why don't we leave it this way: If you
12 read that letter, and you think it doesn't tell the full story,
13 then you can write me a letter. How about that?

14 MR. FARRELL: That's fine.

15 THE COURT: Fair?

16 MR. FARRELL: Fine.

17 THE COURT: Just send a copy to counsel. I will
18 receive it on this understanding.

19 MR. EISENSTEIN: Thank you. I would like to also --
20 because this is referenced in the letter that I've just given
21 to you -- give the court a copy of the debriefing initiative
22 which Paul Chevigny any made reference to, because this is one
23 of the things that we have asked for, which is not in part of
24 the existing record, but it has been specifically identified as
25 a request to be disclosed.

DA17HAN3

1 THE COURT: Show it to counsel.

2 MR. FARRELL: Your Honor, this document, which I
3 believe -- well, I know it was not part of the motion, and I
4 believe was identified by plaintiff's counsel after the motion
5 was fully briefed -- we haven't had an opportunity to respond
6 to this, or explain it, and I think that's important before it
7 gets submitted into evidence.

8 It's not part of their current motion, so I would
9 object on that ground, versus taking this document in at this
10 point in time, without having given defendants an opportunity
11 to review, examine and provide the court with an explanation as
12 to what it means or what it entails. Right now it's a document
13 in a vacuum with no explanation, and I think it's prejudicial
14 in the record.

15 THE COURT: Well, absent a complete agreement between
16 counsel -- which I do not sense as far as this particular
17 document, whatever it may be is -- and in the circumstances, I
18 don't think it would be fair for the court to pressure or
19 mandate it be produced.

20 I am just going to rely on you two to discuss it among
21 yourselves. And after you've done so, if class counsel feel
22 that this is something that should be part of the court's
23 record before any further decision is made, and counsel for the
24 city don't agree with that, then you are going to have to send
25 me letters with copies to each other explaining what the

DA17HAN3

1 dispute is.

2 On the other hand, if after corporation counsel has
3 had sufficient time to examine it, and is also able to make any
4 comments about it that counsel wish to, those additional
5 documents -- which is to say the document most recently
6 offered, and any further comments that corporation counsel may
7 wish to make upon it -- then you can send me both. Send me one
8 or both or nothing.

9 But think about it among yourselves first. A time
10 comes when an ocean going ship, if loaded with one more half
11 ton of grain into her holds, she breaks in half and sinks. I'm
12 not there yet, but I've got a lot of paper in the case.

13 I will receive those, but I want you to consider it
14 among yourselves in the manner that I've discussed. I think
15 that's the proper way to handle it. And if everyone agrees, or
16 you want me to resolve any dispute, I will take that additional
17 scoop into hold number five. Does that conclude --

18 MR. STOLAR: That concludes us, Judge.

19 THE COURT: All right. Now, corporation counsel, the
20 replies are concluded. Does corporation counsel hear anything
21 that they cannot stand and wish to respond to?

22 MR. FARRELL: I think I'm going to have to pop up in
23 front of your Honor one more time to address a couple of those
24 things.

25 THE COURT: It seems like old times, Mr. Farrell.

DA17HAN3

1 MR. FARRELL: So, your Honor, perhaps not in any
2 particular order, but the way that the points I take issue with
3 is, one, that Professor Chevigny had said to you that it is in
4 dispute about what Rahman was involved in, and whether there
5 was sufficient justification for what he was doing.

6 I would just point out two things. It's not in
7 dispute that the investigations that he was involved in led to
8 one of those people that was associated with that investigation
9 pleading guilty to terrorism-related charges in the Eastern
10 District. And I have that press release, and I would like to
11 hand it up to the court when I'm done, to make that part of the
12 record.

13 The second thing is the confidential informant Rahman
14 can't dispute what was going on, because as it is laid out and
15 explained in defendant's papers, a confidential informant is
16 not told all the reasons they are out there and what they are
17 doing, or why they are being tasked to go and associate with
18 certain people.

19 The declarations from defendants lay out the reasons
20 and concerns why that's not done. First it says it's not done.
21 Two is you would never tell a confidential informant all of
22 that information for fear that he would reveal -- either
23 inadvertently or purposefully -- the investigation, what it
24 entailed, who was the subjects of the investigation, and it
25 could create safety issues for both the informant and other

DA17HAN3

1 people involved in the investigation. And those reasons are
2 articulated in detail, your Honor, in defendant's declaration
3 by Detective Hoban, Commissioner Cohen and Chief Galati, to
4 some extent. But those are the reasons. He is not told you
5 are going to go do this for this reason, and here is the
6 subject of the investigation. He is told in a more general way
7 who he should be trying to associate with or go to a particular
8 place to collect that information. So, I think that's a
9 misnomer to say that either of those things are in dispute.

10 The second point, your Honor, is Mr. Chevigny said
11 that, you know, the city hadn't raised the law enforcement
12 privilege in its opposition. Again, I had pointed out in my
13 statements earlier that they didn't ask for discovery as part
14 of this motion. They withdrew their motion for discovery. I
15 would never raise a law enforcement privilege about discovery
16 when it's not at issue in this case. So that's the easy
17 explanation for that point.

18 The third thing is that I did not say -- nor have I
19 ever said or promoted -- that solely being a Muslim is a basis
20 for investigation. The department follows leads, and that's
21 the investigations that they conduct. And my point was that to
22 say that what the department does with respect to its
23 investigations that it does have that involve people of the
24 Muslim faith, to say that that's happening in a vacuum, and not
25 recognizing in the reality of the world that there are Muslims

DA17HAN3

1 who are radicalized or violent, and that has been the primary,
2 main threat to the city, just isn't plausible. That's the
3 argument I was making there, and I believe it was
4 mischaracterized.

5 The fourth thing I would say is they raised a
6 document, that one they were proffering, that had to do with
7 the Arab American Association of New York, and that that was
8 evidence of somehow to support their case. I would just say
9 two things about the Arab American Association of New York.
10 One is it was never the subject of an investigation by the New
11 York City Police Department. So, to the extent that they are
12 claiming that that was the case, that's not true.

13 Two, there was no confidential informant or an
14 undercover placed on the board of the Arab American Association
15 of New York. So those things never happened. So, to the
16 extent they are implying that did happen, that's just not
17 accurate.

18 The next point I just want to make, your Honor, is
19 that I would also just note -- I'm going to switch gears now to
20 the VIII(A)(2) section. We submitted a page from the F.B.I.'s
21 Domestic Investigation Operations Guide, and that's part of an
22 investigation, and the F.B.I.'s Domestic Investigation Options
23 Guide has the mirror type of protocol for going out and
24 developing where there are certain ethnic communities who are
25 from incubator countries where terrorists could come from. So,

DA17HAN3

1 it's not as if what the New York City Police Department said
2 it's doing under the powers of Section VIII(A)(2), going out
3 and identifying ethnic community concentrations, it's something
4 they are doing alone in a vacuum. This is stated almost
5 exactly the same way in the F.B.I.'s Domestic Investigation and
6 Operations Guide, and the operative provisions of that guide
7 were submitted as an attachment to the declarations that the
8 defendants put in in this case.

9 The next point on the Section VIII(A)(2) is that class
10 counsel continues to mix in together what the zone assessment
11 unit was doing by saying it's going out and conducting these
12 investigations.

13 I have said it before -- I'm not going to take the
14 court's time to repeat everything -- but the bulk of the
15 information that the zone assessment unit collects has to do
16 with phone book type of information. It's where a business is
17 located, it's the type of building it's in, it's the address of
18 the business. It's identifying the concentrated ethnic
19 community, which is exactly what the F.B.I. DIOG also says can
20 be done, and it's done for the purpose of being able to respond
21 to terrorist threats in the future when you have somebody of
22 similar characteristics coming in, you know where to go to look
23 and what to do.

24 How they can say that those pieces of information that
25 have to do with business addresses and names of restaurants is

DA17HAN3

1 the investigation of political activity -- political
2 activity -- political activity normally, as I understand it,
3 involves some expression of social change or otherwise, and
4 it's defined in the guidelines itself. The location of a
5 building, its address, that is not an expression of political
6 activity, and it's not an expression of any sort.

7 So, that chunk of information -- which is the bulk of
8 the information that the zone assessment unit collects under
9 Section VIII(A)(2), which is at issue in this case -- does not
10 even fall under the modified Handschu guidelines.

11 So, the reverse of that is because there is such a
12 small subset of information or reports that contain any
13 conversations at all -- which arguably for argument's purposes
14 we'll say, fine, going and hearing a conversation about social
15 change one could characterize that as an investigation of
16 political activity, although there could be reasons here which
17 I'm not going to go into it shouldn't -- but for purposes of
18 argument let's say it does fall under the modified Handschu
19 guidelines -- and that's certainly the way the department
20 treats it, because it is over-inclusive as to what the
21 guidelines cover -- that's such a small amount of reports, it
22 can't be the systemic practice of which they complain.

23 The zone assessment unit is not building dossiers on
24 people, it's not collecting names and addresses of individuals.
25 That's not what it does. So, to the extent that they

DA17HAN3

1 characterize it differently, that's simply not accurate.

2 And then the last point, your Honor, is I think
3 Mr. Eisenstein had referred to common-law probable cause as
4 part of what gets looked at. I would just reiterate -- now
5 this is going back to the investigation side of the guideline,
6 Section V -- the standard is not probable cause.

7 The guidelines specifically say the possibility of
8 unlawful activity. Possibility of unlawful activity. That
9 covers preliminary investigations. When you have a terrorism
10 enterprise investigation, it's a reasonable indication of
11 unlawful activity. And the guidelines themselves define
12 reasonable indication, and I'm quoting, "as substantially less
13 than probable cause".

14 So, any implication that the guidelines have a
15 threshold of either probable cause, or even close to probable
16 cause, for any of the levels of the investigation, is not
17 accurate and is refuted by the language of the guidelines
18 themselves.

19 If you just give me one second, I think that's all I
20 have, your Honor. Thank you.

21 THE COURT: Feel better?

22 MR. FARRELL: Yes, your Honor.

23 THE COURT: Good. I'm going to put one final question
24 to each of you. But do class counsel have anything further,
25 using their right of last word to contribute?

DA17HAN3

1 MR. CHEVIGNY: Well, perhaps I should apologize. I do
2 want to say one thing, a few sentences, with respect to what
3 Mr. Farrell said, if that's all right with you.

4 THE COURT: Yes, yes, I've said you could.

5 MR. CHEVIGNY: Most of what he said were matters that
6 Mr. Eisenstein and I had covered in our discussion here this
7 afternoon.

8 With respect to the belief -- his statement that the
9 city believed that we didn't want discovery because we had made
10 a previous motion for discovery, we did make a motion for
11 discovery. We made a motion for discovery concerning the
12 issues under VIII(A)(2), and we got that discovery, the Galati
13 deposition and the documents. Having done that, we withdrew
14 that motion, as well we might, since we had received some
15 discovery.

16 This is a completely different motion, and they know
17 that. With all due respect, it's just not possible that they
18 didn't believe that we wanted some discovery. There is a point
19 in our reply brief in which we say discovery is essential
20 concerning the reasons for investigations and infiltrations by
21 the intelligence division. If that didn't intimate to them
22 that we wanted discovery, I don't know what would. So that's
23 all I have to say.

24 The other things, I think we've said already.

25 THE COURT: All right. Then I'm going to put a

DA17HAN3

1 question to each of you, and it's a question which does not
2 invite further argument. You have given me a good deal of
3 that, and very good argument it is too, if I might say so.

4 My first question is to class counsel, and then it's
5 to corporation counsel, and the question is this, first for
6 class counsel: Sum up for me what you think the court should
7 do next in this case. Understood?

8 MR. EISENSTEIN: What we think this court should do
9 next is order -- under appropriate protective order,
10 restraints -- the disclosure to class counsel in the first
11 instance of the investigation statements that relate to what we
12 have raised in our papers, with the understanding that the goal
13 of that process will be to put some or all of those documents
14 into a redacted form which can be made part of the court record
15 and thus a publicly available document.

16 We are aware -- and I think this needs to be said --
17 we are aware of the important role that the New York City
18 Police Department plays. We are citizens of New York, and we
19 want to be safe. And we don't ask the court to jeopardize any
20 of the things that Mr. Farrell identified. But we have other
21 interests that we think need to be indicated as well, which are
22 we think that the investigation statements are going to show
23 that investigations have been initiated without a reasonable
24 indication of crime or terrorism.

25 So, what we want the court to do is preside over a

DA17HAN3

1 process under which we will be able to look at these documents,
2 work with corporation counsel to do the redactions that are
3 necessary to make it safe to be part of a court record, and
4 have them part of the court record.

5 THE COURT: Thank you.

6 What does corporation counsel think the court should
7 do next? If you want to say go back to Connecticut and don't
8 return, that's all right; that would be an answer.

9 MR. FARRELL: No, your Honor, I do not want to say
10 that. Plaintiffs have failed to meet their burden. Their
11 papers said that their papers contain "substantial persuasive
12 evidence". That's what they said, and now they are singing a
13 different tune about discovery. They should be held to the
14 choices that they made.

15 The evidence is clear that the New York City Police
16 Department is not violating the modified Handschu guidelines,
17 and their motion should be denied.

18 If your Honor is contemplating giving them discovery
19 despite their choices, then the discovery should be limited to
20 the proposal that I articulated earlier as to the investigative
21 statements for which class counsel could come and review.

22 THE COURT: Good. Very good. Those were good,
23 succinct statements of what the court should do next.
24 Occasionally on both sides little wisps of argument crept in,
25 but you couldn't tell that. And I wanted that summation, and

DA17HAN3

1 it's useful to me. Off the record.

2 (Discussion held off the record)

3 THE COURT: All right. Back on the record, please.

4 The court extends its compliments to counsel for excellent
5 arguments. Decision on all aspects of this motion is reserved.

6 As stated in a colloquy off the record, an expedited
7 transcript of these arguments is to be ordered from the court
8 reporter, paid for in the first instance by the City of New
9 York, with that item of costs to abide the event as the
10 litigation goes forward.

11 And so the hearing is at an end. I will simply say
12 again to all of you who were here, I'm glad you're here. And
13 what you've seen, and what you've heard is good arguments, good
14 arguments, whether you agree with them or not, whether you
15 sympathize with them or not.

16 This was a roomful of good lawyers trying to from
17 their different points of view make the rule of law work, to
18 make the rule of law work in this place and at this time, which
19 is what we're all about, or should be, and so I hope you place
20 some value on the time you've spent in this place today; but if
21 you haven't, you need not write and tell me so. Case
22 continued. Decision reserved.

23 (Decision reserved)

24

25