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To: Interested Parties  
From: Aziz Huq, Brennan Center  
Date: August 22, 2008  
Re: Proposed Changes to 28 C.F.R. part 23

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### Introduction

The Justice Department has announced proposed changes to a federal regulation, 28 C.F.R. part 23, that governs how and when local and state law enforcement agencies can share information with each other, with federal law enforcement agencies, and other federal agencies, including intelligence agencies. Comments on the rule can be submitted to the Department of Justice until September 2, 2008.

This memo outlines in brief and non-technical terms the reasons that Muslim, Arab, and South Asian community groups may be concerned about the proposed changes and also may wish to submit comments to the Department of Justice in opposition to the proposed changes. The more comments that are submitted in opposition to the change, the more difficult it is to enact that change. This memo also contains some suggested points to be made in such submission.

This memo draws heavily on the excellent analysis of the relevant issues by Mike German of the ACLU. Questions can be directed to [aziz.huq@nyu.edu](mailto:aziz.huq@nyu.edu).

## I. Why the Proposed Changes Matter

The regulation that the Justice Department proposes to change governs information-sharing between law enforcement and other agencies at the national and the local level. The proposed change would encourage local and state law enforcement agencies to collect “intelligence” above and beyond that related to possible criminal action, and to disseminate that information to other state and federal law enforcement agencies and intelligence entities. It would also eliminate important safeguards to ensure that false information or material concerning the exercise of First Amendment rights does not get circulated, and that false information gets removed promptly from law enforcement databases.

As many community groups are already aware, local law enforcement already engages in intelligence gathering via intrusive and offensive means: Evidence of the use of informants in New York mosques and the “mapping” exercise proposed by the Los Angeles Police Department are but two recent examples.

The proposed changes to the regulation endorse and likely will accelerate such “intelligence gathering” against minority communities perceived as being linked to terrorist threats. The changes will likely also mean that such locally gathered intelligence will be shared with intelligence agencies and will become the basis of adverse federal actions, such as inclusion on watch lists or the initiation of investigations. Given community concerns about local law enforcement’s use of informants and surveillance, changes in federal law that sanction and encourage such practices, and then leverage their fruit across the country, are of clear and pressing concern.

Details of the specific problematic changes in the regulations are enumerated in Section II below.

Without question, information-sharing between federal and state law enforcement authorities is necessary and important. Under the present legal regime, however, such information-sharing is cabined by First Amendment protections and the need to show a law-enforcement purpose. Loosening these restrictions invites community-wide intelligence gathering and religious/ethnic profiling. Not only would this raise constitutional concerns, it would also hinder effective counter-terrorism. It would likely yield a flood of irrelevant information. It would reward operatives who indulge in ethnic and religious stereotyping to sweep in large quantities of information. What it does not encourage is the far more fine-grained investigative work that is more likely to yield evidence of possible criminality or threats of violence.

In past times of national fear and security panic, local and state law enforcement have been conscripted into violations of core First Amendment rights. The proposed change is an invitation to repetition of those ugly episodes in American history. It is an invitation that should be firmly refused.

## II Commenting on the Proposed Change

Comments on the proposed change can be sent by mail or electronically to the Justice Department up to and including September 2, 2008. They are submitted to:

By mail:

Re: OJP Docket 1473  
Michael Dever  
Bureau of Justice Assistance  
810 7th Street NW  
Washington DC 20531

Electronically:  
<http://www.regulations.gov>

Comments to the Justice Department might use the following text as a basis for development.

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We, [the undersigned community organizations], write to express alarm about the proposed changes to 28 C.F.R. Part 23. As communities that have been the focus of considerable federal, state, and local law enforcement scrutiny after 9/11, we are acutely aware of the costs to constitutional rights when local and state law enforcement agencies treat whole communities as suspect—a step the changed regulation would encourage. We therefore urge the Department of Justice not to adapt the proposed changes to 28 C.F.R. Part 23.

Since 9/11, Muslim, Arab, and South Asian communities have been the subject of a great deal of mistrust and harmful scrutiny. Community-wide counter-terrorism tactics such as “special registration” and the “voluntary” FBI call-in interviews have caused our communities grave harms—and yet have yielded either negligible or no gains to security. We believe that the best kind of counter-terrorism policy is the kind that goes after the small number of individuals, either here or overseas, who intend to commit acts of violence. Counter-terrorism measures that target whole communities on religious, ethnic, or nationality lines, by contrast, only violate constitutional rights and waste precious money and policing resources.

We understand that the changes to 28 C.F.R. Part 23 are intended to make information sharing between federal and state agencies easier. Without question, cooperation between different law enforcement bodies in pursuit of specific suspects and when there is some reasonable suspicion of a crime is wholly appropriate. But the current version of 28 C.F.R. Part 23 already allows that kind of information-sharing. The current, long-standing regulation authorizes local and state police to collect information for an intelligence database when there is a reasonable suspicion that the person is involved in criminal conduct and when information pertains to that criminal conduct. They can

disseminate that information when necessary to serve a law enforcement purpose or prevent imminent harm. No change to the regulation is in fact needed.

But the proposed changes to 28 C.F.R. Part 23 go much further. They allow, and indeed seem to encourage, information sharing and dissemination of the sort that will undermine constitutional rights. Some of the problems of the proposed rule change include (but are not limited to) the following:

- **Section 23.2** of the proposed changed rule expands the triggers for when intelligence can be gathered. It adds “domestic and international terrorism, *including the material support thereof*,” to the list of examples of criminal activities. This change is entirely unnecessary since the list of criminal activities in this section was never intended to be all-inclusive. But we are deeply concerned that the expansion to include the ill-understood term “material support” in particular will expand local and state law enforcement agencies’ perception of what can be collected to include much speech, association, and activity that is constitutionally protected. This is especially worrying because the federal government has recently endorsed recommendations, promulgated by the Los Angeles Police Department about “suspicious activity reporting” that treat taking notes, drawing diagrams, taking pictures or videos, and espousing “extremist views” (all First Amendment protected) as indicative of terrorist activity.
- **Section 23.20(a)** would add new language to “clarify that criminal intelligence information can be collected and maintained about organizations, as well as individuals.” This is a dangerous expansion of authority that will harm First Amendment free association rights by encouraging local and state police to create “blacklists” of suspect organizations. In light of erroneous and often blatantly prejudicial reporting in the media about organizations from the Muslim, Arab, and South Asian communities, it is likely that the burden of this provision will fall disproportionately and improperly on our communities.
- **Sections 23.20(e) and (f)** of the proposed change expand the permissible purpose of dissemination of law enforcement intelligence. They authorize information dissemination to any agency with a counter-terrorism or national security responsibility or may assist in preventing crime or violence or “any conduct dangerous to human life or property.” This is an essentially open-ended standard, and is much broader than the current dissemination rule, which is limited to law enforcement purposes and the prevention of imminent harm. This change in practice would destroy any privacy and civil liberties protections for individuals merely suspected of “dangerous” behavior. Under this proposed standard, a law enforcement official could arguably disseminate criminal intelligence information to have someone fired from their job as a truck driver or evicted from their apartment in an iconic building because such dissemination “might” assist in preventing dangerous conduct. We are concerned that this change will remove any effective constraint on state and local agencies’ sharing information with intelligence agencies. We fear this could lead to innocent activity, ripped from context, becoming the basis of adverse actions such as the placing of persons on watchlists.

- **Section 23.20(f)(2)** as amended would permit the dissemination of an assessment of criminal intelligence information “to a government official or any other individual, when necessary to avoid danger to life or property.” It removes the word “imminent” from the rule. In so doing, it would vastly increase the amount of criminal intelligence information disseminated as it would allow for dissemination where the potential danger was merely speculative. Removing the emergency requirement would basically allow the exception to swallow the rule.
- **Section 23.20(h)** allows data to be kept, without any review, for ten years – doubling the current five-year period. It also would toll the period while a subject is incarcerated. These changes are both unnecessary and will increase the likelihood that erroneous and out-of-date information will lead to incorrect conclusions being made.

These are not the only problematic changes to the rule. But they are among the most troubling. They illustrate why the proposed changes should not be made.

We are concerned that the proposed amendments to 28 C.F.R. Part 23 would encourage the collection and dissemination of domestic intelligence information not related to criminal activity. We are concerned that these changes will encourage our state and local law enforcement agencies to shift from enforcing the law to gathering “intelligence” in ways that will do harm to our community’s ability to exercise our constitutional rights of free speech, freedom of religion, and freedom of association. We also believe that law enforcement for the purpose of detecting potential terrorism threats is best approached in terms of a partnership between community and law enforcement. Because the proposed changes to 28 C.F.R. Part 23 likely will lead to intelligence-gathering and dissemination that undermines constitutional rights and community-police trust, while adding nothing to our security, we urge the Department not to adopt any of the proposed changes.

In past times of national fear and security panic, local and state law enforcement have been conscripted into violations of core First Amendment rights. The proposed rule changes are an invitation to repetition of those ugly episodes in American history at a time when tempers and prejudices are still running high. We urge you, therefore, not to enact the proposed changes to 28 CFR Part 23.

Sincerely