



ROGER BALDWIN FOUNDATION
OF ACLU, INC.

Illinois

ROGER BALDWIN FOUNDATION OF
ACLU, INC.
150 N. MICHIGAN AVENUE
SUITE 600
CHICAGO, ILLINOIS 60601-7570
(312) 201-9740
FAX (312) 201-9760
WWW.ACLU-IL.ORG

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Celia Meza
Corporation Counsel
City of Chicago Department of Law
121 North LaSalle St., Room 600
Chicago, IL 60602
Celia.meza@cityofchicago.org

Allan Slagel
Counsel for the City of Chicago
Taft Stettinius & Hollister LLP
111 East Wacker, Suite 2800
Chicago, IL 60601
aslagel@taftlaw.com

Maggie Hickey
Independent Monitor
Schiff Hardin LLP
233 South Wacker Drive, Suite 7100
Chicago, IL 60606
MHickey@schiffhardin.com

Christopher G. Wells
Chief, Public Interest Division
Office of the Illinois Attorney General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601
Christopher.wells@illinois.gov
CWells@atg.state.il.us

Re: Religious Interactions Policy (G02-01-05)

Dear Counsel:

We write this letter on behalf of the Coalition to provide written comments about the Chicago Police Department's ("CPD") draft Religious Interactions policy (G02-01-05) ("the policy").

The Coalition has serious concerns with the legal underpinnings of the policy, as explained below, as well as the specific guidelines it contains. We urge CPD to revisit and revise this policy in its totality, beginning with the correct legal framework.

- (1) The policy fails to cite and utilize the governing legal standard, which requires a compelling governmental interest to justify any substantial burden on the free exercise of religion.**

The Illinois Religious Freedom Restoration Act, 775 ILCS 35/15 ("ILRFRA"), enacted in 1998, requires all CPD practices and policies that substantially burden a person's exercise of religion to be justified by a compelling governmental interest. ILRFRA provides:

Free exercise of religion protected. Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i)

is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

As the Illinois legislature explained, the purpose of ILRFRA is:

[T]o restore the compelling interest test as set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), and to guarantee that a test of compelling governmental interest will be imposed on all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free exercise of religion is substantially burdened.

775 ILCS 35/10(b)(1).

The draft policy does not mention ILRFRA – the governing statute. Instead, it cites several other wholly inapplicable laws. The Chicago Human Rights Ordinance, cited in Section III, prohibits discrimination in employment and does not bear on law enforcement actions. The Illinois Human Rights Act, cited in Section II.E, applies to employment, credit, education, and public accommodations but, again, does not govern law enforcement. Neither the Chicago Human Rights Ordinance nor the Illinois Human Rights Act sets out the applicable “compelling governmental interest” test established in ILRFRA.

Because the policy cites the wrong statute and ordinances up front, it is clear that CPD failed to consider the remainder of the policy under the appropriate “compelling governmental interest” standard. Indeed, throughout the policy, rather than requiring a compelling government interest, it allows officers to burden someone’s religion if it is “reasonably required.” *See e.g.*, Section V.A.2 (“Department members will ... allow persons wearing religious head coverings, religious clothing, and religious articles to continue wearing them, except when removal or confiscation is reasonably required.”)

CPD should revise the policy to state, at the outset, that CPD members must carefully consider, before taking action, whether they have a compelling interest in any particular action that outweighs an individual’s rights to exercise religious rights, such as wearing religious garments or possessing religious texts. The officer must also take the least restrictive action in furthering that compelling interest.

By way of example, the Los Angeles Police Department Training Bulletin on the same topic (attached) instructs: “When the removal of a religious head cover is being considered, a *compelling governmental interest* (safety, security, identification) must outweigh the subject’s religious rights (wearing of religious headwear)...” (emphasis added).

CPD should fully revise and re-frame its entire policy around the “compelling governmental interest” standard.

(2) Officers must accommodate all sincerely-held religious beliefs.

The Religious Interactions Policy should explain up front that an officer may not deny religious accommodations requested by a member of the public simply because an officer does not believe someone is or appears to be “religious enough” to warrant such accommodations. An individual’s sincerely held and expressed religious belief should be accommodated, regardless of whether that individual is dressed as or presenting as a “typical” member of his or her religious community. The policy must explain that an officer is not permitted to evaluate or decide an individual’s sincerely held religious beliefs based upon stereotypes about how a “real” member of a religious group dresses, presents, or behaves.

Additionally, the policy should state that an officer is not permitted to make law enforcement decisions based upon a subjective determination about whether a person’s expressed religious beliefs are valid.

(3) Section V.B.1.7 should be deleted.

The Coalition generally supports the standards set out in Section V.B., which prohibit officer behavior that is unlawful and disrespectful toward individuals due to their religion, including profiling, using derogatory language, or drawing unwanted attention to someone’s religion.

However, Section V.B.1.7 (“Members will NOT ... unreasonably endanger themselves or another person to conform to this directive”) is a broad exception that would swallow the laudable rules in the remainder of Section V.B. It is unclear how officers would “endanger” anyone by abiding by basic principles of decorum, fairness and non-discrimination set out in V.B.1-6. But because of the vague language of Section V.B.1.7, which allows an officer to determine whether there is an “unreasonable” danger, the exception could give officers an impression that rather than abiding by the requirements of V.B.1-6, they simply have free rein to decide what behavior is “reasonable” when interacting with members of the public. CPD should omit Section V.B.1.7.

(4) Section V.B.1 should state that religious expression is not evidence of criminal intent and explicitly prohibit police from targeting events, places or people due to religion.

Section V.B.1 should add a clear prohibition on police using religion, religious expression or perceived religion as a reason to investigate any person, event, or place.

The Coalition also suggests the following modification to Section V.B.1.4 (additions underlined): “[M]embers will NOT... consider a person's religion, religious expression, or perceived religion as reasonable suspicion or prima facie evidence that the individual is, has, or will engage in a crime.”

The Coalition further suggests adding a provision to Section V.B.1 tracking the exact language of paragraph 55 of the Consent Decree: “CPD will prohibit officers from using ... religion ... when making routine or spontaneous law enforcement decisions, except when such information is part of a specific subject description.”

(5) The policy should clearly require that if religious garments must be removed, either during an investigatory stop or following an arrest, such removal should be completed in private by a same-gender officer.

The policy should unambiguously prohibit officers from removing or requiring removal of religious clothing except when necessary to further a compelling government interest and when such removal can be carried out in private and in the presence of a same-gender¹ officer if the person searched requests such accommodations for religious reasons, after being informed of their right to make such a request. As an example of better practice, the New York Police Department's policy (attached) requires an officer to "advise prisoner that removal and search *will be* conducted in private, and that search will be conducted by a member of the service of the same gender" (emphasis added).

CPD's policy is hedged with a number of caveats that create confusion and fail to establish clear expectations. For example, Section V.A.2 and V.A.3 allow persons to keep religious clothing items and soft-cover religious texts during an investigative stop unless an officer "reasonably believes that removal is necessary to prevent physical harm or to render aid." The policy does not define whose physical safety is at issue, or under what circumstances religious items could cause physical harm or preclude rendering aid. It is difficult to imagine how a person could cause immediate physical danger to an officer using a soft-cover prayer book or cloth head covering. (It is also difficult to picture why someone could not safely retain a hard-covered religious text during an investigative stop.)

Similarly, Section VII.C.2 of CPD's policy instructs that if "a person requests accommodations for religious reasons, the Department member removing the religious head covering [etc.] will ... conduct the removal in an area that is *as private and practical as possible under the circumstances.*" The italicized language is vague and fails to define the circumstances when a search would not be conducted in private.

The Note to Section VII.C.3. also is unclear: "If officer or public safety is compromised, and it is imperative that an immediate search be conducted, member will not endanger themselves or the public to comply with this requirement," i.e., that persons of the opposite gender are not present during a search. The policy has no standards to explain when or under what circumstances officers of the opposite gender would be present during a search against the wishes of a person who has requested a religious accommodation. The Note to Section VII.C.3. should be deleted.

Instead, the policy should simply and clearly require officers to complete any pat-down or search in private, by an officer of the same gender, if an individual so requests for religious reasons.

¹ The policy should use "same gender" in all circumstances rather than "female" (*cf.* NOTE to Section VIII.D.4), being sensitive to the fact that individuals who are transgender or non-binary may require accommodations for religious head coverings or garments, and also be identified as male on their governmental identification documents.

(6) CPD should (a) require booking photos be taken while an individual is wearing their habitual religious garments, (b) clarify when booking photos may be taken without religious head coverings, and (c) establish a policy on re-publication of uncovered photos.

Section VIII (“Arrestee Processing and Procedures”) fails to set forth clear standards requiring CPD to take booking photos while an arrestee is wearing his/her usual religious head covering.

First, the policy should require that at least one set of arrest photos always is taken while an arrestee is wearing their usual religious garments (assuming the individual was wearing those garments when arrested). Second, the policy should clarify circumstances under which another set of photos, without the arrestee’s usual garments, may be taken if justified by a compelling governmental interest. Third, the policy must address limitations on re-publication of the second, uncovered, set of photos. The New York Police Department policy (attached), reflects better practices and utilizes this three-step process, including marking an uncovered photo in the computer system so that it is maintained in confidence and not utilized outside of an individual’s arrest file (e.g., provided to the court or the media).

While CPD’s policy, Section VIII.D, establishes a general rule that “Arrestees will be allowed to keep and wear their religious head cover for their booking photograph...” the following exceptions largely swallow the rule. The first exception, Section VIII.D.1, allows an officer to determine that an uncovered photograph is necessary to show an arrestee’s “hair color” as a “distinguishing feature.” The third exception, Section VIII.D.3, allows an officer to require removal of a head covering that “blocks arrestees’ hairline....” Both of these exceptions likely preclude wearing any head covering that fully covers a person’s hair and undermine, if not fully contradict, the general rule that an arrestee may wear a religious head cover for booking photos. The “hair color” and “hairline” exceptions should be deleted.

Section VIII.D.4 requires a female aide to take photos of a female arrestee whose religious head covering was removed, but only “if operationally feasible.” There are no standards in the policy governing “feasibility.” The phrase “if operationally feasible” should be deleted. The policy should clearly set forth a requirement that, when requested by the arrestee, a same-gender (*see n. 1 above*) arrestee must be photographed by a same-gender employee in private.

(7) Sections VIII.E and VIII.F should allow detained individuals to wear their religious head coverings absent a compelling governmental interest requiring removal

Section VIII.E. of the policy states: “Once the booking photos are taken, members will allow the arrestee to wear their religious head covering unless” four exceptions are present. Those exceptions generally are (or appear to be) framed in terms of an officer’s or supervisor’s “reasonable belief” that the head covering could be used for suicide, “as a weapon” or that other “exigent circumstances” exist. Similarly, Section VIII.F states: “Members will confiscate religious head coverings from arrestees that they *reasonably believe could potentially be used* to harm another person or the arrestee or is [sic] of evidentiary value....” (emphasis added).

As stated above, under ILRFRA, an officer may not require removal of a religious head covering unless justified by a “compelling governmental interest” and the removal of the head covering is

the least restrictive method to achieve the interest. CPD should revise Sections VIII.E and VIII.F. utilizing the correct legal standard.

While Section VIII.E.(c)(1) provides the option for people who are subject to an investigatory stop to remove religious clothing on their own, Section VIII.F does not provide the same option for individuals after they are arrested. Section VIII.F should add that arrestees whose religious garments must be removed have the option of either removing the garments themselves or allowing an officer of the same gender to remove the garments.

(8) The policy should build in recordkeeping and accountability mechanisms.

If an officer does determine that a compelling governmental interest justifies removal of an individual's religious garments or articles in any circumstance (*e.g.*, an investigatory stop, arrest, processing, home raid, or in any other circumstances) that decision should be (a) approved by a supervisor; and (b) documented and substantiated – including an explanation of the compelling governmental interest requiring the removal or confiscation of garments or articles – by both the officer and the supervisor on the appropriate investigatory stop report, arrest log, command log, or other relevant documentation.

The policy should expressly state that failure to make religious accommodations as required within the policy, or to fill out the appropriate documentation, may subject an officer or supervisor to discipline.

(9) The policy should require religious accommodations in the context of home raids.

The current draft policy does not address the situation where officers enter a home or remove an individual from their home, such as when executing a search warrant.

The policy should require that if police raid a home and an individual inside requests to don clothing or head coverings for religious reasons, due to the entry of police into the house, the officers must accommodate that request absent a compelling governmental interest such as an immediate threat to an officer's personal safety. Police should allow sufficient time and privacy for an individual to dress, and opposite-gender officers should not be present or observe the person dressing.

If an individual must be instructed to wait outside their home, or is arrested and walked from their home to a police car, police should be required to allow that individual to don clothing or head coverings that the person wears for religious reasons before leaving the home, subject to the pat-down requirements discussed above.

The policy also should prohibit officers from entering into sacred spaces in homes, touching or damaging religious objects or altars, and stepping or standing on prayer rugs, absent exigent circumstances.

(10) The policy should advise religious accommodations in other interactions.

Individuals of particular faiths may observe cultural or gender norms that differ from the majority, such as not being alone with, shaking hands with, or looking in the eye of a person of the opposite gender. Police should be instructed to be aware of and sensitive to these customs.

Dietary restrictions also should be accommodated. For example, when an individual is awaiting processing at a police department, any food or drink offered should accommodate an individual's religious dietary requirements.

(11) The policy should prohibit interruptions of religious observance absent exigent circumstances.

In instances where an officer observes that a person or group of people is engaged in worship or prayer, or engaged in other religious rituals such as reading a religious text or cleansing/washing (in any location, such as on public property, in a car, on private property with or without permission, including in a person's own home) the policy should prohibit officers from interrupting or disrupting the worship or observance, absent exigent circumstances.

Likewise, the policy should prohibit officers from entering any house of worship in a fashion that would disrupt prayers or religious services, absent exigent circumstances. Officers should be instructed to be aware of and sensitive to the customs of any house of worship that they enter, such as removing shoes or respecting same-gender restrictions when applicable.

(12) The "Religious Interactions Definitions" should have photos and descriptions of religious objects relevant to a pat down or search.

The draft Religious Interactions Definitions, incorporated by reference in Section V.A.4., require significant amplification and explanation. As currently drafted, the document is simply a list of words with vague definitions, categorized by types, such as buildings or garments. To be useful, the training bulletin should:

(A) Contain photos or drawings depicting relevant terms. Simply defining a garment as "a head covering worn by Catholic bishops," or "a religious head covering worn by Orthodox Jewish men," for example, does not assist an officer who has never seen an individual wearing such garments. Likewise, the list of religious articles that simply names items such as "amulets," "sacred writings" or "statues" without explanation is entirely unhelpful. The definitions should include photos or drawings that will help officers identify the religious garments and articles discussed.

(B) Contain information relevant to a pat-down or search, including where religious articles are worn and whether they are hard or soft objects. The Religious Interactions Definitions need to help officers distinguish a religious article from a weapon or contraband when conducting a protective pat-down or search. To that end, the bulletin should not only contain photos, but also explain where on the body an object is likely to be found, such as in a pocket, contained within a turban, or under a shirt.

- (C) *Be categorized by religion or culture.* To adequately explain to an officer the garments and religious articles likely to be encountered in a search, the bulletin should be categorized by religious affiliation (as well as containing an index of religious terms in alphabetical order at the end, for ease of reference). For example, one page should include photos of various types of religious garments worn by Muslims of different sects and cultures, along with religious articles that are often used by people who are wearing such garments, including where on the person those articles usually are held or kept. Another page should include photos of various types of head coverings and religious garments often worn by Orthodox and Conservative Jews of various movements and sects. Additional similar pages should be devoted to Christian, Sikh, Zoroastrian, and other religious affiliations.
- (D) *Explain that beliefs, practices, and garments/head coverings often vary among adherents of a particular religion.* Within each section devoted to a particular religion, the bulletin should expressly state that not every individual who belongs to a particular religion wears identical garments, and that practices vary within religious communities, as well.
- (E) *As discussed below, consult further with religious groups to complete a comprehensive list of religious terminology, including houses of worship, garments and articles.* In the Coalition's brief opportunity to consult with members of various religious communities, they mentioned that the following religious articles should be added: **Stole** (various traditions); **Cleric collar** (Christian); **Tichel** (kerchief or head-scarf sometimes worn by Orthodox Jewish women); **Hat** (often a black hat worn by Orthodox Jewish men; Orthodox and non-Orthodox Jewish women will also sometimes wear a hat, of any color or style); **Streimel** (fur hat worn by some Hassidic orthodox Jewish men); **Snood** (netlike hair covering worn by some orthodox Jewish married women); **Talis** (a prayer shawl worn by orthodox Jewish men, sometimes placed over the head). Additionally, **Pooja/puja room** should be added to the list of sacred spaces in the Hindu tradition, as well as the following names for Jewish houses of worship or study: **Bais Medrash**; **Kollel**; **Shul** and **Yeshiva**. The definitions of **Masjid** and **Mosque** should clarify that they are interchangeable terms for an Islamic place of worship, not two separate types of spaces, and that "Masjid" may be the preferred term. The section on Religious Articles should add **Etrog** (citron) and **Lulav** (palm branch), both used in the Jewish festival of Sukkot; as well as **Kittel** (white button down robe), **Tallit bag** and **Tefillin bag**. The Religious Leaders section should add **Rov** and **Rosh Yeshiva** within the Orthodox Jewish tradition. Undoubtedly, additional consultations with individuals of various religious faiths will expand the lists further.

(13) CPD should delete undefined terms and cross-references.

The proposed Religious Interactions policy incorporates some dozen or so other CPD General Orders and Special Orders by reference, but without sufficient explanation. As the Coalition has stated regarding other CPD policies, we continue to believe that a single, comprehensive handbook would be easier for officers to follow than separate policies that are internally cross-referenced.

Finally, Section VI (“Documentation of Persons of Faith on Department Documents”) utilizes the term “persons of faith” without definition. That term does not appear in any other section of the policy and should be deleted. *All* individuals (regardless of religion or non-religion) whose names or gender identities do not match their government identification should be accorded the respect of recording their preferred name and gender on CPD forms.

(14) CPD should engage with religious communities in Chicago in revising this policy.

CPD’s consultation with the Council of Religious Leaders of Metropolitan Chicago, while laudable and important, does not meet CPD’s impartial policing obligations under the Consent Decree. CPD must directly engage with additional religious communities. Moreover, the 15-day comment period, ending on a weekend, failed to provide a sufficient opportunity for concerned Chicagoans to provide their views.

As demonstrated above, the present draft of the policy requires input and revision, both to conform to the governing legal standards and to cover the broad range of religious accommodations that should be made in interactions between police and members of the public. We urge CPD to develop a second draft that reflects a genuine and robust dialogue between CPD and individuals of all faiths in Chicago.

Sincerely,

Amanda Anholt
Sheila Bedi
Alexandra Block
Vanessa del Valle
Craig Futterman
Michelle Garcia
Joshua Levin
James Mooney

Attorneys for the Coalition