



Homeland
Security

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MEMORANDUM FOR: Kevin S. McAleenan
Commissioner
U.S. Customs and Border Protection

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SUBJECT: Religious Questioning at Ports of Entry – Multiple Complaints

Purpose

This memorandum provides policy and training recommendations to better support front-line U.S. Customs and Border Protection (CBP) Office of Field Operations (OFO) officers in avoiding improper questions regarding travelers' religion while conducting border inspections. It closes, with general findings and specific recommendations, multiple complaints filed with the Office for Civil Rights and Civil Liberties (CRCL) on this subject, and also closes multiple complaints that touch on similar subjects—without findings or recommendations—due to their age and ongoing litigation.

Background

On May 3, 2011, CRCL notified then-Acting CBP Commissioner Alan Bersin of its intent to investigate allegations that OFO officers engaged in inappropriate questioning about religious affiliation and practices during border inspection. The investigation into several of these complaints has been held in abeyance due to active litigation filed by four of the complainants on April 13, 2012, in the U.S. District Court for the Eastern District of Michigan.¹ CRCL continued to hear public concerns about alleged inappropriate questions into religious affiliation and practices at U.S. ports of entry, however, and opened multiple other complaints on similar

¹ Filed as *Cherri v. Mueller*, No. 2:12-cv-11656 (E.D. Mich.).

allegations, unrelated to the cases in litigation. It is clear that the matter of religious questioning remains one of public and Congressional concern, as it arose in the October 2017 testimony of then-Acting Commissioner McAleenan before the Senate Finance Committee. The Attorney General has also articulated principles of religious liberty as an Administration priority.²

With respect to the complaints not affected by the litigation, CRCL notes that CBP has substantially improved OFO officer training on cultural awareness, including issues that could arise in the processing of an individual based on particular religious views. This training is—as discussed more fully below—a valuable component of officer preparedness and provides a sound foundation for a workforce that is skilled at interacting with individuals of many cultural backgrounds. With this training in place, CBP is much better equipped to prevent inappropriate questioning of the sort alleged in these complaints.

In the context of cultural competency and interview training, however, existing materials do not go far enough in establishing clear policy around respect for religious exercise. CRCL therefore makes policy and training recommendations to better support front-line officers in avoiding improper questions at ports of entry.

Procedurally, this memorandum closes a large number of pending matters. It encompasses complaints that have been on litigation hold, including some filed as long ago as 2011, which are being closed due to their age, without specific findings or recommendations. Other complaints regarding religious questioning are being closed with this common set of general findings and recommendations.³

Nature of the Allegations

CRCL opened more than two dozen complaints on the subject of religious questioning at ports of entry. These complaints came to CRCL directly, through the CBP Information Center, or through the Joint Intake Center. The specifics of each individual's allegations were shared with CBP through documentation issued to CBP opening each complaint and need not be repeated here.

In general, the complainants alleged:

- That OFO officers “aggressively” questioned individuals regarding the geographic or cultural origin of their names;
- That OFO officers inquired into individuals’ particular religious practices, including

² Attorney General Jefferson B. Sessions, Memorandum for All Executive Departments and Agencies regarding Federal Law Protections for Religious Liberty (Oct. 6, 2017), *available at* <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>.

³ The specific complaint numbers and resolution are provided in Appendix A to this memorandum, without personally identifiable information, so that they can be shared more widely. The names of individual complainants is presented in Appendix B, which should be shared only with those who require that personally identifiable information (PII).

- sect (e.g. Sunni or Shia Islam);
- affiliation with a particular house of worship;
- frequency of prayer;
- fasting practices;
- religious marital arrangements; and
- “tribal” affiliation;

and

- That OFO officers were insensitive to travelers’ objections, based on their religious beliefs, to OFO officers viewing of photographs of the travelers or their relatives when not wearing religious headwear (e.g., a male officer viewing a photograph of a woman not wearing her hijab).

CRCL’s Investigation

CRCL received and reviewed TECS records and other DHS records in each of the complainants’ cases, as well as applicable CBP policy and training documents. In most of the cases, CRCL also conducted telephonic interviews with the complainants. In some cases, TECS records confirmed the broad outlines of the encounter as relayed by the complainants, while in other cases TECS did not corroborate whether particular questions were asked. CRCL conducted interviews, mostly telephonic, with several of the OFO officers who conducted the interviews in question, discussing both the specific encounters and the officers’ understanding of the training they had received and applicable CBP policy.

The review of the TECS records clarified that most of the complainants described questioning CBP undertook to confirm the individual’s admissibility. There were multiple reasons for the referrals of individuals for secondary inspection, including counterterrorism rules, one-day passenger lookouts, augmented primary lookouts, and other targeting techniques employed by OFO. In one instance, the referral arose in the context of an agricultural products inspection.

In some cases, either CBP’s explanation for the secondary inspection or the examination of TECS notes, provided helpful context for understanding why questions pertaining to the subjects’ religion could have been germane to the inquiry, or were otherwise relevant to determining the accuracy of a related assertion made by the traveler in response to a relevant question. But in other cases, the written records did not explain why, for example, an individual’s marital arrangements or frequency of prayer would be material to an issue CBP needed to resolve, or could otherwise be useful in determining the credibility of a specific assertion. In these cases, the interviews with the subject and officer raised potential concerns. As discussed below, however, there were also cases where CRCL could not determine whether the religious questions were appropriately related to the subject of the inquiry.

Revised CBP Training

CRCL was able to review two training modules that address cultural sensitivity, including religion, in the context of a primary or secondary inspection: CBP's "Detecting Deception and Eliciting Responses" unit (September 2012), and the P540C "Interviewing in Law Enforcement/Referral to Secondary" unit (undated).

CRCL's understanding is that the Detecting Deception and Eliciting Responses unit is an advanced course spanning three instructional days that is provided to a limited number of CBP Officer, Border Patrol Agent, and Office of Air and Marine (OAM) Agents who apply for the course. CRCL also understands that there is currently a waiting list for this course. The unit focuses on interviewing skills to improve information collection. Among the course objectives is to "[i]dentify the cultural factors that could affect eliciting information during a rapport-based interview."

The module CRCL reviewed appropriately avoids making generalizations about cultural factors as affecting an individual's truthfulness. It also avoids ethnic or religious stereotyping. It provides students with accurate and useful information on cultural factors that could arise in an individuals' encounter with law enforcement, including an extensive discussion of "high context" and "low context" cultures, and their different approach to establishing trust and providing information.

CRCL has no civil rights or civil liberties concerns with the content of this training module. It touches on many sensitive issues appropriately. While we did not have an opportunity to observe the module being taught, we expect it provides officers and agents with valuable tools for performing their duties. CRCL has no recommendations for changing or removing content from either module.

Analysis

General Concepts

As a backdrop, when enacting the Religious Freedom Restoration Act of 1993 (RFRA), Congress found that "the framers of the Constitution recognized free exercise of religion as an unalienable right, secured in its protection in the First Amendment to the Constitution," and that "governments should not substantially burden religious exercise without compelling justification."⁴ Accordingly, RFRA requires that the Federal "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except when the government demonstrates that the burden is the "least restrictive means of furthering" a "compelling governmental interest."⁵ The Supreme Court has

⁴ 42 U.S.C. § 2000bb(a)(1), (3).

⁵ 42 U.S.C. § 2000bb-1.

explained that RFRA's protection of religious exercise is "far beyond what [the Supreme Court] has held is constitutionally required."⁶

In 2011, then-Deputy Secretary Jane Holl Lute adopted CRCL's guidance on accommodation of religious beliefs in certain activities as Department policy.⁷ That guidance, in turn, makes clear that "federal agencies, including DHS, are subject to [RFRA], which prohibits any Federal Government practice that substantially burdens a person's exercise of religion, unless the Government demonstrates that the practice represents the least restrictive means of furthering a compelling governmental interest."⁸

This memorandum does not provide an in-depth analysis of how RFRA applies to particular inspection activities.⁹ Rather, it views RFRA as a baseline for CRCL's analysis of applicable policy and practice. CRCL and CBP have addressed these issues previously, for example, in the fingerprinting and photographic policy just discussed, and when CBP has advised POEs to be prepared to screen, and when possible, permit entry of particular agricultural items used in seasonal religious activities. These examples demonstrate that CBP has handled other sensitive religious issues through RFRA's balancing approach.

In light of these laws and policies, in considering these allegations, CRCL has evaluated whether CBP's approach to asking questions about individuals' religion is appropriately vetted through a balancing framework that considers whether CBP's use of religious questioning unnecessarily burdens the religious exercise of individuals who are encountered at the border.

We note that in OFO's unique mission, there are specific contexts where questions about religion are unquestionably valid, most clearly when a traveler seeks admission under a religious worker status (e.g., EB-4 Special Immigrant Religious Worker or R-1 Temporary Nonimmigrant Religious Worker). These complaints do not concern questioning of that nature.

Policy Developments

Following the initiation of the oldest of these investigations, DHS, CBP, and the U.S. Department of Justice have each issued nondiscrimination policies that bear on CBP's use of religion in its interactions with travelers:

⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2767 (2014).

⁷ Deputy Secretary Jane Holl Lute, Memorandum for DHS Component Heads, *Guidance for Accommodating Religious Beliefs in DHS Policies Requiring Fingerprinting or Photographic Identification* (Dec. 30, 2011), available at <https://www.dhs.gov/publication/guidance-accommodating-religious-beliefs-dhs-policies-requiring-fingerprinting-or>.

⁸ Officer for Civil Rights and Civil Liberties Margo Schlanger, Memorandum for DHS Component Heads, *Guidance for Accommodating Religious Beliefs in DHS Policies Requiring Fingerprinting or Photographic Identification* (Dec. 30, 2011), available at <https://www.dhs.gov/publication/guidance-accommodating-religious-beliefs-dhs-policies-requiring-fingerprinting-or>.

⁹ Further, by citing to the above provision of RFRA, CRCL is not stating or implying questioning during secondary inspection is not the least restrictive means available.

- “The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities” (April 26, 2013);
- CBP’s “Policy on Nondiscrimination in Law Enforcement Activities and all other Administered Programs” (2014);
- The Department of Justice’s “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity” (2014) (DOJ Guidance); and
- Attorney General Sessions’ “Memorandum for All Executive Departments and Agencies regarding Federal Law Protections for Religious Liberty” (2017).

While the DHS and CBP policies do not discuss religion, when promulgated they relied on 2003 Guidance from the Department of Justice.¹⁰ The 2014 DOJ Guidance superseded the 2003 Guidance, and does provide guidance regarding the use of religion. DHS partially adopted the 2014 DOJ Guidance through a public statement that stated that certain categories of DHS activities were excluded from the DOJ guidance, including, “[s]creening and inspection for border and transportation security.”¹¹ While DHS and CBP have discussed further policy or training that would address the subjects of the DOJ Guidance while accounting for “the unique nature of parts of DHS’ mission – most notably in protecting our borders and securing our skies,” no further policy has yet been issued. We are therefore confronting a situation where some DHS law enforcement activities are squarely covered by the religious nondiscrimination policy referenced in the DOJ guidance, but OFO’s border security mission is not.

OFO is covered by a general nondiscrimination provision, part of the CBP Standards of Conduct. Paragraph 6.11.1 of that policy provides:

Employees will not act or fail to act on an official matter in a manner which *improperly takes into consideration* an individual’s race, color, age, sexual orientation, *religion*, sex, national origin, or disability, union membership, or union activities (emphasis added).¹²

This general policy is entirely appropriate, but it does not address the issue here, since it does not guide officers on what proper—or improper—consideration of religion would be. That is, this policy only refers to proper use of religion, which is a concept that must be defined somewhere else. As noted, DHS policy looks to RFRA for that definition.

¹⁰ See “The Department of Homeland Security’s Commitment to Race Neutrality in Law Enforcement Activities” (June 1, 2004), at https://www.dhs.gov/xlibrary/assets/training/xus/crcl/racelawofficers/Common/pdf/dhs_profiling_policy.pdf; Department of Justice, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” (June 2003), at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/guidance_on_race.pdf.

¹¹ DHS, Fact Sheet: U.S. Department of Justice Racial Profiling Guidance (Dec. 8, 2014), at <https://www.dhs.gov/news/2014/12/08/fact-sheet-us-department-justice-racial-profiling-guidance>. The DOJ Guidance does expressly apply to some CBP activities, including certain law enforcement activities by Border Patrol that are not in the vicinity of the border. See *id.*

¹² CBP Directive 51735-013A (March 13, 2012).

Findings

Due to the volume and age of the allegations, CRCL does not believe furnishing detailed, case-by-case findings would be productive. In a representative number of the matters, CRCL finds the factual claim that CBP officers asked questions about some individuals' religion to be substantiated, and that these questions included specifics of individual worship as well as religious affiliation, fasting, and marriage practices.¹³ In some cases, these questions may well have been warranted by CBP's needs, and the infringement of the individuals' religious liberty may have been justified by the compelling government need for the information. Ascertaining whether those specific questions struck the appropriate balance under RFRA would require an investigation far more intrusive than CRCL has undertaken.

In some cases, CRCL did find that religious questions were used, not to get at material information, but rather as part of an officer's general effort to create rapport with a subject. Because of the sensitivity of religious matters, including the tendency to give offense by raising those topics unnecessarily, CRCL discourages this approach.¹⁴ For example, in an August 2011 interview of a supervisory CBP officer in matter 11-05-CBP-0171, we learned that the officer had received no briefings or musters on the subject, but would often ask Christians from non-Christian countries what it's like to be a Christian there. Religion questions used in this rapport-building manner are less likely to represent the least restrictive means of furthering the agency's interest in building a rapport in order to obtain information from the subject.

We also found cases where some religious matters were relevant, but officers engaged in broad-ranging questioning of their own devising, not guided by training or policy concerning the appropriate scope of questions touching on religion. In matter 11-03-CBP-0163, for example (another August 2011 interview with a different CBP officer), the officer explained that he had received no training on terrorism topics and was self-taught in understanding various sectarian conflicts. This officer explained that while he put questions to passengers that had been listed for him by the Joint Terrorism Task Force (JTTF), he also asked other questions of his own devising. For example, while the JTTF had never requested that travelers be asked how often a day they pray, the officer himself had determined that questions like that could be relevant, and asked them of some interviewees.

Conceptually, CRCL approaches these allegations through the balancing framework familiar from RFRA. First, we ask whether an individual has a sincerely held religious belief that could

¹³ Conversely, in several cases we could find that there are no significant allegations of wrongdoing by CBP. In matter 11-03-CBP-0164, for example, the allegations of religious questioning pertained to an FBI agent, not DHS personnel. But the point remains that our investigation of the complaints point to general improvements that can be made in addressing religious matters in CBP's interactions with travelers.

¹⁴ Compare U.S. Citizenship and Immigration Services, *Adjudicator's Field Manual*, § 15.3(b), redacted public version available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449/0-0-0-2633.html#0-0-0-353> ("Avoid questions about a person's religious beliefs or practices unless they are relevant to determine the individual's eligibility for a benefit.").

be substantially burdened by an action by the Department or a Component; and, if so, second, whether the action is the least restrictive means of achieving a compelling interest.

On the first step, CRCL finds that, in nearly all of these cases, the complainants objected to questions touching on their religion and asserted that they were an intrusion on their sincere religious beliefs or expressions. CRCL also finds to be credible complaints that CBP officers' viewing of photographs of the complainants or complainants' relatives on the complainants' personal electronic devices offended their sincerely held religious beliefs. We do not make a general finding as to whether each of these intrusions was a substantial burden.

On the second step, CRCL finds that, in general, CBP lacked a general policy or process ensuring that legitimate security needs do not unnecessarily burden individuals' religious expression in the context of an inspection interview. This was clear from the officers who explained to us the improvisational, ad hoc, or self-designed strategies they undertook for resolving alerts, such as alerts pertaining to travel through countries with sectarian civil conflicts. As far as we are aware from our review of policies, no new policy or training introduced since 2011 has comprehensively addressed this issue.

CRCL makes no specific findings as to whether these burdens were justified by the particular security need raised by the information or intelligence CBP or other government agencies had on the complainant. It would not be useful, from the standpoint of making policy recommendations, for CRCL to review the intelligence that prompted these individuals' referrals to secondary inspection. Additionally, CRCL makes no finding as to why any particular individual was referred to secondary inspection, or whether the questions appropriately related to specific intelligence about the individuals.

Accordingly, the recommendations below are aimed at clarifying for CBP Officers how to accomplish their border security mission without unnecessarily chilling any individual's exercise of religion. This includes strengthening training, ensuring that CBP officers follow these best practices, and encouraging appropriate consultation with the Office of the Chief Counsel (OCC).

Recommendations:

- 1) CBP should state explicitly in policy that it is impermissible for CBP personnel to discriminate against travelers because of their actual or perceived religion. One way to articulate this policy, consistent with other policy language now in place, would be to state that:

CBP officers and agents may consider religion as a factor in law enforcement activities only when such consideration is needed to satisfy mission requirements and is relevant under the totality of the circumstances, taking into account any exigency and the degree to which the information is timely, specific, and/or credible. This policy does not limit the use of religion (e.g., through asking questions) to validate or verify relevant information (such as information included on travel documents), or for data gathering, or in situations in which religion is expressly relevant to the administration or enforcement of a statute, regulation, or executive order.

Information regarding religion that is specific to particular suspects or incidents or ongoing criminal activities, schemes, or enterprises may also be considered.

- 2) Officers should be trained on this policy with specific guidance on the use of religion in primary and secondary inspections, building upon the cultural competency and effective interviewing techniques training already in place. The training should be built on legal guidance issued by OCC, setting forth legal obligations, including those under RFRA and the First Amendment, and guide personnel to seek the opinion of counsel when undertaking actions that could burden an individual's religious exercise.

CBP OFO officer training should note the potential negative effects on subjects of questions about their religion where it is not specifically relevant to a legitimate line of inquiry.

CRCL is available to provide technical assistance regarding policy and training materials to facilitate CBP's implementation of these recommendations.

Please inform CRCL within 30 days whether you concur or non-concur with these recommendations; if you concur, please provide CRCL with an action plan.

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Appendix A

Complaints Addressed – Without PII

Number	Manner addressed
10-10-CBP-0137	Closed with recommendations
11-05-CBP-0136	Closed with recommendations
11-06-CBP-0150	Closed with recommendations
11-06-CBP-0151	Closed with recommendations
11-06-CBP-0152	Closed with recommendations
11-06-CBP-0153	Closed with recommendations
11-06-CBP-0154	Closed without recommendations due to age of complaint, ongoing litigation
11-06-CBP-0155	Closed with recommendations
11-06-CBP-0156	Closed without recommendations due to age of complaint, ongoing litigation
11-06-CBP-0157	Closed without recommendations due to age of complaint, ongoing litigation
11-06-CBP-0158	Closed without recommendations due to age of complaint, ongoing litigation
11-06-CBP-0159	Closed with recommendations
11-06-CBP-0160	Closed with recommendations
11-06-CBP-0161	Closed with recommendations
11-05-CBP-0162	Closed with recommendations
11-03-CBP-0163	Closed with recommendations
11-03-CBP-0164	Closed with recommendations
11-03-CBP-0165	Closed without recommendations due to age of complaint, ongoing litigation
11-03-CBP-0166	Closed with recommendations
11-06-CBP-0167	Closed with recommendations
11-06-CBP-0168	Closed with recommendations
11-06-CBP-0169	Closed without recommendations due to age of complaint, ongoing litigation
11-05-CBP-0171	Closed with recommendations
14-04-CBP-0052	Closed without recommendation due to age of complaint, ongoing litigation
14-07-CBP-0210	Closed without recommendations due to age of complaint, ongoing litigation
14-11-CBP-0456	Closed without recommendations due to age of complaint, ongoing litigation
15-03-CBP-0191	Closed without recommendations due to age of complaint, ongoing litigation
15-09-CBP-0560	Closed without recommendations due to age of complaint, ongoing litigation

16-05-CBP-0165	Closed without recommendations due to age of complaint, ongoing litigation
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