

June 25, 2002

**TESTIMONY OF THE NEW YORK CIVIL LIBERTIES UNION BEFORE THE
COMMITTEE ON GOVERNMENTAL OPERATIONS OF THE COUNCIL
OF THE CITY OF NEW YORK CONCERNING INTRO. 102-A
(THE CUSTODY AND CONTROL OF CITY RECORDS OF HISTORICAL,
RESEARCH, CULTURAL AND OTHER IMPORTANT VALUE)**

The NYCLU supports Intro. 102-A and commends the City Council Government Operations Committee for introducing legislation to ensure that the archival records of the City of New York remain in the direct custody and control of the City of New York and are available to historians and members of the general public alike. On April 5, 2002, the NYCLU presented testimony in support of Intro. 102. The NYCLU is pleased to submit further testimony addressing the amended legislative proposal, Intro. 102-A, regarding the custody, control and treatment of the archival records of the City of New York and offer the following observations.

In his April 4, 2002 submission to the Committee, Corporation Counsel Michael A. Cardozo argued that Intro. 102 would inappropriately diminish the powers of the Mayor and/or any of his appointees. We believe that Intro-102-A appropriately amends section 3003 of the New York City Charter in several important ways to clarify the nature and extent of the DORIS Commissioner's power to delegate any of his/her functions and duties.

The New York City Charter vests the DORIS Commissioner with the ability to "exercise or delegate any of the functions and duties vested in such commissioner by law." § 3003(4) Section 2 of Intro. 102-A makes it clear that when the DORIS Commissioner chooses to delegate away the processing and accessioning of the City's archival records, the DORIS Commissioner must maintain those archival records in the public domain. Accordingly, the DORIS

Commissioner may delegate those functions only to quasi-governmental entities like the City University of New York and the State University of New York. Section 2 of Intro. 102-A further clarifies that the DORIS Commissioner may not permit the transfer of the City's archival records to "private entities," including corporations and non-governmental organizations, or "outside the state of New York" and makes it clear that the DORIS Commissioner may not enter into any agreement that would be contrary to public policy as the product of self-dealing.

Nor should section 4 of Intro. 102-A be read as diminishing the powers of the Mayor and/or any of his appointees. This provision merely amends section 1133 of the New York City Charter to clarify the timelines that govern the transfer of City agency records that are to be retained for historical or research purposes to the Municipal Archives or other archival establishment. §1333(c).

Section 5 of Intro. 102-A provides that the amendments to the City Charter are "retroactive to and in full force and effect as of January 1, 2001."¹ The effective date is not invalid. Corporation Counsel Cardozo has not argued that Intro. 102-A, insofar as it would invalidate the contract between DORIS and the Giuliani Center, violates the "contract clause" of the federal Constitution, Article I, § 10 cl. 1 which generally prohibits legislation impairing the obligations of contracts. Nor could he. The constitutional protection extended to the integrity of contracts is not unlimited.² And where, as here, the contract contains a rescission clause,

¹ As the Committee knows, the NYCLU has proposed model legislation for future consideration concerning the Department of Records and Information Services ("DORIS"), derived in part on federal legislation creating the National Archives and Records Administration, 44 U.S.C. §§ 2101 *et seq.* Our model legislation addressed the effective date of the proposed amendments in a different fashion. The Committee may want to consider the suggestion we offered in our model legislation.

² A municipality may override the provisions of a contract when the impairment is "reasonable and necessary to serve an important public purpose." *Subway-Surface Supervisors Association v. New York City Transit Authority*, 44 N.Y.2d 101, 109-110, 404 N.Y.S.2d 323, 328 (1978). Here, the City is acting entirely appropriately and to serve

permitting the City to terminate the agreement in its sole discretion, the contract cannot be said to be impaired since the contract already permits such abrogation.

Section 2 of Intro. 102-A also explicitly and appropriately establishes that “any person aggrieved by a violation of this subdivision” – including the residents of the City of New York and other researchers, journalists and historians – may obtain injunctive or declaratory relief to enforce its provisions.

Finally, we understand that you may soon be considering Intro. 217, an alternative archival records bill introduced at the request of Mayor Bloomberg. Although Intro 217 is not being formally reviewed at today’s hearing, we offer the following comments. Intro. 217 does nothing to ensure that future archival records of the City of New York remain in the direct custody and control of the City of New York, subject to the oversight of DORIS, and available to historians and members of the general public alike. Rather, Intro. 217 would allow the City to enter into contracts with private entities to house, appraise, arrange and describe, and make available for research and public use, the archival records of the City of New York. Intro. 217 permits DORIS to enter into contractual arrangements with such private entities without public disclosure and reduces the power of DORIS to provide oversight of those private entities. In addition, Intro. 217 contemplates a regime of access to those archival records of the City of New York that have been transferred to private entities only under the State Freedom of Information Law. Such a regime reflects an unprecedented change in the manner by which the public accesses the City’s archival records and would dramatically obstruct scholars, archivists and the general community from accessing the materials. Intro. 217 does not return direct custody and control of the records of the Giuliani mayoralty to DORIS nor does it redress the issues of equal

an important public purpose -- safeguarding its historically significant records. It is also important to note that the

access to the records of the Giuliani mayoralty by historians and members of the general public alike. Should Intro. 207 come before this Committee for hearing, we will be happy to supplement our comments.

Conclusion

The NYCLU strongly supports a legislative enactment that will both redress and prevent any future unjustified and irresponsible removal of official City records from the direct care and custody of City officials in an accessible municipal archive. Accordingly, the NYCLU urges the City Council Government Operations Committee to vote yes on Intro.102-A.