

**TESTIMONY OF  
DONNA LIEBERMAN ON BEHALF  
OF THE NEW YORK CIVIL LIBERTIES UNION  
before the  
COMMITTEE ON GOVERNMENTAL OPERATIONS  
of the  
COUNCIL OF THE CITY OF NEW YORK  
concerning  
THE GIULIANI PAPERS  
February 20, 2002**

My name is Donna Lieberman. I am the Executive Director of the New York Civil Liberties Union (NYCLU). I submit this testimony to address the controversy surrounding the contract entered into between the City of New York and the Rudolph W. Giuliani Center for Urban Affairs, Inc. regarding the custody, control and archival treatment of the documents and papers of the Giuliani mayoralty.

Discussion of public affairs and of the conduct and performance of public officials lies at the core of our system of free expression. In the pursuit of such discussion, however, the right to the right to think as one wishes and the right to speak as one thinks are not abstract and isolated activities divorced from the acts of gathering the information necessary to form opinions. Accordingly, in furtherance of the interest in informed and robust discussion of public affairs, the Freedom of Information Law (FOIL) confers access to public documents and papers. It does so in a neutral and even-handed fashion conferring equal access upon all individuals seeking to invoke its provisions.

But, the regime of access proposed by the Rudolph W. Giuliani Center for Urban Affairs governing the documents created during Mr. Giuliani's tenure as Mayor does not offer the qualities of neutrality and even-handedness that characterize the FOIL. Indeed, such a regime provides Mr. Giuliani with an invitation to grant privileged access to some and to deny it to

others. Where Mr. Giuliani is involved such an opportunity presents an almost irresistible attraction.

Under the regime proposed by the Giuliani Center and apparently accepted by City officials, documents will fall into one of three categories. First, there will be documents that both the Giuliani Center and the New York City Corporation Counsel agree are public documents and will be made available to researchers, scholars and other individuals either without a formal request under the FOIL or pursuant to a formal request under the FOIL. Second, there will be documents that are personal or privileged and otherwise exempt from disclosure under the FOIL as determined, first, by the Corporation Counsel and then by the courts. Third, there will be documents that are not so personal as to deserve an exemption from disclosure under the narrow definitions set forth in the FOIL but which, according to the Giuliani Center, are to be treated nonetheless as subject to “restricted access.” Documents falling into this category will not be made generally available on an informal basis but may be secured through the formal and time-consuming FOIL process, except that Mr. Giuliani has been authorized to confer easy access, without the formalities of FOIL, to individuals of Mr. Giuliani’s choosing in the uncabined exercise of the former Mayor’s discretion.

Such a regime will permit Mr. Giuliani to confer upon his favored scholars and journalists privileged access to documents and to deny equal access to less favored individuals. Mr. Giuliani will be permitted to do so on the basis of the views that, in Mr. Giuliani’s belief, these scholars are likely to express. Such a regime conflicts with equality principles of the First Amendment. Those principles hold that in conferring access to expressive opportunities, government has an obligation to confer equal access to individuals and is prohibited from pri-

vileging some and disadvantaging others on the basis of the ideology of such individuals or the views that such individuals are likely to convey.

Because, in our view, this regime invites violations of First Amendment equality principles and because removal of the documents from the direct custody and archival responsibility of DORIS is unjustified, we urge the City Council to adopt a resolution urging the Executive Branch to rescind the December 24 agreement.

Our conclusions, in this regard, are amplified in the following discussion. That discussion will be preceded by a description of the background of this controversy.

## I. BACKGROUND

### *The Transfer of Records of the Giuliani Mayoralty Out of the City's Direct Custody and Control*

On or about December 24, 2001, Commissioner George Rios, on behalf of the City of New York and/or the Department of Records and Information Services of the City of New York (DORIS), entered into a contract with the Rudolph W. Giuliani Center for Urban Affairs Inc., signed by Saul Cohen, President, concerning the records of the mayoralty of Mr. Giuliani. The records are said to include appointment books, cabinet meeting audiotapes, e-mails, telephone logs, advance and briefing memos, correspondence, transition materials, and private schedules, as well as Mr. Giuliani's departmental, travel, event, subject, and Gracie Mansion files. Giuliani's "World Trade Center files" and "Millennium Project files," together with 6000 files of photographs, 1000 audiotapes, and 15,000 videotapes, are also reported to be a part of the records covered by the contract. In addition, the records include those of his chief of staff and every deputy mayor, together with their chiefs of staff. Finally, gifts such as plaques, awards, personalized clothing, and other items presented to the mayor and deputy mayors, as well as World Trade Center-related materials are alleged to be included as part of the records. All of

these items were reported to have been delivered from the direct custody and control of the City to a private warehouse storage facility in Long Island City at the end of December 2001.

*The December 24 Agreement*

The December 24 agreement acknowledges that the "official papers" of the former mayor are a matter of "great historical significance" and "unique value."<sup>1</sup> The agreement further recognizes that "the documents are the property of the City"<sup>2</sup> and that "under the City Charter," the Department of Records "is ultimately responsible for the preservation and organization" of these materials."<sup>3</sup> Nevertheless, the agreement provides that "[w]henver Rudolph W. Giuliani has a personal interest or right in a Document separate and apart from the interests and rights of the City, his approval shall be required before any such document may be released or disclosed to the public."<sup>4</sup> The agreement also grants the Giuliani Center a role in determining the public nature and availability of documents.<sup>5</sup> Under the agreement, if the Giuliani Center determines that material is not a "public document," the Center and the City can agree to withhold it from public access.

*The New York State Committee on Open Government Conclusion  
that the December 24 Agreement Violates the FOIL*

On February 13 and February 14, 2002, the Executive Director of the Committee on Open Government issued two advisory opinions<sup>6</sup> determining that the December 24 agreement violated the Freedom of Information Law in several key respects. The Executive Director of the Committee on Open Government first determined that all the records transferred to the Giuliani

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<sup>1</sup> Page 1, 2<sup>nd</sup> prefatory paragraph.

<sup>2</sup> Article I, ¶ I.

<sup>3</sup> Article I, ¶ G(1).

<sup>4</sup> Article I, ¶ M.

<sup>5</sup> Article I, ¶ A.

Center pursuant to the December 24 agreement constitutes records “that fall[...] within the coverage of [FOIL].” He then determined that Article 1, ¶ M afforded Mr. Giuliani improper veto power over the disclosure of documents he deems personal. He also concluded that Article 1, ¶ A, which allows the Giuliani Center to prescreen documents and determine when they are “public,” improperly intruded the Center into a determinative process not contemplated by FOIL.<sup>7</sup>

The Executive Director of the Committee on Open Government also considered the mandate of Section 87(3)(c) of the Public Officer Law which obligates an agency to maintain a “reasonably detailed list by subject matter” of all agency records. Such a list is necessary to prevent the inappropriate destruction of documents and to inform the public as to the content of

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<sup>6</sup> The Committee on Open Government is authorized, pursuant to section 89(1)(b)(ii) of the New York Public Officers Law, to issue advisory opinions concerning the application of the Freedom of Information Law.

<sup>7</sup> In concluding that the December 24 agreement violated FOIL, the Executive Director relied, in part, on the New York Court of Appeals decision in *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246 (1987). In *Whalen*, the Court of Appeals considered a dispute with respect to the “personal” papers of then-deceased Albany Mayor Erastus Corning. After Mayor Corning’s death, the City of Albany maintained numerous of Mayor Corning’s governmental, as well as personal, documents. The Corning estate objected to the City of Albany’s making Mayor Corning’s papers available in response to FOIL requests of the media. The City of Albany then deferred to the Corning estate, permitting it to screen Mayor Corning’s papers and then, either to remove certain papers from the City’s custody and control or to deny requests for public access to such documents. The Court of Appeals criticized the City for acceding to procedures that conflicted with the Freedom of Information Law.

In so doing, the Court noted:

“as a practical matter, the procedure permitting an unreviewable prescreening of documents--which respondents urge us to engraft on the statute--could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it ‘purely private.’ Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected.”

the documentary collection. The City apparently transferred records to the custody of the Giuliani Center without first compiling such a detailed list. In this regard, the Executive Director expressed the opinion that the list appended to the December 24 contract as Attachment A does not contain sufficiently detailed information to satisfy the requirements of Public Officer Law §87(3)(c).

*The February 14, 2002 Archival Standards and Processing Plan*

On February 14, 2002, the Giuliani Center and DORIS agreed upon an “Archival Standards and Processing Plan.” The February 14, 2002 plan appears to modify some of the provisions of the December 24 agreement. These modifications address some failings of the December 24 agreement. For example, Article 1, ¶ A of the agreement had authorized the Center to participate with the City to determine which documents delivered to the Center are to be regarded as “public documents” and which documents are not “public documents.” The February 14 modification provides as described by the Corporation Counsel in his February 14 letter to the Public Advocate, that “[t]he Office of the Corporation Counsel (not the Center and the former Mayor) [will] determine[] which records held by the Center are official government documents and which are the private records of former Mayor Giuliani or another individual.” While the reassertion of decisionmaking authority by the City represents an improvement, even this modification, as described by the Corporation Counsel, rests upon a fundamental misconception regarding the nature of “agency records” and the erroneous belief that some “agency records” are not government documents. This matter is addressed in more detail below.

Moreover, the February 14 modifications do not correct the irresponsible removal of official mayoral papers from the direct care and custody of City officials in an accessible

municipal archive to a private and considerably less accessible warehouse. The February 14 modifications do not cure the unjustified exclusion of professional city archivists from the archival process and the substitution of a private archivist under the financial control of Mr. Giuliani's functionaries. These matters are also addressed below.

II. THE ACCESS REGIME CONTEMPLATED BY THE GIULIANI CENTER WILL ALLOW THE FORMER MAYOR TO PROVIDE INFORMAL ACCESS TO FAVORED RESEARCHERS AND JOURNALISTS AND TO REQUIRE LESS FAVORED SCHOLARS AND JOURNALISTS TO EMPLOY MORE CUMBERSOME AND FORMAL FOIL PROCEDURES.

At the heart of the opinion letters issued by the Executive Director of the State Committee on Open Government is the conceptual understanding that all documents in the possession of a City agency or in a depository controlled by a City are "agency records." None of these documents are "private." As noted, the access plan promulgated by the Giuliani Center is deeply at odds with this conceptual understanding.

Section III and Section VII of the February 14 plan appear to amplify Article 1 ¶A of the December 24<sup>th</sup> agreement by mandating that non-public documents are to be identified and by specifying which agent of the Giuliani Center is to conduct the preliminary screening.<sup>8</sup> The Corporation Counsel reinforces this error by describing agency records as either "official government documents" or "private records of former Mayor Giuliani or another individual."

The February 14 plan modifies the December 24 agreement by vesting sole authority in the Office of the Corporation Counsel to determine whether the documents identified by the Giuliani Center are, in fact, public or "restricted access materials." But, this transfer of authority

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<sup>8</sup> Section III provides that "restricted access materials" are to be identified during the early processing stage of the work plan. Section VII of the February 14 plan directs the Archivist to "use his/her own judgment and bring all records which may be security-related, privileged or private to the attention of the Office of the Corporation Counsel."

to the Corporation Counsel to undertake the taxonomic process does not cure the conceptual problem of designating some “agency records” as “official government documents” and some as “private records.”

This is not to say that all “agency documents” must be disclosed under FOIL. FOIL clearly contains exemptions. And we have every confidence that Corporation Counsel Cardozo will invoke these exemptions responsibly and in the appropriately narrow fashion contemplated by the framers of the statute and by the New York Court of Appeals. However, the conceptual error in designating some documents as private and non-governmental raises practical problems that become apparent as one examines the categories of “restricted access” contemplated by the plan put forward by the Giuliani Center.

Section VII of the plan creates three categories of “Restricted Access or Private Material” to which “[g]eneral access [...] may need to be restricted.” The Plan defines the restricted categories as those records that either “deal with matters related to City security or law enforcement,” are “of a private nature,” or “relate to current or anticipated litigation or otherwise be legally privileged.” Yet, as defined, these categories establish broader exemptions from disclosure than those permitted by FOIL. This is particularly true of the effort to restrict access to documents that are “of a private nature.” Such a category is potentially quite broad. By contrast, the “privacy” exemption under the FOIL is considerably more specific. Public Officers Law §87(2)(b) permits an exemption from disclosure for those documents which, “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article.” And section 89(2) defines “an unwarranted invasion of personal privacy” as including disclosure of employment, medical or credit histories or personal references of applicants for employment, disclosure of items

involving medical or personal records of a client or patient in a medical facility, the sale or release of lists of names and addresses if the lists are to be used for commercial or fund-raising purposes, disclosure of information of a personal nature when disclosures would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it, disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency, or information of a personal nature contained in a workers' compensation record.

There is a practical significance to this classification system put forward by the Giuliani Center. Under the Center's scheme, three categories of documents are to be identified. First, the Center's plan contemplates documents that are designated as public documents. These documents will, as noted earlier, be made available to researchers and other individuals either formally under FOIL or without a formal FOIL request. Second, the Center's plan contemplates documents that the Corporation Counsel and the courts determine are exempt from disclosure under the FOIL. These documents will be withheld from disclosure. Third, because – as noted – the “privacy” definition in the Center's “restricted access” category will apply more broadly than the “privacy” definition that will support an exemption under the FOIL, there will be documents that must be disclosed under the FOIL but that will nonetheless qualify for “restricted access” under the Center's plan. This third category of documents is addressed in Section IX, subsection (ii) at page 14 of the Center's implementation plan. The subsection provides that

“in the case of any ... request for public access (ie where the City has determined that a document is a private record and the request is not [made under the FOIL]), the Center may grant such access only with the approval of former Mayor Giuliani or such other individual.”

This provision provides Mr. Giuliani with unlimited discretionary authority in a circumstance where a document has been designated as a “private record” under the “Restricted

Access” provisions of the Center’s plan but where the document is not sufficiently personal to qualify for an exemption under the FOIL. In that circumstance, Mr. Giuliani retains the exclusive authority to confer access without requiring the individual to file a formal request under the FOIL to secure access. Alternatively, Mr. Giuliani can require individuals to jump through the hoops of the FOIL in order to secure access to these documents. Accordingly, these provisions permit former Mayor Giuliani to pick and choose his favored researchers, journalists and historians and to provide them with easy access to documents that others will not enjoy; and to do so on the basis of the views to be expressed by such writers or upon Mr. Giuliani’s personal preferences.

Such an arrangement raises deep constitutional concerns. For, under the equality principle of the First Amendment, government must provide “equal access” to expressive opportunities and may not discriminate on the basis of the views that are to be expressed or in favor of some individuals over others. *Police Department v. Mosley*, 408 U.S. 92, 96 (1972) (“there is an ‘equality of status in the field of ideas’ and government must afford all points of view an equal opportunity to be heard.”); *Simon & Schuster v. Crime Victims Board*, 502 U.S. 105 (1991) (discrimination in the burdening of expressive opportunities for individuals constitutes viewpoint discrimination); *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980) (unequal access to reduced mailing rates held unconstitutional).

### III. THE REMOVAL OF DOCUMENTS FROM THE DIRECT CONTROL AND CUSTODY OF DORIS IS UNJUSTIFIED.

The City Charter vests DORIS with the responsibility to preserve and receive all city records of historical, research, cultural or other important value. City Charter, Chapter 72, § 3004(1)(c). The City Charter mandates that DORIS make all of the materials it maintains available for public inspection. §3004(2)(c). The City Charter also mandates that all records

which are deemed to be of historical or research value be transferred by the city official or agency to DORIS' municipal archives for "permanent custody." City Charter, Chapter 49, §1133(b); RCNY §1-07.<sup>9</sup> In transferring the documents to the Center, the City has violated this mandate and has made it less likely that the materials will be readily accessible for public inspection. The February 14 plan contemplates a three-year timetable for the complete processing of the records of the Giuliani Mayoralty during which access will generally not be permitted to the general public.<sup>10</sup> A "member of the public [who] request[s] access to the records of the Center" will only be granted access to those records to which processing has been completed."<sup>11</sup> It is unclear whether Article IX of the February 14 plan is intended to restrict access to documents under a FOIL request. The provisions of FOIL mandate that *all* records of an agency are available to the public *at all times*, except to the extent that records or portions thereof fall within one or more the exemptions set forth at Public Officer Law §87(2).

We are mindful of the fact that the City has made arrangements to obtain private donor funding to defray the expenses attendant to the processing of the records of the Giuliani Mayoralty. There is precedent for the private funding of the cataloguing of mayoral records; there is precedent for the actual work of cataloguing such records by a private entity on behalf of

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<sup>9</sup> Admittedly, the Commissioner has the power to delegate any of his/her functions and duties. § 3003(4). It remains to be seen whether the Commissioner can actually delegate his/her archival functions to a private, non-municipal agency, such as the Giuliani Center, not even participating in the cataloguing of the materials. Arguably, the Charter contemplates merely the delegation of the Commissioner's functions to other municipal employees of the municipal archives/reference and research center structure established by the City Charter. Certainly, past practice and procedure demonstrates that the City has almost exclusively maintained the archival records of New York City's past mayors

<sup>10</sup> February 14, 2002 letter from Michael A. Cardozo to Hon. Betsy Gotbaum, Public Advocate of the City of New York; February 14 plan Article I.

<sup>11</sup> February 14 plan Article IX.

the Municipal Archives.<sup>12</sup> There is, however, no precedent for such work to be carried out without the direct oversight and participation in the processing and cataloguing of such records by DORIS employees. Nor is there precedent for the City to cede direct custody and control over its public records to a private entity.

#### IV. CONCLUSION

We, therefore, urge that the City Council adopt a resolution asking the Executive branch to rescind the contract as the City is apparently authorized to do within 90 days of its execution.

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<sup>12</sup> The records of the Mayoralty of Edward Koch were processed by LaGuardia College.