



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street, 19th floor
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Testimony of the New York Civil Liberties Union

before

**The New York City Council
Committee on Public Safety**

regarding

**Proposed permit requirement for possession or deployment
of environmental testing devices (Int. 650-B)**

April 29, 2008

My name is Beth Haroules. I am a staff attorney with the New York Civil Liberties Union.

In my testimony today I intend to alert City Council members that, notwithstanding the considerable deliberations undertaken regarding Int. 650-B – and the amendments to the bill adopted pursuant to these deliberations – the proposed legislation, if enacted in law, will have a direct, immediate and harmful affect on the exercise of basic rights and liberties.

Int. 650-B would make it unlawful for a person to possess or deploy instruments used to test for the presence of chemical and biological agents and radiation without first obtaining a permit issued by the police commissioner. Under the proposed law the possession of such devices without a permit would be a misdemeanor crime punishable by fine or imprisonment.

The proposed permitting scheme seems intended to establish standards and oversight regarding biological, chemical and radiological testing instruments that may provide early warning of a terrorist attack. And for this reason the bill states, “such instruments should be deployed only with the knowledge of the police department and other appropriate city agencies.”¹ These instruments may be used, however, for a broad range of purposes – including research, experimentation, monitoring of conditions in the natural environment and in the workplace – that are entirely unrelated to providing an early warning of a terrorist attack.

¹ See Int. 650-B, Section 1, Legislative Purposes.

These activities implicate fundamental liberty interests related to the collection and dissemination of information in service of the public good. The NYCLU takes the position that the proposed permitting scheme will unduly frustrate the legitimate and lawful use of chemical, biological and radiological testing devices. We believe the legislation fails to strike the appropriate balance between the city's interest in securing public safety and the interest of individuals in exercising their rights of speech and association without undue government interference.

We address below, in brief, the NYCLU's specific objections to Int. 650-B.

- **The proposed permitting scheme is overly broad and lacks even minimal protections of the right to due process.**

Since Int. 650-B was first introduced in January, 2008, the bill has gone through five iterations. And, in each iteration, representatives of the police department and the City Council have proposed certain amendments to the bill in an effort to deflect the criticism that the permitting scheme is overly broad. However, the version of the bill under consideration today remains unacceptable.

These amendments identify certain uses of testing devices that may trigger an exemption from the permit requirement. One such amendment seems intended to exclude from the permitting requirement the use of detectors by an individual (e.g., testing devices intended for home use), as opposed to use by institutions or organizations.² Another provision seems intended to limit the permitting requirement to the use of devices intended to provide an early warning of a biological, chemical or radiological weapons attack.³

However these exceptions are unclear as drafted; and as applied, will all but certainly lead to unwarranted intrusion upon law-abiding conduct. For example, the provision that purports to exempt an individual from the permit requirement employs a double negative in defining the ostensible purpose, or intent, of the individual in possession of a testing device.

[The permitting requirement] shall not apply to . . . detectors which are not possessed or deployed as an early warning device with a purpose of detecting a possible biological, chemical or radiological weapons attack. . .⁴

How is a police officer supposed to discern from this provision what conduct manifests culpable intent? In short, the proposed permitting scheme grants police officers extremely broad and poorly defined authority to prohibit or curtail what may be the lawful and legitimate uses of environmental testing devices.

² Section 10-809a(4).

³ Section 10-809a(5).

⁴ Sections 10-809a & a(5).

Pursuant to this authority, and as further articulated in the police commissioner’s proposed rules, police officers may be authorized to issue a summons and seize equipment prior to judicial review. This leaves the individual to establish his right to possess such equipment only after – and, quite likely, long after – that right has been violated.⁵

- **The legislation vests in the police commissioner unilateral authority to issue or withhold a permit.**

The bill vests the police commissioner with excessively broad authority to establish criteria regarding eligibility to receive a permit based upon the undefined “character and fitness” criteria, to establish grounds for refusing to issue a permit, and to enumerate the circumstances under which law enforcement officials may seize environmental testing instruments. And, even the process appealing the denial of a permit is subject to the authority of the police commissioner.

Under this scheme the police commissioner becomes the sole arbiter as to who is permitted to use environmental testing devices in New York City.

- **The bill grants the NYPD oversight authority for which it lacks the requisite expertise.**

The legislation authorizes the police commissioner to regulate matters of significant scientific and technological complexity. In implementing and enforcing the proposed permitting scheme, police officials will be required to assess the design, capabilities and uses of environmental testing instruments – including the threshold levels at which biological, chemical or radiological measurements must be reported to the NYPD.

In making assessments of this nature it would be expected that experienced experts may have a sound scientific grounds for reaching different conclusions. What’s more, the methodologies and standards employed are constantly evolving. The NYPD does not have the technological expertise required to implement the proposed permitting scheme with a reasonable degree of competence.

It has become clear in the deliberations over this legislation that its objectives are not clear. During the course of the debate, the bill’s sponsors changed their rationales justifying the legislation: the proposed law is necessary to prevent false alarms, to avoid undue anxiety among the public regarding the publication of results obtained from environmental testing, to establish baseline standards regarding such testing equipment, or to regulate testing equipment that may provide early warning of an attack.

⁵ In discussions regarding this provision with NYPD representatives, they declined to amend the bill to require either prohibition of seizure of testing devices or a hearing prior to any such seizure.

This lack of clarity regarding the bill's intent is reflected in the drafting of the bill. It has become increasingly apparent that the police department (the primary sponsor of this legislation) is most concerned with the early detection of a possible biological, chemical or radiological attack. In seeking to address this objective, it appears that drafters began with the assumption that all environmental testing devices may be used as early warning devices; and then, in response to the advocates' criticism that the proposed permitting scheme was overly broad, the drafters attempted to carve out exceptions for the use

In our view this approach is untenable; it has led to a misguided and poorly crafted bill. We recommend that the City Council explore a different approach: Establish a Task Force, comprised of appropriately representational stakeholders including, for example, CBRN detection experts, academicians and industrial hygienists. The Task Force should be charged with identifying those testing instruments that are designed and intended for the purpose of detecting weaponized CBRN attack[s]. If this proves feasible, the Task Force should then develop, if appropriate, a registration scheme for such fixed-installation testing devices. (It is equipment of this sort, maintained by large institutions, that may trigger readings that are disseminated to employees or the general public and that therefore warrant regulation.) Such a scheme may dictate technical standards for such testing equipment and protocols for reporting test results to public officials.

I close with a general observation regarding lawmakers' approach to counter-terrorism initiatives. When the threat of terrorism is invoked as a justification for enacting laws to secure public safety, policy makers seem quick to ignore the principle that legislation implicating fundamental rights and liberties must be narrowly tailored to accomplish its objective (even one as important as public safety) – and that, as a general rule, government must employ the least restrictive means to accomplish that objective.

The NYCLU urges the mayor, the City Council and police officials to reconsider Int. 650-B in light of this legal standard.