

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROGRAMS AND SERVICES COMMITTEE REPORT

WEDNESDAY, FEBRUARY 22, 2006

Present: Marcia Johnson (Chair) Ald. Sangiolo, President Baker, Ald. Coletti, Parker, Hess-Mahan (Vice-Chair)

Absent: Ald. Lipof, Merrill

Other Aldermen Present: Ald. Weisbuch, Yates, Vance, Mansfield, Linsky, Harney, Danberg

Others: Stuart Lipoff, Robert Cerra, David Olson (City Clerk) Mayor Cohen, Dan Funk (City Solicitor), Gayle Smalley (Assistant City Solicitor), Audrey Cooper, (Library Trustee), Beth Wilkinson (Library Trustee), Kathy Glick-Weil (Library Director), Police Chief O'Brien, Sandy Pooler (Chief Administrative Officer)

REFERRED TO PROGRAMS AND SERVICES AND FINANCE

#94-06

HIS HONOR THE MAYOR requesting an appropriation in the amount of \$280,000 from Budget Reserve for the purpose of supplementing the FY06 School Department budget. The School Department will use these funds to supplement its various energy accounts.

ACTION: **APPROVED 5-0-1 (Sangiolo)**

NOTE: Sandy Pooler was present and explained that in the Fall there was approximately \$400,000 set aside from the tax levy in order to go for future energy costs and that was split 70-30 with the schools and the city side. It was known that there were major shortfalls in the energy budgets starting back in June when bids came in on gasoline and diesel accounts. Brookline and several other communities bid out in a consortium. Net costs went up 60-70%. For example, the City was paying just under \$2.00 a gallon as we don't pay any tax on the gasoline. The account that really affects the School Department, Public Buildings and DPW are the electricity and natural gas accounts. In the fall, we still did not know what the costs would be for the year on those items because we had gone from long-term contracts that were fairly cheap for the city. The electricity contracts expired in September and the natural gas contracts expired in October. Post Katrina has shown a huge increase in the natural gas market. Natural gas has gone up by about 60%, and electricity has gone up between 30% to 40%. Projections to the end of the year have been based on consumption amounts that were similar to previous years. January was mild and February appears to be typical. Those are the two big months and consumption should get easier. The \$280,000 is needed to close the gap on the school side. There would still be a remaining gap of about one-half of a million dollars.

Ald. Parker hoped that adequate plans are made as the FY07 budget is planned for appropriate reserves for both city and school sides. Both Ald. Sangiolo and Hess-Mahan mentioned that often windows were open in schools on cold days and this appeared to be an operational issue.

#105-06 STUART LIPOFF, 192 Kirkstall Road, Newtonville, requesting a discussion of the decision on January 18, 2006 by the Newton Library Director requiring a search warrant from investigators looking into the source of a threat e-mailed to Brandeis University prior to providing access to the Newton Library public access computers, including the possibility of a review of guidelines for future decision-making by the director relating to library records, if and when such an incident were to recur.

ACTION: **NAN 6-0**

#106-06 ROBERT L. CERRA, 77 Auburn Street, Newton requesting that the Newton Board of Aldermen conduct an inquiry into the manner in which the City of Newton responded to a request by law enforcement authorities for assistance. This event which took place on January 18, 2006 at the main library has generated extensive and conflicting media reports, raised public concern and warrants a public review.

ACTION: **NAN 6-0**

NOTE: Mr. Cerra and Mr. Lipoff were present and both items were discussed together.

Chairman Johnson opened the meeting stating the ground rules regarding these items. Discussion was to only focus on process and procedures. There would be no discussion of people and personalities. Given those two guidelines, the Chairman opened the discussion by providing the petitioners with an opportunity to provide opening comments to the Committee.

Mr. Lipoff believes that this is an issue of national importance that goes well beyond the borders of Newton. He would like clarification of events as he thinks they could have implications for national security and would like to see a Public Hearing with an outcome that would hopefully result in maximum participation by the public and the press. He would like the witness list to include specific eye witnesses who were on site and can give first hand accounts of what happened as well as other decision makers and advisors who were in “real time” communication with people on site and provided advice and input on what people should do.

His first objective is to disabuse terrorists of thinking of the library as a safe haven. He feels it is important to have accurate, objective and visible press coverage so that any criminal who becomes aware of this press coverage does not use a public library as a safe haven to engage in terrorist activities. He hopes that an outcome of a hearing will be that any ambiguities or conflicts in policy, regulation or law that may have prevented a timely response to the incident are surfaced so that the ambiguity can be solved by policy clarification and/or change in adopting

new laws. He asked that the actions be subject to scrutiny to determine if they acted in an objective, professional and correct manner.

His understanding of the situation on January 28th is based on second hand press accounts. The press accounts note that a threat was received at 11am regarding a bomb and in response police evacuated 12 buildings at Brandeis as well as an elementary school. By about 2pm the email was traced to a computer at the Newton Library and shortly thereafter FBI, State Police, and Newton Police rushed to the library and requested access to the crime and access to computers.

Based on newspaper articles, Mr. Lipoff related that he further understood that Ms. Glick-Weil backed by Mayor Cohen would not allow police access to computers on the grounds that they did not have a warrant. It took US attorneys several hours to get a warrant and impound the computer from the library at 11:30 that night.

Questions that Mr. Lipoff had:

- At the time the police were not granted access, did all parties understand that it was no longer a threat? Based on what was known when the police first arrived, would people's lives have been put at risk as a result of the delay?
- Even if there would be no impact on people's lives, did this delay inhibit discovery of the identity of the criminal?
- Had any danger of a threat passed by the time the police first arrived at the library and what was the nature of the threat and the importance of timely action to the crime scene? With respect to actions taken, did all the parties react in a professional manner?
- What was done to protect the crime scene and avoid loss or contamination of the evidence?
- He would ask what regulations exist that cover this situation and is there clarity to which of these laws apply if there are conflicts and were all decision makers involved in the incident aware of and agreed upon the governing law?

With respect to action recommendations, Mr. Lipoff would hope the following would result: The policies would be changed or clarified; recommendations would be passed regarding new policies. New laws or ordinances that need to be approved will happen and recommendations in regard to retraining would also take place. Press releases and public relation policies should be developed to inform the public as to what actually happened so that future criminal behavior and actions by future terrorists could be discouraged.

Mr. Cerra, as a concerned citizen, explained that he felt this is a public safety issue. He has observed that we have been given a second chance to review what happened and to do it better. In his opinion, he believes it was an emergency as he checked back to 1980 in this area and could not find any other circumstances where the FBI, the Mass. State Police and Local Police descended on any location and looked for particular information. He quotes from an emergency plan that discusses an evacuation policy. Mr. Cerra noted that Mayor Cohen has said that the Newton Police Department continues to do surveillance around the city and to work with the

FBI. Every school has an evacuation policy. He read statements from Mary Minnow, a lawyer, library trustee, and a library law consultant who has taught library law at the San Jose School of Library Science. She is currently writing a book on legal issues for the library association. Mr. Cerra went on to read some articles written by Ms. Minnow and said what happened in the library should not have happened. In his opinion the police should not have been delayed. He feels the circumstance should be looked at and re-examined and come out with a better process to find out what happened at that library.

Mr. Cerra sent an email to Ms. Glick-Weil where he suggested that she address this issue in a series she has on privacy, freedom of information, and safety. She has had two sessions at the library regarding issues surrounding the Patriot Act and other issues. He hopes that the Committee sends to the Board of Aldermen the request to review the circumstances surrounding that incident in the library and also requests that if this committee is going to listen to personal, first-hand accounts about what took place in that library, in fairness to his request, they have individuals present first hand accounts about what took place. He hopes that first hand accounts are listened to.

Mayor Cohen: In response to the petitioner's request for information, Mayor Cohen outlined the events that took place on January 18th. He wanted people reassured by what happened because he felt we were able to protect public safety and the privacy of innocent people by following the law. At the time federal authorities made it clear to us that there were not exigent circumstances where law enforcement authorities have a right to actually go in and get hold of the computers right away without a warrant to prevent something very bad happening.

The first call the Mayor received was from the Newton police from Superintendent McDonald shortly before 2 pm and was told that the email threat to Brandeis (not characterized as a bomb threat) had been traced to one of the computers in the Newton Public Library and the Mayor realized that a very important decision would have to be made and then spoke to the City Law Department and Kathy Glick-Weil. Both the Mayor and Ms. Glick-Weil agreed that they would do everything necessary to preserve evidence. With respect to the release of personal information that divulged email contents and who said what to whom, it was agreed the federal authorities would be provided with what they were legally entitled to. If there were an immediate threat, they would have had the right to seize computers without consent and take them. The fact of the matter is that Mayor Cohen had a conversation with the US Attorney and Ms. Glick-Weil had multiple conversations and they were never told that exigent circumstances existed. In fact, in a conversation with one of the representatives of the US Attorney's office, the Mayor was asked if he would turn over the computers in question and the Mayor responded that he would be happy to provide any information needed pursuant to a warrant. That was not contested and the Mayor asked if this was a situation where federal authorities were seeking a warrant-less search pursuant to the Patriot Act and the answer received was the Patriot Act was not involved in this case. Under those circumstances, the Mayor was confident that public safety was not hinging on that. In one of the news accounts, there is a statement from someone who said the Patriot Act did not come into this, but it was said that if they had needed to seize those computers, they could have. There is an exception to the act that would provide that.

A request for a warrant was made but in the meantime, the Mayor said there was close cooperation in the preservation of the evidence. The library closed the rooms where the computers in question were located. There was a way of narrowing it down to a few computers and the library lent their staff in making that determination and assisting the FBI in that endeavor. In addition to that, the library was very careful to indicate that when the warrant was received, the library would be available and in fact it was arranged that a member of the Police Department and the FBI stayed in the library after closing in order to protect the integrity of the evidence. Ms. Glick-Weil went to the library at 11:30 pm when the warrant came through. It was agreed to accept the warrant rather than to wait for a US Marshall to deliver it. Service was accepted on a related subpoena via fax so there was definite cooperation in terms of preserving the evidence and making sure that the evidence was in a state that they needed it when the warrant came through.

In terms of the exigent circumstances, the Mayor wanted to make the point that neither he nor Ms. Glick-Weil made any determination. It is the federal authorities that make the determination of whether exigent circumstances exist. If they had determined that exigent circumstances do exist, they would have had the right to go in and seize those computers. The Mayor asked what was accomplished by asking the FBI and the US Attorney's office to obtain a warrant. First of all, the Mayor felt something very important was done. We said let's follow the rule of law, let's have a court decide to be sure that what is produced is what law enforcement authorities are entitled to. Second, there was a warrant and they were able to get the information needed.

The Mayor believes we sent out two very important messages to the person who committed a very serious crime. We said that if you are using library equipment to commit a crime, you will not be protected; that in fact there are lawful means to obtain your information about the criminal act that you have done. On the other hand, a very important message was sent to the innocent users of that computer who might have used that very same computer that the perpetrator used hours afterwards and to the thousands of people who use those library computers throughout the year. We said to the innocent public that your lawful communications and emails and use of our computers will not be subject to basically getting caught up in someone else's business. Your privacy will be protected. That is very important because there are several laws and rules that go to importance and expectation that someone in the library has that there is a certain amount of privacy. There is the policy of the library which talks about needing legal process to turn over this kind of information.

There is a section of the Massachusetts General Laws (Chap.78 Sec. 7) which basically creates an exception to the public records law that says these types of records are not subject to public disclosure so the people who use the library computers have a reasonable expectation that if they are engaging in lawful activity, their communications and use of emails will not be disturbed. The Mayor said that by carefully distinguishing between those circumstances where there are those exigent circumstances. In rare cases where they had to get the information on that computer to stop something terrible from happening versus this where the information they needed would help them in a criminal investigation but it was not critical that they get it

immediately as long as we preserve the evidence and we did that. The Mayor stated that public safety was protected because the FBI got the information that they needed and privacy was also protected because the thousands of people who use those computers innocently every day know that they are safeguarded. It was a difficult circumstance but the Mayor feels that when you look at the sum total of the City's actions, you will see that what was done was act reasonably and responsibly and in a way that should further public confidence in our ability to protect safety and privacy. It is not Ms. Glick-Weil or the Mayor who determines the exigent circumstances, but the federal authorities.

Ms. Glick-Weil noted that the words "exigent," "emergency," "bomb" or "terrorist" were never used. It was presented to her as a credible threat. The FBI did not act like it was an emergency. The staff of the library worked with them to isolate which computers possibly were used to send the email. They asked once if they could take the computer and Ms. Glick-Weil responded that they needed a warrant. She asked the FBI if they were surprised that I she was asking for a warrant. The FBI agent said, "not surprised at all." All this talk of an emergency, exigent circumstances, bomb threat is not what happened, although it was presented to her that there was a credible threat, and that hours before some buildings at Brandeis had been evacuated. Ms. Glick-Weil was given very little information from the FBI. She had no idea of what the email said, and she was not shown a copy of the email. She reiterated that it was never presented as an emergency and that they gave total cooperation. She noted that the newspaper had said that she wanted to allow people to go back and use the computer. Of course, she said, she didn't expect people to go back into that room and use any of the computers. She said the library staff were cooperative with the FBI. She went home at 8:30pm believing that the computers were safe as the FBI and members of Newton Police were at the library. She went back at 11:30 pm and unlocked the computers, upon acceptance of the warrant. She noted that there is a law in Massachusetts that protects the identity of library users and says that the identity of library users is not a public record and all policies on privacy are based on Chap. 78, Sec. 7, which says, that the identity of library users is not a "public record."

Discussion with the Aldermen

President Baker said his understanding is that the procedures that have been established have been established by the Library Board of Trustees and they are the policy makers. He wanted to be clear that the policies of the library are set by the Board of Library Trustees. Ald. Coletti wanted to know who confirms the library trustees and the response was the confirmation is from the Board.

Ald. Coletti felt that in his 29 years with the City he has never seen any person in the city not cooperating. His concern was that computers often are picked up by the IT Department. Some are thrown out and in some instances, people can take computers home. In most cases, the memories were not wiped out. Ald. Coletti felt there should be a disclaimer on the wall at the library that states that privacy is not 100% guaranteed. He went on to say that what Ms. Glick-Weil did was fair and reasonable and was within library guidelines for what needs to be done for release.

Ms. Glick-Weil responded that there is a policy that states that nothing illegal can be done on the computer and if you do, you cannot use the computer. There is another policy that talks about the information that is kept. She felt there needs to be an update that states on that particular day, before that computer is turned off, we can't figure out what addresses that computer has accessed. For the sake of privacy, that information is not kept. Ms. Glick-Weil said that the posted policy states it is illegal to send pornographic, obscene, threatening, or harassing materials. It also states what is and what is not kept.

Ald. Yates asked if the IT person was able to generate a specific email sent from a library computer. Ms. Glick-Weil said he was able to generate the address and a time. Ald. Yates felt a photo ID should be required for computer use.

The Mayor felt the internet is an important service and people should be encouraged in its use. Ms. Glick-Weil said in a new system to be installed, if you want to use a computer for an hour, you would put in a library card number and that lets you in. If you don't have a library card, you can go up to the reference librarian and let her know you don't have a card and would like to use the computer, they give you a dummy card, and that number is put in.

Mayor Cohen said if lives were on the line, there could have been a search without a warrant. That was not the case and we protected public safety by what was done. Another misconception was asking for a warrant is not the same as saying you are never going to release this information. What it is saying is that a lawful process must be used, set out by the Constitution and in this case, that happened and federal authorities got the information needed. The difference was that it was done lawfully.

Ald. Parker noted that Mr. Lipoff's memo mentioned possible actions of dismissal and discipline. Ald. Parker wanted to say loudly and clearly that Kathy Glick-Weil has always been professional and the idea that she would need to be disciplined or dismissed is inappropriate. The final point Ald. Parker made was that in pressure situations when issues are time-sensitive, miscommunications can happen and it will probably never be known if there was a miscommunication here regarding whether law enforcement wanted to articulate they had the exigent circumstances necessary to have a warrant less search. Ald. Parker went on to say he had no reason not to believe city officials.

President Baker does feel a thorough inquiry has been made and does not see any reason to change that policy, especially since there were no exigent circumstances presented to the library that they disagreed with. He feels there appears to be no reason to change any policy. He went on to say it was very important that we not lose sight of the fact that we live in a constitutional democracy and the fourth amendment and the laws of the Commonwealth protect the privacy of individual citizens and against those that balance the interests of public safety and one would yield to the other depending on the nature of the circumstance. Here it was not an exigent circumstance that was presented to the library staff so they did what their policy required them to do.

Ald. Coletti would like to continue to encourage the Police Chief to try to stop crime before it happens.

Ald. Hess-Mahan said one other reason to have a search warrant is to be sure that the evidence is admissible and making sure that whatever evidence is gathered in a lawful way, that a court has had a chance to pass on it and ultimately is not excluded if it has been gathered illegally. The FBI made the decision to seek the warrant. In terms of what Ms. Glick-Weil did, it appears that she acted exactly as she should. He sees no basis for any policy change. Accordingly, Ald. Hess-Mahan moved that no action was necessary on the items.

Mr. Lipoff said he had no reason to doubt the word or the viewpoint of the Library Director or the Mayor but does not believe the Committee can make a reasonable decision unless they hear both sides of the story. He suggested those individuals from the Newton Police Department who are under the authority of the Mayor come forward as well as other individuals from the FBI. He does not believe that both stories have been heard. Mr. Cerra agreed with Mr. Lipoff but felt certainly no evidence was brought forward. He did have one comment that involved legal theories. He looked closely at the programs in the library and the people who were offered as guests at those programs and felt it was very lopsided. There was no opportunity for opposing opinions and maybe at the next series there be some opposing opinions.

Chairman Johnson indicated that if there are concerns regarding library programming the group to be contacted is the Library Trustees Board. The Chair of this board, Audrey Cooper, was present. Chairman Johnson also had read various accounts and heard various stores and has learned a good deal from the legal perspective as well as how the librarian handled herself and the process followed the letter of the law to protect both sides. She agreed with Ald. Baker, Coletti, Hess-Mahan, and Parker that we followed process and that there is no extenuating information that warrants any further action on this board. She suggested that if Mr. Cerra has further information, he raise it to the Mayor, Library Trustees, or the Chief of Police and felt it was not something, in her opinion, for the Board of Aldermen to address any further.

President Baker said we have first hand testimony from the Mayor and the Librarian. There is the allegation that there is different testimony but that is hearsay evidence, no direct evidence. Even if we did, would we recommend any change in policy or procedure? President Baker said he still did not see any modification warranted from anything that is before us.

Ald. Harney had heard from many constituents and was very shocked by the public comments. He felt this was a very good discussion. He was concerned about notices that were posted about illegal computer use but felt that could never be enforced and he had concerns about what, if anything could be done to add to that. Another concern is that any people who do not have a library card could come in and have easier access to a computer than a resident of Newton. He wonders what we could do down the road to possibly address this flaw in the future.

Ald. Hess-Mahan said in the past, people would make a threat from a pay phone and there was no way to identify them. He thinks of the Information Highway as very similar. He would discourage people from changing the current status of computer use at the library, which is a public service that the City provides. He feels further restrictions would have a chilling effect on innocent members of the public who want to use the library computers.

The Committee voted No Action Necessary 6-0

#20-06 ALD. YATES, & ALD. SCHNIPPER proposing an amendment to the Rules and Orders of the Board stating that when the City Clerk/Clerk of the Board position is to be filled, a search committee shall be established consisting of representatives of all sectors of the board (officers, chairs rank and file) employees of the department, department heads who frequently interact with the Clerk's office and lawyers and other representatives of the public who frequently interact with the Clerk's office.

ACTION: **REFERRED TO RULES**

NOTE: This item was referred to the Rules Sub-Committee.

Respectfully submitted,
Marcia Johnson, Chair