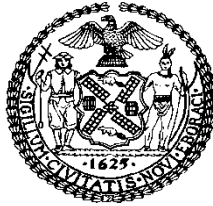


Committee on Public Safety
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THE COUNCIL OF THE CITY OF NEW YORK

BRIEFING PAPER OF THE JUSTICE DIVISION

Jeffrey Baker, Legislative Director
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COMMITTEE ON PUBLIC SAFETY

Hon. Adrienne Adams, Chair

April 28, 2021

Oversight: Property Seizure and Arrest Evidence

INT. NO. 2108:

By Council Members Cabrera and Chin

TITLE:

A Local Law to amend the administrative code of the city of New York, in relation to increasing penalties for damages to houses of religious worship

ADMINISTRATIVE CODE:

Amends §10-116

I. INTRODUCTION

On April 28, 2021 the Committee on Public Safety, chaired by Council Member Adrienne Adams, will hold an oversight hearing to examine the policies and practices related to property seizure and arrest evidence in New York City. The committee will also hear Int. No. 2108, in relation to amending the penalty for damages to houses of religious worship. Among those expected to testify include representatives from the New York City Police Department (“NYPD” or “the Department”), representatives from District Attorney offices, advocates, and members of the public.

II. BACKGROUND

In 2020, the NYPD seized 55,511 cellular phones from persons under arrest.¹ During the same year, it returned 30,180 phones, or about 54 percent. The previous year, 92,154 cellular phones were confiscated by the Department, while it returned 66,996, or about 73 percent; this represents a nearly 20% decrease in the rate of returned cellular phones from 2019 to 2020.

¹ <https://www1.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page>

Scrutiny of the NYPD's seizure of phones from individuals in police custody has been renewed after a March 2021 article in *The City*.² Lawyers who represent young adults in court have questioned the Department's practice of logging cellular phones as arrest evidence, citing the practice as routine, even when there is no clear connection of the phones to cases. Mayor de Blasio acknowledged the concerns, stating, "I don't want to see a kid's property, a family's property withheld from them inappropriately."³ Concerns about phone seizure also include NYPD potentially unlocking phones held as evidence for surveillance purposes, drawing connections to its gang and DNA databases. Surveillance Technology Oversight Project ("STOP"), a non-profit privacy advocacy organization, filed a lawsuit against the NYPD in 2019 to gain insight into the use of "mobile device forensic tools," devices which can unlock and extract data from cellular phones.⁴ According to Albert Cahn, the Executive Director of STOP, the Department has been resistant to disclosing which crimes warrant the seizures and searches of cellular phones.⁵

III. DUE PROCESS

The fifth and fourteenth amendments to the U.S. Constitution prohibit the deprivation of life, liberty, or property without due process of law. In 1972, the United States Court of Appeals for the Second Circuit held that the local law⁶ governing the return of property seized as evidence was "unconstitutional as applied to persons from whose possession money or property, other than contraband, had been taken or obtained, though such money or property was not related to any

² "When NYPD Takes Kids' Phones, They're Disconnecting a Pandemic Lifeline," *The City*, available at: <https://www.thecity.nyc/2021/3/28/22355546/nypd-seizes-kids-phones-disconnecting-pandemic-lifeline>

³ "Mayor, Council Dial Up Anger over NYPD Phone Seizures" *The City*, April 2, 2021, available at: <https://www.thecity.nyc/justice/2021/4/2/22365079/mayor-city-council-nypd-phone-seizures-juveniles>

⁴ Id.

⁵ Id.

⁶ Currently, NY Ad Code § 14-140. At the time of *McClendon*, this ordinance was codified as § 435-4.0. Although the numbering has changed, the ordinance itself has not substantively changed since *McClendon*. See *Herbert v. City of New York*, 2012 WL 3779230, note 2 at 1 (E.D.N.Y. Aug. 30, 2012).

criminal proceeding, or, if it was so related, such criminal proceedings had been terminated, or if the money or property had been needed as evidence in a criminal proceeding, it was no longer needed for that purpose, as violative of the due process clauses of the fifth and fourteenth amendments.”⁷ *McClendon* also recognized a potential due process violation where property seized at the time of arrest was being held for a reason other than its use during a pending criminal proceeding.⁸

The Second Circuit remanded the case and directed the District Court to establish procedures governing the seizure of non-contraband property in connection with an arrest. On January 31, 1974, the District Court issued an order implementing these new procedures,⁹ which were subsequently endorsed by the Second Circuit in 1990.¹⁰ Following the implementation of the 1974 order, the parties to the original case found that some issues remained unresolved. After a long period of negotiation, the parties agreed to a new Order, which was issued by District Judge Lasker on March 28, 1994,¹¹ and was codified verbatim in the Rules of the City of New York.¹²

IV. LOCAL REGULATIONS AND NYPD PRACTICE

Administrative Code §14-140 requires the police commissioner to employ a property clerk and sets forth the property clerk’s duties. However, because the statute has not been amended since the decision in *McClendon* and does not reflect the current practice employed by the District Attorneys and the NYPD regarding the retention and return of arrestee property in order to comply

⁷*McClendon v. Rosetti*, 460 F.2d 111, 116 (2d Cir. 1972).

⁸ *Id.*

⁹*McClendon v. Rosetti*, No. 70 CIV. 3851 (MEL), 1993 WL 158525, at *1 (S.D.N.Y. May 12, 1993).

¹⁰*Butler v. Castro*, 896 F.2d 698, 703 (2d Cir. 1990).

¹¹*McClendon v. Rosetti*, No. 70 CIV. 3851 (MEL), 1994 WL 17107022, at *1 (S.D.N.Y. Mar. 28, 1994), *hereinafter* “McClendon Order.”

¹² 38 RCNY Sec. 12-31 to 12-38.

with the subsequent court order,¹³ the City has appended a footnote to official copies of §14-140¹⁴ stating that the relevant procedures for obtaining property are contained within the Rules of the City of New York.¹⁵ Instructions given to officers on how to comply with these rules are contained within the NYPD Patrol Guide.¹⁶

Rules of the City of New York

The NYPD is required to inventory all non-contraband property taken from an arrestee and provide a voucher that includes the name of the individual, an itemized list of all property taken, and a brief description of the items.¹⁷ The NYPD is also required to post conspicuous notices setting forth the procedures for claiming property at all relevant NYPD facilities.¹⁸

The NYPD Property Clerk must¹⁹ “return all non-contraband property other than arrest evidence to a claimant who produces proper identification and the voucher issued to him or her for the property”²⁰ and to return arrest evidence to a claimant who produces proper identification and who submits a written District Attorney's release covering such property and the voucher issued at the time of arrest. “Arrest Evidence” is defined as “property taken from the person or possession of an individual prior to, simultaneous with, or subsequent to an arrest because of its relation to the matter for which the person has been arrested.”²¹ The Rules require the District Attorney to

¹⁴ Available at: <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCAAdmin/0-0-0-25027>

¹⁵ 38 RCNY §§ 12-31 to 12-38.

¹⁶ NYPD Patrol Guide §208-03, available at: <https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page>

¹⁷ 38 RCNY §12-32

¹⁸ 38 RCNY §12-33

¹⁹ The only exceptions to these procedures are when the property clerk may initiate a civil forfeiture proceeding, such as when the item was unlawfully obtained, or constituted the proceeds or instrumentality of a crime, 38 RCNY 12-36; or, when more than one individual attempts to claim the item, 38 RCNY 12-37.

²⁰ 38 RCNY §12-35

²¹ 38 RCNY §12-31

make the determination “in good faith” as to whether the item “may be needed as evidence”²² within fifteen days of a request for a release by a claimant.²³ Pursuant to the Rules, the refusal to grant a District Attorney’s release must be accompanied by a statement in writing of the reasons for the determination, and may only be appealed to the District Attorney supervisor.²⁴ Thus, in practice, the determination of the arresting officer that an item is relevant to the matter for which the person is arrested is presumed to be correct unless a District Attorney affirmatively releases the item.

NYPD Patrol Guide

The NYPD Patrol Guide instructs officers to remove certain kinds of property from any individual being taken into NYPD custody, such as items that are:

- a. Unlawfully carried
- b. Required as evidence
- c. Lawfully carried, but dangerous to life, would facilitate escape, could be used to attempt/commit suicide, or assault another (e.g., articles containing glass or having sharp edges, belts, neckties, shoelaces, drawstrings, etc.)
- d. Can be used to deface or damage property
- e. Personal (identification card, debit/credit cards, etc.), except clothing, only if person under arrest is intoxicated or unconscious²⁵

The Patrol Guide instructs officers to provide the individual with an itemized receipt of property, known as a voucher, for items that are only temporarily removed and “not to be held in

²² 38 RCNY §12-34(d)

²³ 38 RCNY §12-34 (c)

²⁴ 38 RCNY §12-34 (e)

²⁵ The complete list of items to be removed is contained in NYPD Patrol Guide §208-03, available at: <https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page>

police custody.”²⁶ In addition, officers are required to ask individuals in police custody if there are any items the individual would like held for safekeeping.

The Patrol Guide also contains a specific provision for cellular phones, which should be invoiced for “‘safekeeping’ unless the circumstances regarding the arrest indicate that [it] should be invoiced as ‘investigatory evidence’ or ‘arrest evidence.’”²⁷ The Rules of the City of New York do not define or in any way regulate the determination that certain property shall be deemed “investigatory evidence,” but do explicitly state that Investigatory Property that is unconnected to an arrest is not subject to the governing rules for personal property and arrest evidence.²⁸ Investigating officers are able to authorize the release of a phone held for “safekeeping”; however, prosecutors must approve the discharge of those items designated as arrest evidence.²⁹

V. **IMPACT ON MINORS**

The seizure of phones has a unique impact on the lives of young people. According to recent media reports, children, parents and juvenile justice advocates say that when taking away a young person’s phone during a pandemic, the impact is far more harmful than a mere inconvenience.³⁰ Young people are cut off from vital resources, including remote learning, work, programming services, hobbies, and direct contact with their support system of friends, family and caregivers.³¹ This in turn can negatively impact entire households as caregivers may face the

²⁶ *Id.*

²⁷ The department does not include this section of the patrol guide on its website, but is available at: <https://www.yumpu.com/en/document/read/29192245/patrol-guide>

²⁸ See 38 RCNY §§ 12-31--12-38.

²⁹ <https://rulesofnyc.readthedocs.io/en/latest/c20/#chapter-12-return-of-property-from-property-clerk-division>

³⁰ “When NYPD Takes Kids’ Phones, They’re Disconnecting a Pandemic Lifeline,” *The City*, available at: <https://www.thecity.nyc/2021/3/28/22355546/nypd-seizes-kids-phones-disconnecting-pandemic-lifeline>

³¹ *Id.*

financial burden of purchasing new devices or struggling to manage with fewer shared devices among siblings and other household members.³²

Young people have additional responsibilities during the pendency of their criminal legal system involvement that only become more difficult to fulfill without a phone. City juvenile defense attorneys have expressed several related concerns, including a hindrance to young people's access to virtual court, virtual alternative to incarceration programming, and contact with their defense teams.³³ They note that young people who do not successfully complete programming, therapy, probation monitoring and curfew checks are more likely to receive a jail sentence.³⁴ Given NYPD's history of targeting social media accounts of young people,³⁵ juvenile defense attorneys are concerned that NYPD could be cracking into seized phones for surveillance.³⁶ This is particularly troubling amidst the growing concerns of expanding gang and DNA databases.³⁷

There are also particular challenges within the Family Court process that further contribute to the impacts of phone seizure on young people. Before a case involving a juvenile is either transferred to or filed in Family Court, the probation department must review it.³⁸ The process means minors whose phones are vouchered as evidence face an additional delay of up to 90 days

³² *Id.*

³³ "The NYPD keeps almost 40% of the phones it seizes, and NYC lawmakers say that has a 'severe impact' on young people in the city," *Insider*, April 9, 2021, available at: <https://www.insider.com/nypd-youth-phone-seizures-under-scrutiny-from-nyc-lawmakers-2021-4>

³⁴ "When NYPD Takes Kids' Phones, They're Disconnecting a Pandemic Lifeline," *The City*, available at: <https://www.thecity.nyc/2021/3/28/22355546/nypd-seizes-kids-phones-disconnecting-pandemic-lifeline>

³⁵ "When Cops Check Facebook," *The Atlantic*, April 19, 2015, available at: <https://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/>

³⁶ "When NYPD Takes Kids' Phones, They're Disconnecting a Pandemic Lifeline," *The City*, available at: <https://www.thecity.nyc/2021/3/28/22355546/nypd-seizes-kids-phones-disconnecting-pandemic-lifeline>

³⁷ *Id.*

³⁸ General Stages of the Family Court Process, *NYC Law Department Family Court Division*, available at: <https://www1.nyc.gov/site/familycourtdivision/juvenile-delinquency/general-stages-of-the-family-court-process.page>

until the case is transferred to prosecutors, a prerequisite for its release.³⁹ In response to these concerns, the City Law Department, which represents the city in Family Court, has set up a process in each county to “streamline the ability of attorneys on individual cases” to figure out whether property is needed as evidence or not.⁴⁰

VI. RECENT ACTIONS BY CITY COUNCIL

Local Law 126 of 2017

Local law 126 of 2017 requires the NYPD to offer individuals within their custody the ability to write down contact information from their cellphones, subject to certain limitations regarding officer safety, public safety, and the destruction of evidence.⁴¹ Officers are also not required to grant access to any cell phone that is determined to be arrest evidence as defined within the Rules of the City of New York.⁴²

Prior to the passage of the legislation, the NYPD did not consistently permit arrestees to write down contact information that may be contained in their mobile phones or other property. That made contacting potential sureties far more difficult, and even impossible – especially for juveniles who never memorized a loved one’s cell phone number.

However, accounts of justice-involved providers have indicated that such opportunities are not being provided. On November 17, for example, a defense attorney at Brooklyn Defender Services stated that a 19-year-old client was not allowed access to his telephone; as a result, he

³⁹ “When NYPD Takes Kids’ Phones, They’re Disconnecting a Pandemic Lifeline,” *The City*, available at: <https://www.thecity.nyc/2021/3/28/22355546/nypd-seizes-kids-phones-disconnecting-pandemic-lifeline>

⁴⁰ *Id.*

⁴¹ Local Law 126-2017, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3028944&GUID=1C2A0606-6C80-41FD-B50C-C43A51A68170&Options=ID|Text|&Search=2017%2f126>

⁴² NY Ad Code 14-168

could not remember his mother's telephone number and was unable to contact anyone to pay his bail.⁴³ Similarly, at the Committee on the Justice System's December 3, 2018 hearing on the implementation of the council's legislation geared towards making the payment of bail easier, the Bronx Defenders testified that Local Law 126 has "failed to fully implement and here to [the] law" and that the council's mandate "remains unfulfilled."⁴⁴

Local Law 131 of 2017

Local law 131 of 2017 amended chapter 1 of the Administrative Code by adding a new section, 14-169, which requires the department to report annually on seized and retained U.S. currency, vehicles, and other property.⁴⁵ This information must be disaggregated by: 1. The amount of money retained by the NYPD after settlement; 2. The amount of money that has been retained by the Department after a civil forfeiture proceeding; 3. The amount of money returned by the department following dismissal, judgment, or settlement; 4. The number of vehicles that the Department retained after settlement or judgement; 5. The revenue generated by the liquidation of vehicles; 6. The revenue generated by the liquidation of property other than vehicles; 7. The amount of money obtained by the Department through the District Attorney pursuant to state forfeiture laws; and 8. The amount of money obtained by the Department through the Department of Justice pursuant to federal forfeiture laws.

Local law 131 also requires the Department to report on seized money and vehicles, each disaggregated by whether the property was held for safekeeping, arrest evidence, forfeiture,

⁴³ Scott Hechinger Twitter post, available at <https://twitter.com/ScottHech/status/1063991397768970245>

⁴⁴ Transcript of Justice System's December 3, 2018 testimony, page 109, available at: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3714875&GUID=CA7B5C1B-973E-499C-8B4D-7847A2DFBD75&Options=&Search=>

⁴⁵ Local Law 131-2017, available at: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2513763&GUID=0C33F58D-343A-4E86-85E8-F2D9452C7712&Options=ID|Text|&Search=131>

investigatory evidence, or retained because no person retrieved the property. The seized property must be further disaggregated by type, including: cellular telephones, clothing items, wallets, keys, identification documents and non-perishable peddle property. Finally, all property must be disaggregated by the number of claimants that retrieved their property within six months, one, two, and three or more years after the seizure.

The NYPD's reporting pursuant to Local law 131 from 2016 to 2020 is available on the Department's website.⁴⁶ Since 2019, the Department's reporting has included four Excel spreadsheet attachments. The first breaks down currency seized by borough and by month, the second vehicles vouchered for safekeeping by precinct, the third cell phones vouchered and returned by precinct, and the fourth the type of property by the time it took to return it.

April 2, 2021 Letter to NYPD

On April 2 of this year, Councilmembers Adams, Gibson and Levin wrote to Commissioner Shea asking for specific information missing from the NYPD's reports made in accordance with Local Law 131.⁴⁷ In relation to seized cell phones, the letter asks for breakdowns of whether the NYPD vouchered the phones for safekeeping, investigative evidence, arrest evidence, civil forfeiture or contraband. For each of those categories, the letter also requests further breakdowns by race/ethnicity, gender, age and precinct, as well as the average amount of time the Department holds onto the phones before being released.

In addition, the letter requests the total number of laptops and tablets that were seized in 2020, the number that were subsequently returned, and the number that were marked as property of the Department of Education. The letter also requests that this information be further

⁴⁶ <https://www1.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page>

⁴⁷ April 2, 2021 Letter from Councilmembers Adams, Gibson and Levin to the NYPD, available at: <https://www.documentcloud.org/documents/20537906-juvenile-phone-seizures-data-request-letter-1-1>

disaggregated by the same categories as seized cell phones – by type of voucher, and then by demographic category and average length of seizure. That information is not included in any of the Department’s Local law 131 reporting, or the accompanying Excel spreadsheets.

As of the writing of this committee report, the NYPD have not yet responded with the requested data.

VII. ISSUES AND CONCERNS

The Committee will explore the NYPD’s practices with regard to the retention of property and the ability of individuals to retrieve lawfully owned items in a timely manner. Given the importance of cellular phones in modern life, which has only increased during the COVID-19 pandemic, the Committee seeks to learn what steps the Administration has taken to reduce the impact of its classification of cell phones on vulnerable youth populations. The Committee will examine the extent to which the determination that cell phones constitute arrest evidence may prevent individuals from accessing crucial contact information pursuant to Local Law 126. In addition, the Committee will examine the NYPD’s characterization of certain property as “Investigative Evidence,” which is not currently subject to any local regulation or judicial oversight.

VIII. INT. NO. 2108

Int. No. 2108 would amend the administrative code by raising the minimum fine for criminal defacement of religious houses of worship from \$500 to \$1,000. The other penalties currently proscribed in administrative code section 10-116 would remain unchanged; the offense

itself would remain a misdemeanor, the maximum fine would remain \$2,500, and the maximum time of incarceration would remain one year.

Int. No. 2108

By Council Members Cabrera and Chin

A Local Law to amend the administrative code of the city of New York, in relation to increasing penalties for damages to houses of religious worship

Be it enacted by the Council as follows:

Section 1. Section 10-116 of the administrative code of the city of New York is amended to read as follows:

§ 10-116. Damaging houses of religious worship or religious articles therein prohibited. Any person who [wilfully] willfully and without authority breaks, defaces or otherwise damages any house of religious worship or any portion thereof, or any appurtenances thereto, including religious figures or religious monuments, or any book, scroll, ark, furniture, ornaments, musical instrument, article of silver or plated ware, or any other chattel contained therein for use in connection with religious worship, or any person who knowingly aids, abets, conceals or in any way assists any such person shall be guilty of a misdemeanor punishable by imprisonment of not more than one year or by a fine of not more than two thousand five hundred nor less than [five hundred dollars] one thousand dollars, or both. In addition, any person violating this section shall be subject to a civil penalty of not less than ten thousand dollars and not more than twenty-five thousand dollars. Such civil penalty shall be in addition to any criminal penalty or sanction that may be imposed, and such civil penalty shall not limit or preclude any cause of action available to any person or entity aggrieved by any of the acts prohibited by this section.

§ 2. This local law takes effect immediately.

9/23/20