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Court of Appeals

of the

State of New York

In the Matter of
RECLAIM THE RECORDS,

Petitioner-Appellant,

– against –

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent-Respondent.

BRIEF FOR *AMICUS CURIAE* THE JUSTICE COMMITTEE

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Corporate Disclosure Statement Pursuant to Rule 500.1(f)

Pursuant to Court of Appeals Rule 500.1(f), The Justice Committee states that it is a New York non-profit corporation and has no parents, subsidiaries, or affiliates.

Statement Pursuant to Rule 500.23(a)(4)(iii)

The proposed Amicus Curiae—The Justice Committee—states that no party to the appeal or a party's counsel has contributed content to the proposed Brief of Amicus Curiae or participated in the preparation of the proposed Brief in any other manner; no party to the appeal or a party's counsel has contributed money that was intended to fund preparation or submission of the proposed Brief; and no person or entity, other than movant, has contributed money that was intended to fund preparation or submission of the proposed Brief.

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PRELIMINARY STATEMENT

The Justice Committee – a grassroots organization dedicated to ending police violence against communities of color in New York – respectfully makes this submission in support of the appeal filed by Petitioner-Appellant Reclaim the Records ("RTR") seeking reversal of the judgment of the Appellate Division – Third Department, which denied RTR's request to access historical records of public importance held by the City of New York's Department of Health ("DOH").

Relying on N.Y. Public Officers Law § 87(2)(b) (the Freedom of Information Law—or "FOIL"—privacy exemption) and this Court's holding in *N.Y. Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477 (2005), the Third Department improperly held that DOH was authorized under the FOIL to withhold all the death index records sought by RTR because disclosure would constitute an "unwarranted invasion of personal privacy." (R237).

The Justice Committee seeks involvement in this controversy to underscore the manner in which the City of New York, including the New York City Police Department ("NYPD") and Civilian Complaint Review Board ("CCRB"), as well as New York City-local prosecutors, commonly misuse FOIL's personal privacy exemption to shield crucial information about law enforcement misconduct from grieving families seeking closure and justice for loved ones murdered by the police,

as well as other members of the public. *See generally,* March 24, 2025 Affirmation of Gideon Orion Oliver (the "Oliver Affirmation").

If the Court allows it to stand, the decision below would set a dangerous precedent with far-reaching implications for transparency around policing, police misconduct, and related investigations and discipline. Where government agencies, including the NYPD, are permitted to withhold records based on vague and unsubstantiated privacy concerns, communities face greater hurdles in holding their local law enforcement accountable for police misconduct and abuse. *See, e.g., Buffalo News, Inc. v. Buffalo Enter. Dev. Corp*., 84 N.Y.2d 488, 492 (1974) (noting that access to government records is important in the objectives of "assur[ing] accountability and [] thwart[ing] secrecy"). Lack of transparency erodes the trust between law enforcement and the communities who have been systemically harmed by police violence, which in turn undermines public safety.

In enacting FOIL, the New York Legislature expressed the importance of government accountability and transparency in no uncertain terms, noting that "the more open a government with its citizenry, the greater the understanding and participation of the public in government." N.Y. Public Officers Law §84. FOIL's primary aim of transparent governance is stymied where agencies use amorphous "privacy" concerns to shield the public from records, particularly where the agency presents no evidence of any credible threats to personal privacy. Such was the case

here, and allowing the DOH's denial to stand would only further empower agencies to conceal evidence of misconduct from members of the community who seek justice and accountability for those harmed by police violence.

INTEREST OF AMICUS CURIAE

The Justice Committee is a grassroots organization dedicated to building a movement against police violence and systemic racism in New York City and empowering low-income Latinx and other people of color to address these issues. The Justice Committee's membership is multi-racial, but majority Latino/a, and includes families who have lost loved ones to the police, as well as other members of impacted communities. *See* https://justicecommittee.org/. The Justice Committee is an active member of Communities United for Police Reform, a campaign that is working to end discriminatory policing and advance policies that protect the safety and rights of all New Yorkers. *See* https://changethenypd.org/.

Pursuant to its mission, The Justice Committee regularly seeks records on behalf of families whose loved ones were murdered by NYPD member as a means of pursuing transparency, accountability, and justice for victims, as well as for use in community education, lobbying around legislative and policy changes, and otherwise advancing its organizational goals. As such, The Justice Committee frequently relies on the FOIL. And, because of The Justice Committee's experience with FOIL requests, it is well aware of the ways in which agencies expand FOIL's narrow privacy exemptions and subvert its overall goals of government transparency and accountability.

Through this submission, The Justice Committee therefore presents this Court

with information that might otherwise escape this Court's consideration regarding New York City police and prosecutorial agencies' expansive interpretation of the FOIL's privacy exemption and the ways in which it has impacted The Justice Committee and the families The Justice Committee works with in key aspects of their police misconduct-related social justice work.

ARGUMENT

I. The Justice Committee's FOIL requests for records related to the police killings of Ramarley Graham, Shantel Davis, and Eric Garner, and related investigations, show that New York agencies routinely and improperly withhold records from the families of people killed by police, community organizations, and their allies, based on sweeping applications of the privacy exemption in FOIL §87(2)(b).

In each of the examples below, The Justice Committee was among the petitioners in a FOIL request seeking records related to a police killing and related investigations – classic law enforcement disciplinary records, and the agency to which the FOIL request was directed sought to withhold broad swaths of records – sometimes entire law enforcement disciplinary investigative files, witness names and statements, and other key records and information – invoking FOIL's §87(2)(b) privacy exemption, without providing the required concrete and particularized justifications.

If this Court rules in favor of DOH, it will further embolden the NYPD, CCRB, local prosecutors, and other agencies to withhold key records and information from families and community members who are seeking transparency, accountability, and police reform.

A. The Ramarley Graham FOIL Request.

On February 2, 2012, then-NYPD officer Richard Haste shot and killed 16-year-old Ramarley Graham, who was unarmed, after forcing themselves into the Bronx, New York apartment where he lived with his 6-year-old brother and grandmother. In 2016, along with Mr. Graham's parents, Constance Malcolm and Franclot Graham, and Communities United for Police Reform, The Justice Committee submitted a FOIL request to the NYPD seeking access to records related to Garner's death, and any investigations, disciplinary actions, or prosecutions of the officers involved.

Both at the agency level and in litigation later, the NYPD invoked the privacy exemption in FOIL §87(2)(b) to withhold entire categories of records, as well as to justify (often unspecified) redactions – often without even specifically identifying the records or information in question, let alone justifying withholding them with particularity. *See Malcolm, et al. v. New York City Police Department,* New York County Supreme Court Index No. 100466/17 ("*Malcolm v. NYPD*"); *Matter of Constance Malcolm, et al. v. New York City Police Department*, 2017 N.Y. Misc.

LEXIS 5349 (Sup Ct, NY County Dec. 22, 2017) ("*Malcolm I*"); *Matter of Constance Malcolm, et al. v. New York City Police Department*, 2018 NYLJ LEXIS 2874 (Sup Ct, NY County July 31, 2016) ("*Malcolm II*").[1]

For example, at the agency level, the NYPD relied on the privacy exemption in FOIL §87(2)(b) as to:

- Unspecified redactions to around 40 pages of records documenting NYPD investigative steps, *see, e.g.,* Petition ¶ 115(a);
- Unspecified redactions to around 10 pages of a Location Search and IAB Call-Out Report, *see, e.g.,* Petition ¶ 128; and
- Withholding undescribed "witness statements, crime scene evidence, lab reports, and non-routine computer checks and notifications" as well as other unspecified records, *see, e.g.,* Petition ¶ 129(d); and
- Withholding Mr. Graham's own criminal history information from his family members, including the administrator of his estate, *see, e.g., Malcolm I*, 2017 N.Y. Misc. LEXIS 5349, at *22-23 (ordering disclosure of criminal history information with certain redactions).

[1] Notably, *Malcolm I* and *Malcolm II* were decided before the New York legislature's 2020 repeal of Civil Rights Law §50-a and attendant changes to the FOIL, under which all "law enforcement disciplinary records" within the meaning of FOIL § 86(6), including records of "law enforcement disciplinary proceedings" within the meaning of FOIL § 86(7), are now presumptively subject to disclosure under the FOIL. *See, e.g.,* FOIL §§ 86(6) and 86(7).

On Article 78 review, after considering extensive submissions – including from amicus curiae - and oral arguments, the Supreme Court issued an interim decision directing that the NYPD disclose certain categories of records it had claimed were exempt based on the FOIL §87(2)(b) exemption (among others), and produce many other categories of withheld and redacted records for *in camera review*. *See generally, Malcolm I*, 2017 N.Y. Misc. LEXIS 5349.

After conducting that review, the Court ordered the NYPD to produce many categories of records and information that it had previously withheld and redacted based on the FOIL §87(2)(b) exemption (among others), including, but not limited to:

- Recordings of and notes about witness interviews (including some witness names), *see Malcolm II*, 2018 NYLJ LEXIS 2874, at *12-14, 16-17, 28-31, 69;
- Indices of investigative materials, *see Malcolm II*, 2018 NYLJ LEXIS 2874, at *17, 28-29, 67;
- SPRINT records, *see Malcolm II*, 2018 NYLJ LEXIS 2874, at *9;
- NYPD Roll Calls, *see Malcolm II*, 2018 NYLJ LEXIS 2874, at *10-11;
- CCRB histories of Mr. Graham's family members, *see Malcolm II*, 2018 NYLJ LEXIS 2874, at *20-21; and

- The transcript of the disciplinary hearing of the NYPD member who killed Mr. Graham, *Malcolm II*, 2018 NYLJ LEXIS 2874, at *68-69.

B. The Shantel Davis FOIL Request.

On June 14, 2012, NYPD Detective Phillip Atkins shot and killed 23-year-old Shantel Davis in East Flatbush, New York. On April 30, 2021, Ms. Davis's sister, Natasha Duncan, who is a member of The Justice Committee, filed a FOIL request seeking records related to investigations conducted by the Office of the District Attorney of Kings County (the "KCDA" or "KCDA's Office") and the NYPD into her sister's killing.

In response, both at the agency level and in litigation later, the KCDA's Office invoked the privacy exemption in FOIL §87(2)(b) to withhold and redact records. *See, e.g., Matter of Natasha Duncan v. Kings County District Attorney's Office,* Kings County Supreme Court Index No. 512557/2022; *Matter of Natasha Duncan v. Kings County District Attorney's Office*, 2023 NYLJ LEXIS 2940 (Sup Ct, Kings County October 5, 2023) ("*Duncan*").

The records redacted included photographs of Ms. Davis's autopsy taken by NYPD members and included in NYPD law enforcement disciplinary records related to the investigation, the names of civilian witnesses, the internal NYPD Tax

Registration Numbers of NYPD members[2], and Ms. Davis's own date of birth. *See, e.g., Duncan,* 2023 NYLJ LEXIS 2940, at *8-9.

On Article 78 review, after considering extensive submissions and oral arguments, the Supreme Court issued an interim decision directing that the KCDA's Office disclose the photographs of Ms. Davis and the civilian witness names to Ms. Davis's sister.

As to the photographs, after recognizing that the justifications the KCDA's Office advanced for withholding them on FOIL §87(2)(b) grounds were conclusory, the Court rejected the KCDA's Office's invocation of *New York Times Co. v. City*

[2] The NYPD assigns a unique Tax Registration Number to each NYPD member, which follows that NYPD member throughout their career. That unique Tax Registration Number has nothing to do with the NYPD member's taxpayer identification number, social security number, or other, similar, truly confidential personal information. Unlike those categories of truly confidential personal information, Tax Registration Numbers are subject to disclosure under the FOIL under First Department precedent. *Compare, e.g.,* 22 NYCRR § 202.5(e)(1)(i) (requiring the redaction or omission of confidential personal information such as "the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof" from public court filings) *with Matter of Exoneration Initiative v. New York City Police Dept.*, 114 A.D.3d 436, 439 (1st Dept. 2014) ("respondent fails to establish that the disclosure of the tax registration number of the detective who recorded an unnamed informant's statement would constitute an unwarranted invasion of public privacy; thus, respondent must disclose a new copy of the pertaining to this informant with this number unredacted"); *see also Malcolm II*, 2018 NYLJ LEXIS 2874, at *14-15 ("there is no need to redact the tax registration number of the officer") (citing *Matter of Exoneration Initiative,* 114 A.D.3d at 437-40).

of N.Y. Fire Dept., 4 NY3d 477 (2005). *See Duncan,* 2023 NYLJ LEXIS 2940, at *23-26.The Supreme Court distinguished *New York Times*, 4 NY3d at 484-87- which "refers to the determination to not disclose documents to an individual in order to protect the decedent family's privacy interests…of surviving relatives of individuals who called 911 on September 11, 2001 as outweighing the public interest in those records where the tapes and transcripts may depict the terror and agony those individuals felt, which would impact grieving families and may be exploited by the press" from Ms. Duncan's Article 78 petition, in which she "is a family member of the decedent and is interested in obtaining the records for what appears to be her personal use" and ultimately found "that the privacy concerns of decedent's family members are not at issue here and do not overrule disclosure of the records." *Duncan,* 2023 NYLJ LEXIS 2940, at *23-26; *see also, e.g., Edwards v. New York State Police,* 44 A.D.3d 1216, 1217 (2007) (noting that it is the deceased victim's family that holds the privacy interest in protecting the victim's "dignity and memory").

C. The Eric Garner FOIL Requests.

On July 17, 2014, NYPD members killed Eric Garner in Staten Island, New York. In 2019, along with Mr. Garner's mother, Gwen Carr, and others, The Justice Committee submitted a FOIL request to the CCRB and NYPD for access to records related to Garner's death, and any investigations, disciplinary actions, or

prosecutions of the officers involved. *See Carr, et al. v. New York City Police Department,* New York County Supreme Court Index No. 158461/2021 ("*Carr v. NYPD*"); *Carr, et al. v. Civilian Complaint Review Board,* New York County Supreme Court Index No. 158462/2021 ("*Carr v. CCRB*")*; see also, e.g., Matter of Gwen Carr, et al. v. New York City Police Department,* 2025 NY Slip Op 30828[U] (Sup Ct, NY County March 14, 2025).

In response to the identically-worded FOIL requests filed with the NYPD and the CCRB, both agencies denied broad swaths of the requests, invoking the privacy exemption in FOIL §87(2)(b) (among others) to withhold entire categories of records, as well as to justify (often unspecified) redactions, at the agency level and in the subsequent Article 78 litigation.

By way of example, both agencies withheld and redacted the names of police and civilian witnesses, photographs of police and other City employees who were on the scene of Eric Garner's death (and whose images were captured and widely disseminated on videos that have become infamous), in both records related to the Eric Garner investigation in records related to other investigations involving in the NYPD members who were the subject of the Garner investigation.

In interim decisions in both matters, the Court ordered each agency to make further productions. Among other things, the Court ordered the CCRB to disclose information that it claimed should be withheld on FOIL §87(2)(b) grounds (among

others) that the NYPD had disclosed. *See Carr v. CCRB* docket, NYSCEF Doc. Nos. 60, 63.

However, the Court largely upheld both agencies' determinations to withhold and redact records on FOIL §87(2)(b) grounds (among others) – including to withhold witness names and the like. *Carr v. CCRB* docket, NYSCEF Doc. No. 64; *Carr v. NYPD* docket, NYSCEF Doc. No. 77.

The cases were both subsequently reassigned to another Justice, and Petitioners made motions to reargue and/or renew. In the *Carr v. NYPD* matter, the Court recently granted Petitioner's motion to reargue, finding that the Court's prior order had

> …allowed Respondent to withhold records in their entirety, leaving out potentially relevant and non-exempt information without any such justification. Documents were rendered exempt from disclosure in the name of privacy protections, but there is no evidence that indicates that, for example, identifying information could be redacted from witness statements while the statements themselves remained unredacted.

Carr v. NYPD, 2025 NY Slip Op 30828[U], at *3 [Sup Ct, NY County 2025]). The court described the NYPD's "wanton method of redacting information" without any justification, characterized the NYPD's withholding as based on "blanket exemptions," and reiterated the NYPD's statutory requirement to "evaluate each record individually and determine whether a 'particularized and specific justification' exists for denying access" based on privacy grounds. *Id.* at p. 3. The Court has ordered the NYPD to re-do the production. *Id.*

CONCLUSION

As the above examples demonstrate, although they each involve FOIL requests in which the family members of people killed by the NYPD – and, in some cases, the executors of their estates - are seeking the records, having themselves weighed the very privacy interests the Court often recognizes and takes into account in conducting the relevant test under FOIL §87(2)(b) and determined to seek their disclosure, both agencies and reviewing courts have applied, and are applying, the exemption to withhold broad categories of records and information, without providing (or requiring) particularized, factual justifications in each instance.

WHEREFORE, this Court should reverse the Third Department's decision below and reinstate the Albany County Supreme Court's decision.

Dated: New York, New York
March 24, 2025

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer, using Times New Roman 14 point font for the body and 12 point font for footnotes (double-spaced). According to Microsoft Word, the portions of the brief that must be included in a word count contain 2,829 words.

Dated: New York, New York
March 24, 2025

GIDEON ORION OLIVER

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)	ss.:	**BY OVERNIGHT FEDERAL**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above

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Sworn to before me on March 24, 2025

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