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Testimony of Alvin Bragg Regarding the Repeal of New York Civil Rights Law Section 50-a

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**Testimony of Alvin Bragg
Co-Director of the New York Law School Racial Justice Project**

**New York Senate Standing Committee on Codes
October 17, 2019
250 Broadway
New York, NY 10007**

Regarding the Repeal of New York Civil Rights Law Section 50-a

Alvin Bragg, on behalf of the New York Law School Racial Justice Project, respectfully submits the following testimony today regarding the repeal of N.Y. CIV. RIGHTS LAW § 50-a.

The Racial Justice Project is a legal advocacy organization dedicated to protecting the constitutional and civil rights of people who have been denied such rights on the basis of race, and to increasing public awareness of racism and racial injustice in, among other areas, the areas of education, employment, political participation, economic inequality, and criminal justice. The Racial Justice Project's work includes impact litigation, appellate advocacy, legislative advocacy, training, and public education.

For the reasons outlined below, the Racial Justice Project expresses full support for the repeal of N.Y. CIV. RIGHTS LAW § 50-a.

Overview of N.Y. CIV. RIGHTS LAW § 50-a

N.Y. CIV. RIGHTS LAW § 50-a provides that police officers' "personnel records used to evaluate performance toward continued employment or promotion" "shall be considered confidential" and not subject to public disclosure absent the officer's consent or a court order.¹ The New York Court of Appeals has held that N.Y. CIV. RIGHTS LAW § 50-a was enacted to protect police officers from the use of personnel records for "harassment and reprisals and for purposes of cross-examination by plaintiff's counsel during litigation."² Straying far from this legislative purpose, police departments and municipalities: (a) employ an overly broad conception of what constitutes a personnel record;³ (b) use the law as a shield against disclosure of even the most basic information (*e.g.*, the identity of police officers at the scene of a civilian death caused by police use of force);⁴ and (c) inconsistently invoke the law to release materials selectively.⁵

Overview of NYCLU v. NYPD

In late 2018, in *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 564 (2018), the New York Court of Appeals broadly interpreted N.Y. CIV. RIGHTS LAW § 50-a. This ruling makes it even more important to repeal N.Y. CIV. RIGHTS LAW § 50-a.

The NYCLU submitted a Freedom of Information Law (“FOIL”) request to the New York City Police Department (“NYPD”) seeking copies of all internal disciplinary proceedings and adjudications arising from cases in which the Civilian Complaint Review Board (“CCRB”) had substantiated charges against a member of the NYPD from January 1, 2001 to August 17, 2011, the time at which the FOIL request was made. The NYPD denied the request, invoking N.Y. CIV. RIGHTS LAW § 50-a. The NYCLU administratively appealed; the NYPD granted the appeal in part. The NYCLU then commenced a CPLR Article 78 proceeding, seeking disclosure of the withheld NYPD disciplinary records. The Supreme Court ordered the NYPD to select five random adjudication decisions, redact them to remove information identifying officers who were the subjects of the complaints, and submit the decisions for *in camera* review. The Supreme Court deemed the redactions adequate and ordered that the remainder of the requests were to be done in the same manner as the five *in camera* submissions. The NYPD appealed, and the First Department unanimously reversed and dismissed the proceeding.

Upon the NYCLU’s appeal, a divided Court of Appeals held that police personnel records are exempt from disclosure pursuant to the Freedom of Information Law (“FOIL”), Public Officers Law Section 87(2)(a), and N.Y. CIV. RIGHTS LAW § 50-a. Effectively, the decision eliminates access to such records through FOIL and thereby bars access to police personnel records, even if the records are redacted and the police department itself is willing to release them.⁶

N.Y. CIV. RIGHTS LAW § 50-a Urgently Requires Repeal

Public access to police disciplinary decisions is critical to maintaining public confidence in law enforcement and ensuring that NYPD disciplinary actions are properly pursued and adjudicated. As the law is an obstacle to promoting these important policies, N.Y. CIV. RIGHTS LAW § 50-a should be repealed in its entirety.

N.Y. CIV. RIGHTS LAW § 50-a is Not Necessary for Law Enforcement Purposes

N.Y. CIV. RIGHTS LAW § 50-a is wholly unnecessary for law enforcement purposes. FOIL provides that a police department or prosecutorial office may withhold records from public disclosure on the basis that the records “are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations” or reveal non-routine criminal investigative techniques.⁷ FOIL also expressly allows records not to be released publicly if disclosure “would constitute an unwarranted invasion of personal privacy” or “could endanger the life or safety of any person[.]” thereby making N.Y. CIV. RIGHTS LAW § 50-a unnecessary to protect police officers’ safety or privacy.⁸

N.Y. CIV. RIGHTS LAW § 50-a Undermines Effective Law Enforcement

The anti-transparency application of N.Y. CIV. RIGHTS LAW § 50-a erodes community trust in policing and prosecutions and, thereby, undermines effective law enforcement. Disclosure of police-civilian interactions is essential to effective policing and prosecutions. Such disclosure provides critical information to the public and fosters dialogue about needed systemic reforms that can improve police-community relations and avoid future tragic police-community interactions.

By way of example, I oversaw a unit at the New York State Attorney General's Office that investigated police use of lethal force.⁹ Based upon input we received from families whose loved ones were killed by police, we decided, for each investigation that did not result in a criminal charge, to issue public reports of our investigative findings. These public reports: (1) named the involved officers; (2) provided accounts of interviews of police officers; (3) released video of police officer actions; and (5) attached forensic reports concerning, for example, ballistics and DNA evidence.¹⁰ The disclosure of this information fostered productive police-community dialogue.

The Lack of Transparency Concerning Eric Garner's Death is a Prime Example of Why N.Y. CIV. RIGHTS LAW § 50-a Requires Repeal

The lack of transparency concerning Eric Garner's death underscores the need to repeal N.Y. CIV. RIGHTS LAW § 50-a.

The Racial Justice Project is co-counsel in a lawsuit that was filed in August 2019 against the Mayor and the Police Commissioner of the City of New York (among others) by Gwen Carr and Elisha Flagg Garner (Eric Garner's mother and sister), Constance Malcolm (whose son Ramarley Graham was killed by the NYPD in February 2012) and several organizers and advocates for police accountability. The lawsuit was filed, because **more than five years** after Mr. Garner's death, the public and his family are still being denied access to fundamental information concerning his death, including even the identity of all of the police officers at the scene of his arrest. The City uses N.Y. CIV. RIGHTS LAW § 50-a to facilitate this lack of transparency.

The lawsuit seeks a judicial inquiry, during which City officials would be required to testify under oath to provide details about issues such as:

- The filing of a false arrest report claiming that no force was used in effecting the arrest of Mr. Garner;
- Statements by two Sergeants to NYPD internal investigators that, during his arrest, Mr. Garner did not appear to be in distress and that his condition did not seem to be serious;
- The inadequacy of the medical treatment provided to Mr. Garner; and
- The leaking of Mr. Garner's alleged arrest and medical history.¹¹

It is unjust to require Mr. Garner's family to file a lawsuit, five years after his death, to get these basic facts.

Conclusion

We thank the Committee for the opportunity to provide testimony today. The Racial Justice Project looks forward to working with the Committee on this and other measures to enhance law enforcement transparency and accountability.

¹ N.Y. CIV. RIGHTS LAW § 50-a (also applying to records of firefighters and correction officers, among others).

² *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 564 (2018) (quoting *Prisoners' Legal Servs. of New York v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 31-32 (1988)).

³ N.Y.C. BAR ASS'N, REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE AND THE CRIMINAL COURTS COMMITTEE (2018) ("In 2014, however, the death of Eric Garner led to renewed focus on CRL 50-a and how its broadened interpretation has shielded officers from public accountability and impedes racial justice. As the Garner case exemplifies, policies and practices that appear to prioritize protecting officer misdeeds over strengthening community trust divide communities of color from the police departments that are meant to protect them.").

⁴ Petition at 2, *Gwen Carr v. Bill De Blasio*, Docket No. 101332/2019 (N.Y. Sup. Ct. Aug 27, 2019) ("[T]he City has not even identified all of the NYPD officers present at the scene.").

⁵ Rocco Parascandola & Graham Rayman, *Exclusive: NYPD Suddenly Stops Sharing Records on Cop Discipline in Move Watchdogs Slam as Anti-Transparency*, N.Y. DAILY NEWS (Aug. 24, 2016), <https://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145>.

⁶ *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018).

⁷ Public Officers Law Section 87(2)(e).

⁸ *Id.* 87(2)(b) and (f).

⁹ N.Y. Exec. Order No. 147, 9 CRR-NY 8.147 (July 8, 2015).

¹⁰ See e.g., N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF EDSON THEVENIN (2017), https://ag.ny.gov/sites/default/files/oag_report_-_edson_thevenin.pdf; N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF MIGUEL ESPINAL (2016), https://ag.ny.gov/sites/default/files/oag_report_-_bronx-westchester.pdf; N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF RAYNETTE TURNER (2015), <https://ag.ny.gov/pdfs/SIPReport.pdf>.

¹¹ Petition at 13-15, *Gwen Carr v. Bill De Blasio*, Docket No. 101332/2019 (N.Y. Sup. Ct. Aug 27, 2019).