SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Application of

RONALD CASTORINA, JR. and
NICOLE MALLIOTAKIS,

Index No. 80258/16

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

BILL DE BLASIO, in his official capacity
as Mayor of the City of New York, et al.,

Respondents.

MEMORANDUM OF LAW FOR AMICUS CURIAE OFFICE OF THE ATTORNEY GENERAL IN SUPPORT OF RESPONDENTS

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8022

BARBARA D. UNDERWOOD
Solicitor General
ANDREW W. AMEND
Senior Assistant Solicitor General of Counsel

Dated: December 20, 2016

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

This C.P.L.R. article 78 proceeding raises critical issues about the application of New York's Freedom of Information Law (FOIL) to requests for documents comprised of highly sensitive personal information—such as names, addresses, dates of birth, and Social Security numbers—of nearly 900,000 state residents. That information was provided to the City of New York by participants in the New York City identity card (IDNYC) program —adopted in important part to aid the City's most vulnerable populations—under express assurances of confidentiality. Its disclosure would invade these individuals' personal privacy and endanger their safety, in addition to violating a pledge of confidentiality essential to the success of a major public program. Amicus curiae the State of New York has substantial interests in ensuring that FOIL is construed to avoid these grave results.

The privacy and safety concerns emphasized by respondents are not simply matters of local concern. As respondents explain (Respondents' Mem. of Law in Supp. of Verified Answer ("City Mem.") at 14-25), because the documents sought by petitioners are documents that establish identity and residence, they contain precisely the kinds of

identifying details that are most likely to invade the privacy and endanger the safety of the individuals identified. The threat posed by the public disclosure of nearly 900,000 New Yorkers' personal information is a matter not only of local concern but also of state concern, as it greatly increases the risk of identity theft and of hate crimes, and the prevention and prosecution of crime is a quintessential state concern. Identity theft, in particular, is an important concern of the Attorney General.[1] So too is the prevention of hate crimes and harassment aimed at the vulnerable populations who were in part the intended beneficiaries of the IDNYC program—including, though not limited to, persons who might be identified by their application papers as transgender individuals or as immigrants, whether documented or undocumented.[2]

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[1] *See*, *e.g.*, N.Y. State Off. of the Att'y Gen., A.G. Schneiderman Announces Guilty Pleas And Prison Terms For Identity Thieves Who Targeted Bank Customers In Westchester And NYC (Jan. 20, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-guilty-pleas-and-prison-terms-identity-thieves-who-targeted.

[2] *See*, *e.g.*, Eric T. Schneiderman, Guidance To Law Enforcement Officials And Prosecutors In The Investigation and Prosecution of Hate Crimes In New York State, Letter from E. Schneiderman to Law Enforcement Officials and Prosecutors (Nov. 16, 2016) (recounting

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And the State has a strong interest in ensuring that FOIL does not become a mechanism for undermining governmental pledges of confidentiality like the one made here by the City to program participants. When a state or local government entity duly establishes a program that depends for its very operation on a pledge of confidentiality made to program participants, the government should keep its promises. And that is especially true here, where the program was designed in part to serve marginalized and vulnerable individuals who were unlikely to participate if they thought their application materials could be publicly disseminated.

Accordingly, the State submits this brief amicus curiae in support of the City's position that the present petition should be dismissed. Petitioners wrongly seek to invoke FOIL as a basis to bar the City from

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recent "spate of bias-based offenses" across State), *available at* https://ag.ny.gov/sites/default/files/hate_crime_guidance_11.16.pdf; Letter from E. Schneiderman and M. Elia to School Districts (Nov. 18, 2016) (noting recent "number of disturbing incidents of bias and hate-based acts of bigotry, including vandalism, harassment, bullying, and even violence across New York communities"), *available at* https://ag.ny.gov/sites/default/files/sed_ag_joint_letter_11-17-16_final.pdf.

implementing a provision of the 2014 local law creating the IDNYC program. That provision calls for identity card application materials that are not needed to review pending applications to be destroyed on or before December 31, 2016. *See* N.Y.C. Local Law No. 35 (2014) (the "IDNYC Law") (codified in pertinent part at N.Y.C. Admin. Code § 3–115(e)); *see also* 68 R.C.N.Y. § 6–11(b)-(c). Petitioners assert that this provision violates FOIL, but they are mistaken: FOIL governs only the disclosure of records an agency has; it does not dictate what records an agency must retain.

And the IDNYC records at issue here, for which petitioners have filed eleventh-hour FOIL requests, are not disclosable under FOIL in any event. FOIL affirmatively exempts from disclosure any records the disclosure of which would be an unwarranted invasion of personal privacy or would threaten the life or safety of any person. And the statutory policies against disclosure are particularly weighty here, where governmental assurances of confidentiality were crucial to the success of an important program benefitting vulnerable New Yorkers. The policies of FOIL and the policies of the IDNYC program are aligned

in the present matter, not opposed, and the State's and the City's laws accordingly can and should be construed harmoniously.

ARGUMENT

POINT I

THE CITY'S RECORD-RETENTION PROVISION DOES NOT VIOLATE THE FREEDOM OF INFORMATION LAW (FOIL) BECAUSE FOIL GOVERNS RECORD DISCLOSURE, NOT RECORD RETENTION

Petitioners start from a flawed premise—i.e., that the IDNYC Law provision dictating that application materials be retained no later than December 31, 2016, violates FOIL because FOIL purportedly requires preservation of those documents to allow the public to access them. FOIL, however, imposes no such requirement. The statute governs public access to records that an agency retains; it does *not* take the further step of dictating what records an agency must retain or how long it must retain them, subject only to limited exceptions not relevant here.[3]

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[3] The limited exceptions are found in Public Officers Law § 87(3), which requires agencies to maintain (i) records of agency member votes,

(*continued on next page*)

The Committee on Open Government has thus repeatedly observed that FOIL "does not deal with the preservation or destruction of records."[4] Courts have likewise upheld the denial of FOIL requests for records destroyed in the course of business pursuant to agency document-retention policies comparable to the one challenged here—without suggesting that such policies somehow violate FOIL. *See*, *e.g.*, *Matter of Ahmed v. Yin*, 117 A.D.3d 429, 429 (1st Dep't 2014), *lv. denied*, 24 N.Y.3d 1208 (2015). In fact, in *Matter of Duban v. State Board of Law Examiners*, the Third Department held that the respondents' destruction of records under such a policy mooted the petitioner's action, even though he had lodged his FOIL request shortly before the records were destroyed. *See* 157 A.D.2d 946, 947 (3d Dep't 1990). In doing so, the Court explained that the petitioner's inability to obtain relief was "due in large part to his own delay in requesting the

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(ii) certain data about agency employees, and (iii) current lists by subject matter of the records the agency has.

[4] N.Y. Dep't of State, Comm. on Open Gov't, Advisory Op. No. 14667 (May 5, 2004), *available at* http://docs.dos.ny.gov/coog/ftext/f14667.htm; *see also* City Mem. at 5 n.1 (collecting authorities).

information," and that there was "nothing in the record to suggest that respondents acted in bad faith." *Id.*

As these authorities make clear, the obligations imposed by FOIL do not relate to the retention of records, but rather to the disclosure of records that are in fact within the possession of covered government entities. Petitioners therefore fundamentally misread the statute in asserting that it bars agency policies that provide for records to be retained for a certain period of time and then destroyed (*see* Mem. of Law in Supp. of Petitioners/Plaintiffs' Order to Show Cause ("Pet. Mem.") at 11).

Indeed, the statutory text on which petitioners attempt to rely reinforces this point. Petitioners principally invoke Public Officers Law § 84, which they claim "contemplates the preservation of the public record" (*id.*). Petitioners' reliance is misplaced. As a threshold point, § 84, entitled "[l]egislative declaration," is a prefatory statement that "enacts nothing" and "contains no directives," *Thompson v. Wallin*, 301 N.Y. 476, 493 (1950), and therefore cannot expand the scope of the operative provisions of the statute. *See Matter of Westchester County Soc'y for Prevention of Cruelty to Animals, Inc. v. Mengel*, 292 N.Y. 121,

126 (1944). In any event, § 84 addresses not "preservation" of records, but rather "*access*" to records (emphasis added)—and it declares that such access should be "in accordance with the provisions" of FOIL. Since FOIL imposes no relevant obligation to preserve records, neither does § 84 concerning access in accordance with FOIL.

Nor does petitioners' argument find support in Public Officers Law § 89(8) or Penal Law § 240.65. Those provisions make it a violation for a person to willfully conceal or destroy a record with the intent to prevent its public inspection under FOIL. The purpose and effect of these provisions is to ensure that government officers do not respond to FOIL requests by destroying particular records (or lying about their existence) to prevent disclosure.[5] They do not bar agencies from adopting general record-retention schedules that call for the destruction of designated types of records after a certain point in time. To the contrary, the Legislature has elsewhere specifically authorized local

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[5] *See* N.Y. Dep't of State, Comm. on Open Gov't, Advisory Op. No. 14692 (May 24, 2004), *available at* http://docs.dos.ny.gov/coog/ftext/f14692.htm.

governments to adopt such schedules. *See* Arts and Cultural Affairs Law § 57.25(2).

Finally, petitioners' FOIL requests for the City's IDNYC application materials do not alter this analysis. Those requests were submitted in December 2016, and the City's adoption of its challenged document-retention provision in June 2014 therefore cannot be considered an attempt to avoid those requests. Petitioners' requests would at most entitle them to access to responsive records not exempt from disclosure under FOIL, and not to invalidation of the record-retention schedule on its face. There are no such records, however, because the materials petitioners seek qualify for multiple FOIL exemptions, as we demonstrate below.

POINT II

FOIL EXEMPTS FROM DISCLOSURE THE MATERIALS SOUGHT BY PETITIONERS

The materials petitioners seek in this case are exempt from disclosure under FOIL, a point that disposes of any suggestion that their destruction would frustrate the public's right to access their contents. FOIL does not require the disclosure of any and all records an agency has, but instead includes several exceptions grounded in important public policies.

A. The Statute Does Not Require Disclosures That Would Constitute an Unwarranted Invasion of Personal Privacy or Endanger the Life or Safety of Any Person.

The IDNYC application materials sought by petitioners qualify for (at least) two FOIL exceptions: (i) Public Officers Law § 87(2)(b)'s exception for records that "if disclosed would constitute an unwarranted invasion of personal privacy" as defined under Public Officers Law § 89(2); and (ii) Public Officers Law § 87(2)(f)'s exception for records that "if disclosed could endanger the life or safety of any person."

The records petitioners seek are a classic example of the type of material properly withheld on invasion-of-privacy grounds. Public

Officers Law § 89(2) provides a non-exhaustive list of the types of disclosure that would constitute an unwarranted invasion of privacy, including any "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it," as well as any "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency." Public Officers Law § 89(2)(b)(iv), (v). In addition, where none of § 89(2)(b)'s enumerated exceptions applies, records still may be withheld under a balancing test weighing the privacy interest at stake against the public's interest in the information sought, *Matter of N.Y. Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485-86 (2005), with an unwarranted invasion of personal privacy existing where disclosure "would be offensive and objectionable to a reasonable person of ordinary sensibilities," *Matter of Massaro v. N.Y. State Thruway Auth.*, 111 A.D.3d 1001, 1003 (3d Dep't 2013) (quotation marks and brackets omitted).

Disclosure of the records sought by petitioners would constitute an unwarranted invasion of personal privacy under all of these tests. The

records meet the "information of a personal nature" requirement of § 89(2)(b)(iv) and (v) because they consist of highly sensitive personal data, such as names, addresses, dates of birth, photographs, Social Security numbers, and the like. Indeed, the entire reason the City collected the records was to establish the identity and residence of IDNYC program applicants. Moreover, the records were submitted to the City "in confidence," Public Officers Law § 89(2)(b)(v), and maintaining them would not appear to be relevant to the work of the city agency that collected them, *see id.* § 89(2)(b)(iv)-(v).[6] And the records' disclosure would work personal and economic hardship on IDNYC applicants by subjecting them to, *inter alia*, a substantial risk of

[6] The collecting agency is the City's Human Resources Administration (HRA), a social services agency whose work consists in administering a dozen public assistance programs. *See* HRA, About HRA, https://www1.nyc.gov/site/hra/about/about-hra.page. The personal data of the nearly 900,000 city residents who applied for IDNY identity cards does not seem particularly relevant to that work. *Cf. Matter of Prall v. N.Y.C. Dep't of Corr.*, 40 Misc. 3d 940, 944 (Sup. Ct. Queens County 2013) (inmate dates of birth and addresses not relevant to corrections department's work of "detaining inmates and preparing them for successful reentry into the community"), *aff'd on other grounds*, 129 A.D.3d 734 (2d Dep't 2015).

identity theft. Accordingly, all of the criteria of § 89(2)(b)(iv) and (v) are met.

But even if those enumerated exceptions were inapplicable, the material sought by petitioners would still be exempt on invasion-of-privacy grounds because its disclosure "would be offensive and objectionable to a reasonable person of ordinary sensibilities," *Matter of Massaro*, 111 A.D.3d at 1003 (brackets and quotation marks omitted). Courts have routinely applied that standard to sustain the withholding of precisely the same types of personal data at issue here. *See*, *e.g.*, *id.* (employees' names, home addresses, and Social Security numbers); *Matter of Beyah v. Goord*, 309 A.D.2d 1049, 1050 (3d Dep't 2003) (correction officers' home addresses, phone numbers, Social Security numbers, and dates of birth); *Matter of Prall v. N.Y.C. Dep't of Corr.*, 129 A.D.3d 734, 734-37 (2d Dep't 2015) (dates of birth, home addresses, and photographs of inmates). The same outcome is warranted here.

Furthermore, disclosure of the records sought by petitioners would, in addition to being an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b), endanger the lives and safety of IDNYC program participants, thereby qualifying for the separate FOIL

exception established by § 87(2)(f). An agency "need only demonstrate 'a possibility of endanger[ment]' in order to invoke this exemption." *Matter of Ruberti, Girvin & Ferlazzo P.C. v. N.Y. State Div. of State Police*, 218 A.D.2d 494, 499 (3d Dep't 1996) (quoting *Matter of Connolly v. N.Y. Guard*, 175 A.D.2d 372, 373 (3d Dep't 1991)). Such a possibility is readily apparent here.

The IDNYC program was designed in significant part to aid some of the City's most vulnerable inhabitants. These include individuals who have previously suffered violence—such as domestic abuse victims—and those who belong to groups facing a particular threat of violence, such as individuals who are, or may be perceived to be, transgender or immigrants (documented or undocumented). Indeed, as respondents' papers show (*see* City Mem. at 22-24), the IDNYC program has been controversial since its inception precisely because of its design to serve vulnerable populations—a design that sadly has provoked threats of violent retaliation against members of those populations, particularly immigrants or those thought to be immigrants. The danger that such threats will become reality cannot be ignored, especially given the recent rash of bias-related crimes and incidents around the State

(see *supra* note 2). Accordingly, disclosure of data that could identify IDNYC applicants constitutes a danger warranting withholding under Public Officers Law § 87(2)(f). *See*, *e.g.*, *Matter of Hynes v. Fischer*, 101 A.D.3d 1188, 1190 (3d Dep't 2012) (anonymous handwritten letters about prison inmate's drug and gambling activities properly withheld where disclosure could lead to efforts to identify writer and subsequent retaliatory violence); *accord N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 117-20 (2016) (personal data about abortion-services providers not disclosable in response to public-records request in light of threats of violence); Final Decision, *Matter of Powell*, Dkt. No. 2007-498 (Freedom of Info. Comm'n of Conn. July 9, 2008) (application materials of participants in New Haven's municipal identity card program not disclosable in light of surrounding "pattern of pervasive hate speech and violence")[7].

Moreover, the policy considerations against disclosure are especially weighty here, because the City reasonably concluded that in order to make the IDNYC program effective, it was essential to promise

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[7] *Available at* http://www.state.ct.us/foi/2008FD/20080711/FIC2007-498.htm.

confidentiality to applicants. As the Court of Appeals explained in a 2012 FOIL decision involving a request for information provided to the City under assurances of confidentiality in the 1950s, it would be "unacceptable for the government to break" its promise "even after all these years," however small the present risk of resulting harm or embarrassment. *Matter of Harbatkin v. N.Y.C. Dep't of Records & Info. Servs.*, 19 N.Y.3d 373, 380 (2012). A fortiori, it would be unacceptable for the City to break its recent promises of confidentiality to the IDNYC program's participants, especially at a moment when disclosing their personal information would subject to them to a concrete and imminent threat of identity theft, intimidation, violence, or even death.

B. The Statute Also Does Not Require Disclosure of Records Whose Substantive Contents Have Been Redacted.

FOIL does not require the disclosure of documents subject to such extensive redaction that what remains lacks meaningful content. As the statute's name reflects, FOIL's purpose is to foster access to *information*—and that purpose is not frustrated by the nondisclosure of records "so heavily redacted by the applicability of a legal exemption as to render them devoid of any other substance." *Matter of Porter v.*

David, 2014 N.Y. Slip Op. 30965(U), at *10 (Sup. Ct. N.Y. County 2014). Such records do not convey useful information, and "[t]he interests of judicial economy also logically dictate that disclosure be avoided entirely in such a circumstance to prevent waste." *Id*. Indeed, FOIL is to be applied in light of the reality that "governmental functioning involves a healthy mixture of practicality." *Matter of Delaney v. Del Bello*, 62 A.D.2d 281, 288 (2d Dep't 1978).

These principles are applicable here. Petitioners have requested well over a million documents (including IDNYC applications and supporting materials), the meaningful contents of which are personal data that would be subject to redaction. It would serve no purpose to put respondents to the immense burden of redacting virtually all the meaningful data contained in these documents and disclosing the empty shells, especially in light of respondents' statements that the City "maintains and will continue to maint[ain], separate from any imaged personal documents, deidentified aggregate data that records the document types submitted" by IDNYC applicants, "which petitioners are free to seek under FOIL." City Mem. at 20.

Finally, contrary to petitioners' attempt to read FOIL as conflicting with the IDNYC Law, courts should endeavor to construe state and local provisions harmoniously wherever possible. "When a locality exercises the legislative power delegated to it by the State Constitution, there is an 'exceedingly strong presumption' that the local law enacted is constitutional," and "[i]n order to defeat that presumption of validity, a party must show that the local law in question is inconsistent with either provisions of the State Constitution or with a general law enacted by the State Legislature." *Holt v. County of Tioga*, 56 N.Y.2d 414, 417 (1982) (quoting *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11 (1976)). In this case, the adoption of the IDNYC Law was well within the scope of the legislative powers delegated to the City under article IX, § 2(c)(10), of the New York Constitution, which authorizes localities to pass measures concerning the "government, protection, order, conduct, safety, health and well-being" of their inhabitants. *See also* Municipal Home Rule Law § 10(1)(ii)(a)(12).

The IDNYC Law and FOIL accordingly should be read to be consistent with each other if it is possible to do so—and it is. As described above, FOIL does not require agencies to retain records for

any particular period of time—or even to collect them in the first place—and therefore does not displace the IDNYC Law's schedule for destruction of identity-card application materials. Indeed, as respondents point out (*see* City Mem. at 6), the separate statute by which the State generally regulates the retention of records by local governments specifically excepts New York City, which is authorized to destroy records in accordance with its city charter. *See* Arts and Cultural Affairs Law § 57.33(2). This detail reinforces the Legislature's determination *not* to prescribe the period during which the City must retain records. And, in light of respondents' expressed willingness to maintain data about the types of documents submitted by IDNYC applicants, there is no reason to read FOIL as requiring the City to retain the underlying documents for the purpose of redacting their meaningful contents and then producing them in sanitized form just to satisfy petitioners' belated FOIL requests.

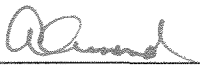
CONCLUSION

For all of these reasons, this Court should dismiss the petition.

Dated: New York, NY
December 20, 2016

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York

By: 
ANDREW W. AMEND
Senior Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8022

BARBARA D. UNDERWOOD
Solicitor General
ANDREW W. AMEND
Senior Assistant Solicitor General
of Counsel

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