SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION, Petitioner, vs. NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department, Respondents.	Index No. 07/115154 Judge Marylin G. Diamond **NOTICE OF MOTION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF**

PLEASE TAKE NOTICE that, upon the annexed affirmation of David McCraw, dated Jan. 8, 2008, the undersigned will move this Court at the Motion Support Office, Courtroom, Room 130, at the Courthouse thereof, located at 60 Centre Street, New York, New York 10007, on January 22, at 9:30 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order granting permission to The New York Times Company to file an amicus curiae memorandum of law in the above-captioned matter, and for such other and further relief as the Court may deem just and proper. A copy of the proposed amicus curiae brief is annexed hereto as Attachment I.

Dated: New York, New York
January 8, 2008

David E. McCraw
Legal Department
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SUPREME COURT OF THE STATE OF NEW YORK

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NEW YORK CIVIL LIBERTIES UNION, Petitioner, vs. NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department, Respondents.	Index No. 07/115154 Judge Marylin G. Diamond **AFFIRMATION OF DAVID McCRAW**

David McCraw, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am Vice President and Assistant General Counsel of The New York Times Company ("NYT"), publisher of The New York Times ("The Times"). I make this affirmation in support of NYT's motion to file an amicus curiae memorandum of law in the above-captioned matter.

2. Attached hereto as Attachment I is NYT's proposed amicus curiae memorandum of law. The parties in this action have consented through counsel to this motion.

3. The Times is the largest general interest daily published in the City of New York. It has a long history of providing in-depth coverage to issues of criminal justice, law enforcement, and community relations. It devotes significant time and resources to covering the New York Police Department ("NYPD") and maintains a bureau at Police Headquarters.

4. At issue in the litigation is whether the so-called stop/frisk database of the NYPD is public under the Freedom of Information Law ("FOIL"). The database is at the center of the current public controversy over whether race plays a role in stops of citizens by the NYPD.

5. The Times has closely covered events surrounding stops and frisks and the analyses of the stop/frisk data. Among the articles that have appeared in The Times are: "Police Report Far More Stops and Searches," Feb. 3, 2007 (Exhibit A hereto); "Amid Claims of Police Profiling, Study Will Review 'Stops and Frisks'," March 1, 2007 (Exhibit B hereto); and "City Police Stop Whites Equally But Frisk Them Less, a Study Finds," Nov. 21, 2007 (Exhibit C hereto).

6. Last year, the NYPD provided the database to a private entity, the Rand Corporation ("Rand"), for an independent analysis of the data. (See Ex. B hereto.) The City of New York has not disclosed what terms and conditions, if any, governed Rand's use of the data.

7. NYT has a significant interest in the FOIL issue presented by this action. Public release of the database would permit The Times to conduct its own analysis of the data, review the analyses done by the NYPD and the Rand Corporation, and provide more in-depth coverage of the performance of the NYPD and its relationship with minority communities.

WHEREFORE, I respectfully request that this Court issue an order granting NYT permission to file an amicus curiae memorandum of law in the above-captioned action.

Dated: New York, New York
January 8, 2008

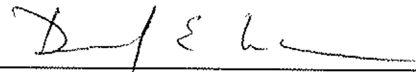

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EXHIBIT A TO McCRAW AFF.

February 3, 2007, Saturday Late Edition - Final
Section A **Page** 1 **Column** 2 **Desk:** Metropolitan Desk **Length:** 1622 words

Police Report Far More Stops And Searches

By AL BAKER and EMILY VASQUEZ

The New York **Police** Department released new information yesterday showing that **police** officers stopped 508,540 individuals on New York City streets last year -- an average of 1,393 stops per day -- often searching them for illegal weapons. The number was up from 97,296 in 2002, the last time the department divulged 12 months' worth of data.

After inquiries by the City Council and civil rights advocates, the department delivered four bound volumes of statistics to the Council in midafternoon. The raw data showed that more than half of those stopped last year were black: an average of 67,000 per quarter.

At the same time, the average number of people arrested per quarter as a result of such stops almost doubled to 5,317 last year, from 2,819 in 2002, and summonses nearly quintupled, to a quarterly average of 7,292 last year from 1,461 in 2002.

Until yesterday, the most recent information released by the **Police** Department about how and why it stops people to search them, sometimes looking for illegal guns, was from 2003, according to city officials and city and court records. Some officials have said that lag put the department at odds with a pair of legal requirements that sprang from public outrage at the 1999 fatal **police** shooting of Amadou Diallo, an unarmed black street peddler.

The department, which rejects such assertions, has not released numbers from 2004 and 2005, or from the last three months of 2003.

Those who review the data are now grappling with dual issues: determining why the **Police** Department waited so long to release any

new figures, and why it is stopping more people and searching them.

The issue of these **police**-public encounters -- called "**stop** and frisks" -- became an emotional flashpoint after the shooting of Mr. Diallo, whose death in a barrage of 41 **police** bullets led to weeks of protests and scores of arrests outside 1 **Police** Plaza, in Lower Manhattan.

Many of the protesters contended that there was a pattern of racial profiling in **stop**-and-frisks. A state study later in 1999 confirmed racial disparities in such stops.

The guidelines to monitor **stop**-and-frisks in detail were set forth in a city law signed in 2001, and in a federal court case settled by the Bloomberg administration in 2004. Both called for the **Police** Department to release to the City Council, four times a year, basic data about the people who are stopped and questioned by officers, and the reasons for such encounters.

But until yesterday, it had been a year since the department reported its **stop**-and-**frisk** activity, and those numbers dated from a three-month period ending in September 2003.

In the meantime, the Civilian Complaint Review Board, an independent city agency that investigates charges of **police** misconduct, found that complaints involving stops and searches have more than doubled in recent years, increasing to 2,556 last year from 1,128 in 2003. Complaints involving **police** stops now account for 33 percent of all complaints, up from 20 percent in 2003.

At a City Council hearing on Jan. 24, **Police** Commissioner Raymond W. Kelly assured council members that his officers were not practicing racial profiling in street stops.

"Officers are stopping those they reasonably suspect of committing a crime, based on descriptions and circumstances," Mr. Kelly said, "and not on personal bias."

Paul J. Browne, the chief **police** spokesman, said later that the department's analysis of the numbers showed that while 55.2 percent of the **stop** encounters last year involved blacks, 68.5 percent of crimes involved suspects described as black by their victims (or by witnesses, in the case of homicides). Hispanics, he said, made up 30.5 percent of those stopped and 24.5 percent of suspected offenders. For whites, he said, the numbers were 11.1 percent and 5.3 percent, respectively.

Mr. Browne said that aggressive street enforcement was partly responsible for the increase in **stop**-and-frisks. Also, he said, "careful accounting" of such encounters by the department in recent years made the increase seem greater. "Part of it is taking guns off the street and responding to complaints where we use **stop**-and-**frisk**," he said.

It was unclear last night how much of the increase in stops was due to suspected gun possession or how many led to gun arrests. Mr. Browne could not confirm a direct line between gun arrests and increases in stops, and said officers' efforts to take guns off the streets were just one facet of the crime suppression the **stop**-and-**frisk** forms reflected.

The 2006 figures, delivered yesterday by two officers in plain clothes, were contained in four books of about 250 pages each. Councilman Peter F. Vallone Jr., chairman of the Council's public safety committee, said his staff was unable to interpret the numbers immediately.

The department's lag in releasing the numbers came to light after the fatal shooting in November of another unarmed black man, Sean Bell, and has been seized on by civil rights advocates, academics and current and former government officials. Mr. Bell's death was not related to a **stop**-and-**frisk** operation, but it has become a valve for frustrations over relations between the **police** and minority residents. But members of the City Council said they had been requesting the material even before the Bell shooting.

Jeffrey Fagan, a professor of law and public health at Columbia University who studied the issue in 1999 for Eliot Spitzer, then the attorney general, said he was not surprised that the number of **stop**-and-frisks went up "during a period of no accountability."

But, he added, "it is an astonishing fact that **stop** rates went up by 500 percent when crime rates were flat." **Police** officials and a city lawyer said there were several reasons the department had fallen behind in releasing the numbers. Compiling the reports, they said, has been hampered by antiquated technology, especially since the numbers have risen. The department has been working to modernize its reporting system, officials said, and has not been withholding the data deliberately.

Some observers questioned whether producing data on street stops remained on the department's front burner during the age of terrorism.

"I just don't think it's a priority," Dr. Fagan said of the data collection.

The total number of stops includes cases in which the officers acted to prevent what could have been terrorist activity, the **police** said. But those stops are relatively rare, they said, and there is no separate category for keeping track of them. Searches of subway riders' bags are not considered **stop**-and-**frisk** encounters because people willing to forgo entry to the subway can decline them.

Joel Berger, who monitored matters of **police** conduct as an executive in the city's Law Department from 1988 to 1996, said: "It is particularly frightening that the **Police** Department is not following the statute that requires reporting on **stop**, question and frisks. It is the thing that happens most often and most troubles people, and the failure to report the numbers is, effectively, very alarming."

Mr. Spitzer first dug into the issue of street stops after the Diallo shooting and found that Hispanics and blacks were being disproportionately targeted. After adjusting for varying crime rates among racial groups, his analysis found that blacks were stopped 23 percent more often than whites. Hispanics were stopped 39 percent more often than whites.

In the wake of those findings, the city signed a law allowing the Council to collect the **Police** Department's **stop**-and-**frisk** data on a quarterly basis. Separately, the federal class-action lawsuit, Daniels v. City of New

York, alleged that the **police** habitually used racial profiling in **stop**-and-**frisk** situations. When the city's corporation counsel settled the case in January 2004, the agreement required the **police** to disclose data on such encounters through 2007.

The idea was that increased transparency about **police** stops would not only foster analysis of one of the department's most crucial tactics for reducing crime, but also would help restore the public's trust.

Mr. Spitzer's study reviewed **police** records known as UF-250s. Officers must fill them out after making forcible stops, including those in which a person is frisked or searched. His report noted that officers did not always fill them out. The form shows the race of the person stopped as well as the reason.

Under a system begun in the spring of 1999, **police** officials said, forms completed at individual precincts were taken to 1 **Police** Plaza, where their 50 points of data were gathered. Envisioning a daunting backlog, Mr. Kelly in 2005 directed that the process be decentralized so that the raw data could be recorded quickly, at the precinct level.

Mr. Kelly told officials at the Jan. 24 hearing that the data for the remainder of 2003, and for all of 2004 and 2005, would take longer to provide. That is "because it must be compiled manually, rather than in a technologically advanced way," according to a letter sent Thursday from the Law Department to a plaintiff in the federal case.

"We've been patiently waiting for years now," Councilman Vallone, told Mr. Kelly at the hearing. "We would again request that you give us that information."

For a time, the **police** gave the data to the City Council with some regularity. But the frequency of the reports slowed, and in February 2006, the department released data for the third quarter of 2003.

Then, the flow of data stopped. Until yesterday.

But city leaders came under criticism as well for failing to more forcefully demand the data. "The City Council has failed to ensure that the **Police** Department is producing the reports, as required by the statute," said Christopher Dunn of the New York Civil Liberties Union. "As a result, it has not been doing any monitoring of **stop**-and-**frisk** activity, which was the very point of the statute."

Images: Photo: The report on so-called **stop**-and-frisks by the **police** last year was released to the city yesterday. (Photo by Marko Georgiev for The New York Times)(pg. B2)

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EXHIBIT B TO McCRAW AFF.

March 1, 2007, Thursday Late Edition - Final
Section B **Page** 1 **Column** 1 **Desk:** Metropolitan Desk **Length:** 731 words

Amid Claims of Police Profiling, Study Will Review 'Stop and Frisks'

By AL BAKER

The New York City Police Department has commissioned a six-month independent review of the way it stops people on the streets, sometimes searching them for illegal weapons, after the release of statistics that showed the department stopped 508,540 people in the five boroughs last year, officials said yesterday.

The study will focus on the role that race plays in everyday street stops: some critics have suggested that minorities, particularly black people, were unfairly singled out, a claim the police deny. It will be done by the **RAND** Corporation, a private nonprofit organization that has studied the issue in other cities, including Oakland, Calif., and Cincinnati, officials said.

Nearly two months ago, Police Commissioner Raymond W. Kelly commissioned **RAND** to review several aspects of firearm use in the department after the fatal police shooting of Sean Bell in Queens in November. That study is still under way.

The issue of stopping people on the streets -- known in department parlance as "**stop** and frisks" -- has been a source of occasional tension between the police and residents. As part of the study, analysts from **RAND** will not only examine last year's 508,540 stops, but also ride with police officers on duty. The officers will be interviewed about their decisions to make stops.

Analysts will also see firsthand how officers complete forms known as UF-250s, which they are supposed to fill out after all such stops. The form captures several points of data, including the circumstances that led to the **stop**, whether physical force was used, whether the **stop** included a

frisk, and the race or ethnicity of the person stopped. A factor cited frequently on the forms is "area has high crime incidence."

The analysts will also review an electronic database of all the stops made by officers last year and "take steps to audit the data collection process," said Greg Ridgeway, the associate director of **RAND**'s Safety and Justice Program, who will lead the research in New York.

Police officials released statistics on Feb. 2 showing that the number of people stopped last year increased to 508,540 from 97,296 in 2002, the last time the department divulged the data from a single calendar year.

The officials have said that the steep increase is partly due to greater adherence to departmental rules for filling out the **stop**-and-**frisk** forms and more aggressive crime-fighting activities, particularly in high-crime neighborhoods. They have repeatedly said that officers do not practice racial profiling.

In a statement announcing the **RAND** study yesterday, Mr. Kelly said that while the department's own analysis of its data "in general terms showed that stops were consistent with concentrations of crime and of victim descriptions of suspects," the **RAND** analysts would work "to determine whether there are any flaws that we may need to address."

Responding to complaints of profiling, the department noted that while 55.2 percent of those stopped were black, 68.5 percent of reported crimes involved suspects described as black.

Mr. Kelly added, "We thought it was important to have a separate, independent review, and we turned to **RAND** again because of its reputation for objectivity and quality research."

The study will cost $120,000 and will be paid for by New York City Police Foundation, a charity that supports the Police Department.

Donna Lieberman, the executive director of the New York Civil

Liberties Union, said that the department's raw data -- not just its own summary of its data -- should be disclosed publicly and to an array of interested parties, not just to its "chosen consultants" at **RAND**.

"The situation cries out for an independent review," she said.

Critics have said that the summary the department released in early February raises as many questions as it answers and, in isolation, is hard to understand.

For instance, according to the department's data, the average number of people arrested per quarter as a result of street stops doubled to 5,317 last year, from 2,819 in 2002. But Ms. Lieberman pointed out that the story behind the numbers was that in 2002, one person was arrested for every 8.5 stops, while last year, one person was arrested for every 25 stops.

Thomas A. Reppetto, a police historian, said he was eager to hear what **RAND** finds.

"I want the constitutional question answered," Mr. Reppetto said. "Are these stops, frisks and searches reasonable? That is what the U.S. Constitution demands, that searches not be unreasonable."

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EXHIBIT C TO McCRAW AFF.

November 21, 2007, Wednesday Late Edition - Final
Section B **Page** 1

Desk: Metropolitan Desk **Length:** 1018 words

CORRECTION APPENDED

City Police Stop Whites Equally But Frisk Them Less, a Study Finds

By AL BAKER

Whites and members of minorities have a roughly equal chance of being stopped by police officers and questioned on the street in New York City. But officers are more likely to **frisk**, search, arrest or give summonses to black or Hispanic people -- or to use force against them -- according to a study released yesterday.

The study by the **Rand** Corporation, commissioned in March after it was revealed that the police stopped 508,540 people on the street last year, also found:

The pattern of whites and minorities being stopped equally, but the minorities being frisked more often, held up in white and black neighborhoods, but was most pronounced on Staten Island.

Slightly more than half of the 508,540 stops last year were made by 2,756 officers -- an average of about 100 each.

Fifteen of those 2,756 officers -- six of whom are assigned to precincts in the southern part of Queens -- were disproportionately more likely to **stop** blacks and Hispanics, and an additional nine officers were disproportionately more likely to **stop** whites.

The issue of stopping people on the street -- known in department jargon

as "**stop** and frisks" -- has been a source of occasional tension in New York. It became an emotional flash point after the 1999 fatal police shooting of Amadou Diallo, an unarmed black street peddler. It came to light again after the fatal shooting in November 2006 of Sean Bell, when many people began to question why the number of stops had jumped to 508,540 from 97,296 in 2002, which was the last time that the department released a full year's worth of data.

The 59-page report by **Rand**, a private nonprofit organization, was commissioned by Police Commissioner Raymond W. Kelly after the department released the data. Of the 508,540 people stopped, about 10 percent were arrested or received summonses.

The report includes six recommendations for Mr. Kelly, such as refining paperwork to capture data on use of force and requiring officers to explain to people why they are being stopped.

"We're going to take an in-depth review of the six recommendations and study them, and obviously I think the report is well done," Mr. Kelly said. He added, "It seems to me that they all have merit, and we'll put in place what we think is appropriate as quickly as possible."

The other recommendations were to review the boroughs with the greatest disparities; to train newly hired officers in **stop**-and-**frisk** policies; to modify the internal audits of street stops; and to flag and investigate those officers who make more racially disparate stops.

The analysts, for the most part, did not explain why the racial disparities exist regarding stops, said Jack Riley, the associate director of the **Rand** division that did the study.

"There may be missing factors that are not collected by the officers that might help explain the small differences in what we would term adjusted **frisk** rates," Mr. Riley said.

"Certainly, resisting arrest or resisting interaction with an officer is not captured and that would be a factor that would influence whether the

person is frisked or not."

Critics of the department's street-**stop** practices faulted **Rand**'s methodology.

Donna Lieberman, the executive director of the New York Civil Liberties Union, called the report "hugely flawed," saying that the document was more striking for what it did not say than for what it said. She said the report relied on "inappropriate benchmarks" to reach its findings.

The phenomenon of a small number of officers doing most of the stops is roughly similar to patterns found in Oakland, Calif., and in Cincinnati, Mr. Riley said. **Rand** conducted similar studies there. "There are typically officers who are disproportionately involved in stops of all racial groups, not just minorities," Mr. Riley said. "**Rand** has found similar patterns."

In explaining why roughly 7 percent of the department's total patrol strength was responsible for 54 percent of all street stops last year, Paul J. Browne, the Police Department's chief spokesman, said it was generally based on their assignments to high-crime areas.

"In addition, it involves officers assigned to special units," he said. "Units that are encountering more suspects such as anticrime, narcotics, gang and other units."

Rand analysts left it to police officials to come up with an explanation for why blacks and Hispanics were more likely to be frisked, searched, arrested or to have force used against them -- such as officers wielding a baton, spraying pepper spray or pointing a gun -- on Staten Island compared with other boroughs.

Mr. Browne said the department would have to study why the disparities are most pronounced on Staten Island. "We don't know," he said. "It is something we will have to examine." Greg Ridgeway, the associate director at **Rand**, who wrote the report, said there were plausible reasons

for the 508,540 stops in 2006, despite projections -- based on data from national surveys on police and citizen contacts -- that suggested 250,000 to 330,000 stops could be expected. This does not include traffic stops.

He said possible reasons included more 911 calls, more officers on the street -- there are 44 officers per 10,000 residents in New York City, as opposed to roughly 29 officers per 10,000 residents around the country -- more pedestrian traffic and more instances of violent crime than the national average.

The report stated that 69 percent of suspects in violent crimes were described by their victims as black whereas only 53 percent of all those stopped by police officers for **stop**-and-frisks were black. But the civil liberties group said only a fraction of the 508,540 people stopped last year were suspects in violent crimes, making the analysis flawed.

In one area -- the use of force -- the **Rand** study said, "If black suspects are likelier to flee or resist, the observed difference in rates of force may not be due to officer bias." But Christopher Dunn of the civil liberties group called this "an example of them not doing analysis and instead looking for justifications. It simply reflects the dishonesty that runs through this report."

Correction: November 30, 2007, Friday

An article on Nov. 21 about a **RAND** Corporation study on street stops by the New York Police Department referred incorrectly at some points to an overall figure and misstated the number of individual officers who were found to be disproportionately more likely to **stop** whites. There were 508,540 street stops in 2006 -- not 508,540 people stopped -- and 13 officers, not 9, tended to **stop** whites more often. The article also misstated the finding of a racial disparity in the handing out of summonses. Whites are more likely -- not less -- to receive them.

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ATTACHMENT I TO NOTICE OF MOTION

SUPREME COURT OF THE STATE OF NEW YORK

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Respondents.

Index No. 07/115154
Judge Marylin G. Diamond

MEMORANDUM OF LAW OF AMICUS CURIAE THE NEW YORK TIMES COMPANY IN SUPPORT OF PETITIONER

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The New York Times Company ("NYT"), publisher of The New York Times ("The Times"), respectfully submits this brief as amicus curiae in support of the Article 78 petition filed by the New York Civil Liberties Union ("NYCLU").

STATEMENT OF INTEREST OF AMICUS CURIAE

The Times has a long history of providing in-depth coverage of issues involving criminal justice, law enforcement, and community relations. As the largest general-interest daily published in New York City, it devotes significant time and resources to covering the New York Police Department ("NYPD") and maintains a bureau at Police Headquarters. More specifically, it has covered the ongoing controversy over allegations of discrimination in police stops, including stories about the so-called stop/frisk database that is at issue in the case. Among other things, The Times published articles about the NYPD's report on possible racial disparity in stops, questions raised about the NYPD's report, the NYPD's decision to seek an analysis of the data by the Rand Corporation ("Rand"), and Rand's report based on the data. (Affirmation of David McCraw, dated Jan. 8, 2008 ("McCraw Aff."), ¶ 5 and Exs. A, B, and C thereto.)

The Rand analysis, like NYPD's own analysis, remains a subject of public controversy, and there continues to be keen public interest in the question of how the NYPD deals with minority communities. Only if the stop/frisk database is made public can reporters at The Times rigorously and systematically review the analyses presented by Rand and the NYPD and undertake its own analysis of the data. Press organizations

serve the citizens of New York by functioning as a watchdog on government, and they cannot play that constitutionally protected role when vital information about the operations of government is kept secret.

ARGUMENT

NYPD HAS WAIVED ITS RIGHT TO WITHHOLD THE DATABASE BY RELEASING THE INFORMATION TO RAND

The stop/frisk database is an invaluable source of information about the performance of the NYPD and is at the center of the controversy over whether the police have engaged in racial profiling in making stops of citizens. The NYPD initially reported that the data supported its contention that race did not play a role in stops, but in the wake of criticism by members of the public, it decided to turn the data over to Rand, a private entity, for an independent analysis. (Affirmation of Christopher Dunn, dated Nov. 13, 2007 ("Dunn Aff."), ¶ 11 and Ex. 5 thereto.) The study by Rand was arranged through, and financed by, another private entity, the Police Foundation. (Ex. B to McCraw Aff.) Yet the NYPD continued to deny access to the database to other members of the public. (Dunn. Aff. ¶¶ 17-19.) City officials have not disclosed what terms and conditions, if any, governed the release of the data to Rand. (McCraw Aff. ¶ 6.)

NYT adopts the various arguments that NYCLU makes in its moving memorandum of law, all of which demonstrate that the stop/frisk database must be made public under the Freedom of Information Law ("FOIL"). Rather than repeat those arguments here, NYT instead will address a separate legal basis dictating that the database is a public document under FOIL. Simply put, by releasing the database to

Rand, an independent nongovernment entity, the NYPD has waived its right under FOIL to deny access to the database to other members of the public. An agency cannot pick and choose whom among the public it deems worthy of receiving official releases of information.

It is a fundamental principle of freedom-of-information jurisprudence that "[t]o allow the Government to now withhold information that it has already disclosed . . . would permit the Government to engage in withholding of information from the public that is intolerable under the law." Kimberlin v. Dept. of Justice, 921 F. Supp. 833, 835 (D.D.C. 1996), remanded on other grounds, 139 F.3d 944 (D.C. Cir. 1998). As the Kimberlin court explained, were agencies allowed to pick and choose among members of the public, agency officials "could selectively disclose non-public information to favored sources and then invoke FOIA exemptions to prevent disclosure to press sources not in their favor." Id. The ban on selective disclosure applies even when the first release is subject to a confidentiality agreement. State of North Dakota v. Andrus, 581 F.2d 177, 180-81 (8th Cir. 1978). The Andrus court rejected the notion that a governmental agency could "foreclose citizens their rights under [the Freedom of Information Act] merely by executing an agreement in which it reserves its right to assert at a later time that the documents are privileged." Id.; see also Sherman v. U.S. Dept. of Army, 244 F.3d 357, 362 (5th Cir. 2001) (while finding no waiver where privacy exemption was at issue, "we share the Kimberlin court's concern regarding selective disclosure with respect to those exemptions that protect the government's interest in non-disclosure").

While New York courts have not addressed the waiver issue in circumstances similar to those here, the courts have recognized that agencies may implicitly waive FOIL

exemptions that would otherwise apply. See Pittari v. Pirro, 170 Misc. 2d 241, 251, 683 N.Y.S.2d 700, 707 (Sup. Ct. Westchester 1998); McGraw-Edison Co. v. Williams, 133 Misc. 2d 1053, 1055, 509 N.Y.S.2d 285, 287 (Sup. Ct. Albany 1986) (recognizing waiver doctrine in FOIL case, when waiver is intelligent and voluntary). The New York courts have declined to let agencies assert FOIL exemptions and withhold materials when there has been an earlier authorized release of the same materials. Corwin Solomon & Tanenbaum v. N.Y. State Div. of Lottery, 239 A.D.2d 763, 763-64, 657 N.Y.S.2d 803, 804 (3d Dep't 1997) (information publicly released may not be subsequently withheld by agency); Empire Realty Corp. v. N.Y. State Div. of Lottery, 230 A.D.2d 207, 274, 657 N.Y.S.2d 504, 507 (3d Dep't 1997) (agency cannot withhold names of lottery winners previously disclosed by the agency); Thompson v. Weinstein, 150 A.D.2d 782, 783, 542 N.Y.S.2d 33, 33 (2d Dep't 1989) (agency cannot withhold information that has already been made a matter of public record); cf. Scaccia v. N.Y. State Div. of State Police, 138 A.D.2d 50, 53, 530 N.Y.S.2d 309, 311 (3d Dep't 1988) (no waiver of FOIL exemption where earlier release of material by subordinate officer was unauthorized). Moreover, under New York law, agencies are generally prohibited from making FOIL determinations based on the requesters' status or intended use of the governmental information and thereby discriminating among FOIL requesters. Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566-67 (1986) ("the status or need of the person seeking access is generally of no consequence in construing FOIL").

Because the waiver issue has not been fully addressed in the New York cases, it is appropriate to look to the federal precedents for guidance. See Fink v. Lefkowitz, 47 N.Y.2d 567, 571 n. (1979) (endorsing use of FOIA to interpret provisions of FOIL);

Bahnken v. N.Y. City Fire Dept., 17 A.D.3d 228, 232, 794 A.D.2d 312, 315-16 (Friedman, J., dissenting) (1st Dep't 2005) (same). And those precedents clearly demonstrate why the stop/frisk database should be deemed a public document. In cases like Kimberlin and Andrus, the courts have construed a limited prior release of materials to be a waiver of whatever right the governmental agency may have had otherwise to withhold the materials to others. In Kimberlin, the Drug Enforcement Administration unsuccessfully asserted that it could withhold materials from a private citizen under FOIA's law enforcement exemption even though the documents had previously been shared with a reporter. 921 F. Supp. at 835. In Andrus, the State of North Dakota sought information from a federal agency concerning certain water projects but its FOIA request was denied under the deliberative process exemption of FOIA. The Eighth Circuit ruled that the materials were public because they already had been provided in litigation to the National Audubon Society, which had sued the federal government. The court rejected the argument that materials could be kept secret because the National Audubon Society had agreed not to make the materials public. 581 F.2d at 180-81. Similarly, in Shell Oil Co. v. Internal Revenue Serv., 772 F. Supp. 202, 208-209 (D. Del. 1991), the court found that a federal agency had waived its right to withhold documents pertaining to a tax credit after federal officials read from the materials at a public meeting.

The fact that Rand was retained to do the analysis does not change the conclusion that the NYPD's release of the database to Rand constituted a waiver. It is true that in some instances an outside consultant will be treated as if it were part of the agency, and the deliberative process, or intra-agency, exemption will continue to apply to documents provided to the consultant. See Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133

(1985). In those cases, the sharing of materials between the agency and the private third party will not constitute a waiver. However, consultants will be treated as governmental actors only when they are "part of the agency's deliberative process," Xerox, 65 N.Y.2d at 133, or, as another court has expressed it, the consultants "were serving as agents of the government agency and were directly involved in the internal agency decision-making." Natural Resources Defense Council v. U.S. Dept. of Defense, 442 F. Supp.2d 857, 867 (C.D. Calif. 2006) (citing Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10-11 (2001)). That principle does not apply when the private party that receives the information is independent and "not beholden" to the government. Natural Resources, 442 F. Supp.2d at 868.

Here, Rand was retained precisely because it was independent of the police, who were seeking an objective analysis of the data.[1] In announcing Rand's retention, NYPD Commissioner Raymond W. Kelly stated: "We thought it was important to have a separate, independent review, and we turned to RAND again because of its reputation for objectivity and quality research." (Ex. B to McCraw Aff.) Far from being "beholden" to the NYPD, Rand was brought in by the police in the face of public criticism that the NYPD's own analysis failed to account for racial disparities in the data, as Commissioner Kelly acknowledge. (Id.) Moreover, the retention of Rand was arranged through the Police Foundation, a nongovernmental agency, not the NYPD. (Id.)

A governmental decision to release information in a discriminatory fashion also raises constitutional issues. In Anderson v. Cryovac, Inc., 805 F.2d 1, 8-9 (1st Cir. 1986), the First Circuit found that when the government provides information to a private party,

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[1] The NYPD has not disclosed the terms under which Rand received the database, specifically whether Rand is permitted to keep and use the data for other purposes as part of its consulting and research at the Rand Center on Quality Policing.

its refusal to provide that same information to others is subject to strict scrutiny. In Anderson, a protective order barred the press from obtaining information from a civil lawsuit, but permitted the parties' experts to use the confidential information in academic courses and "learned journals." The order also gave one media outlet, WGBH-TV, access to the otherwise sealed materials. Ruling on a challenge to the order brought by The Boston Globe, the First Circuit found that a court could not "selectively exclude news media from access to information otherwise made available for public dissemination." Id. at 9. Courts have similarly struck down attempts by government to favor certain members of the press over others in access to information. American Broadcasting Companies v. Cuomo, 570 F.2d 1080, 1083 (2d. Cir. 1977) (finding that the First Amendment required equal access for media to public function involving mayoral candidates); Sherrill v. Knight, 569 F.2d 124, 129 (D.C. Cir. 1977) (First Amendment implicated by denial of White House press pass due to content of reporter's stories); Westinghouse Broadcasting Co. v. Dukakis, 409 F.Supp. 895, 896 (D. Mass. 1976) (public officials may not selectively exclude one news organization from public meetings and press conferences absent a compelling government interest).

Here, the NYPD has voluntarily chosen to release the database to a private entity, Rand, but declined to release the same material to another private entity – the NYCLU – which may look more skeptically at the data and then use it to criticize the police. If the NYPD is allowed to pick and choose who gets information that is vital to monitoring the performance of the police, it in effect can prevent its critics from obtaining information necessary to make informed, critical judgments about the agency's conduct. Conversely, it can assure that it is treated favorably by carefully selecting the private parties that are

rewarded with access to the information. That manipulative use of government information runs directly counter to a core purpose of FOIL: to open government up to the scrutiny of all members of the public, not the chosen few, and to foster a vigorous and wide-ranging discussion of how well government is doing its job.

CONCLUSION

For all the reasons set forth here and in the moving memorandum of law of the NYCLU, this Court should order the NYPD to make the stop/frisk database public.

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