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THE COUNCIL OF THE CITY OF NEW YORK

REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION
Robert Newman, Legislative Director
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COMMITTEE OF THE WHOLE
Speaker Christine C. Quinn, Chair

August 22, 2013

INTRO. NO. 1080 By Council Members Williams, Mark-Viverito, Mendez, Lander, Cabrera, Jackson, Arroyo, Barron, Brewer, Chin, Comrie, Dickens, Dromm, Ferreras, Foster, Garodnick, James, King, Koppell, Lappin, Levin, Palma, Reyna, Richards, Rodriguez, Rose, Van Bramer, Vann, Weprin, Wills, Mealy, Eugene, Gonzalez and the Public Advocate (Mr. de Blasio)

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to prohibiting bias-based profiling.

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I. INTRODUCTION

On August 22, 2013 the Committee of the Whole will meet to consider whether to recommend the override of the Mayor's veto of Introduction No. ("Intro.") 1080: A Local Law to amend the administrative code of the city of New York, in relation to prohibiting bias-based profiling, and whether to recommend that veto message M-1184-2013 be filed.

On June 12, 2013 Intro. 1080 was introduced and referred to the Committee on Public Safety. Thereafter, on June 24, 2013 Intro. 1080 was discharged from the Committee on Public Safety and summarily submitted to the full Council for a vote. The legislation was then passed by the Council on June 26, 2013 by a vote of 34 in the affirmative and 17 in the negative. On July 23, 2013, the Mayor issued a message of disapproval for Intro. 1080 and the Mayor's veto message, M-1184-2013 (attached hereto as Appendix A), was formally accepted by the Council and referred to the Committee of the Whole at the Council's stated meeting held on July 24, 2013.

The question before the Committee of the Whole today is whether to recommend that Intro. 1080 should be re-passed notwithstanding the objections of the Mayor, and whether to recommend that the Mayor's veto message, M-1184-2013, should be filed.

II. BACKGROUND

There are long-standing concerns about the New York City Police Department's ("NYPD") use of stop-and-frisk tactics and the impact of this practice on communities of color.[1] The practice of briefly stopping an individual for questioning, and possibly patting him or her

[1] A more detailed background on stop, question, and frisk practices is provided in an October 10, 2012 report of the Public Safety Committee at pp. 4-8 and 12-15, *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1078151&GUID=D1949816-2C35-46C8-B8A9-897A3EFFAFFD&Options=ID|Text|&Search=800.

down for weapons, commonly referred to as "frisking," was officially recognized by the Supreme Court of the United States in 1968 as an exception to the requirement that police officers must have "probable cause" to seize and search a person or his or her effects.[2] The New York case of *People v. De Bour* stated that the police must have a "founded suspicion that criminal activity is present" before they may stop a person "pursuant to the common-law right to inquire."[3] Under New York Criminal Procedure law, a "stop" is only allowed when an officer "reasonably suspects that" a "person is committing, has committed or is about to commit" a crime.[4]

The number of individuals stopped by the NYPD steadily rose for many years – from under 470,000 stops in 2007 to over 680,000 stops in 2011 – before declining in 2012 with 533,042 stops.[5] NYPD data shows that blacks and Hispanics are more likely than others to be stopped by the NYPD. Of those who were stopped in 2011, approximately 87% were either black or Hispanic. In 2012 it was approximately 85%.[6]

In response to the concerns surrounding, among other things, the NYPD's use of stop-and-frisk, many have called for a mechanism by which the city's existing prohibition on racial profiling can be enforced. The bill being considered today is designed by the sponsors to respond to these concerns.

III. PROPOSED LEGISLATION – INTRO. 1080

Intro. 1080 would amend the city's current prohibition on racial profiling, codified in section 14-151 of the Administrative Code of the City of New York, to re-define the: (1)

[2] *Terry v. Ohio*, 392 U.S. 1 (1968).
[3] *People v. De Bour*, 40 N.Y.2d 210, 215 (1976).
[4] N.Y. Crim. Proc. Law § 140.50(1).
[5] Based upon data provided by the New York City Police Department to the New York City Council and on file with the Committee on Public Safety.
[6] *Id.*

prohibited act as "bias-based profiling;" and (2) characteristics that may not be used as the determinative factor in initiating law enforcement action against an individual as "actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status." Additionally, Intro. 1080 would further amend section 14-151 of the Administrative Code of the City of New York to create two causes of action. Specifically, the legislation creates:

(1) a cause of action that may be brought if either a governmental body or an individual law enforcement officer has intentionally engaged in bias-based profiling and the governmental body cannot prove that the profiling was necessary and narrowly tailored to achieve a compelling governmental interest or the individual officer cannot prove that his or her action was justified by a factor (or factors) unrelated to unlawful discrimination; and

(2) a cause of action that may be brought if an NYPD policy or practice regarding the initiation of law enforcement action has had a disparate impact on subjects of that law enforcement action who are covered by the prohibition such that the policy or practice has the effect of bias-based profiling. In order for this claim to prevail, the police department must fail to plead and prove as an affirmative defense that the policy or practice at issue bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact; provided, however, that if a policy or practice is demonstrated to result in a disparate impact under the bill, it shall be deemed unlawful if the person bringing the action produces substantial evidence that an alternative policy or practice with less disparate impact is available and the police department fails to prove that such alternative policy or practice would not serve the law enforcement objective as well.

If a claim alleges disparate impact, the mere existence of a statistical imbalance between the demographic composition of the subjects of the challenged law enforcement action and the general population would not alone be sufficient to establish a prima facie case of disparate impact violation unless: (i) the general population is shown to be the relevant pool for comparison; (ii) the imbalance is shown to be statistically significant; and (iii) there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

Intro. 1080 would allow those who choose to seek enforcement of this law to either bring a civil action or to file a complaint with the New York City Commission on Human Rights. In either case, the remedy is limited to injunctive and declaratory relief; provided that, in a civil action for claims brought under this law, a court may allow a prevailing plaintiff reasonable attorney's fees, including expert fees. If passed, the law would take effect ninety days after it is enacted.

Int. No. 1080

By Council Members Williams, Mark-Viverito, Mendez, Lander, Cabrera, Jackson, Arroyo, Barron, Brewer, Chin, Comrie, Dickens, Dromm, Ferreras, Foster, Garodnick, James, King, Koppell, Lappin, Levin, Palma, Reyna, Richards, Rodriguez, Rose, Van Bramer, Vann, Weprin, Wills, Mealy, Eugene, Gonzalez and the Public Advocate (Mr. de Blasio)

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting bias-based profiling.

Be it enacted by the Council as follows:

Section 1. Declaration of Legislative Intent and Findings. The City Council finds that bias-based policing endangers New York City's long tradition of serving as a welcoming place for people of all backgrounds. The Council further finds that the people of the City of New York are in great debt to the hard work and dedication of police officers in their daily duties. The name and reputation of these officers should not be tarnished by the actions of those who would commit discriminatory practices. By passing this legislation, it is the intent of the City Council to create a safer city for all New Yorkers.

The City Council expresses deep concern about the impact of NYPD practices on various communities in New York City. In particular, the Council expresses concern about the NYPD's growing reliance on stop-and-frisk tactics and the impact of this practice on communities of color. In 2002, the NYPD made approximately 97,000 stops. By 2010, the number of stops had increased to more than 601,000. Black and Latino New Yorkers face the brunt of this practice and consistently represent more than 80 percent of people stopped despite representing just over 50 percent of the city's population. Moreover, stop-and-frisk practices have not increased public safety, as year-after-year nearly 90 percent of individuals stopped are neither arrested nor issued a summons.

Bias-based profiling by the police alienates communities from law enforcement, violates New Yorkers' rights and freedoms, and is a danger to public safety. It is the Council's intent that

the provisions herein be construed broadly, consistent with the Local Civil Rights Restoration Act of 2005, to ensure protection of the civil rights of all persons covered by the law.

§ 2. Section 14-151 of the administrative code of the City of New York is amended to read as follows:

§ 14-151 [Racial or Ethnic]Bias-based Profiling Prohibited. a. Definitions. As used in this section, the following terms have the following meanings:

1. "[Racial or ethnic]Bias-based profiling" means an act of a member of the force of the police department or other law enforcement officer that relies on actual or perceived race, [ethnicity, religion or] national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons [of a particular race, ethnicity, religion national origin] to suspected unlawful activity.

2. "Law enforcement officer" means (i) a peace officer or police officer as defined in the Criminal Procedure Law who is employed by the city of New York; or (ii) a special patrolman appointed by the police commissioner pursuant to section 14-106 of the administrative code.

3. The terms "national origin," "gender," "disability," "sexual orientation," and "alienage or citizenship status" shall have the same meaning as in section 8-102 of the administrative code.

4. "Housing status" means the character of an individual's residence or lack thereof, whether publicly or privately owned, whether on a temporary or permanent basis, and shall include but not be limited to:

(i) an individual's ownership status with regard to the individual's residence;

(ii) the status of having or not having a fixed residence;

(iii) an individual's use of publicly assisted housing;

(iv) an individual's use of the shelter system; and

(v) an individual's actual or perceived homelessness.

b. Prohibition.

1. Every member of the police department or other law enforcement officer shall be prohibited from [racial or ethnic]engaging in bias-based profiling.

2. The department shall be prohibited from engaging in bias-based profiling.

c. Private Right of Action

1. A claim of bias-based profiling is established under this section when an individual brings an action demonstrating that:

(i) the governmental body has engaged in intentional bias-based profiling of one or more individuals and the governmental body fails to prove that such bias-based profiling (A) is necessary to achieve a compelling governmental interest and (B) was narrowly tailored to achieve that compelling governmental interest; or

(ii) one or more law enforcement officers have intentionally engaged in bias-based profiling of one or more individuals; and the law enforcement officer(s) against whom such action is brought fail(s) to prove that the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination.

2. A claim of bias-based profiling is also established under this section when:

(i) a policy or practice within the police department or a group of policies or practices within the police department regarding the initiation of law enforcement action has had a disparate impact on the subjects of law enforcement action on the basis of characteristics delineated in paragraph 1 of subdivision a of this section, such that the policy or practice on the subjects of law enforcement action has the effect of bias-based profiling; and

(ii) The police department fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact; provided, however, that if such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be

unlawful where such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available and the police department fails to prove that such alternative policy or practice would not serve the law enforcement objective as well.

(iii) For purposes of claims brought pursuant to this paragraph, the mere existence of a statistical imbalance between the demographic composition of the subjects of the challenged law enforcement action and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

d. Enforcement

1. An individual subject to bias-based profiling as defined in paragraph 1 of subdivision a of this section may file a complaint with the New York City Commission on Human Rights, pursuant to Title 8 of the Administrative Code of the City of New York, or may bring a civil action against (i) any governmental body that employs any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, (ii) any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, and (iii) the police department where it has engaged, is engaging, or continues to engage in bias-based profiling or policies or practices that have the effect of bias-based profiling.

2. The remedy in any civil action or administrative proceeding undertaken pursuant to this section shall be limited to injunctive and declaratory relief.

3. In any action or proceeding to enforce this section, the court may allow a prevailing plaintiff reasonable attorney's fees as part of the costs, and may include expert fees as part of the attorney's fees.

e. Preservation of rights. This section shall be in addition to all rights, procedures, and remedies available under the United States Constitution, Section 1983 of Title 42 of the United States Code, the Constitution of the State of New York and all other federal law, state law, law

of the City of New York or the New York City Administrative Code, and all pre-existing civil remedies, including monetary damages, created by statute, ordinance, regulation or common law.

§ 3. Section 8-502 of the administrative code of the city of New York is amended by relettering current subdivisions e and f as new subdivisions f and g, and amending relettered subdivision f to read as follows:

[e]f. The provisions of this section which provide a cause of action to persons claiming to be aggrieved by an act of discriminatory harassment or violence as set forth in chapter six of this title shall not apply to acts committed by members of the police department in the course of performing their official duties as police officers whether the police officer is on or off duty. This subdivision shall in no way affect rights or causes of action created by Section 14-151 of the Administrative Code of the City of New York.

[f]g. In any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees. For the purposes of this subdivision, the term "prevailing" includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement or as a result of a judgment in such plaintiff's favor.

§ 4. Severability. If any provision of this bill or any other provision of this local law, or any amendments thereto, shall be held invalid or ineffective in whole or in part or inapplicable to any person or situation, such holding shall not affect, impair or invalidate any portion of or the remainder of this local law, and all other provisions thereof shall nevertheless be separately and fully effective and the application of any such provision to other persons or situations shall not be affected.

§ 5. This local law shall take effect ninety days after it is enacted.

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APPENDIX A

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THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

July 23, 2013

Hon. Michael McSweeney
City Clerk and Clerk of the Council
141 Worth Street
New York, NY 10013

Dear Mr. McSweeney:

Pursuant to Section 37 of the New York City Charter, I hereby disapprove Introductory No. 1080, which would amend Administrative Code § 14-151, the City's existing prohibition on racial and ethnic profiling by police officers, to permit lawsuits against individual police officers and the Police Department for "bias-based profiling."

Introductory No. 1080 would define "bias-based profiling" as an act by a law enforcement officer that "relies on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual," and the bill further defines "housing status" to include, among other things, being homeless or having a home, living in public housing, and owning or renting a home. The bill then would create two private causes of action. The first would permit a plaintiff to sue individual police officers or the Police Department for allegations of intentional bias-based profiling. The second would permit lawsuits against the Police Department alleging that "a policy or practice . . . or policies or practices within the Police Department regarding the initiation of law enforcement action has had a disparate impact" on any of the categories set forth in the bill's definition of bias-based profiling.

New York City is the safest big city in the country, and year after year our neighborhoods and streets have become even safer. Last year, there were an all-time low 419 murders, and so far this year the number of murders is down 28% compared to last year. The number of shootings last year was also a record low, and so far this year the number of shootings is 28% lower than it was at this time last year. These numbers mean lives: between 2002 and 2012, we saved 7,364 lives that would have been lost if the murder rate had been the same as it was in the ten years before 2002. Public safety is the foundation of everything the City has accomplished over the last eleven years, and New York City's success in preventing crime has been predicated on targeted policing, with data-driven strategies based upon where crime is occurring.

Introductory No. 1080 would imperil the hard-earned gains we have made and would seriously impede the ability of the Police Department and the City to protect 8.4 million New Yorkers. It is poorly conceived, overly broad, and preempted by state law. It would also unleash an avalanche of lawsuits against police officers and the Police Department, redirecting the City's fiscal resources to attorneys commencing the lawsuits and the expert witnesses retained by those attorneys, and away from supporting public schools and afterschool programs, facilities for the elderly, parks, and other essential City services.

The bill would expand the categories of people covered in the law so that virtually everyone in New York City could sue the police about any action a police officer might take, and it would authorize lawsuits against individual police officers. From the police officer's perspective, then, every officer acting on a description that includes some characteristic of a possible perpetrator would have to think about whether taking action will result in a lawsuit. The specter of the new lawsuits this bill would engender would make police officers hesitate to act on information that would prevent crime or apprehend criminals, and it would therefore endanger the proactive policing that has been crucial to New York City's success in preventing crime.

The disparate impact lawsuits that would be created by this bill, meanwhile, would pose a threat to the Police Department's ability to implement strategies that keep New Yorkers safe. The bill would permit disparate impact challenges to *any* "policy or practice" of the Police Department based simply upon statistical disparities. But targeting particular areas or types of criminals, which is essential to effective policing, could frequently give rise to allegations of disparate impact on some group or groups mentioned in the bill. Patrol strategies, investigations, arrests, the deployment of police resources to particular neighborhoods or areas, the use of cameras in high crime neighborhoods, even counterterrorism intelligence-gathering or surveillance operations: all could be subject to legal challenge based on the claim that police activities have a disparate impact by gender, or age, or religion, or housing status, or any of the categories set forth in the bill. Furthermore, the bill is entirely unclear about what would constitute a "disparate impact." While the bill says that "the mere existence of a statistical imbalance between the demographic composition of the subjects of the challenged law enforcement action and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison," it does not say what *is* the relevant "imbalance" that would establish a disparate impact. The Police Department would therefore be left wondering how it is supposed to know whether any strategy it adopts will become the subject of a disparate impact claim. And judges would have unprecedented leeway to decide what statistical imbalances they believe are important, thus giving them, rather than the Mayor and Police Commissioner, the final say over how to target criminal activity. The problem is compounded even further by language in the bill permitting plaintiffs to propose "an alternative policy or practice with less disparate impact." The Police Department would then have to prove that the alternative proposal would not "serve the law enforcement objective as well" as the Department's challenged policy would. This language would result in courts second-guessing police strategy based upon suppositions about what would happen if a hypothetical alternative strategy were adopted. Thus, this bill is practically an explicit invitation to judges to impose their own law enforcement policy preferences on the Police Department and, ultimately, the citizens of New York City.

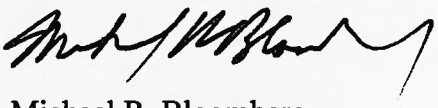
Furthermore, the bill's awarding of fees to plaintiffs' lawyers would create a significant incentive for lawsuits to be filed. The bill contains a provision awarding not only attorney fees but also expert witness fees to plaintiffs' attorneys. In this regard, the bill is far more generous to plaintiffs' attorneys than the federal statute that authorizes lawsuits for the deprivation of civil rights, 42 U.S.C. § 1983, which does not permit the recovery of expert witness fees. Plaintiffs' lawyers would have an incentive to come up with creative statistical analyses to file disparate impact lawsuits with the hope of obtaining the fees this bill would authorize. Police officers would have to spend time in courtrooms rather than on the streets fighting crime. And the City would not only be forced to devote large amounts of money and resources to defend against the predictably numerous and burdensome litigations that would result from this bill, but also potentially to pay the expensive attorney and expert fees this bill authorizes courts to award to plaintiffs.

Finally, Introductory No. 1080 is legally untenable because it seeks to legislate in an area that is wholly preempted by state law. Introductory No. 1080 is, in essence, an effort to regulate the procedures governing the provision of law enforcement and the administration of criminal justice in the City of New York. These procedures, however, are not a subject within the purview of local law; rather, they are exclusively governed by state law.

The state Criminal Procedure Law is an elaborate and comprehensive set of laws that was intended to govern all matters of criminal procedure in the State of New York. For example, section 140.50 of the Criminal Procedure Law governs the stopping and questioning of persons by police officers. It specifies the conditions under which a stop may lawfully be made and the conditions when an officer may lawfully search a person. By imposing new restrictions on the use of stop, question and frisk as an enforcement tool, Introductory No. 1080 seeks to legislate in an area that has been wholly occupied by the State. Of course, because the scope of the bill includes all actions taken by police officers and other law enforcement officers, the legal problems with Introductory No. 1080 are not confined to stop, question and frisk. The Criminal Procedure Law regulates all aspects of criminal proceedings, and it preempts local legislation on any aspect of the criminal process from an initial stop to post-judgment proceedings. Regulating criminal procedure is not a role for a local legislative body. To the extent Introductory Number 1080 is an attempt to take on this role, it is unlawful.

Introductory No. 1080 is a dangerous and irresponsible bill that will make New Yorkers less safe. It is disapproved.

Sincerely,



Michael R. Bloomberg
Mayor