SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

JOHN COOK,	:	
	:	
Petitioner,	:	Index No. 11-014558
	:	
-against-	:	
	:	
THE NASSAU COUNTY POLICE DEPARTMENT, THOMAS C. KRUMPTER, in his official capacity as Acting Commissioner of the Nassau County Police Department; and ISRAEL SANTIAGO, in his official Capacity as Commanding Officer of the Legal Bureau of the Nassau County Police Department	:	
	:	
Respondents.	:	
	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S VERIFIED ARTICLE 78 PETITION

Respectfully submitted,

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New York, N.Y.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In this Article 78 petition, John Cook, a journalist, seeks to compel the Nassau County Police Department ("NCPD") to disclose records pertaining to his investigation into allegations that NCPD improperly used public resources to conduct an internal investigation at the behest of a prominent news personality, William O'Reilly. Petitioner seeks these records for the purpose of reporting on a story "about O'Reilly's attempts to pressure the NCPD into launching an internal affairs investigation into an NCPD detective whom O'Reilly believed to be romantically involved with his wife," Petition (Oct. 11, 2011) ¶ 9, a story that "raised serious questions about the NCPD and whether it was contracting out its law enforcement capabilities for the private, personal benefit of a prominent broadcaster and potential NCPD Foundation donor." *Id.* ¶ 12.

Petitioner's request sought three categories of records: (1) records pertaining to two internal investigations – one regarding the investigation of the unknown detective, purportedly at the behest of Mr. O'Reilly, and the other regarding leaks of information pertaining to that first investigation; (2) records of call logs, schedules of meetings, correspondence, and other contacts between the O'Reilly's and former NCPD Commissioner Lawrence Mulvey; and (3) records of NCPD contacts with two residential addresses belonging to the O'Reilly's. *See id.* ¶ 8.

After Petitioner filed a *pro se* Article 78 petition on October 11, 2011, challenging the denial of his FOIL request, Respondents NCPD, Acting Commissioner Krumpter, and Detective Sergeant Santiago (hereinafter, "Respondents") failed to respond, allowing the return date to lapse. After requesting additional time, Respondent now moves to dismiss the Petition, asserting two arguments to justify its blanket denial of the request – that the documents are exempt "personnel records," and that disclosure would violate the privacy exemption. Each of these arguments is flawed.

First, Respondents acknowledge that at least one Internal Affairs Investigation (IAI) occurred, but claim that any IAI records are subject to Civil Rights Law §50-a, which exempts from disclosure "[a]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency." Even assuming that Section 50-a applies to the records requested, controlling authority from the Court of Appeals requires the release of redacted personnel records. The Court of Appeals has held that doing so accomplishes FOIL's goal of transparency while protecting the interest served by the exemption – namely, protecting law enforcement officers from personal attacks in litigation. By failing to acknowledge their responsibility to disclose redacted records, Respondents have violated FOIL. The Court should order Respondents to produce responsive records pertaining to the two investigations Petitioner has identified, with redactions of the names and any personal identifying information of any police officer.

Second, Respondents claim that any call logs, schedules and communications pertaining to the former Police Commissioner are exempt pursuant to the privacy exemption of Public Officers Law § 89(2)(b)(v), which protects "information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency." But Respondents fail to provide the Court with any basis for concluding that any such records contain "information of a personal nature," let alone that the information was "reported in confidence" and was "not relevant to the ordinary work of" NCPD. Even if they had made such a showing, the public's strong interest in understanding this government official's actions, particularly in light of public accusations of misconduct, outweighs any private interest in non-disclosure. The Court should order Respondents to produce unredacted call logs and schedules of

the former Commissioner, as well as communications, with any redactions necessary to protect legitimately private information.

Finally, Respondents have failed to articulate any opposition to disclosure of records pertaining to police contacts with the two addresses belonging to the O'Reilly's. The Court should, therefore, order Respondents to produce those records.

ARGUMENT

I. NCPD Is Required to Disclose Redacted Versions of any "Personnel Records."

Respondents have withheld records of Internal Affairs Investigations ("IAI records") under Civil Rights Law § 50-a, which exempts "[a]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any police agency." Even assuming that Respondents had met their burden to establish that the records fall under Section 50-a, a proposition Petitioner disputes,[1] the Court of Appeals has held that the release of redacted records pertaining to disciplinary action taken against police officers does not violate Section 50-a. In *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 149 (1999), the Court held that "disclosure for uses that would not undermine the protective legislative objectives could be attained . . . through redaction by the agency having custody of the records,

[1] The Court of Appeals recently held that a "conclusory affidavit," like the one submitted by Deputy Commissioner William G. Flanagan in support of Respondent's Motion to Dismiss, fails to establish the facts required for Respondent to meets it burden of showing that Civil Rights Law § 50-a applies. *See Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 15 N.Y.3d 759 (2010). Respondent must demonstrate a "particularized and specific basis," *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979), for concluding that there exists "substantial and realistic potential of the requested material for the abusive use against the officer." *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 149 (1999). By merely asserting that "an IAU [Internal Affairs Unit] investigation is . . . part of the member's personnel file," Deputy Commissioner Flanagan's affirmation fails to meet that burden. However, the Court need not reach this issue because Petitioner is willing to receive redacted versions of the records at issue and, as explained fully above, Respondent has utterly failed to demonstrate how the release of redacted records would trigger Section 50-a.

tailored . . . so as to preclude use in personal attacks against an officer which Civil Rights Law § 50-a was enacted to preclude." This controlling authority from New York's highest court compels the outcome in this case – NCPD must disclose any IAI records with the names and identifying information of any officers redacted.

The reason for requiring disclosure with redactions is clear. As the Court of Appeals held in *Daily Gazette*, "when access to an officer's personnel records relevant to promotion or continued employment is sought under FOIL, nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50-a – to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer." *Id.* at 158. To overcome FOIL's presumption of openness and invoke the exemption, Respondents "must demonstrate a substantial and realistic potential of the requested material for the abusive use against the officer or firefighter." *Id.* at 159. As the Court of Appeals held, redaction "preclude[s]" that potential. *Id.*

Recently, in a case pertaining to records purportedly exempt under the privacy exemption to FOIL, the Court of Appeals issued a broad admonition to agencies that refuse to consider the option of redacting materials when doing so would allow for disclosure. In *Schenectady County Society for Prevention of Cruelty to Animals, Inc. v. Mills*, the Court held unequivocally that "[w]here it can do so without unreasonable difficulty, the agency must redact the record," adding that "[w]e are at a loss to understand why this case has been litigated." 18 N.Y.3d 42, 43 (2011). This unmistakable signal from New York's highest court was clearly meant to end any misapprehension that might still exist as to whether redactions should be required in lieu of blanket denials under any of FOIL's exemptions.

The Court of Appeals' frustration with agencies that force FOIL requestors to litigate when released redacted records would have solved the problem is likely born of the fact that, in addition to the on-point discussion of the personnel records exemption in *Daily Gazette*, numerous other Court of Appeals and Appellate Division decisions have required disclosure of redacted records – including police officer personnel records and other internal law enforcement records – rejecting exactly the kind of blanket withholding Respondents demand here. *See, e.g., Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 466 (2007) (finding a document exempt under FOIL only if "such information cannot be reasonably redacted"); *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 486 (2005) (directing the release of call tapes and transcripts of 911 calls from Sept. 11, 2001 with portions revealing intimate moments of terror redacted to avoid the privacy exemption of section 87(2)(b)); *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996) (ordering disclosure of NYPD complaint follow-up reports with opinions and analysis subject to the intra-agency exemption redacted); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985) (remanding for *in camera* inspection and redaction of non-exempt portions of documents sought under FOIL); *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984) (same); *Fink v. Lefkowitz*, 47 N.Y.2d 567, 573 (1979) (finding that while certain portions of a record were appropriately redacted, there was "no reason" why other portions should not be disclosed); *New York Civil Liberties Union v. New York City Police Dep't*, 74 A.D.3d 632, 632 (1st Dep't 2010) (ordering NYPD to disclose redacted versions of records pertaining to individual officer's use of firearms); *Capital Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 1339 (3d Dep't 2009), *modified on other grounds*, 15 N.Y.3d 759 (2010) (ordering the Albany Police Department to release redacted "gun tags" – records of individual police officers who purchased assault rifles from the Department –holding that

"[w]hile the gun tags are personnel records, redacting the names of any current or former police department employees would adequately protect the individual officers"); *Burtis v. New York Police Dep't*, 659 N.Y.D.2d 875, 876 (1st Dep't 1997) (ordering production of records with redaction of portions that fall within law enforcement or intra-agency exemptions); *Johnson v. New York City Police Dep't*, 257 A.D.2d 343, 349 (1st Dep't 1999) (holding that disclosure of unredacted complaint follow-up reports could pose a threat to witness safety, but rejecting the NYPD's claim of a blanket exemption and instead ordering disclosure of the records with names and identifying information redacted); *Newsday, Inc. v. New York City Police Dep't*, 133 A.D.2d 4 (1st Dep't 1987) (affirming the decision to require the NYPD to release Firearm Discharge Reports – records of individual officer's use of their firearms – with the names and identifying information of individual officers redacted).[2]

Thus, Respondents may not rely on Civil Rights Law § 50-a in support of their blanket withholding of the records Petitioner seeks. This Court should order Respondents to produce redacted versions of the IAI records sought, including the "Internal Affairs Report" referenced in Respondent's papers and any other documents or correspondence pertaining to the two investigations alluded to in Petitioner's FOIL request.

II. Respondents Have Failed To Establish that Logs of Communications Involving the Police Commissioner, Schedules of Meetings with the Commissioner, or Correspondence With the Commissioner Should Be Withheld Under the Privacy Exemption.

[2] The Appellate Division's discussion of the case focuses mainly on the debate over whether or not the records at issue were, in fact, "personnel records" – finding that they were indeed – but as the procedural discussion of the case contained in the dissenting opinion makes clear, the outcome of the majority's decision was to affirm Supreme Court, New York County's decision "that those [Firearm Discharge] reports should be redacted to eliminate identification information, and, as redacted, given to the petitioner." *Id.* at 10 (Smith, J., dissenting).

Respondents assert that *any* "correspondence, call logs, schedules of meetings or visits between former Commissioner Mulvey and Mr. or Mrs. O'Reilly unrelated to the IAI [Internal Affairs Investigation] ... would be immune from inspection under Public Officers Law § 89(2)(b)(v), which protects 'information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.'" Respondents' Memorandum of Law in Support of Motion to Dismiss (Dec. 6, 2011) at 4.[3] The Court should reject this argument for two reasons: First, Respondents have failed to establish any of the requisite elements of this exemption. Second, the privacy exemption is a qualified exemption that must give way where, as here, the public's interest in the information outweighs the private interest in non-disclosure. Each of these arguments is discussed in detail below.

The Court of Appeals has made it abundantly clear that the agency bears the burden of proving the facts required to establish the applicability of any exemption to FOIL. *See Gould*, 89 N.Y.2d at 275. To meet this burden, agencies must articulate "particularized and specific" facts justifying their belief that the requested records are exempt. *Id.* Conclusory averments, without more, are insufficient. *See, e.g., Capital Newspapers*, 15 N.Y.3d at 759 (reversing the Appellate Division and holding that a "conclusory affidavit" from the head of an agency is insufficient to meet the burden of invoking an exemption); *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567 (1984) (rejecting the reliance on "conclusory pleading allegations and affidavits" to withhold records). Exemptions are to be "narrowly construed." *Gould*, 89 N.Y.2d at 275.

Where, as here, a request for records pertains to allegations of government misconduct, courts must be especially vigilant about construing exemptions narrowly, so as not to undermine

[3] Respondent's memorandum is not paginated. Petitioner has used page numbers as if the first page, not including the cover page, was page 1.

FOIL's legislative purpose of exposing government actions to the light of public scrutiny. In signing the legislation, Governor Malcolm Wilson represented FOIL as "a structure through which citizens may gain access to the records of government and thereby gain insight into its workings." Memorandum of Governor Malcolm Wilson, approving Laws of 1974, chs. 578-580, May 29, 1974, in N.Y. Sess. Laws at A-319, A-320 (McKinney 1974); see also Ralph J. Marino, *The New York Freedom of Information Law*, 43 Fordham L. Rev. 83, 83-84 (1974) (describing the legislative history of FOIL). As the Court of Appeals has recognized, by "afford[ing] all citizens the means to obtain information concerning the day-to-day functioning of State and local government," FOIL serves as "an effective tool for exposing waste, negligence and abuse on the part of government officers." *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 566 (1986), citing *Fink v. Lefkowitz*, 47 N.Y.2d 567 (1979). The New York Department of State's Committee on Open Government, which is charged with overseeing and advising the government and public on FOIL, has similarly highlighted FOIL's purpose of unearthing government misconduct. In its 2010 Report to the Governor and State Legislature, the Committee emphasized FOIL's success at exposing government misdeeds as one of its "highlights of 2010." Committee on Open Government, Department of State, State of New York, *Report to the Governor and the State Legislature: Building a Culture of Openness and Improving Transparency* 8-9 (2010).

Respondents plainly have not born their burden of overcoming this strong presumption of openness. The privacy exemption obviously does not apply to the "call logs" or "schedules of meetings or visits" discussed above, as those records merely document the fact of a call or meeting involving a public official and do not contain any "information of a personal nature." Respondents have not even attempted to establish any factual basis for applying this exemption; the affidavits in support of their motion to dismiss do not even mention call logs or schedules.

Nor have Respondents cited any case law to suggest that call logs, schedules, or other daily records of the business of prominent public officials like the Nassau County Police Commissioner should be considered "private." To the contrary, such a position is antithetical to the open government purposes of FOIL. Many decades ago, the daily calendar of the Mayor of the City of New York was held to be a public record under FOIL. *See Kerr v. Koch*, N.Y.L.J. (N.Y. County Sup. Ct., Feb. 1, 1988) (a courtesy copy of this decision is appended hereto). As a prominent government official, the Commissioner of the Nassau County Police Department is no different.

Respondents have similarly failed to meet their burden to show that release of copies of correspondence between the former Commissioner and the specified individuals would constitute an invasion of privacy. The papers in support of Respondents' motion do not establish any of the facts that would be required to invoke the privacy exemption. They do not even discuss the purportedly "private" nature of the communications at issue, they fail to establish any factual basis for this Court to conclude that the records contain "information of a personal nature," and they fail to establish any factual basis for concluding that the information was "reported in confidence" or that it was "not relevant to the ordinary work of" the agency. Without any factual basis for assessing any of these points, the Court should hold that Respondents failed to meet their burden to invoke the exemption.

Even if Respondents had established a factual basis for application of the privacy exemption to any of these records, the public's interest in disclosure outweighs any private interest in non-disclosure. When determining whether disclosure would constitute an unwarranted invasion of personal privacy pursuant to Public Officers Law § 89(2), the Court must "balanc[e] the privacy interests at stake against the public interest in disclosure of the

information." *New York Times*, 4 N.Y.3d at 485. In this case, Respondents have articulated no individual interest in privacy, whereas Petitioner's papers detail the public's interest in the potential abuse of governmental authority and preferential treatment for certain citizens. *See* Affidavit of John Cook in Support of Article 78 Petition (October 11, 2011) at 6-7, and Exhibit B (Gawker.com, *How Bill O'Reilly Tried to Get His Wife's Boyfriend Investigated By the Cops*, August 30, 2011).

As the Appellate Division recently held in ordering the disclosure of records identifying persons who may have received preferential treatment in the adjudication of parking tickets by the Albany Police Department, over the City of Albany's objection that release would violate the privacy exemption, "[t]he public's interest in the circumstances surrounding respondent's administrative dismissal of tens of thousands of parking tickets . . . necessarily requires the disclosure of the recipients' identities given the allegations that respondent afforded preferential treatment in dismissing tickets issued to certain classes of individuals." *Hearst Corp. v. City of Albany*, 88 A.D.3d 1130, 1134 (3d Dep't 2011). Likewise, in this case, Petitioner's allegations of preferential treatment and the use of "law enforcement capabilities for the private, personal benefit of a prominent broadcaster and potential NCPD Foundation donor," Petition ¶ 12, create a strong public interest in disclosure sufficient to overcome Respondents' unsupported invocation of the qualified privacy exemption.

For all of these reasons, the Court should hold that Respondents have failed to meet their burden to show that the privacy exemption blocks disclosure of any of the records sought by Petitioner.

III. Respondents Have Not Raised Any Objection to Producing Records of Police Responses or Police Calls to the Residences Named in Petitioner's FOIL Request.

Petitioner's FOIL request sought "[a]ny police reports, investigation reports, call logs or any other records of any police responses or calls involving" two residences, both belonging to the O'Reilly's. *See* Petition ¶ 22, and Exhibit A (FOIL Request). Respondents' motion to dismiss does not address this portion of Petitioner's request. The Court should, therefore, order Respondents to produce any responsive records, as Respondents have neither asserted nor established any basis for withholding them.

CONCLUSION

For all the foregoing reasons, the petitioner John Cook respectfully requests that the Court grant his petition.

Respectfully submitted,

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Dated: January 5, 2012
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