SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department,

Respondents.

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

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Index No. 12/102436

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

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of the public and of the petitioner, the New York Civil Liberties Union (NYCLU), to learn how the New York City Police Department (NYPD) is adjudicating charges against police officers found to have engaged in misconduct by the New York City Civilian Complaint Review Board (CCRB), the independent city agency charged with overseeing the NYPD. Under the Freedom of Information Law (FOIL), the NYCLU sought final judicial opinions issued since 2001 by NYPD judges after the conclusion of hearings open to the public. Those opinions include a summary of trial testimony, findings of fact, and conclusions of law supporting the determination of an officer's guilt or innocence and the appropriate penalty. The NYPD has categorically withheld all the requested decisions from the NYCLU.

There is a vital public interest in knowing how the NYPD disposes of cases charging police officers with misconduct in their treatment of civilians. To take one example, the department's increased use of stops and frisks has received constant attention in recent years from the media, advocacy organizations such as the NYCLU, elected officials, and members of the public. Complaints about stop-and-frisk are among the most common type of complaint received and substantiated by the CCRB, and all of those concerned about stop-and-frisk practices would benefit from seeing the legal analysis used by the department to assess substantiated cases of misconduct related to stops and frisks. In addition, the NYCLU and others are concerned about the lack of functional accountability mechanisms for NYPD misconduct, and proposals to reform the CCRB have recently been discussed by high-level city officials and in the media. An understanding of how substantiated complaints are handled once they are

brought to trial within the NYPD is vital for the public to gauge the efficacy of the accountability mechanisms currently in place for those charged with breaching the public trust.

The NYPD has invoked several FOIL exemptions in an attempt to justify withholding the opinions from the public, but none of the exemptions prevents disclosure. The NYPD's primary argument is that the opinions never become "final," even after the police commissioner approves the recommendation of the Deputy Commissioner of Trials (DCT) in full. New York City regulations as well as the NYPD's standard practices demonstrate that the opinion becomes final when the police commissioner adopts it by signing it, stamping "APPROVED", removing a stamp that said "DRAFT for ATTORNEY Comment", and sending the final opinion it to the accused officer and his counsel. The NYPD invokes several other exemptions, designed to protect personnel records, personal privacy, and law enforcement investigations, to avoid disclosure. But to the extent that any of those exemptions applies to the records at all, the NYPD has no authority under FOIL to withhold the documents entirely and instead can only redact from the documents specific exempt material.

FACTS

In 1992, New York City created the CCRB as an independent city agency charged with oversight responsibility for the NYPD. Affirmation of Christopher Dunn, Apr. 12, 2012, ¶ 3. A primary responsibility of the CCRB is to investigate complaints from civilians of misconduct of uniformed members of the NYPD. *Id.*, ¶ 5. In particular, the CCRB investigates complaints of excessive force, abuse of authority, discourtesy, and offensive language. *Id.* After CCRB staff members investigate a complaint, the case goes to the board (which consists of 13 individuals appointed by the Mayor) for decision on a final disposition of the case. *Id.*, ¶ 6. One option available to the board is to "substantiate" the case, which means the board concludes that the

officer did engage in at least one act of alleged misconduct. *Id.* In those cases where it substantiates at least one allegation against an officer, the CCRB sends the case to the NYPD for prosecution and discipline. *Id.*, ¶ 7. When it refers a substantiated case to the NYPD, it also makes a recommendation about actions to be taken by the NYPD. *Id.*, ¶¶ 7-8, Ex. B (2010 Annual Report of the CCRB) at 20-21.

Once a substantiated case is referred to the NYPD, the department assumes responsibility for it. Dunn Aff., ¶ 9. At that point, it can simply drop the case, negotiate a plea with the officer, or prosecute the case in the NYPD's Trial Room, which is an adjudicatory forum inside the NYPD. *Id.* The NYPD Trial Room is overseen by the Deputy Commissioner of Trials, who has jurisdiction over disciplinary matters adjudicated by the NYPD. *Id.*, ¶ 10; 38 RCNY § 15-02.[1] The DCT office includes judges who act as hearing officers in the Trial Room. Dunn Aff., ¶ 10.

A relatively small number of CCRB-substantiated cases go to trial. Dunn Aff., ¶ 11. According to CCRB reports, the number of such cases that have gone to trial over the last five years are as follows: 2011: 17; 2010: 14; 2009: 20; 2008: 19; 2007: 11. *Id.*, ¶ 11. For those cases that go to trial, the NYPD's hearing process closely resembles a conventional trial. Dunn Aff., ¶ 12. The NYPD and the officer are represented by lawyers, a judge (appointed by the NYPD) presides over the case, the lawyers make arguments and introduce evidence (including witness testimony), and briefs are filed. *Id.*; *see also* 38 RCNY § 15-03, 15-04 (describing pre-hearing and hearing procedures). The hearing must be open to the public unless the DCT finds a

[1] The regulations provide for a different procedure for complaints that have been substantiated by the CCRB when there is an applicable Memorandum of Understanding (MOU) in place between the NYPD and the CCRB. *See id.*, § 15-11–15-17. Those procedures are not relevant to this FOIL request because there is currently no applicable MOU in place. *See Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dep't 2003) (enjoining portions of previous MOU). City officials recently announced a new MOU between the NYPD and the CCRB expanding the CCRB's prosecution powers. *See* Al Baker, "Independent Agency Gets New Powers to Prosecute New York Police Officers," *New York Times*, Mar. 28, 2012, at A20. That new process has not yet started, however, and does not affect this FOIL Request for records dating back to 2001.

legally recognizable ground for closure of all or a portion of the hearing. Dunn Aff., ¶ 12; 38 RCNY § 15-04(g).

After the hearing is concluded, the judge issues a written opinion that "consist[s] of a summary and analysis of the testimony, recommended findings of fact and conclusions of law, and recommendations for the disposition of the Charges and Specifications." 38 RCNY § 15-06(2). That opinion is a draft and is marked "DRAFT for ATTORNEY Comment." Dunn Aff., ¶ 13; *see id.*, ¶ 15, Ex. C (sample draft DCT opinion). It is sent to the officer's counsel for review and comment. *Id.*; 38 RCNY § 15-06(a)(2). Once comments are received, the office of Deputy Commissioner of Trials forwards the draft opinion, the comments, and other trial materials to the police commissioner for his review and final decision. Dunn Aff., ¶ 13; 38 RCNY § 15-06(a)(2), (b).

After the police commissioner reviews the materials, he makes a final disposition in the case. Dunn Aff., ¶ 14; 38 RCNY § 15-08(a). In doing so, the police commissioner may approve the DCT's recommendation or modify the findings or the penalty consistent with the record. 38 RCNY § 15-08(a). The NYPD then sends to the officer and his counsel two documents. Dunn Aff., ¶ 14; 38 RCNY § 15-08(c) (mandating that the "written final determination" be served on the respondent and his counsel). One is a document identifying the final disposition of the case. Dunn Aff., ¶ 14; *see id.*, ¶ 15, Ex. E (sample Disposition of Charges). The second is the trial commissioner's opinion with the stamp "DRAFT for ATTORNEY Comment" removed and with the police commissioner's signature on a stamp with the word "APPROVED." Dunn Aff., ¶ 14; *see id.*, ¶ 15, Ex. D (sample DCT opinion in final form and bearing the police commissioner's signature).[2] ***That second document is the final version of a DCT opinion that the NYCLU***

[2] In a small percentage of cases (upon information and belief less than 10%), the police commissioner does not adopt the decision of the trial judge in full. Dunn Aff., ¶ 16. Upon information and belief, when

seeks through this Article 78 proceeding.

The NYCLU is a not-for-profit, non-partisan organization whose mission is to defend civil rights and civil liberties and to preserve and extend constitutionally guaranteed rights to people whose rights have historically been denied. Dunn Aff., ¶ 2. Police accountability has long been an issue of major concern to the NYCLU. *Id.*, ¶ 3. The NYCLU played a central role in the creation of the New York City Civilian Complaint Review Board (CCRB) as an independent city agency in 1992. Since then, the NYCLU has devoted substantial resources to monitoring and reporting about the activities of the CCRB. *Id.*, ¶ 3 and Ex. A (2007 NYCLU report on CCRB and police accountability).

The NYCLU has long been interested in learning of the legal and factual bases on which the police commissioner disposes of CCRB-substantiated cases that proceed to trial. Dunn Aff., ¶ 17. To take just one example, the NYCLU wishes to see the legal analysis being used by the department to assess substantiated cases about stops and frisks. *Id.* The NYCLU is deeply involved in stop-and-frisk issues, and complaints about stop-and-frisk are among the most common type of complaint received and substantiated by the CCRB. *Id.* Accordingly, the NYCLU, as well as the public in general, has a strong interest in knowing the contents of final DCT opinions.

ADMINISTRATIVE PROCEEDINGS

On August 17, 2011, the NYCLU served a FOIL request on the NYPD seeking:

> 1. Copies of all final opinions, dated from January 1, 2001 to present, from the department trial room (Deputy Commissioner of Trials) adjudicating charges and specifications arising out of cases in which the CCRB has substantiated charges against a member of the department. By final decisions, I am referring to

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this happens the police commissioner prepares a separate memo that supplements the original judicial opinion and explains any changes to the opinion made by the police commissioner. *Id.* When this happens, that memorandum is also provided to the officer and his counsel. *Id.*

versions of opinions actually adopted by the Police Commissioner as opposed to recommendation decisions (or so-called Fogel drafts). I assume these final decisions are readily available from the Deputy Commissioner of Trials or from the Department Advocate's Office.

2. Copies of documents identifying the formal and final discipline imposed in conjunction with each decision encompassed within request 1 above.

See Dunn Aff. ¶ 18, Ex. F (Letter from Christopher Dunn to Thomas P. Doepfner (Aug. 17, 2011) [hereinafter the "FOIL Request"]). On September 21, 2011, the NYPD denied the NYCLU's request in its entirety. *See* Dunn Aff. ¶ 19, Ex. G (Letter from Sgt. James Russo to Christopher Dunn (Aug. 18, 2011) [hereinafter the "Initial Denial"]). As a basis for the denial the NYPD invoked three FOIL exemptions: 1) section 50-a(1) of the Civil Rights Law, which exempts certain personnel records used to evaluate the continued employment of police officers; 2) section 87(2)(g) of the Public Officers Law, which exempts certain non-final intra-agency records; and 3) section 87(2)(b) of the Public Officers Law, which exempts records the disclosure of which would constitute an unwarranted invasion of personal privacy. *Id.*

On October 20, 2011, the NYCLU administratively appealed the blanket denial on the grounds that the NYPD provided no meaningful explanation or support for any of the three claimed exemptions, and that to the extent some material within the records is exempt, the NYPD must redact that information rather withhold the entire records. *See* Dunn Aff. ¶ 20; Ex. H (Letter from Christopher Dunn to Jonathan David (Oct. 20, 2011) [hereinafter "Appeal"]). The NYCLU also noted in its Appeal that it had expressly sought final DCT opinions, not drafts, contrary to the NYPD's claim that the responsive records are "non-final." *Id.*

On December 15, 2011 the NYPD granted in part and denied in part the NYCLU's administrative appeal. *See* Dunn Aff. ¶ 21; Ex. I (Letter from Jonathan David to Christopher Dunn (Dec. 15, 2011) [hereinafter "Appeal Response"]). The NYPD granted the appeal with

respect to the second category of requested documents, those "identifying the formal and final discipline imposed in conjunction with each [DCT] decision," and agreed to produce those documents with redactions. *Id.* at 2-3. The NYPD denied the appeal with respect to the first category of requested documents, the final DCT opinions, and cited the same three exemptions it invoked in the Initial Denial plus a fourth, section 87(2)(e) of the Public Officers Law, which permits withholding of certain law enforcement records.

As the NYPD will not withdraw its objections to producing the final DCT opinions, the NYCLU is forced to seek relief from this Court under FOIL by filing the instant Article 78 petition.

ARGUMENT

I. THE FREEDOM OF INFORMATION LAW ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO AGENCY RECORDS THAT CAN BE ENFORCED VIA ARTICLE 78

The New York State legislature, in enacting the Freedom of Information Law, created a broad right of public access to government records in order to foster transparency and accountability in government. N.Y. Pub. Off. L. § 84; *see also Capital Newspapers v. Burns*, 67 N.Y.2d 562, 565-66 (1986) ("The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies.") (citation omitted). Indeed, this commitment to open government is captured in the statute's legislative declaration:

> [A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions . . . . The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

N.Y. Pub. Off. L. § 84. Because FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government," *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979), the law requires state and municipal agencies to make available for public inspection and copying all agency records except those that fall within one of the statute's narrowly drawn exemptions. *See* N.Y. Pub. Off. L. § 87(2)(a)-(j); *see also Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996).

An agency seeking to withhold records "bear[s] the burden of demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific justification for denying access." *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1292 (3d Dep't 2009); *see also Capital Newspapers*, 67 N.Y.2d at 566; *Farbman & Sons v. N.Y. City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984). The "agency does not have carte blanche to withhold any information it pleases . . . ." *Fink*, 47 N.Y.2d at 571 (citation omitted).

Where an agency denies access to records sought under FOIL, the statute provides for an administrative process whereby a person may appeal the agency's initial denial and, upon further denial by the agency, may initiate a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules for judicial review of the denial. N.Y. Pub. Off. L. § 89(4)(a)-(b). In such a proceeding, the agency bears the burden of proving that the records sought fall within FOIL's statutory exemptions, *id.* § 89(4)(b), and a court may assess reasonable attorneys fees and other litigation costs against the agency when the person has substantially prevailed and the agency had no reasonable basis for denying access, *id.* § 89(4)(c).

In accordance with the FOIL statute, the NYCLU challenges the NYPD's blanket withholding of over ten years of DCT opinions and seeks release of these opinions via this Article 78 proceeding.

II. THE NYPD IMPROPERLY DENIED THE PETITIONER'S REQUEST FOR THE FINAL DCT OPINIONS

The NYPD invokes four different FOIL exemptions to justify withholding the final DCT opinions in their entirety. The NYPD has not met its burden to justify withholding under any of those exemptions, however, and none provides a basis to avoid public disclosure of the opinions.

The NYPD's claim that the opinions are exempt from disclosure fails for several reasons. *First*, even if some material in the opinions is exempt under FOIL, the NYPD must redact that information and disclose the remainder, which it has not done. *Second*, the exemption for intra-agency documents, section 87(2)(g) of the Public Officers Law, does not allow withholding because the DCT opinions the petitioner seeks are final agency determinations. *Third*, the exemption for personnel records, section 50-a of the Civil Rights Law, does not allow withholding because the NYPD has not demonstrated that the opinions could be used abusively against an officer if disclosed. *Fourth*, the exemption for personal privacy, section 87(2)(b) of the Public Officers Law, does not allow withholding because the NYPD trial proceedings are already public and because the strong public interest in disclosure outweighs any privacy concerns. *Fifth*, the exemption for law enforcement records, section 87(2)(e) of the Public Officers Law, does not allow withholding because the NYPD has failed to demonstrate how any of the specific risks from disclosure required for that exemption could apply. Accordingly, the Court should order the NYPD to comply with its statutory mandate and disclose the final DCT opinions.

A. The NYPD Must Redact Any Exempt Portions Rather than Withholding the DCT Opinions in Their Entirety.

As discussed in the remainder of this memorandum, the petitioner contends that several of the exemptions the NYPD invokes do not apply at all. But even to the extent that the DCT

opinions contain some material that is exempt from disclosure under FOIL—for example, unwarranted invasions of personal privacy or identities of confidential informants—the agency must redact only that information rather than issuing a blanket denial.

The Court of Appeals has repeatedly insisted that agencies redact records rather than withhold them in their entirety. *See, e.g.*, *New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (2005) (ordering release of 911 call tapes from September 11, 2001 with redaction of portions that were exempt as unwarranted invasions of personal privacy); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985) (per curiam) (remanding for *in camera* review and redaction of any portions exempt as non-final intra-agency materials); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 152 (1999) (endorsing redaction where some personnel information is exempt under section 50-a of the Civil Rights Law).

Just last year, the Court addressed redaction in *Schenectady Society for the Prevention of Cruelty to Animals, Inc. v. Mills*, a case in which the petitioner had requested certain records pertaining to licensed veterinarians and technicians and the State Education Department refused to produce the records at all, claiming they also contained home addresses that were exempt under FOIL's privacy exemption, section 87(2)(b) of the Public Officers Law. 18 N.Y.3d 42 (2011). The Court emphatically rejected the agency's position, stating that redaction must be deployed where feasible:

> We hold that an agency responding to a demand under the Freedom of Information Law (FOIL) may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.

Id. at 45. Moreover, the Court made clear its frustration with agencies' failure to recognize their obligation to redact:

> We are at a loss to understand why this case has been litigated. It seems that an agency sensitive to its FOIL obligations could have furnished petitioner a redacted list with a few hours' effort, and at negligible cost. Instead, lawyers for both sides have submitted briefs and argued the case in three courts, demanding the attention of 13 judges, generating four judicial opinions and resulting in a delay in disclosure of almost four years. It is our hope that the Department, and other agencies of government, will generally comply with their FOIL obligations in a more efficient way.

Id. at 46.

It is thus clear that an agency responding to a FOIL request may not withhold entire records simply because a portion of the records is exempt from disclosure. Rather, the agency must redact the exempt material and release the remaining portions.

In this case, the NYPD has withheld the final DCT opinions in their entirety even though, at most, small portions of the opinions are exempt from disclosure. This Court should order the NYPD to release the opinions with only the exempt portions redacted or, if necessary, should conduct *in camera* review of the opinions to determine which portions, if any, should be redacted.

B. FOIL's Exemption for Intra-Agency Materials Does Not Apply Because the DCT Opinions at Issue are Final Agency Determinations.

The NYPD's primary justification for withholding the DCT opinions is the exemption for certain "intra-agency materials." Appeal Response at 1-2 (citing N.Y. Pub. Off. L. § 87(2)(g)). This argument fails because the DCT opinions are final agency determinations and thus not exempt from disclosure.

Section 87(2)(g) of the Public Officers Law permits agencies to withhold "inter-agency or intra-agency materials" unless they fall within four specified categories:

> i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public;
> iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

N.Y. Pub. Off. L. 87(2)(g). "The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." *New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 488 (2005). Still, the exemption "does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo." *Miracle Mile Assoc. v. Yudelson*, 68 A.D.2d 176, 182-83 (4th Dep't 1979) (citation omitted), *lv. to appeal denied*, 48 N.Y.2d 706.

The DCT opinions that the NYCLU seeks in this proceeding are final agency determinations. As illustrated by Exhibit D (a sample of the version of a DCT opinion at issue), these versions are signed and stamped "APPROVED" by the police commissioner, have the "DRAFT for ATTORNEY Comment" stamp removed, and are sent to the officer and his counsel along with the final disposition of charges. *See* Ex. C, D, E. It is thus clear at that time that the police commissioner has adopted the DCT opinion in full as the basis for the final disposition of charges, making it a "final agency determination" and not exempt under section 87(2)(g).[3]

The Nassau County Supreme Court reached a similar conclusion in *Miller v. Hewlett-Woodmere Union Free School District #14*, ordering a school district to produce a document describing a subordinate team's reasons for recommending that the superintendent deny a student's request to transfer schools. (Supreme Court, Nassau County, N.Y.L.J. May 16, 1990),

[3] With regard to the NYCLU's request for final versions of DCT opinions, the NYPD also contends that it "does not prepare of maintain such records" because even versions of DCT opinions that have been approved by the police commissioner are not final. Appeal Denial at 1. The NYPD does not suggest that the NYCLU has failed to "reasonably describe[]" the requested records sufficient "to enable the agency to locate the records in question." *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (1986) (citing N.Y. Pub. Off. L. § 89(3)). Rather, it has simply reiterated its intra-agency exemption argument that the opinions are never "final." For the reasons discussed in this section, that argument should be rejected.

attached as Ex. J to Dunn Aff. The court rejected the district's claim that the intra-agency exemption shielded disclosure because "the Superintendent unreservedly endorsed the recommendation of the Te[a]m, adopting the reasoning as his own, and made his decision based on it." *Id.* at 3. The court explained:

> When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it.

Id.; *see also id.* at 2 ("A final determination[] implies the documents that support a particular decision and goes to the very heart of what FOIL is about."). Likewise, in *Walker v. City of New York* the Second Department held that previous civilian complaints and CCRB investigations regarding a police officer "should be considered to be in the nature of final opinions or determinations," and ordered disclosure with confidential information redacted. 64 A.D.2d 980, 980 (2d Dep't 1978); *see also Scaccia v. New York State Div. of State Police*, 138 A.D.2d 50 (3d Dep't 1988) (ordering disclosure of "final decision sustaining charges of misconduct" against a police investigator as a final agency determination, but allowing withholding of "written notification of proposed imposition of penalty" against the investigator because it "represented an intermediate step leading to a decision to proceed to a formal disciplinary hearing" and was thus predecisional).[4]

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[4] Even for documents that are not final agency determinations, an agency must still disclose the factual portions because section 87(2)(g) does not apply to "factual data," i.e. "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 276 (1996) (citing N.Y. Pub. Off. L. § 87(2)(g)). That is because withholding such materials would not serve the "limited aim" of the exemption, "which is to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers." *Id.* at 276-77 (citations omitted). Although the NYPD suggests in passing that the intra-agency exemption applies to

Accordingly, the intra-agency records exemption does not provide a basis for withholding the final DCT opinions.

C. Section 50-a of the Civil Rights Law Does Not Allow Withholding Because the NYPD Has Not Shown That the Opinions Could Be Used Abusively Against an Officer If Disclosed.

The NYPD has also failed to meet its burden for withholding the final DCT opinions based on the exemption for certain personnel records, section 50-a of the Civil Rights Law.[5] The purpose of section 50-a is "narrowly specific: to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569 (1986) (citation omitted). To meet its burden for withholding records under this exemption, "the agency must demonstrate a substantial and realistic potential of the requested material for the abusive use against [an] officer . . . ." *Daily Gazette Co.*, 93 N.Y.2d. at 158-59. Records having remote or no potential use for the purpose of harassing or embarrassing officers in litigation fall outside the scope of the statute. *Id.* at 157-58. Moreover, this exemption "must be tempered when it interacts with the competing, equally strong legislative policy of open government through broad public access to governmental agency records embodied in the FOIL legislation." *Id.* at 157. Thus, "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 157-58.

In this case, the NYPD has not "demonstrate[d] a substantial and realistic potential" of "the abusive use against [an] officer" if the DCT opinions were released, so it may not withhold

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factual material in the DCT opinions, Appeal Response at 2, "a plain reading of section 87(2)(g)," *see Gould*, 89 N.Y.2d at 276, refutes that argument.

[5] This section of the Civil Rights Law creates a FOIL exemption by virtue of section 87(2)(a) of Public Officers Law, which exempts from disclosure documents exempted by other state statutory provisions.

them under section 50-a. *Id.* at 159; *see, e.g.*, *Capital Newspapers*, 67 N.Y.2d at 567-69 (ordering disclosure of records of sick leave taken by police officer because purpose of section 50-a did not require their withholding). Further, the trial proceedings are open to the public, *see* 38 RCNY § 15-04(g), so the officer's identity and the evidence presented are already known and any potential abusive use of that information would already have occurred. *See, e.g.*, *Empire Realty Corp. v. N.Y. State Div. of the Lottery*, 230 A.D.2d 270, 273-74 (3d Dep't 1997) (rejecting claim of privacy exemption and ordering disclosure of lists of names and addresses of certain lottery winners because those winners had already been the subject of a publicly disseminated press release).[6] Accordingly, section 50-a does not justify withholding the DCT opinions.

D. FOIL's Privacy Exemption Does Not Allow Withholding Because the Factual Information in the DCT Opinions is Already Public and There is a Strong Public Interest in Disclosure.

FOIL's personal privacy exemption permits an agency to deny access to records or portions thereof that "would constitute an unwarranted invasion of personal privacy," as further described by section 89(2) of the Public Officers Law. N.Y. Pub. Off. L. § 87(2)(b). Section 89(2) sets forth seven specific types of disclosure that implicate the personal privacy exemption, but the list is non-exhaustive. *Id.* at § 89(2)(b); *Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Where an agency record does not fall within one of the seven enumerated categories, a court determines whether release would nonetheless constitute an unwarranted invasion of personal privacy by "balancing the competing interests of public access and individual privacy."

[6] Moreover, even where an agency shows that section 50-a applies to some information, the exemption's goal of shielding officers from abuse and harassment can be fully achieved by redacting those portions and releasing the remainder. *See, e.g.*, *Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 1339 (3d Dep't 2009) (ordering redacted release of gun tags because "redacting the names of any current or former police department employees would adequately protect the individual officers"); *New York Civil Liberties Union v. New York City Police Dep't*, 74 A.D.3d 632, 632 (1st Dep't 2010) (affirming Supreme Court order to release shooting incident reports because "the reports can be redacted to adequately protect their confidential nature").

Dobranski v. Houper, 154 A.D.2d 736, 737 (3d Dep't 1989). "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a man of ordinary sensibilities." *Id.*

In this case, disclosure of the factual material in the DCT opinions does not implicate any privacy interests because the NYPD's trial proceedings are already open to the public, so the witness testimony and other evidence presented to the DCT judge has already been revealed and any potential negative effects on the officers from disclosure have already taken place. Thus, with regard to the factual material, the NYPD cannot show, as the exemption requires, that "disclosure . . . would injure [privacy] interest[s]." *New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (2005). The only portions of the DCT opinions that are not already public are the trial judge's reasoning for the decision. It is difficult to imagine, and the NYPD has certainly not shown, how disclosure of the judge's reasoning could injure privacy interests when the underlying evidence and the disposition of the case are already public.

Even assuming *arguendo* that disclosure of some portions of the DCT opinions do implicate personal privacy interests, the Court must "balanc[e] the privacy interests at stake against the public interest in disclosure of the information." *New York Times Co.*, 4 N.Y.3d at 485-86. There is a great public interest in NYPD practices and the functioning of accountability mechanisms for alleged police misconduct. The opinions at issue in this proceeding all concern allegations that the CCRB has substantiated, and disclosure will allow the public to learn the legal and factual bases on which the police commissioner disposes of those cases. Such information is a critical tool for evaluating the efficacy of the existing accountability

mechanisms and considering reforms to those mechanisms. Accordingly, any privacy concerns must be balanced against this strong public interest in disclosure of the final DCT opinions.[7]

E. FOIL's Law Enforcement Exemption Does Not Permit Withholding of the DCT Opinions Because the NYPD Has Failed to Meet Its Burden.

Neither does FOIL's law enforcement exemption permit withholding the final DCT opinions. Under that exemption, an agency may withhold a record, in whole or in part, if the record was compiled for law enforcement purposes and disclosure of the record would, *inter alia*, interfere with ongoing law enforcement investigations or judicial proceedings, identify a confidential source, or reveal non-routine investigative techniques. N.Y. Pub. Off. L. § 87(2)(e)(i), (iii), (iv). The NYPD has not demonstrated that the DCT opinions fall into any of those categories, so they cannot be withheld.

After not even mentioning the law enforcement exemption in the Initial Denial, the NYPD mentions it in the Appeal Response only in passing, asserting that "factual material could not be disclosed inasmuch as it is exempt from disclosure pursuant to CRL § 50-a(1) and POL sections 87(2)(a), (b), (e), and 89(2)." Appeal Response at 2. This is plainly insufficient, as it does not explain why the DCT opinions are exempt, does not specify which sub-section of the law enforcement exemption applies, and indeed does not even assert that the exemption applies, claiming only that it may withhold factual material "inasmuch as it is exempt." *Id.* The NYPD has not met its burden of providing a "particularized and specific justification" to withhold the DCT opinions under the law enforcement exemption. *See Fink*, 47 N.Y.2d at 571.[8]

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[7] Even where an agency shows that the privacy exemption applies to some material, it must redact that information and release the remainder. *See, e.g., Beyah v. Goord*, 309 A.D.2d 1049, 1052 (3d Dep't 2003) (ordering release of employee training records of corrections officers with social security numbers redacted to prevent an unwarranted invasion of personal privacy).

[8] And even assuming *arguendo* that the final DCT opinions contain some information that falls within the law enforcement exemption—such as the names of confidential informants—such information can easily

III. THE PETITIONER IS ENTITLED TO ATTORNEY'S FEES

The petitioner respectfully requests an award of attorneys' fees and litigation costs pursuant to FOIL. FOIL permits a court, in its discretion, to award reasonable attorneys' fees and other litigation costs when the moving party has "substantially prevailed" in its Article 78 petition and the agency had "no reasonable basis for denying access" to the records in dispute. N.Y. Pub. Off. Law § 89(4)(c).

In 2006, Public Officers Law § 89(4)(c) was amended, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." *See, e.g. Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441-42 (2005) (rejecting petitioner's fee claim under "clearly significant interest to the general public" standard). The legislative history to the 2006 amendment states that, "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access without any real justification." 2005 Legis. Bill Hist. N.Y. S.B. 7011.

Thus, the only showing that now must be made for an award of attorneys' fees under FOIL is that the petitioner substantially prevailed and that "the agency had no reasonable basis for denying access." N.Y. Pub. Off. Law § 89(4)(c).[9] For all the reasons discussed above, it appears at this stage that the NYPD lacks a reasonable basis for denying the NYCLU's FOIL request. The NYCLU recognizes, however, that this matter cannot be definitively resolved until

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be redacted to achieve the exemption's goals while permitting disclosure of the records. *See* section II.A., *supra*.

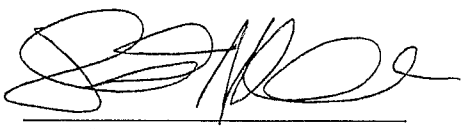
[9] Although Section 89(4)(c) alternatively awards attorneys' fees when an agency has not responded to the FOIL request within the statutory timeframe, Petitioner does not invoke this section.

the NYPD files its opposition, at which point the NYCLU will be able to address the fee issue more completely.

CONCLUSION

For all of the foregoing reasons, the petitioner New York Civil Liberties Union respectfully requests that the Court grant its petition.

Respectfully submitted,



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