

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

In the Matter of,

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

Index No.: _____

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

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF
THE VERIFIED PETITION**

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

By: Guadalupe Victoria Aguirre

Robert Hodgson

Christopher Dunn

125 Broad Street, Floor 19

New York, NY 10004

Tel: (212) 607-3300

Fax: (212) 607-3318

Email: laguirre@nyclu.org

Counsel for Petitioner

Dated: September 30, 2021
New York, New York

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PRELIMINARY STATEMENT

In the summer of 2020, high-profile incidents of police killings of Black people and other egregious forms of police violence nationwide sparked a new wave of public protest and dialogue about police misconduct and accountability. As a result, the New York State legislature repealed Civil Rights Law Section 50-a, known to many as New York’s “police secrecy law” because, for decades, it insulated a wide-range of police misconduct and disciplinary records from public access. This secrecy had a damaging effect on the public’s trust in the government’s ability to police itself and on marginalized communities, particularly communities of color, which are disproportionately impacted by police violence and misconduct.

Following this repeal, on April 30, 2021, the New York Civil Liberties Union (“NYCLU”) submitted a detailed request under the Freedom of Information Law (“FOIL”) to the New York City Police Department for records relating to the department’s misconduct and disciplinary databases. The request clearly sought databases that the NYPD maintains to collect and organize reports of police misconduct and discipline, including at least one database that is publicly available, as well as records identifying and describing the databases. In response, the NYPD categorically denied the request and produced no records. The NYPD based its denial on conclusory assertions that the request was not specific enough, was too voluminous, and that a response would require the NYPD to create a new record. In addition to being internally inconsistent and unsupported by the facts and logic each of these justifications must fail under binding case law.

Having exhausted administrative remedies, the NYCLU now seeks judicial relief to require the NYPD to search, identify, and produce responsive records. The NYCLU also seeks

an award of attorney's fees and costs in light of the NYPD's failure to adhere to FOIL's statutory requirements.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Repeal of Section 50-a

Following the murder of George Floyd by a Minneapolis police officer, nationwide protests erupted, prompting public outrage and dialogue around the issues of police violence, misconduct, and accountability. As a result, lawmakers across the country began to reexamine the public's interest in changing a culture of lack of transparency and accountability in law enforcement. New York State was no exception. Long criticized for its strict Civil Rights Law Section 50-a ("section 50-a"), which shielded a broad swath of police misconduct and disciplinary records from public disclosure, in June 2020 New York made the landmark decision to repeal it (*see* Civil Rights Law § 50-a, repealed by 2020 NY Senate-Assembly Bill S8496, A10611; *Schenectady Police Benevolent Assn. v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093, *6 [Sup Ct, Schenectady County, Dec. 29, 2020] ["It strikes the Court that the legislature intended not just a change in law, rather, a change in culture."]).

Prior to the repeal, the law "had been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer" and was noted as the most secretive in the country (*see* Committee on Open Government, 2014 Annual Report 3–6, available at <https://video.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf> [last accessed Sept. 29, 2021]). The Sponsoring Memorandum to the bill repealing section 50-a stated that the public's inability to access "complaints or findings of law enforcement misconduct" was the primary purpose behind the repeal (Senate Bill S8496, *Justification*, available at

<https://www.nysenate.gov/legislation/bills/2019/s8496> [last accessed September 29, 2021]).

Corresponding amendments to FOIL underscored this intent. “Police-involved killings by law enforcement officials who have had histories of misconduct complaints, and in some cases recommendation of departmental charges, have increased the need to make these records more accessible.” (*Id.*) Consequently, when the bill was signed into law, New York State effected a complete rejection of the prior regime of default categorical secrecy. (*See id.*)

Immediately following the repeal, the NYCLU submitted a FOIL request to the New York City Complaint Review Board (“CCRB”)—an independent agency that is authorized to investigate civilian complaints of certain forms of misconduct by NYPD officers—for records related to a misconduct complaint database that it maintained. As a result of the request, the CCRB supplied the NYCLU with a trove of data and information on complaints spanning over 35 years from its database. In August 2020, the NYCLU published these records, garnering significant public attention and prompting important public discussions about what those historical documents revealed about the CCRB complaint process (*see* Aguirre Affirmation, Exhibit E, Ashley Southall, NY Times, *323,911 Accusations of N.Y.P.D. Misconduct Are Released Online*, Aug. 20, 2020).

Since the repeal, other law enforcement agencies have published more narrow sets of data and records that were previously covered by section 50-a. The NYPD itself maintains a public database, published in March of 2021, related to the investigative findings and internal administrative prosecution of certain misconduct allegations against NYPD officers—part of the NYPD’s departmental “trial” process and distinct from records maintained by the CCRB. The NYPD’s webpage that hosts this database provides that the “Trial Decision Library . . . allow[s] members of the public to view [internal NYPD] trial decisions along with the Police

Commissioner’s final determination in each matter.” (NYPD, Trial Decision Library, <https://nypdonline.org/link/15> [last accessed on September 29, 2021] [hereinafter “Trial Decision Library”]). The Trial Decision Library lists the date of the decision, name of the subject officer, and a link to a downloadable document which contains, among other things, a memorandum prepared for the Deputy Commissioner of Trials and related “Report and Recommendation” regarding the charged misconduct and disciplinary recommendation. (*Id.*) But the Library reportedly does not include records related to unsubstantiated allegations, cases where an officer was found “not guilty”, or investigations that did not proceed to an internal administrative trial (*see id.*; Aguirre Affirmation, Exhibit F, Jake Offenhartz, Gothamist, *New NYPD Database Offers “Narrow” Glimpse at Police Disciplinary Records*, Mar. 9, 2021; *see also* Hon. Mary Jo White et al., *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department* at 7–10 [2019] [explaining the process of allegations that proceed to a NYPD “trial”], available at <https://www.independentpanelreportnypd.net/assets/report.pdf> [last accessed Sept. 29, 2021]). Because many, if not most, allegations are never substantiated and/or never proceed through an internal administrative trial—for a host of reasons that are relevant to understanding the NYPD’s systems of accountability and discipline¹—the NYPD’s public database only covers a small portion of misconduct and disciplinary records maintained by the NYPD.

¹ For example, a 2019 independent investigative report by the Office of the Inspector General for the NYPD revealed that the NYPD had failed to substantiate any of the nearly 2500 complaints of racial profiling or biased policing made between 2014–2018, in part due to gross inadequacies with the NYPD’s Internal Affairs Division’s investigatory practices (*see* Department of Investigation, Office of the Inspector General of the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD’S Investigations, Policies, and Training* [2019], available at https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf [last accessed Sept. 29, 2021]).

B. Background of the Petition

On April 30, 2021, following the publication of the NYPD's Trial Library, the NYCLU sent a FOIL request to the NYPD's Foil Officer seeking four categories of records relating to the Trial Library as well as any other NYPD databases of misconduct complaints and discipline:

1. Documents sufficient to identify all databases maintained by or on behalf of the Department that include information about (a) complaints or reports of misconduct against Department employees, or (b) discipline of Department employees in response to a complaint or set of complaints.
2. For each database identified in request 1 (above), please provide any documents that include the following:
 - a. A description of the database's structure or format;
 - b. A description of each field or column in the database;
 - c. An explanation of all abbreviations or acronyms in the database.
3. Any databases maintained by or on behalf of the Department that include information about complaints or reports of misconduct against Department employees, including the following data regarding each complaint or report of misconduct:
 - a. The name, position, and duty station of the Department employee;
 - b. The type of complaint (e.g. use of force, discourtesy, racial profiling or bias, etc.);
 - c. The date and location of the alleged incident that is the subject of the complaint or report;
 - d. Whether the complaint or report of misconduct was investigated;
 - e. The division of the Department or the name of the entity that investigated the complaint or report;
 - f. What the outcome of the investigation was (e.g. substantiated/found to be true and not compliant with policy; exonerated/found to be true and compliant with policy; unfounded/found to be untrue; unsubstantiated/insufficient evidence to determine truth or falsity or compliance with policy); and
 - g. For each substantiated complaint, whether the investigation resulted in the initiation of a disciplinary process, any disciplinary settlement, or the imposition of discipline.
4. Any databases maintained by or on behalf of the Department that include information about discipline of Department employees in response to a complaint or set of complaints, including the following data regarding each instance in which a disciplinary process was initiated other than for a technical infraction that did not involve a member of the public:

- a. The name, position, and duty station of the Department employee;
- b. The type of disciplinary charges (e.g. use of force, discourtesy, racial profiling or bias, etc.);
- c. The date and location of the alleged incident that is the subject of the disciplinary charges;
- d. The outcome of the disciplinary charges (e.g. sustained, not sustained, settled); and
- e. The discipline, if any, imposed (e.g. termination, suspension, loss of pay or vacation days, admonition).

(Aguirre Affirmation, Exhibit A, FOIL Request by the NYCLU dated April 30, 2021 [hereinafter “FOIL Request”].)

On May 5, 2021, the NYPD denied the NYCLU’s request with a one-line email “on the basis that [the] request is too broad in nature and does not describe a specific document.”

(Aguirre Affirmation, Exhibit B, FOIL Request Denial dated May 5, 2021). The NYCLU timely filed an administrative appeal of the decision on June 3, 2021, and in accordance with Public Officers Law 89 [4] [a] (Aguirre Affirmation, Exhibit C, NYCLU Administrative Appeal Letter dated June 3, 2021 [hereinafter “Appeal Letter”]). The appeal noted that the NYCLU provided sufficient information to allow the NYPD to locate responsive records, including providing examples of the type of information the records would include, defining the term “database”, and explaining that, at the very least, “descriptions of the records in [the] request should have allowed the NYPD to identify, locate, and provide responsive documents related to the narrow set of disciplinary proceedings published on the NYPD’s website”—in other words, the NYPD’s Trial Decision Library. (Exhibit C, Appeal Letter). The appeal also clarifies how, for example, the material in the Trial Decision Library—which is limited to only certain documents dating back to 2016, although the NYPD’s website states that it is “working on including decisions prior to 2016,” (Trial Decision Library)—plainly implies the existence of one or more responsive NYPD databases collecting, organizing, and publishing those Trial Decision Library documents

(see Exhibit C, Appeal Letter [reiterating the NYCLU’s request for records related to the Trial Decision Library “database or any other database on which it relies”]).

That same afternoon, the NYPD Records Access Appeals Officer denied the appeal. (Aguirre Affirmation, Exhibit D, Letter from Sergeant Jordan S. Mazur, Records Access Appeals Officer, dated June 3, 2021 [hereinafter “Appeal Denial”]). The denial reasserted the original reason for the NYPD’s denial, stating that the “request failed to reasonably describe a record in a manner that could enable a search,” and raised new rationales to support its decision: 1) that some of the requested records “would require the creation of a new record”; 2) that the request was burdensome or voluminous; 3) that the NYCLU failed to identify actual databases; and 4) the request was “overbroad in that the scope of records responsive to [the] request cannot be determined since a ‘database’ could include not only Department-wide systems but also documents like Excel spreadsheets maintained at a precinct-level . . .” (Exhibit D, Appeal Denial).

Having exhausted administrative remedies, the NYCLU files this Petition pursuant to Article 78 of New York’s Civil Practice Law and Rules seeking immediate production of responsive records as well as attorneys’ fees and costs.

ARGUMENT

Under FOIL, all government records are “presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of [FOIL].” (*Gould v. New York City Police Dept.*, 89 NY2d 267, 274–275 [1996].) The historical repeal of section 50-a underscored the need for transparency in the context of police misconduct and disciplinary records and removed a long-standing barrier to their broad disclosure. Here, the NYPD’s

contentions—that the NYCLU’s request did not reasonably describe the records sought and would require the creation of new records—are without merit.

A. THE NYCLU REASONABLY DESCRIBED THE RECORDS IT SOUGHT AND THE REQUEST IS NOT UNDULY BURDENSOME.

FOIL “requires only that [requested] records be ‘reasonably described’ . . . so that the respondent agency may locate the records in question.” (*M. Farbman & Sons, Inc. v. NYC Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984] [quoting Pub. Officers Law § 89(3)].) The Court of Appeals has explained that this standard is lower than the civil discovery standard requiring a requestor to “specifically designate” the records sought (*id.* at 80–83). The fact that a response might be voluminous or burdensome does not mean it is not “reasonably described” (*see Konisberg v. Coughlin*, 68 NY2d 245, 249–250 and n * [1986]). Importantly, the burden lies with the respondent agency to “establish[] that the descriptions were insufficient for purposes of locating and identifying” the requested records (*M. Farbman & Sons, Inc.*, 62 NY2d at 83; *see also Konisberg v. Coughlin*, 28 NY2d at 247 [concluding that the agency failed to show the insufficiency of the description in the petitioner’s request]).

Here, the NYCLU asked for records related to NYPD databases that store complaints about police misconduct and disciplinary matters, which it clearly described. Among other things, the NYCLU supplied examples of specific terms and types of information the requested records would contain (e.g., misconduct complaints by type, including racial profiling, force, and discourtesy and disciplinary dispositions, such as substantiated, unsubstantiated, unfounded, etc.) as well as defining the term database to mean “any tabulated, electronic records.” (Exhibit A, FOIL Request).

The NYCLU also referenced at least one public database for which responsive records exist and on which the NYCLU relied to provide the important terms and types of information likely to show up in the database fields. The NYCLU’s reference to this publicly available database further establishes the sufficiency of the description for purposes of identifying and locating responsive records (*see New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 AD3d 153, 160–161 [1st Dept 2010] [concluding the description at issue was sufficient in part because it referred to a local law that specifically delineated the materials city agencies were required to maintain and turn over to the Mayor’s office, which constituted part of the request]). For these reasons, the NYCLU’s request is both clear and reasonably described.

Yet the NYPD produced no responsive records and has offered conclusory and conflicting justifications for its denial of the NYCLU’s request. The NYPD argues, first, that it cannot be expected to know whether the agency has any responsive database collecting misconduct complaints, but also, *second*, that responsive documents would be too voluminous to produce. Regarding the first argument, as described above, the request was plainly reasonably described, particularly given the fact that there is a public version of at least one responsive database.

Regarding the second argument, the NYPD “cannot evade the broad disclosure provisions of [FOIL]” with conclusory assertions regarding burden or volume (*see Konisberg*, 68 NY2d at 249). Specifically, a request for fields from a database is proper under FOIL, and the task of pulling such information is not unduly burdensome. As explained in *Time Warner Cable News NYI v. New York City Police Dept.*, “when an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so” under FOIL (53 Misc 3d 657, 670 [Sup Ct, NY County 2016]). And

“generally speaking, an agency will have a difficult time proving that disclosure of electronically stored and easily transferrable records will be unduly burdensome.” (*Id.* at 671.)

B. THE NYCLU’S REQUEST DOES NOT IMPROPERLY REQUIRE THE CREATION OF A NEW RECORD.

FOIL requires the production of responsive records in an agency’s possession but does not require the creation of a new record in response to a FOIL request (*see Data Tree, LLC v. Romaine*, 9 NY3d 454, 464–465 [2007]). But the Court in *Data Tree* clarified that “[a] simple manipulation of the computer necessary to transfer existing records” does not constitute the creation of a new record. (*Id.*) And the legislature, after *Data Tree*, further clarified that “[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record . . . shall not be deemed to be the preparation or creation of a new record.” (Pub. Officers Law § 89 [3] [a]). Since then, specifically regarding records related to a database, courts have held that “when an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort,” it is required to do so under FOIL (*Time Warner Cable News NY1*, 53 Misc 3d at 670).

Here, the NYCLU has asked for basic records already in the NYPD’s possession that identify or describe internal NYPD databases collecting misconduct complaints and disciplinary outcomes. And the NYCLU’s request for records that could be retrieved from certain responsive databases falls squarely within what is required by § 89 [3] [a] (*see also Data Tree*, 9 NY3d at 464–465; *Time Warner Cable News*, 53 Misc 3d at 670; *Hearst Corp. v. State of New York*, 24 Misc 3d 611, 625 [Sup Ct, Albany County 2009] [requiring agency to extract records and data from existing databases and produce to requestor]).

This result comports with the overarching goals and purpose of FOIL—to provide “the public with broad access to the records of government,” (*see Data Tree*, 9 NY3d at 494 [internal quotations and citations omitted]), particularly important records like those related to police misconduct and discipline, as the recent repeal of section 50-a makes clear. The NYPD’s attempt to maintain the prior status quo and shroud its complaint- and discipline-tracking databases in secrecy contravenes its disclosure duties under FOIL and should be rejected.

C. THE NYCLU IS ENTITLED TO ATTORNEYS’ FEES

The petitioner respectfully requests an award of reasonable attorneys’ fees and litigation costs on the ground that the NYPD had no reasonable basis for categorically denying access to the requested records and failing to produce any responsive records. (Pub. Officers Law § 89 [4] [c] [ii].

Courts are required to assess reasonable attorneys’ fees and costs when a party has “substantially prevailed” and the agency had “no reasonable basis for denying access to the records in dispute. (*Id.*) If this Court orders the NYPD to disclose requested documents in response to this petition, or if the NYPD voluntarily provides documents after the filing of the petition, the NYCLU will have “substantially prevailed” for the purposes of this provision (*see Madeiros v. New York State Educ. Dept.*, 30 NY3d 67, 79 [2017] [finding that the petitioner “substantially prevailed” when the respondent had made “no disclosures, redacted or otherwise, prior to petitioner’s commencement of [a] CPLR article 78 proceeding”]; *Powhida v. City of Albany*, 147 AD2d 236, 239 [3d Dept 1989] [finding that the petitioner substantially prevailed when it was “the initiation of this proceeding which brought about the release of the documents”]). With the NYPD having made no disclosures to the NYCLU’s request, should the

NYCLU obtain records it sought, the NYCLU would be statutorily entitled to its attorney's fees and costs.

CONCLUSION

For the foregoing reasons, the petitioner, the NYCLU, respectfully requests that the Court order the New York City Police Department to abide by Article 6 of the New York Public Officers Law and disclose immediately the records the petitioner requested in its April 30, 2021 FOIL request.

Respectfully Submitted,



NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

By: Guadalupe Victoria Aguirre

Robert Hodgson

Christopher Dunn

125 Broad St., Floor 19

New York, NY 10004

Tel: (212) 607-3300

Fax: (212) 607-3318

Email: laguirre@nyclu.org

Date: September 30, 2021
New York, New York

Counsel for Petitioner

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Guadalupe V. Aguirre, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b because it contains 3,410 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: September 30, 2021
New York, New York



Guadalupe V. Aguirre