

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

CITY OF ROCHESTER and ROCHESTER POLICE
DEPARTMENT,

Respondents.

INDEX NO: _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. In this case about records related to police accountability, the New York Civil Liberties Union (“NYCLU”) seeks relief from this Court because the City of Rochester and the Rochester Police Department (“RPD”) have constructively denied the NYCLU’s request under the Freedom of Information Law (“FOIL”). The records requested—including basic information about officer discipline, use of force, stops, and civilian complaints—are of immense public significance, not only to inform important debates about how the RPD’s policies and practices affect the Rochester community, but also to ensure that community’s prompt access to increased transparency as mandated by the repeal of Civil Rights Law section 50-a.

2. On September 15, 2020, in response to the June 2020 repeal of section 50-a and the elimination of that statutory barrier to accessing police disciplinary files, the NYCLU submitted a FOIL request to the RPD seeking records related to police conduct. Many of the records requested would have been shielded from disclosure prior to repeal, and the NYCLU sought to vindicate the public’s right to information that the New York State Legislature recognized as vital to understanding how police accountability mechanisms function.

3. Nearly three months later, the respondents have not granted or denied the request or provided a substantive response of any kind, in clear violation of their FOIL obligations. This constructive denial also comes on the heels of a report from the Deputy Mayor of Rochester criticizing the city's "disorganized" and delayed handling of a FOIL request related to the death of Daniel Prude, a Black man who died one week after being hooded and pinned to the ground by RPD officers.

4. This Article 78 proceeding seeks to compel the respondents to respond to the request.

5. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to require the respondents to produce responsive records.

6. The petitioner also seeks an award of attorneys' fees and costs in light of the respondents' failure to adhere to FOIL's statutory requirements.

VENUE

7. Pursuant to C.P.L.R. 7804(b) and 506(b), venue in this proceeding lies in Monroe County, in the judicial district in which the respondents took the action challenged here and where the offices of the respondents are located.

PARTIES

8. Petitioner the New York Civil Liberties Union is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For almost seventy years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

9. Respondent City of Rochester is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84 et seq.

10. Respondent Rochester Police Department is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84 et seq.

FACTUAL BACKGROUND

11. Until this summer, the greatest obstacle to police transparency in New York was Civil Rights Law section 50-a, which generally excluded from disclosure “police personnel records used to evaluate performance towards continued employment or promotion” that were otherwise presumptively public. (C.R.L. § 50-a[1] [repealed June 12, 2020]).

12. Although the intended breadth of section 50-a when first enacted in 1976 was narrow, its scope quickly expanded, with police departments and unions leading the charge.

13. Indeed, according to a report from the Department of State Committee on Open Government, by 2014, section 50-a 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.” A true and correct copy of the report is attached to this petition as **Exhibit A** to this Petition.

14. However, amid the nationwide reckoning with racism following the death of George Floyd, Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611) on June 12, 2020.

15. Despite this push for transparency in New York, the respondents continue to shield crucial information regarding police misconduct from the public. This year, the City of Rochester withheld body camera footage of RPD officers’ interaction with Daniel Prude, a Black man who died one week after being hooded and pinned to the ground by RPD officers on March 23, 2020.

A true and correct copy of an article detailing Prude's death is attached as **Exhibit B** to this Petition. The City of Rochester spent months hiding this footage from the public, despite a FOIL request submitted by the Prude family's attorney on April 3, 2020. This footage was not released to Prude's family until August 12, 2020. A true and correct copy of the Managerial Review of the Death of Daniel Prude, detailing how the City of Rochester withheld this footage, is attached as **Exhibit C** to this Petition.

16. Rochester's Deputy Mayor James P. Smith issued a report dated September 14, 2020 (revised September 16, 2020), finding that the City's "handling of the initial FOIL and appeal filed by the attorneys for Mr. Prude's family seemed disorganized," that the Municipal Attorney who handled the request appeared to "completely miss the significance of the subject matter," and that the Records Access Officer failed to review the body camera footage and notify the Mayor of his findings (*see Exhibit C*).

17. Following the release of Deputy Mayor Smith's report detailing their failure to adequately respond to the Prude family's FOIL request, the Records Access Officer, Justin Roj, and Corporation Counsel, Tim Curtin, were suspended for 30 days without pay (*id.*).

The NYCLU's FOIL Request to the RPD

18. The NYCLU submitted a FOIL request to the RPD on September 15, 2020, seeking records related to RPD conduct that had previously been shielded from the public by section 50-a. The request sought documents related to RPD disciplinary records, use of force, stops, civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements. A true and correct copy of the FOIL request is attached as **Exhibit D** to this Petition.

19. Mr. Roj acknowledged the request in an email dated September 22, 2020. His email stated that "[d]ue to the volume or complexity" of the request and because the "records are

extensive and require more time for a complete search, legal review and redaction,” the City estimated that the request “will be completed on or about 3/31/21.” The email did not clarify whether the City was granting or denying any part of the request, and it implied that the City would not make even that threshold determination until March 2021, over six months after the Request was filed. A true and correct copy of the City’s acknowledgment is attached as **Exhibit E** to this Petition.

20. Following that acknowledgment, the NYCLU has received no further response to its FOIL request, even though the NYCLU’s counsel made several follow-up phone-calls to inquire about its progress.

21. On a September 24, 2020 phone call, City of Rochester employee Amalia Bellucci referred the NYCLU’s counsel to Rochester Municipal Attorneys Stephanie Prince and Shani C. Mitchell, who she said would be handling the request.

22. However, when asked for details about the delay on a September 28, 2020 phone call, Ms. Mitchell stated that she is not the Records Access Officer and did not know details about how the request was being handled. Ms. Mitchell memorialized this phone call in an email dated September 28, 2020, in which she directed the NYCLU to file an administrative appeal directly with her and stated that she was not aware of where the request was “in the queue” or “how it was currently being handled.” A true and correct copy of Ms. Mitchell’s email is attached as **Exhibit F** to this Petition.

23. Mr. Roj then acknowledged the original FOIL request for a second time in an email dated October 5, 2020, but again did not clarify whether the City was granting or denying the request or whether the City would make any substantive determination before March 2021. A true and correct copy of the City’s second acknowledgment is attached as **Exhibit G** to this Petition.

24. By letter dated October 16, 2020, the NYCLU requested a phone call with Mr. Roj to discuss a sensible path forward with respect to the request. Mr. Roj did not respond to this letter. A true and correct copy of the NYCLU's letter is attached as **Exhibit H** to this Petition.

25. By letter dated November 10, 2020, eight weeks after the City first acknowledged receipt of the FOIL request but failed to grant or deny it, the NYCLU filed an administrative appeal for the constructive denial of its FOIL request with Mr. Roj and Ms. Mitchell. Mr. Roj and Ms. Mitchell did not respond within ten business days as required by Public Officers Law § 89 (4)(a). A true and correct copy of the NYCLU's administrative appeal is attached as **Exhibit I** to this Petition.

26. As of the filing of this petition, the respondents still have not further responded to the request, provided a single document, claimed any exemptions, or responded to the administrative appeal.

27. Having exhausted administrative remedies, the NYCLU files this Article 78 proceeding seeking immediate production of responsive documents.

CAUSE OF ACTION UNDER ARTICLE 78

28. The petitioner repeats and realleges paragraphs 1 through 27 hereof as if fully set forth herein.

29. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

30. The petitioner has a clear right to the records responsive to each of the categories outlined in its request.

31. There is no basis in law or fact for the respondents to fail to respond to the initial FOIL request or the administrative appeal, or to withhold the requested records.

32. The respondents' obligation under FOIL to respond to a FOIL request, respond to a FOIL administrative appeal, and produce documents is mandatory, not discretionary.

33. The petitioner exhausted its administrative remedies with the respondents when it appealed the respondents' constructive denial of its initial request and did not receive records or a response to the appeal within ten business days as required by Public Officers Law § 89 (4)(a).

34. The petitioner has no other remedy at law.

35. This Petition is timely under CPLR § 217 as it is filed within four months of the City's denial of the NYCLU's administrative appeal on November 24, 2020.

REQUESTED RELIEF

WHEREFORE, the petitioner seeks judgment:

- (1) Pursuant to CPLR § 7806, directing the respondents to comply with its duty under FOIL and disclose the records sought by the petitioner in Requests 1 through 24 in the FOIL request dated September 15, 2020;
- (2) Awarding reasonable attorneys' fees and litigation costs as allowed under New York Public Officers Law § 89; and
- (3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,

By: /s/ Joshua Ebersole
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*Counsel for Petitioner the New York Civil
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Dated: December 14, 2020
New York, NY

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Joshua Ebersole, an attorney admitted to practice in the State of New York, affirms pursuant to CPLR § 2106 under the penalties of perjury:

- 1. I am an attorney for the petitioner in the within proceeding. I make this Verification pursuant to CPLR § 3020 [d] [3].
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

/s/ Joshua Ebersole
JOSHUA EBERSOLE

Dated: December 14, 2020
New York, New York

Sworn and subscribed to me
this 14 day of December, 2020

[Handwritten signature]

PAUL GIL
Notary Public, State of New York
No. 01GI6210266
Qualified in New York County
Commission Expires August 10, 2021