SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

NEW YORK CIVIL LIBERTIES UNION, Petitioner, vs. CITY OF SYRACUSE and SYRACUSE POLICE DEPARTMENT, Respondents.	INDEX NO: _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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I. PRELIMINARY STATEMENT

The New York Civil Liberties Union ("NYCLU") seeks relief to redress improper denials by the City of Syracuse and the Syracuse Police Department (the "SPD") of the NYCLU's September 15, 2020 request under the Freedom of Information Law ("FOIL"). The SPD has asserted a blanket denial as to all records associated with complaints against police officers that have not yet been resolved or that did result in discipline. That categorical position defies the plain text of the statute and its legislative history; it has therefore been rejected by each court previously to have considered the issue.

FOIL provides organizations like NYCLU with the judicially-enforceable right to access the records maintained by governmental agencies, especially when review of those records implicates matters of substantial public interest or concern. Such concerns are central to the recent and comprehensive repeal of Section 50-a of the New York Civil Rights Law ("Section 50-a"): the primary purpose of that repeal was to mandate the disclosure of *all* police disciplinary files—the very records at issue in this case.

In derogation of that clear mandate, the City of Syracuse and the SPD (together, "Respondents") seek to shield from disclosure all records of "unsubstantiated," open, and ongoing complaints. The stated ground for Respondents' position is FOIL's limited privacy exemption. Respondents' position is untenable, and has recently—and correctly—been rejected by multiple New York courts.

Having exhausted its administrative remedies, the NYCLU now asks the Court to order the Respondents to produce all law enforcement disciplinary records regardless of disposition. It also seeks an award of attorneys' fees and costs in light of the Respondents' failure to adhere to FOIL's statutory requirements.

II. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Repeal of Section 50-a

The repeal of Section 50-a, which was signed into law in June 2020, came at an important time in our nation's history. Nationwide protests following the police killing of George Floyd prompted lawmakers to reexamine the public's interest in enhanced law enforcement transparency and accountability. In New York State, the repeal of Section 50-a was a watershed, intended to effect "not just a change in law but, rather, a change in the culture." *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 N.Y. Misc. LEXIS 10947, at 19 (N.Y. Sup. Ct. Dec. 29, 2020).

Prior to its repeal, Section 50-a had insulated police disciplinary records from public disclosure, subject to a handful of narrow exceptions. Although the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope quickly expanded, with police departments and unions utilizing the provision to shield the conduct of law enforcement personnel from public scrutiny and civilian oversight. Section 50-a rendered "*all* records of police conduct or misconduct essentially invulnerable." *Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, at 8.

The Legislature changed the law fundamentally when it effected a complete repeal of Section 50-a and, on the same day, amended Section 86(6) of FOIL. The amendment explicitly added "law enforcement disciplinary records" as part of the "records of government" now presumptively subject to disclosure under FOIL. *See* S.8496, 243rd Leg., Reg. Sess. § 2 (N.Y. 2020); N.Y. Pub. Off. L. § 86(6). As made clear by the express language of the amendment:

> "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the

> agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

N.Y. Pub. Off. L. § 86(6). "'Law enforcement disciplinary proceeding' means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency." N.Y. Pub. Off. L. § 86(7).

The legislature, through Senate Bill 8496, simultaneously amended Section 87 to add two new provisions that addressed privacy protections applicable to "[a] law enforcement agency responding to a request for law enforcement disciplinary records." S.8496, 243rd Leg., Reg. Sess. § 3 (N.Y. 2020). The first states that "[a] law enforcement agency responding to a request for law enforcement disciplinary records . . . shall redact any portion of such record containing the information specified in [Section 89(2-b)] of this article prior to disclosing such record." N.Y. Pub. Off. L. § 87(4-a). To address valid, genuine privacy concerns, this provision requires that the producing agency redact: (i) medical history information; (ii) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of the employee and their family members; (iii) any social security number; or (iv) the use of an employee assistance program, mental health service, or substance abuse assistance service. N.Y. Pub. Off. L. § 89(2-b).

The second new privacy provision permits redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." *See* N.Y. Pub. Off. Law §§ 87(4-b), 89(2-c). "Technical infractions" cannot include incidents stemming from an interaction with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. N.Y. Pub. Off. L. § 86(9).

B. Background to the Petition

On September 15, 2020, shortly after the repeal of Section 50-a, the NYCLU submitted a FOIL request with the FOIL Officer of the SPD, seeking records relevant to police accountability

in Syracuse—including information that might reveal any patterns of discriminatory policing and information that had previously been shielded under Section 50-a (the "Request"). The NYCLU sought, *inter alia*, police disciplinary records, use of force records, records of citizen complaints about officer misconduct, and records concerning the diversity of the SPD personnel.

On November 17, 2020, the SPD, through the City's Office of Corporation Counsel, responded to the Request. Of relevance to this Petition, Respondents categorically denied access to any record related to "unfounded, unsubstantiated or open complaints" and to all Citizen Review Board records relating to the same. *See* Verified Petition ¶ 3 & Exhibit ("Ex.") C at 2 (Nov. 17, 2020 Letter from SPD).. The alleged authority on which the denial was based was Public Officers Law ("POL") § 87(2)(b) and a July 27, 2020 advisory opinion from the New York Committee on Open Government (the "July 27 Advisory Opinion"). *Id.* at 1-2. The subsection of the POL cited by the SPD exempts from disclosure information that "would constitute an unwarranted invasion of personal privacy," *see* N.Y. Pub. Off. L. § 87(2)(b), and the July 27 Advisory Opinion suggested that POL § 87(2)(b) could exempt records of certain complaints that did not lead to discipline if disclosure would "constitute an unwarranted invasion of personal privacy," *see* Comm. on Open Gov't FOIL AO 19775 (July 27, 2020). In its response, the SPD further informed the NYCLU it would take up to one full year to respond to even those aspects of the Request to which it did not object. *See* Ex. C, *supra*, at 1-2. (citing N.Y. Pub. Off. L. § 87(2)(b) (2020)).

On December 10, 2020, the NYCLU filed an administrative appeal challenging both the SPD's failure to provide a particularized and specific justification for the nondisclosure of unsubstantiated and open complaints, and the SPD's contention that the materials sought were protected by POL § 87(2)(b) and the July 27 Advisory Opinion. To the extent the SPD believed its Request infringed on any valid privacy concerns, the NYCLU expressed in its administrative

appeal that it would be "amenable to discussing the receipt of documents redacted as permitted under § 89(2)(a)." *See* Verified Petition ¶ 9 & Ex. E at 3 (Dec. 10, 2020 Administrative Appeal).

On December 22, 2020, the SPD issued its letter determination affirming its original FOIL response and denying the NYCLU's appeal. Having exhausted its available administrative remedies, the NYCLU now files this Article 78 proceeding seeking immediate production of all disciplinary records, regardless of disposition, as well as attorneys' fees and costs.[1]

III. ARGUMENT

A. The SPD's Denial of the Request Violates FOIL.

1. The text and legislative history of the repeal bill require the disclosure of all disciplinary records, including complaints that did not result in discipline.

Respondents have no valid basis on which to withhold production of police misconduct complaints that have not been resolved or were unsubstantiated. Under FOIL, government records are "presumptively open for public inspection . . . unless they fall within one of the enumerated exemptions of [FOIL]." *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996). The text of the Section 50-a repeal bill commands the disclosure of all disciplinary records, regardless of status or disposition, and the records the SPD has decided to withhold do not fall within any exception to FOIL's disclosure rule.

The legislature defined "law enforcement disciplinary records" broadly, to include "complaints, allegations, and charges . . . [and] the disposition of *any* disciplinary proceeding." S.8496, 243rd Leg. Sess. § 2 (N.Y. 2020) (emphasis added). The purpose of the repeal was to

[1] Petitioner reserves the right to file separate, non-duplicative Article 78 petitions that might become necessary as the SPD continues its rolling response to the Request. *See, e.g.*, *Cobb v. Lombardi*, 261 A.D.2d 172, 172 (1999) (allowing petitioner to file more than one Article 78 request where the items sought in the petition at issue "were not specifically designated in [the] prior request").

heighten accountability for police forces in light of the recent spotlight on institutional racism, corruption, and fatal use of force, particularly against Black men, women, and children. *See Schenectady PBA*, 2020 N.Y. Misc. LEXIS 10947, at 2 ("[T]he Court recognizes that strong lobbying by advocacy groups, coupled with recent nationwide protests in the name of racial equality and demanding massive reform, were the catalysts for the statutory repeal of CRL 50-a."). In an attempt to create such accountability, the legislature enacted a *full repeal* of Section 50-a in order to provide the public with access to *all* law enforcement records.

The legislature did not act idly or without understanding the scope and implications of its action. During the New York State Assembly debate of the repeal, the bill's sponsor, Assemblymember O'Donnell, said that the bill did not distinguish between substantiated and unsubstantiated records. N.Y. Assembly, Floor Debate, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020) at 61. Assemblymember Ramos further noted the value of unsubstantiated complaints as a potential means to establish patterns of misconduct and to identify officers "[w]ho might be a problem and who might be a risk to the public." *Id.* at 100.

As important, the legislature considered—and rejected—competing, narrower proposals. In the 2019-2020 session, the final repeal measure was one of at least five Section 50-a related bills. The most detailed of those bills, S.4213, would have allowed for the release of narrow categories of records only in situations in which allegations had been substantiated. *See* S.4213, 242nd Leg., Reg. Sess. (N.Y. 2019). In its rejection of this competing bill, the legislature rejected Respondents' position.

Following the repeal, all police records thus became presumptively open to the public upon request, save for information that was protected by narrow, statutorily prescribed exceptions. The legislature created a dedicated exemption to protect the privacy of officers, *see* N.Y. Pub. Off. L.

§ 89(2-b) (requiring agencies disclosing officer records to redact home addresses and personal contact information of officers), and permitted the redaction of minor rule violations of little public interest. N.Y. Pub. Off. L. § 89(2-c) (permitting withholding records of "technical infractions"). The legislature did not include any exemption based on the status or disposition of a complaint.

2. Respondents' interpretation of POL § 87(2)(b) would enable police departments to nullify the repeal of Section 50-a by maintaining the secrecy of the vast majority of police misconduct complaints.

The SPD's sweeping position would frustrate the legislature's intention to permit public inquiry through FOIL into the disciplinary *processes* of law enforcement agencies, not just into a small subset of outcomes. The repeal of Section 50-a empowers the public to hold individual officers accountable for past and repeat offenses, and it provides for inspection into the departments' policies and procedures (or lack thereof) for investigating and substantiating civilian complaints about such offenses.

The fact that a complaint of police misconduct did not result in discipline or remains mired for years in some murky procedural limbo can reveal vital information to the public about failures of police accountability systems. During the floor debates of the repeal bill, Assemblymember O'Donnell and Senator Bailey each remarked on the significance of the dual purpose served by the repeal. They noted that the NYPD's Internal Affairs Bureau had substantiated *none* of the 2,495 complaints made against officers alleging biased policing from 2014 to 2018, *see* Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training* 17-18 (2019), and stressed the importance of examining all records regardless of disposition. N.Y. Assembly, *supra*, at 98, 168; N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1805-06 (June 9, 2020).

The Request seeks nothing more than that which the legislature deemed matters of public concern; denial of the Petition (and validation of the position asserted by Respondents) would nullify a core, explicit basis for the Section 50-a repeal.

3. New York courts have rejected Respondents' interpretation of the law.

Respondents are wrong in asserting that releasing records related to complaints that were not substantiated or have not been finally adjudicated would constitute an "unwarranted invasion of personal privacy."[2] First, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274-75 (1996). Moreover, it is well-established in New York that "public employees enjoy a lesser degree of privacy than others." *Thomas v. New York City Dept. of Educ*., 103 A.D.3d 495, 499 (1st Dep't 2013) (quoting Comm. on Open Gov't FOIL AO 10399 (Oct. 31, 1997)).

Each New York court that has looked at the question in the wake of the repeal of Section 50-a has afforded access to the sorts of materials Respondents seek to shield on "personal privacy" grounds. The Supreme Court for the County of Schenectady stated the matter well:

> [T]here is simply no ambiguity . . . as to the legislature's instructions when responding to FOIL requests. In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct. . . . It is not the veracity of the allegations but, instead, whether they relate to the discharge of public duties which guides the analysis.

Schenectady PBA, 2020 N.Y. Misc. LEXIS 10947, at 12-13; *see also Buffalo Police Benevolent Ass'n. v. Brown*, 134 N.Y.S.3d 150, 154 (N.Y. Sup. Ct. 2020) (finding that the new law authorized

[2] The SPD has not identified the information within its records that implicates privacy concerns or why the privacy-related redactions which it must make in any event are inadequate. To the extent the SPD identifies specific information that it proposes redacting pursuant to a particularized privacy concern, the NYCLU is amenable to discussing appropriate measures to address those requests.

release of pending and unsubstantiated allegations). And, the United States Court of Appeals for the Second Circuit recently found that police unions' stated interests in preserving confidentiality over unsubstantiated complaints "are counterbalanced by other important policies." *Uniformed Fire Officers Assoc. v. De Blasio*, No. 20-2789-cv(L), 2021 U.S. App. LEXIS 4266, at 14 (2d Cir. Feb. 16, 2021). In none of these decisions did the court conclude that vague, facial invocations of "personal privacy" rights overrode the legislature's clarity in repealing Section 50-a.

Respondents ignore those precedents and instead invoke a nonbinding advisory opinion from the Committee on Open Government, whose conclusion has been rejected by each of those courts. That opinion acknowledges that FOIL embodies "a presumption of access," and then notes the existence of a narrow exception under POL that permits an agency to withhold records which, "if disclosed would constitute an unwarranted invasion of personal privacy under [POL § 89(2)]." Comm. on Open Gov't FOIL AO 19775 (July 27, 2020). It goes on to suggest that, in the "absence of judicial precedent or other legislative direction," certain complaints that did not result in discipline could constitute such an unwarranted invasion of privacy. *Id.*

But the repeal of Section 50-a is exactly such a "legislative direction," and courts have provided ample "judicial precedent" explaining why the privacy exemption relied upon by Respondents cannot shield unsubstantiated complaints from disclosure. *See Schenectady PBA,* 2020 N.Y. Misc. LEXIS 10947, at 17 (rejecting the agency's attempt to withhold unsubstantiated records under POL § 89(2)); *Buffalo PBA*, 134 N.Y.S.3d at 155 (same); *see also Uniformed Fire Officers Assoc.*, 2021 U.S. App. LEXIS 4266 (compelling disclosure of unsubstantiated complaints).

B. The NYCLU is Entitled to Attorneys' Fees

Because the SPD has refused to provide unsubstantiated or open complaints, and has done so in violation of FOIL and derogation of the repeal of Section 50-a, the NYCLU is entitled to attorneys' fees and costs.

Courts are required to assess attorneys' fees and costs in favor of a party that "substantially prevails" in its Article 78 petition against a government agency upon a finding that the agency had "no reasonable basis for denying access" to the records in dispute. *See* N.Y. Pub. Off. L. § 89(4)(c).[3] An award of fees and costs is warranted where a government agency "seek[s] to broaden" a well-established FOIL exemption without a reasonable basis for doing so. *See Rauh v. DeBlasio*, 75 N.Y.S.3d 15, 20 (N.Y. App. Div. 2018).

POL Section 89(4)(c) requires courts to assess attorneys' fees and costs against an agency in these circumstances in part because agency attempts to withhold documents that should be public under FOIL "run counter to the public's interest in transparency and the ability to participate on important issues of municipal governance," and an award of attorneys' fees and costs is a tool to combat such behavior. *Rauh*, 75 N.Y.S.3d at 21.

Here, the SPD has invoked a vague "personal privacy" exemption, despite the legislature's actions and stated intent in repealing Section 50-a, and despite recent, relevant, and unexcepted contrary authority, which Petitioner brought to Respondents' attention. *See* Verified Petition ¶ 34

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[3] Prior to 2017, POL § 89(4)(c) merely *permitted* courts to assess attorneys' fees upon a successful challenge to the denial of a FOIL request if an agency lacked a reasonable basis for the denial. In December 2017, the New York Legislature amended Section 89(4)(c) of the Public Officers Law to *require* courts to award attorneys' fees in this situation and did so "to encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding." A2750, 240th Leg., Reg. Sess. (N.Y. 2017).; *see also Rauh v. DeBlasio*, 75 N.Y.S.3d 15, 20-21 (N.Y. App. Div. 2018) ("The language of the statute is mandatory and not precatory, if the statutory requirements are met . . . this evinces an unmistakable legislative intent that attorney's fees are to be assessed . . . .").

& Ex. I at 2-3 (Feb. 1, 2020 Letter from M. Lacovara). Because the SPD's denial of the disciplinary records was without reasonable basis, the NYCLU is entitled to the costs and fees of this litigation.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court order the Syracuse Police Department to produce all disciplinary records, regardless of disposition, that Petitioner sought in its September 15, 2020 FOIL request, and to pay reasonable attorneys' fees and costs associated with this litigation.

DATED: New York, New York
March 18, 2021

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Michael Lacovara, 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 22 NYCRR § 202.8-b, because it contains 3,313 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: New York, New York
March 18, 2021

/s/ Michael Lacovara
Michael Lacovara