

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

CITY OF BUFFALO and BUFFALO POLICE
DEPARTMENT,

Respondents.

INDEX NO: _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. In this case related to police accountability, the New York Civil Liberties Union seeks relief from this Court because the City of Buffalo and the Buffalo Police Department (“BPD”) have constructively denied the NYCLU’s request under the Freedom of Information Law. 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 BPD’s policies and practices affect the Buffalo 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 BPD 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 four months later, the respondents have not granted or denied the request or provided a substantive response, in clear violation of their FOIL obligations.

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 Erie 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 Buffalo is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84 et seq.

10. Respondent Buffalo 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.

The NYCLU’s FOIL Request to the BPD

16. The NYCLU submitted a FOIL request to the BPD on September 15, 2020, seeking records related to BPD conduct that had previously been shielded from the public by section 50-a. The request sought documents related to BPD 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 B** to this Petition.

17. The Records Access Officer, Jeff Rinaldo, acknowledged the request in a letter dated September 21, 2020. His letter stated “[d]ue to the large number of requests the department is currently handling, please allow (40) business days” for a determination regarding the request. A true and correct copy of the City’s acknowledgment is attached as **Exhibit C** to this Petition.

18. By letter dated December 3, 2020, ten 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 the Records Access Officer and City of Buffalo Police Department. The Records Access Officer 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 D** to this Petition.

19. By letter dated January 21, 2021, the BPD provided notice that it was ready to produce the discipline file of a single BPD officer, Lt. Michael A. Delong. A true and correct copy of City’s letter is attached as **Exhibit E** to this petition.

20. By letter dated January 29, 2021, the NYCLU responded to the BPD and requested clarification regarding the BPD’s January 21, 2021 letter because it did not address whether the BPD intended to produce the remaining records sought in the FOIL request. A true and correct copy of the NYCLU’s letter is attached as **Exhibit F** to this petition.

21. The NYCLU did not receive any further response to its FOIL request or its January 29, 2021 letter, even though the NYCLU’s counsel made several follow-up phone-calls and emails to inquire about its progress.

22. By letter dated March 11, 2021, over 24 weeks after the City first acknowledged receipt of the FOIL request, the NYCLU filed a second administrative appeal for the constructive denial of its FOIL request with the Records Access Officer and City of Buffalo Police Department.

A true and correct copy of the NYCLU's administrative appeal is attached as **Exhibit G** to this Petition. The NYCLU has not received any response to this administrative appeal.

23. As of the filing of this petition, the respondents have produced only a portion of a single officer's disciplinary file, still have not provided any date by which they intend to produce the remaining disciplinary files or other documents responsive to petitioner's FOIL requests, and have not identified any basis for withholding these outstanding materials.

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

CAUSE OF ACTION UNDER ARTICLE 78

25. The petitioner repeats and realleges paragraphs 1 through 24 hereof as if fully set forth herein.

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

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

28. 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.

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

30. 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).

31. The petitioner has no other remedy at law.

32. This Petition is timely under CPLR § 217 as it is filed within four months of the City's denial of the NYCLU's administrative appeals on December 17, 2020 and March 25, 2021.

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: April 20, 2021
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.

[Handwritten Signature]
JOSHUA EBERSOLE

Dated: April 19, 2021
New York, New York

Sworn and subscribed to me
this 19 day of April, 2021

[Handwritten Signature]

PAUL GIL
Notary Public, State of New York
No. 01GI6210266
Qualified in New York County
Commission Expires August 10, 20 31

