SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Pursuant to the Freedom of Information Law ("FOIL"), the New York Civil Liberties Union ("NYCLU") seeks relief to redress improper denials by the Village of Freeport and the Freeport Police Department ("FPD") of the NYCLU's September 2020 request for documents related to police misconduct. FPD has asserted a blanket denial as to all records associated with complaints against police officers that did not result in discipline. That categorical position defies the plain text of the statute and its legislative history and has been rejected by several courts that have considered the issue.

FOIL is grounded in important public policy meant to ensure that government agencies and their employees are held accountable to the public, and the recent and comprehensive repeal of Section 50-a of the New York Civil Rights Law ("Section 50-a") specifically mandates the disclosure of all police disciplinary files—the very records at issue in this case. In response to nationwide protests reckoning with biased policing on the heels of the widely viewed death of George Floyd, the New York State Legislature made the reasoned determination that access to records bearing on police accountability is in the public interest, and, in addition to making previously secret police disciplinary records publicly available, it amended FOIL to add specific—and limited—privacy protections to delineate what material should be redacted from such records.

Instead of redacting police disciplinary records consistent with the new law, FPD seeks to categorically withhold the vast majority of such records—all but the few cases in which FPD has itself decided to impose discipline on an officer—and the stated grounds for its position are FOIL's general privacy exemption and an exemption that protects the "life and safety" of vulnerable individuals. FPD's position is untenable, and it has been rejected by multiple New York courts.

Having exhausted its administrative remedies, the NYCLU now seeks judicial relief under Article 78 to order Respondents to produce all responsive records, including all law enforcement

disciplinary records regardless of disposition. Petitioner also seeks an award of attorneys' fees and costs due to Respondents' failure to adhere to FOIL's statutory requirements.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The New York State Legislature's Repeal of Civil Rights Law Section 50-a

In New York State, the repeal of Section 50-a was a watershed moment, 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*, 2020 WL 7978093, at *6 (N.Y. Sup. Ct. Dec. 29, 2020) ("*Schenectady PBA*"). Prior to its repeal, Section 50-a comprehensively insulated police disciplinary records from public disclosure. *See* N.Y. Civ. Rights Law § 50-a(1) (repealed June 12, 2020). Although the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope was quickly expanded in court decisions, with police departments and unions leading the charge. 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."[1] When, on June 12, 2020, Governor Andrew Cuomo signed into law Senate Bill S8496/Assembly Bill A10611 (the "Repeal Bill"), the state effected a complete rejection of the prior regime of default categorical secrecy. S. 8496, 243d Sess. (N.Y. 2020) (repealing Section 50-a); Assemb. 10611, 2019-2020 Reg. Sess. (N.Y. 2020) (Assembly version of the Repeal Bill).

[1] Exhibit A to the Verified Petition.

II. FOIL Amendments Related to Law Enforcement Disciplinary Records

The same day Section 50-a was repealed, Governor Cuomo signed into law an amendment to Public Officers Law ("POL") Section 86(6). The amendment added "law enforcement disciplinary records" as part of the government records now presumptively subject to disclosure under FOIL. *See* N.Y. S. 8496. The Legislature defined "law enforcement disciplinary records" to mean "***any*** record created in furtherance of a law enforcement disciplinary proceeding," which includes, among other things, the "***complaints***, allegations, and charges" against an officer. N.Y. Pub. Off. Law § 86(6) (emphasis added). The Legislature further defined "law enforcement disciplinary proceeding" to mean "the commencement of ***any investigation*** and any subsequent hearing or disciplinary action conducted by a law enforcement agency." § 86(7) (emphasis added).

The Sponsoring Memorandum to the Repeal Bill stated that the public's inability to access "complaints or findings of law enforcement misconduct" was the primary purpose behind Section 50-a's repeal and the corresponding amendments to FOIL: "Police-involved killings by law enforcement officials who have had histories of ***misconduct complaints***, and in some cases recommendations of departmental charges, have increased the need to make these records more accessible."[2]

The Legislature, through the Repeal Bill, simultaneously amended POL Section 87 to add two new provisions governing the privacy protections afforded to "a law enforcement agency responding to a request for law enforcement disciplinary records." *See* N.Y. S. 8496. The first of these provisions states that "[a] law enforcement agency responding to a request for law enforcement disciplinary records as defined in [POL Section 86] ***shall*** redact any portion of such record containing the information specified in [POL Section 89(2-b)] prior to disclosing such

[2] Senate Bill, S8496, *Justification*, NYSenate.gov, https://www.nysenate.gov/legislation/bills/2019/s8496 (last visited May 5, 2021) (emphasis added).

record under this article." N.Y. Pub. Off. Law § 87(4-a) (emphasis added). To address valid, genuine privacy concerns, it requires the producing agency to 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; and (iv) the use of an employee assistance program, mental health service, or substance abuse assistance service. *See* § 89(2-b).

The second new privacy provision permits—but does not require—redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." *See* §§ 87(4-b), 89(2-c). "Technical infractions" is a limited term of art and 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. *See* § 86(9).

III. FPD's Refusal to Produce Civilian Complaints That Have Not Resulted in Discipline

On September 15, 2020, following the enactment of the Repeal Bill, the NYCLU sent a FOIL request to FPD's FOIL Officer seeking police disciplinary records, including use of force records and records of civilian complaints against officers—information that had previously been shielded under Section 50-a. In response to the NYCLU's request for "[a]ll civilian complaints against law enforcement officers" from January 1, 2000 to present,[3] FPD, through Chief Michael Smith (then Deputy Chief Smith), provided 25 officer disciplinary reports.[4] On November 27, 2020, FPD denied access to information responsive to the NYCLU's request for "[a]ll civilian complaints" stating in an email that it "will only release information pertaining to founded civilian

[3] Exhibit B to the Verified Petition.

[4] Exhibit C to the Verified Petition.

complaints."[5] FPD explained that the 25 records produced were limited to the "founded complaints during the period requested."[6] Later, on December 7, 2020, FPD, through Village Attorney Howard Colton, explained to the NYCLU's counsel that FPD's denial of access to civilian complaint records that remain open or that were deemed "unfounded" was based on FPD's interpretation of POL Section 89(2)(b)(iv).[7] FPD contended that pursuant to POL Section 89(2)(b)(iv), "unfounded complaints are a nullity and are *void ab initio.*"[8] FPD further invoked the public privacy exception claiming that "[t]he only purpose such disclosure would serve is to bring 'personal hardship to the subject party.'"[9] (For convenience, we refer to the November 27 and December 7, 2020 responses, collectively, as the "Denial.")

On December 24, 2020, in accordance with POL Section 89(4)(a), the NYCLU filed an administrative appeal of FPD's partial denial with Lt. Michael Williams of FPD.[10] On January 7, 2021, FPD sent the NYCLU a response denying that administrative appeal (the "Response").[11] In the Response, FPD raised a new rationale for its denial, now also claiming that unfounded complaints are exempt from disclosure under FOIL's life and safety exception of POL Section 89(2)(f).[12] The Response cites no evidence, relying instead on the general FOIL exemptions and

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5 Exhibit D to the Verified Petition.

6 *Id.*

7 Exhibit E to the Verified Petition (citing N.Y. Pub. Off. Law § 89(2)(b)(iv)).

8 *Id.*

9 *Id.*

10 Exhibit F to the Verified Petition.

11 Exhibit G to the Verified Petition.

12 *Id.*

speculation about the hypothetical harms that ***might*** befall officers if unfounded complaints are made public.[13]

As of the filing of this petition, FPD refuses to produce any civilian complaints beyond the small number that have resulted in discipline. Having exhausted administrative remedies, the NYCLU files this Petition pursuant to Article 78 of New York's Civil Practice Law & Rules seeking immediate production of responsive records—including all disciplinary records regardless of disposition—as well as attorneys' fees and costs.

ARGUMENT

Respondents have no valid basis on which to withhold production of the materials in dispute. Under FOIL, all 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 repeal bill commands the disclosure of all disciplinary records, regardless of status or disposition, with limited redactions, and neither of the two FOIL exemptions cited by FPD can justify the categorical withholding of those records without any consideration to what information actually appears in the records.[14] As a result of FPD's blanket denial in violation of FOIL, NYCLU is entitled to the requested documents, redacted as permitted by the statute, as well as reasonable attorneys' fees and litigation costs.

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[13] *Id.*

[14] Petitioner reserves the right to file separate non-duplicative Article 78 petitions that might become necessary as FPD continues to its rolling response to the Request. *See, e.g.*, *Cobb v. Lombardi*, 261 A.D.2d 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").

I. FPD's Conclusory Assertions Cannot Justify the Categorical Withholding of the Records in Dispute

As a threshold matter, FPD's bare invocation of two FOIL exemptions cannot justify its categorical refusal to produce the records in dispute. FPD "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665, 667 (N.Y. 1986); *see also Empire Ctr. for Pub. Policy v. N.Y.C. Police Pension Fund*, 107 N.Y.S.3d 646, 649 (N.Y. Sup. Ct. 2019) ("To invoke a POL § 87(2) exemption, the agency must articulate particularized and specific justification for not disclosing requested documents."). Neither the Denial nor the Response provides a particularized justification for why all unfounded civilian complaints fall under the FOIL exceptions FPD cites. Rather, FPD does what the New York Court of Appeals has prohibited by reciting only "sections, subdivisions and subparagraphs of the applicable statute and conclusory characterization of the records sought to be withheld." *Church of Scientology v. New York*, 46 N.Y.2d 906, 907-08 (N.Y. 1979); *see also Allen Grp., Inc. v. New York State Dep't of Motor Vehicles*, 538 N.Y.S.2d 78, 79-80 (3d Dep't 1989) (an agency response consisting of "general denials" and "conclusory allegations" "was totally inadequate to permit the conclusion that respondents sustained their burden of showing that the requested material fell within a statutory exemption").

New York courts have held that, when claiming exemptions under either the personal hardship exception of POL Section 87(2)(b)(iv) or the life and safety exception of POL Section 87(2)(f), "conclusory" assertions do not suffice to carry an agency's burden. *Capital Newspapers*, 496 N.E.2d at 670 (granting release of report when intervenor's assertion that he would suffer "economic or personal hardship" upon release of records was conclusory and not supported by any facts); *see also Jaronczyk v. Mangano*, 996 N.Y.S.2d 291, 293 (2d Dep't 2014) (granting release

of captains' signatures when agency failed to proffer more than conclusory assertions that disclosure of signatures "would result in economic or personal hardship to the subject party" and the signatures were "not relevant to the work of the agency"); *Empire Ctr.*, 107 N.Y.S.3d at 649 (holding that conclusory assertions are insufficient to carry burden of claiming exception under POL Section 87(2)(f)) (citing *Dilworth v. Westchester Cnty. Dep't of Corrections*, 940 N.Y.S.2d 146, 146 (2d Dep't 2012)).

Here, FPD has not provided any justification for its denial of the NYCLU's FOIL request for all civilian complaints beyond vague and conclusory statements.[15] Instead, FPD asserts, without detail or support and as a categorical matter, that disclosure of any unfounded complaint threatens the privacy and safety of police officers. FPD has not set forth a specific or particularized justification for withholding the requested records; rather, FPD recited the FOIL's statutory language and speculated about what ***might*** occur if unfounded complaints are produced to the NYCLU.[16] Without more, FPD has not met its burden to show that the requested materials are exempt from disclosure under FOIL.

II. Complaints Are Available Under FOIL Regardless of Their Disposition

Under FOIL, "[a]ll records [of an agency] are presumptively available for public inspection" and "statutory exemptions [are] narrowly interpreted." *Adbur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 803 (N.Y. 2018); *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 464 N.E.2d 437, 439 (N.Y. 1984). "Courts have repeatedly held that release of job performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy"—***even when these records are mere***

[15] *See* Exhibit G to the Verified Petition.

[16] *Id.*

accusations. *Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York*, 919 N.Y.S.2d 786, 790 (N.Y. Sup. Ct. 2011); *see also Faulkner v. Del Giacco*, 139 Misc. 2d 790, 794 (N.Y. Sup. Ct. 1988) (authorizing release of the names of prison guards accused of inappropriate behavior); *Capital Newspapers*, 496 N.E.2d at 670 (authorizing release of report of sick days taken by individual police officer).

Now, following the repeal of Section 50-a, police disciplinary records are presumed to be open for public inspection. In response to a FOIL request, police departments must make available "law enforcement disciplinary records," which specifically include, but are not limited to, "***complaints, allegations***, and charges against an employee." N.Y. Pub. Off. Law § 86(6) (emphasis added). Nothing in the statute limits disclosure of "complaints" or "allegations" to only founded or substantiated complaints.

Indeed, the shielding of complaints against police officers from public review was a major impetus for Section 50-a's repeal and the corresponding amendments to FOIL. *See* Senate Bill, S8496, *Justification*, NYSenate.Gov, https://www.nysenate.gov/legislation/bills/2019/s8496 (last visited May 5, 2021) ("Due to the interpretation of § 50-a, records of ***complaints*** or findings of law enforcement misconduct that have not resulted in criminal charges against an officer are almost entirely inaccessible to the public or to victims of police brutality, excessive use of force, or other misconduct. . . . Police-involved killings by law enforcement officials who have had histories of ***misconduct complaints***, and in some cases recommendations of departmental charges, have increased the need to make these records more accessible.") (emphasis added).

In amending POL Section 87, the Legislature detailed how privacy concerns should be balanced with public access. POL Section 87 requires certain identifying information to be redacted from documents before production and permits other potentially sensitive information to

be redacted at the discretion of the responding agency. N.Y. Pub. Off. Law §§ 87(4-a, b). The Legislature made a reasoned determination regarding what disciplinary records must be made publicly available and what limited information can and must be redacted from such records to protect the privacy, safety, and well-being of individual officers. The Legislature did not exempt from production or allow the redaction of information solely on the basis that the requested materials relate to complaints determined to be unfounded or unsubstantiated. FPD cannot rewrite the law.

III. Complaints That Have Not Resulted in Discipline Are Not Exempt Under FOIL's Personal Privacy Exception

Despite the prior FOIL case law and the amended FOIL language—each making clear that police officer job performance records must be produced even when these records are mere accusations, and that redaction is the appropriate means to address narrow privacy concerns—FPD's Response claims that unfounded civilian complaints are categorically exempt from disclosure under POL Section 87(2)(b) because such records "would be an unwarranted invasion of personal privacy."[17] This Court should reject FPD's overbroad, categorical argument.

Since the repeal of Section 50-a, several New York courts have held that law enforcement disciplinary records do not categorically fall within the statutory definitions of materials that can be withheld on the basis of personal privacy claims. *See Schenectady PBA*, 2020 WL 7978093, at *1, *4 (N.Y. Sup. Ct. Dec. 29, 2020) (in deciding "whether a police officer's personnel and disciplinary record, to the extent it contains uncharged or unsubstantiated allegations of misconduct, or founded charges resolved without professional discipline, must be disclosed in response to a [FOIL] request," holding that it must be and rejecting the PBA's privacy argument

[17] Exhibit G to the Verified Petition at 1.

because "this Court is hard-pressed to find that any of these [law enforcement disciplinary records] fall within the types of records to which POL §89(2)(b)(i-viii) ascribes a right of personal privacy") (internal quotations omitted); *New York v. Herrara*, 2021 WL 1247418, at *5 (N.Y. Dist. Ct. Apr. 4, 2021) (ordering the production, pursuant to FOIL, of unsubstantiated ***and*** substantiated complaints and holding that "privacy concerns should be allayed by" the redactions listed in POL §§ 89(2-b) and (2-c)); *cf. Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-2789-CV, 2021 WL 561505, at *3 (2d Cir. Feb. 16, 2021) (rejecting officers' argument that New York City should be enjoined from changing its prior position that "unsubstantiated allegations should be withheld under FOIL's exemption for documents whose disclosure would constitute an unwarranted invasion of privacy"); *Buffalo Police Benevolent Ass'n. v. Brown*, 134 N.Y.S.3d 150, 154-55 (N.Y. Sup. Ct. 2020) (declining to hold that release of unsubstantiated allegations against officers violates privacy and holding that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated'" is a "drastic" and "inappropriate" remedy).

The New York Supreme Court's decision in *Schenectady Police Benevolent Association v. City of Schenectady* is particularly instructive. The *Schenectady PBA* case concerned a FOIL request made to the city's records access officer seeking the personnel and disciplinary records of Schenectady Police Department Officer Brian Pommer, and the disciplinary records of all other officers employed by the city. 2020 WL 7978093, at *2. The *Schenectady PBA* court held that, with the repeal of Section 50-a, records of unsubstantiated civilian complaints are subject to FOIL and are not an unwarranted invasion of personal privacy. *Id.* at *5. The *Schenectady PBA* court did not mince words:

> [R]egardless of whether unsubstantiated or unfounded or exonerated or dismissed, or regardless of whether not fully yet determined, or regardless of whether founded but without discipline imposed, the respondents herein cannot determine to deny the sought disclosure. A finding that Patrolman Pommer's personnel record, or any portion thereof, be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy, cannot be realized by petitioners, as to do so would render the legislature's repeal of [Section] 50-a utterly meaningless simply by the respondents theorizing that the record (or any portion thereof) is, in their opinion, "private."

Id. at *6.

In contrast to the *Schenectady PBA* court—and every other court to consider the issue—stands a recent decision in *New York Civil Liberties Union v. City of Syracuse et al.*, No. 002602/2021 (NYSCEF No. 43) (N.Y. Sup. Ct. May 5, 2021) ("*Syracuse*"). There, the court held that the repeal of Section 50-a "does not require documents related to unsubstantiated claims against police officers to be released" and "the public interest in the released of unsubstantiated claims do not outweigh the privacy concerns of individual officers." *Id.* at 11. What is evident from the decision, however, is that the court misapprehended the NYCLU's position to be broadly asserting that the new FOIL regime required the production of unsubstantiated complaints without any redactions (*id.* at 8 (framing the question before it as whether "the subject records should be disclosed wholesale" or withheld wholesale), thereby ignoring any and all privacy considerations, when, in fact, the NYCLU's position is that civilian complaints that have not resulted in discipline cannot be categorically withheld precisely because specific privacy concerns can be addressed through targeted redactions consistent with FOIL. This more limited approach is consistent with the Legislature's decision to provide detailed privacy-based redaction provisions applying specifically to "law enforcement discipline records," *see* POL §§ 87(4-b), 89(2-b, 2-c), and the *Syracuse* court's decision is in direct conflict with the Court of Appeals' binding directive that Section 87(2)(b) does not permit an agency to "refuse to produce the whole record simply because

some of it may be exempt from disclosure" pursuant to the privacy exemption, *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011).

The *Syracuse* decision also explicitly rejects the clear legislative intent behind the Repeal Bill. *Syracuse*, No. 002602/2021 at 9. Importantly, the *Syracuse* court does not dispute the *Schenectady* court's reading of the Legislature's intent to require disclosure of civilian complaints that did not result in discipline subject to only the narrow redactions permitted by FOIL. Notwithstanding, the court concludes "[a]ll this Court can base its determination on is the final [legislative] product: ***the law as enacted***." *Id.* (emphasis in original). The court cites no binding authority for such a strict textualist approach. In fact, New York law is to the contrary. The Court of Appeals has emphasized the paramount importance of understanding and giving effect to the legislative intent in interpreting statutes. *See, e.g.*, *Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (2012) ("In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention." (citing *Yatauro v. Mangano*, 17 N.Y.3d 420, 426 (2011))); *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) ("In matters of statutory and regulatory interpretation, 'legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactors]'. . . . Additionally, inquiry should be made into 'the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.'" (citing *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 476-77 (2004)) (alteration in original)).[18] For these reasons, Petitioner respectfully submits that the recent

[18] The *Syracuse* decision also relies upon distinguishable FOIL opinions predating the repeal of Section 50-a, predating the creation of specific redaction provisions associated with "law enforcement discipline records," and analyzing meaningfully different contexts (*id.* at 10 (citing *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 632 N.Y.S.2d 576 (1995) (ordering partial redaction of one record based on the *in camera* review of a settlement agreement concerning a school administrator)).

decisions in *Schenectady PBA*, *Buffalo*, *Herrera*, and *Uniformed Fire Officers* are more persuasive and more consistent with the statute and with controlling precedent.

In support of its position, FPD has relied solely on two advisory opinions from the Committee on Open Government ("COOG"): (1) FOIL AO 11747, an opinion rendered in 1999; and (2) FOIL AO 19775, an opinion rendered on July 27, 2020.[19] As an initial matter, Petitioner notes that advisory opinions are no more than that; the Committee's views are not binding on this Court. *See Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 493 (1994) (holding that the advisory opinions of the COOG are "neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency"). Regardless, the COOG has recently issued another advisory opinion addressing the *Schenectady PBA* and *Buffalo* decisions and characterizing its position as follows: "[I]n light of the repeal of Section 50-a of the Civil Rights Law and the provisions added to FOIL to address law enforcement agency disciplinary records, FOIL now requires that upon a request therefor, a law enforcement agency must review all records of complaints, ***whether or not substantiated***, to determine rights of access."[20] FPD is thus in violation of the authority upon which it has relied.

Finally, the result urged by Petitioner is consistent with the Legislature's purpose in repealing Section 50-a and amending FOIL. The statutory changes were intended to heighten

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[19] *Id.*; Advisory Op. from Robert Freeman, Exec. Dir., COOG, FOIL AO 11747 (Oct. 19, 1999), https://docs.dos.ny.gov/coog/ftext/f11747.html; Advisory Op. from Shoshanah Bewlay, Exec. Dir., COOG, FOIL AO 19775 (July 27, 2020), https://docs.dos.ny.gov/coog/ftext/f19775.html.

[20] Advisory Op. from Shoshanah Bewlay, Exec. Dir., COOG, FOIL AO 19785 (Mar. 19, 2021), https://docs.dos.ny.gov/coog/ftext/f19785.html (emphasis added). The March 29, 2021 opinion further states that its conclusion is wholly "consistent with" the July 27, 2020 opinion, *id.*, indicating that the earlier opinion—which was not a model of clarity—in fact never stood for the sweeping proposition suggested by FPD. Taken together, these COOG opinions appear to stand for the unremarkable proposition that an agency must, on a case-by-case basis, examine requested complaint records for material that would fall within the narrow privacy exemption and redact such material prior to production. This is precisely what the NYCLU has asked FPD to do.

accountability for police forces considering the recent spotlight on institutional racism, corruption, and fatal use of force, particularly against Black men, women, and children. *See Schenectady PBA*, 2020 WL 7978093, at *1 ("[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 [Section] 50-a."). To create such accountability, the Legislature enacted a full repeal of Section 50-a to provide the public with presumptive access to ***all*** law enforcement records.

The Legislature did not act without understanding the scope and implications of its action. During the New York State Assembly debate of the repeal, the bill's sponsor (Assemblymember Daniel O'Donnell) stated that the bill did not distinguish between substantiated and unsubstantiated records, and 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." N.Y. Assembly, Floor Debate, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020) at 61, 100. And those who unsuccessfully opposed the bill noted that with the repeal of Section 50-a, all disciplinary records—including unsubstantiated ones—would be accessible unless they fell under a FOIL exemption. *Id*. at 61-67.

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, 243rd Leg. Sess. Thus, in its rejection of this competing bill, the Legislature essentially rejected Respondents' position.

Following repeal, all police disciplinary records thus became presumptively open to the public upon request, except for information that is protected by narrow, statutorily prescribed

exceptions and properly shielded by targeted redaction. The Legislature carved out limited exceptions to ensure the redaction of sensitive personal information, *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, *see* § 89(2-c) (permitting withholding records of "technical infractions"). The Legislature did not include any categorical exemption of countless records based on the status or disposition of a complaint.

IV. FPD Has Not Demonstrated That Producing Complaints That Have Not Resulted in Discipline Could Endanger the Life or Safety of Any Person

FPD also claims that all unfounded civilian complaints may be withheld, as a categorical matter, under POL Section 87(2)(f) because producing those records "could endanger the life or safety of any person."[21] Because FPD relies on sweeping generalization and pure speculation, having made no attempt to adduce evidence to support its assertion, its arguments must fail.

The burden rests on the agency seeking to withhold documents to establish that the disclosure of the requested records could endanger the life or safety of any person. *Bellamy v. N.Y.C. Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011); N.Y. Pub. Off. Law § 87(2)(f). Whether an agency has met this burden, however, depends on the "facts and circumstances" of the particular case. *Bellamy*, 87 A.D.3d at 876. "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Empire Ctr.*, 107 N.Y.S.3d at 649 (citing *Dilworth*, 940 N.Y.S.2d at 149).

FPD has not produced any evidence or advanced any concrete, fact-specific arguments regarding how disclosure of the unfounded civilian complaints could endanger the life or safety of

[21] Exhibit G to the Verified Petition.

any person, and it certainly has not shown that specific safety concerns could not be addressed by the less drastic remedy of targeted redaction. Instead, FPD relies generically on the FOIL exception's statutory language and speculation that it may be applicable. FPD has thus failed to carry its burden, and it cannot withhold the requested complaints. *See Pennington v. Calabrese,* No. 2002/155, 2002 WL 31885409, at *2 (N.Y. Sup. Ct. 2002) ("[T]he public-safety exemption must be based on more than mere speculation. The record in this case is devoid of any indication that access to [the witness'] photograph would inherently endanger his life or safety."); *Laveck v. Vill. Bd. of Trs*., 145 A.D.3d 1168, 1171 (3d Dep't 2016) (requiring disclosure of personal identifying information where an affidavit failed to establish that subjects "had received any threats").

The Second Circuit's recent decision in *Uniformed Fire Officers Ass'n v. De Blasio*, 2021 WL 561505 (2d Cir. Feb. 16, 2021), further undermines FPD's position. There, several unions representing uniformed members of the New York Police Department, the New York City Fire Department, and the New York City Department of Correction, sought to enjoin disclosure of unsubstantiated allegations of misconduct against their members. The unions argued that disclosure of unfounded complaints would harm their members' future employment opportunities and create a heightened threat to their safety. *Id.* at *8-9. The Second Circuit rejected the unions' argument. In so doing, the Court recognized that "numerous other States make similar records available to the public" and that the unions had put forth no evidence suggesting these similar disclosures resulted in harm to employment opportunities or resulted in an increased risk of danger to police officers in the relevant states. *Id.* The Second Circuit affirmed the Southern District of New York's decision to deny the unions' request to shield unfounded complaints from disclosure. *Id.*

For these reasons, FPD's categorical denial of all complaints that did not result in discipline cannot be justified under POL Section 87(2)(f) because FPD has not demonstrated that producing unfounded complaints could endanger the life or safety of any person.

V. The NYCLU Is Entitled to Attorneys' Fees

If the Court holds that FPD has asserted its blanket denial in violation of FOIL and in derogation of the repeal of Section 50-a, the NYCLU would be entitled to reasonable attorneys' fees and litigation costs. Specifically, the NYCLU would be entitled to fees and costs because FPD failed to meet its burden of demonstrating that the requested records fall squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.

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. N.Y. Pub. Off. Law § 89 (4)(c). An award of fees and costs is warranted where a government agency "seek[s] to broaden" a well-established FOIL exemption as a means to withhold documents. *See Rauh v. De Blasio*, 75 N.Y.S.3d 15, 20-21 (1st Dep't 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. *Id.* at 21.

If this Court orders Respondents to disclose the requested documents in response to this Petition, Petitioner will have "substantially prevailed" for the purposes of POL Section 89(4)(c). *See Bottom v. Fischer*, 129 A.D.3d 1604, 1605 (4th Dep't 2015) (petitioner substantially prevailed when respondent made disclosures only after "the court directed it to justify their nondisclosure"); *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 79 (2017) (petitioner substantially

prevailed when the respondent had "made no disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding"). Having made no disclosures of unfounded civilian complaints against law enforcement officers—redacted or otherwise—before the commencement of this proceeding, Petitioner would be statutorily entitled to attorneys' fees and costs.

As stated above, the recipient of a FOIL request seeking to prevent disclosure of the records "carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers*, 496 N.E.2d at 667. FPD has not provided the NYCLU a particularized justification for why all unfounded civilian complaints purportedly fall under the FOIL exceptions FPD cites, but instead does what the New York Court of Appeals has prohibited by reciting only "sections, subdivisions and subparagraphs of the applicable statute and conclusory characterization of the records sought to be withheld." *Church of Scientology*, 46 N.Y.2d at 907-08. Under these circumstances, an award of reasonable attorneys' fees and litigation costs is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court order Respondents to produce all responsive policy disciplinary records, regardless of disposition and subject to only the narrow redactions permitted by FOIL, and to pay reasonable attorneys' fees and costs associated with this litigation.

Respectfully submitted,

Dated: May 6, 2021
New York, New York

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