Docket No. 2021-06373

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

In the Matter of the Application of
TIMOTHY D. SINI as District Attorney of the County of Suffolk,

Petitioner,

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

against

HON. CHRIS ANN KELLEY, Justice, Suffolk County Supreme Court and FIDEL PORTILLO,

Respondents.

MEMORANDUM OF LAW FOR AMICUS CURIAE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION

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INTRODUCTION

The legislative reforms to New York's criminal discovery law and the repeal of Civil Rights Law § 50-a have ushered in a new era of law enforcement transparency. However, the Suffolk County District Attorney attempts to evade this transparency and shirk his discovery obligation to produce "all evidence and information" relating to police officers that could impeach their credibility. In doing so, he now asks this Court to issue a sweeping writ holding that prosecutors following the new law need never review or produce *any* material related to internal police department investigations that resulted in a finding of "unfounded" or "exonerated." These arguments misrepresent the privacy interests at play and the effect of the repeal of Civil Rights Law § 50-a and must fail.

Amicus writes specifically to address the petitioner's argument—echoed by proposed *amici* police unions—that disclosing an unfounded or exonerated complaint would "be unfair to an officer" (Pet'r's Br at 28) because it would constitute an unwarranted invasion of that officer's privacy. This argument is misplaced for two reasons.

First, under the Criminal Procedure Law there is no basis to hold that general concerns about an officer's privacy can stand as a basis to completely withhold internal affairs documents. The unwarranted invasion of privacy exemption that petitioner relies on is rooted in the text of the Freedom of Information Law (FOIL) and appears nowhere in the criminal discovery law. The petitioner's attempt to graft FOIL's

statutory privacy exemption onto the criminal discovery statute cannot be squared with the plain text and purpose of the statute. Indeed, the framework for discovery in criminal trials offers multiple options for addressing privacy concerns that do not exist under FOIL, including protective orders and ongoing court oversight, which make a categorical bar on disclosure particularly inappropriate.

Second, even under the FOIL standard for *public* disclosure, the petitioner fails to note that the overwhelming majority of New York courts to have considered this issue after the repeal of 50-a have found that FOIL's privacy exemption does not shield unfounded or exonerated complaints. Indeed, jurisdictions around the state have published vast public databases that include records of all complaints, regardless of their disposition. Correcting the petitioner's mischaracterization underlines the weakness of his argument: when these documents are available to the public pursuant to a FOIL request, it cannot be the case that an officer's privacy interest compels a criminal court to bar their production categorically to a defendant whose more limited use of those documents will be subject to the court's direct oversight.

For these reasons, and for the reasons articulated by the respondent and other *amici* writing in support of the respondent, *amicus* respectfully submits that this Court should deny the petition.

STATEMENT OF INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union ("NYCLU") is a non-profit membership organization with more than 112,800 members and is the New York State affiliate of the American Civil Liberties Union. The NYCLU is devoted to the protection of fundamental freedoms, including the rights of criminal defendants, and to the enhancement of police transparency and accountability. Since the repeal of section 50-a, the NYCLU has engaged in a statewide police transparency project involving over a dozen ongoing FOIL requests seeking decades of records related to police misconduct and disciplinary proceedings (*see* NYCLU, *NYCLU Launches Statewide Police Transparency Campaign* [Sept. 15, 2020], https://www.nyclu.org/en/press-releases/nyclu-launches-statewide-police-misconduct-transparency-campaign), routinely litigates the issue of access to those records (*see, e.g.*, *Schenectady PBA v Schenectady Police Department*, 2020 WL 7978093 [Schenectady County Sup Ct 2020] [with NYCLU joined as intervenor, ordering production of misconduct investigations regardless of disposition]), and participates as *amicus* on cases implicating the effect of section 50-a's repeal (*see Uniformed Fire Officers Assn. v de Blasio*, 846 F Appx at 30 [2d Cir 2021] [rejecting police union's privacy argument and declining to block the public release of a searchable database of NYPD complaints and investigations regardless of disposition]). *Amicus curiae* brings expertise in the relevant law and has a strong interest in ensuring the correct analysis and resolution of questions directly implicating police misconduct records.

ARGUMENT

I. Criminal Procedure Law § 245 Does Not Exempt Internal Affairs Documents From Disclosure Based on General Concerns About Officer Privacy.

In support of his request to block Justice Kelley from ordering the release of any "unfounded" and "exonerated" internal affairs files, the petitioner suggests that such disclosure constitutes an "unwarranted invasion of officers' privacy" (*see* Pet'r's Br at 30 [quoting *NYCLU v Syracuse*, 72 Misc 3d 458 [Sup Ct Onondaga 2021]). However, this "unwarranted invasion of privacy" standard is inapplicable to New York's criminal discovery law. By invoking this standard, the petitioner is improperly attempting to import FOIL's statutorily-based exemption to public disclosure requirements into the criminal discovery law when a careful review of Criminal Procedure Law § 245 reveals that it has its own balanced approach to addressing privacy concerns. Accordingly, this Court should reject any attempt to create an atextual officer privacy exemption to the rules of criminal discovery.

The FOIL statute, Article 6 of the New York Public Officers Law, governs the *public* release of agency records. Under Public Officer Law § 87 (2)(b), "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that . . . if disclosed would constitute an *unwarranted invasion of personal privacy*." (emphasis added). The provision then cross references Public Officer Law § 89 to

explain that an "unwarranted invasion of personal privacy" means the public disclosure of certain personal information like medical history, credit history, and e-mail addresses or social network usernames (*see id.*; Pub Officers Law § 89[2][b]).

New York's criminal discovery law, CPL § 245, which governs disclosure in criminal matters, does not contain analogous language. While the petitioner has sought to categorically withhold certain internal affairs files based, in part, on general concerns about officer privacy, CPL § 245 does not grant prosecutors this broad authority. Indeed, the text of CPL § 245 reflects a legislatively-crafted framework that balances certain enumerated and limited privacy protections against the need of a defendant to mount a full defense.

The very narrow categories of information that may be completely withheld pursuant to CPL § 245 to protect privacy interests are specifically enumerated, and they do not include officer disciplinary records. For example, the law does not require the prosecution to disclose physical addresses of witnesses unless the defendant makes a showing of good cause. CPL § 245.20 (1)(c). Additionally, CPL § 245.20 grants the prosecution a limited ability to withhold identifying information about certain specifically enumerated categories of people. CPL § 245.20 (1)(c)(d). The prosecution can withhold information "related to or evidencing the *identity*" of 911 callers, victims or witnesses of sex trafficking or sex offenses, witnesses to crimes involving criminal enterprises, and confidential informants. CPL § 245.20 (1)(c). Importantly, this section only allows the withholding of information revealing the identity of people within these

groups, it does not grant the prosecution the ability to withhold *all information* derived from these sources based on concerns about their privacy.

Regarding law enforcement personnel specifically, for a certain subset of officers—*undercover personnel*—information revealing their identities "may be withheld, and redacted from discovery materials, without need for a motion." CPL § 245.20 (1)(d). Otherwise, "[t]he name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense" must be automatically disclosed to the defense. *Id.* The withholding of officers' information is limited to undercover officers and only to information revealing their identities. In *People v Singh*, this Court held that "the new discovery statute specifically permits the People to withhold and redact from discovery the name and work affiliation of undercover personnel without the need for a motion for a protective order," but information beyond that identifying information could only be withheld pursuant to a motion and showing of good cause by the prosecution. 187 AD3d 691 [2d Dept 2020]. This balancing reflects the Legislature's understanding that undercover officers have a special interest in maintaining the privacy of their identities that non-undercover officers will not have.

Unlike subsections CPL § 245.10 (1)(c) and (d), the subsection of the criminal discovery law that Justice Kelley found requires the disclosure of the internal affairs files, CPL § 245.10 (1)(k), does not have language indicating that the disclosure of law enforcement information that tends to impeach credibility may be withheld without a

protective order. This subsection certainly does not contain language mimicking FOIL's unwarranted invasion of privacy standard. Instead of evincing any special concerns for information disclosed pursuant to this subsection, it directs the prosecution to "disclose the information expeditiously upon its receipt." *Id.*

While the unions, in their *amicus* brief, attempt to argue that general "privacy and safety implications" should compel this Court to read an exemption into a statute that does not contain one, *see* Proposed Amicus Brief of The New York State Association of Police Benevolent Associations, Affiliated Police Associations of Westchester, the Suffolk County Detectives Association, and the Rockland County Police Benevolent Association [*hereinafter* "Unions' Br"] Amicus Brief at 13-17, the handful of anecdotes they highlight do not support their conclusion. Indeed, none of these examples of purported harm or harassment involve the release of information in the course of discovery of a criminal case.[1]

What is more, if the release of certain information about an officer presents a serious threat to that officer, the criminal discovery law provides a simple solution: the

[1] Beyond the fact that none of the unions' examples occurred as a result of disclosure in the course of discovery, their claims of officer harassment should be taken with a grain of salt. The Second Circuit recently rejected the same argument about a "general assertion of heightened danger and safety risks to police officers" even in the context of FOIL, where explicit privacy and safety exemptions exist, because "the Unions [did] not sufficiently demonstrate[ ] that those dangers and risks are likely to increase" with the disclosure of unfounded and exonerated complaint records (*Uniformed Fire Officers Ass'n*, 846 F Appx at 31 ["In arriving at that conclusion, we note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers."]).

prosecution can either redact certain personal information or obtain a protective order. CPL § 245.20 (6)(a); CPL § 245.70 (1), (4). Criminal Procedure Law § 245.20 (6)(a) allows either party to redact social security numbers and tax numbers from disclosures. Further, upon a showing of good cause, the prosecution can seek a protective order limiting the disclosure of information and the court will balance the defendant's interests in disclosure against any countervailing concerns. CPL § 245.70 (1), (4) (good cause may exist based on the "risk of . . . harassment or unjustified annoyance or embarrassment to any person"); *see also People v Beaton,* 179 AD3d 871 [2d Dept 2020] ("the People, in seeking a protective order . . . should provide a sufficiently detailed factual predicate to enable the courts to evaluate the applicability of the statutory factors governing the issuance of protective orders, assess the weight to be given to each factor, and draw an appropriate balance"). Through redactions and protective orders, the criminal discovery law has ample ways to protect individuals from any genuine risks of harassment, unjustified annoyance, or intimidation that may come from disclosure, if the prosecution can make their required showing of good cause.

In sum, New York's criminal discovery law does not afford the prosecution the authority to have whole categories of documents withheld based on police officer's general privacy concerns. Not only does the framework for criminal discovery established in CPL § 245 conflict with the petitioner's argument, as a policy matter there is no basis to incorporate FOIL's broader privacy exemption into the criminal discovery law.

II. Even Under FOIL's Standard For The Public Release of Records, There Is No Basis To Categorically Withhold "Unfounded" Or "Exonerated" Complaints.

Even if FOIL's "unwarranted invasion of privacy" exemption was the standard governing whether IAB files categorically may be withheld under CPL § 245.20(k)(1)(iv)—which it is not—the petitioner's argument fails because officer disciplinary records are subject to public inspection regardless of the disposition of internal investigations. The petitioner's interpretation is contrary to the plain text of FOIL and has been rejected by the overwhelming majority of courts to have considered the issue since the repeal of section 50-a, though he misleadingly relies on a single case to have held otherwise (*see* Pet'r's Br at 30 [quoting *NYCLU v Syracuse*, 72 Misc 3d at 458]).

A. The 2020 Repeal of Section 50-a and the Amendment of FOIL Made Law Enforcement Discipline Records Presumptively Publicly Available, Regardless of Disposition and Subject To Limited Redactions.

Prior to June 2020, section 50-a broadly insulated police personnel records from public disclosure. It created an exception to the default rule embodied in FOIL, which provides that "[e]ach agency shall make available for public inspection all records" unless a specific statutory exemption applies (NY Pub Off L § 87[2]). When first enacted, section 50-a had imposed relatively modest limitations to the public disclosure of police misconduct records. Over time, however, its scope expanded.[2] Police

[2] *See* Brendan J. Lyons, *Court rulings shroud records*, TIMES UNION, (Dec. 15, 2016), https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php.

departments and unions increasingly utilized the provision to shield the conduct of law enforcement personnel from public scrutiny and civilian oversight. Thus, by the time of its repeal, section 50-a had come to render "*all* records of police misconduct essentially invulnerable." (*Schenectady PBA*, 2020 WL 7978093, at *7.)

Last year, the Legislature reassessed—and fundamentally altered—the balance between privacy and public access. It did so by effecting a complete repeal of section 50-a and amending section 86(6) of FOIL on the same day. The latter action for the first time defined "law enforcement disciplinary records" and added them to the class of "records of government" now presumptively subject to disclosure under FOIL (*See* S.8496, 243rd Leg Reg Sess § 2 [NY June 12, 2020]; Pub Off. L § 86[6]) . The amendment provides:

> "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 subsequent hearing *or* disciplinary action conducted by a law enforcement agency." N.Y. Pub. Off. L. § 86(7) (emphasis added). The law makes no distinction between law enforcement discipline records based on

their ultimate disposition. (*See* S8496 Justification ["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])

The second act of legislative rebalancing of the interests of law enforcement personnel and the public was the addition of two new provisions to section 87. Those new provisions created targeted privacy protections for a "law enforcement agency responding to a request for law enforcement disciplinary records." S.8496, 243rd Leg, Reg Sess § 3 [NY 2020]. First, the new statute specifically enumerated certain private information for redaction. It provides 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." NY Pub Off L § 87(4-a). In turn, section 89(2-b) requires the producing agency to redact from law enforcement records: (i) medical history information; (ii) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of the officer 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. NY Pub Off L § 89(2-b).

The second new privacy provision permits redaction of any portion of a law enforcement disciplinary record that pertained only to "technical infractions." *See* NY Pub Off L §§ 87(4-b), 89(2-c). "Technical infractions" are defined as minor rule violations by law enforcement solely related to the enforcement of administrative departmental rules. NY Pub Off L § 86(9). They do not include incidents stemming from interactions with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. *Id.*

Pursuant to FOIL, "[a]ll [agency] records are presumptively available for public inspection" and any "statutory exemptions [are] narrowly interpreted." *See Abdur-Rashid v New York City Police Dept.,* 31 NY3d 217, 225 [2018]; *M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.,* 62 NY2d 75, 80 [1984]. Thus, following the repeal of section 50-a and the concurrent amendment of the FOIL statute, this presumptive availability now applies to police disciplinary records. The current FOIL statutory scheme reflects a new, finely-honed legislative judgment as to the appropriate scope of FOIL exemptions addressing law-enforcement related privacy concerns, and it is limited to the targeted redaction of a narrow range of information. Nowhere does the statute distinguish between substantiated, unsubstantiated, unfounded, or exonerated complaints, and nowhere does it create a categorical exemption for any type of law enforcement disciplinary record.

B. FOIL's General Privacy Exemption Does Not Shield "Unfounded" or "Exonerated" Complaints From Disclosure.

While the unions are correct that "[t]he privacy concerns that motivated the enactment of CRL § 50-a have not become irrelevant due to the law's repeal" (Unions' Br at 20), the Legislature chose to address law-enforcement-specific privacy concerns by mandating that certain information be redacted rather than by creating categorical exemptions for complaints with certain dispositions. (*See* Pub Off L § 87[4-a].) Under Section 87(2)(b)'s pre-existing general privacy exemption, an agency may also redact certain information if it falls within a non-exhaustive list of categories found in POL Section 89(2)(b), including, for example, "medical or credit histories," "personal information" that is irrelevant to agency work, and certain personal contact information. Where the information requested does not fall into one of these narrow categories, courts may determine that additional information is "private" and disclosure is "unwarranted" by identifying the privacy interests at stake and balancing them against the public interest in disclosure of the information. (*The New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 485 [2005].) But this analysis is fact-specific, and "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." (*Gould v New York City Police Dept.,* 89 NY2d 267, 275 [1996].)

Pursuant to this statutory scheme, alleged police misconduct that—for many different reasons, including lackluster investigations and faulty oversight systems—may have resulted in an "unfounded" or "exonerated" disposition, does not and cannot rise

to the level of an unwarranted invasion of privacy justifying the categorical withholding of every single complaint record. In considering whether disclosure of allegedly private information would be "unwarranted," courts must keep in mind that "[p]ublic employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned." (*Schenectady PBA*, 2020 WL 7978093, at *5.) New York courts have recognized that the "proficiency of public employees in the performance of their job duties" is of "compelling interest to the public" (*Mulgrew v Bd. of Educ. of City School Dist. of City of New York,* 87 AD3d 506, 508 [1st Dept 2011]; *see also Gray Media Grp. v. City of Watertown*, 2020 WL 8464437, *3 [Jefferson County Sup Ct Aug 18, 2020] ["privacy interest" in how city manager "conducts his duties . . . should be minimal"]), even when only accusations are at issue (*see Faulkner v Del Giacco,* 139 Misc 2d 790, 794 [Albany County Sup Ct 1988] [ordering release of names of prison guards accused of inappropriate behavior]). And an invasion of privacy is not "unwarranted" if it sheds light upon the operations of government agencies or the proficiency of government employees. (*See LaRocca v Bd. of Educ. of Jericho Union Free School Dist.,* 220 AD2d 424, 429 [2d Dept 1995].)

Consistent with these key principles, since the repeal of section 50-a the vast majority of New York courts to have considered the question have held that unfounded, unsubstantiated, and exonerated police misconduct complaints do not fall within the statutory definitions of materials that can be withheld in their entirety on the basis of personal privacy claims. (*See Schenectady PBA*, 2020 WL 7978093, at *7 [holding

that police officer's disciplinary record, including "unfounded or exonerated" complaints, must be disclosed in response to a FOIL request because withholding such records "would render the legislature's repeal of CRL §50-a utterly meaningless"]; *People v Herrera,* 71 Misc 3d 1205[A], at *5 [Nassau County Dist Ct 2021] [declining to limit production to only "substantiated" records and noting that "privacy concerns should be allayed by" redactions listed in POL §§ 89[2-b] and [2-c]]; *People v Cooper,* 71 Misc 3d 559, 567 [NY County Ct 2021] ["The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available. The definition of 'law enforcement disciplinary records' is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated."]; *People v Perez,* 71 Misc 3d 1214[A] [Bronx County Crim Ct 2021] ["Moving New York State along the path in [the] quest, towards equity, transparency, and accountability was the main thrust of the Legislature's intent when . . . repealing section 50-a . . . the transparency sought could not be achieved without disclosing both substantiated and unsubstantiated records."]; *cf. Uniformed Fire Officers Assn. v Blasio,* 846 Fed Appx 25, 30 [2d Cir 2021] [rejecting police union's privacy argument and allowing public database of complaints to be published]; *Buffalo Police Benevolent Assn., Inc. v Brown,* 69 Misc 3d 998,154-55 [Erie County Sup Ct 2020] [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 decision in *Schenectady PBA* is particularly instructive. In that case, a local

news reporter made a request under FOIL for personnel and disciplinary records concerning one officer, and disciplinary records concerning all police officers employed by the City of Schenectady. (2020 WL 7978093, at *2.) The court held that, in light of the repeal of Section 50-a and the related expansion of FOIL, records of all complaints against police officers are subject to FOIL and cannot be withheld pursuant to privacy concerns, explaining in no uncertain terms that "regardless whether unsubstantiated or unfounded or exonerated or dismissed . . . the respondents herein cannot determine to deny the sought disclosure." (*Id.* at *6.)

Similarly, the petitioner's position cannot be squared with the first, and to date the only, Appellate Division precedent addressing the effect of the repeal of section 50-a on police misconduct investigation records, which affirmed a civil discovery order compelling the release of an officer's entire personnel file and complaint history. (*See Zhang v City of New York*, 152 NYS 3d 591 [1st Dept 2021].) In *Zhang*, in the context of a civil discovery dispute, the trial court found that an officer's full "personnel records from the New York City Police Department and from the Civilian Complaint Review Board" must be disclosed, without making any exception for unfounded, exonerated, or open investigations, holding that "[i]n light of the repeal of Civil Rights Law 50-a, these records are not only discoverable in court proceedings, but are subject to Freedom of Information Law Requests under Public Officers Law sections 84-90" (*Zhang*, Index No. 157088/2015, NYSCEF Doc. No. 245 [NY County Sup Ct, Nov. 9, 2020]). The First Department unanimously affirmed. (*Zhang*, 152 NYS3d at 591.)

All these decisions are consistent with the text and structure of the amended FOIL statute and with its purpose. They are also, unlike the petitioner's position, consistent with binding Court of Appeals case law prohibiting the categorical withholding of certain types of documents based on the privacy exemption and instead requiring narrowly targeted redactions. (*See Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills,* 18 NY3d 42, 46 [2011] [POL Section 87(2)(b) does not permit agencies to "refuse to produce the whole record simply because some of it may be exempt from disclosure."].)

Only two courts to examine the issue following the repeal of section 50-a and the related expansion of FOIL have found differently, and *amicus* submits that they were wrongly decided. The first is *Syracuse* (2021 WL 1804382), cited by the petitioner (*see* Pet'r's Br at 30). A close reading makes clear that, in reaching its decision, the *Syracuse* court misinterpreted the NYCLU's position to be a broad assertion that FOIL required the production of all complaints without any redactions. (*See id. at* *4 [characterizing the question to be decided as whether "the subject records should be disclosed wholesale" or withheld in their entirety].) But that was not the NYCLU's position in *Syracuse*, nor is it the NYCLU's position here. Rather, our position is simply that FOIL does not allow for the categorical denial of any group of IAB records based on disposition. Instead, if there are justified privacy concerns about certain "unfounded" or "exonerated" claims, police departments must address those through targeted

redactions instead of blanket withholding.[3]

The second decision to have broken from the majority view was *NYCLU v Rochester* (Index. No. E2020009879, NYSCEF Doc. No. 47 [Monroe County Sup Ct, Aug. 10, 2021]). But there, the court merely adopted the *Syracuse* court's conclusion in a cursory one-page discussion that did not attempt to distinguish—or even acknowledge—any of the majority of court opinions to have disagreed with *Syracuse*. It therefore suffers from the same deficiencies as the *Syracuse* opinion.

Finally, while the petitioner also cites in passing a vaguely worded July 27, 2020 Committee on Open Government ("COOG") Advisory Opinion (*see* Pet'r's Br at 30 n 7 [quoting COOG AO 19775]), he ignores a subsequent 2021 Advisory Opinion explicitly interpreting Advisory Opinion 19775 and clarifying that that opinion does *not* justify the categorical withholding of unfounded complaints. In fact, FOIL "imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder" (COOG AO 19805 [Apr. 30, 2021] [citing AO 19775]).

The NYCLU notes that COOG opinions are not binding on this Court (*see*

[3] 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. *See* 2021 WL 1804382, at *2 (relying on *LaRocca v Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424 (2d Dep't 1995), to justify the wholesale withholding of all unsubstantiated complaints, when that decision merely ordered the partial redaction of one record based on the *in camera* review of a settlement agreement concerning a school administrator).

Buffalo News, Inc. v Buffalo Enter. Dev. Corp., 84 NY2d 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"]), but even pursuant to the reasoning of the COOG on which the petitioner relies, his argument must fail. Indeed, the COOG's opinions are squarely in line with Justice Kelley's holding that "the People must assess, on an individual basis, the allegations underlying each IAB investigation, and by not doing so, it is possible the People are failing to turn over that which is required by CPL § 245.20(1)(k)(iv)." (*People v. Portillo*, 73 Misc 3d 216 [Sup Ct 2021].)

CONCLUSION

For these reasons, *amicus* the NYCLU respectfully submits that this Court should deny the petition and affirm the holding of the trial court.

Dated: November 1, 2021
New York, NY

Respectfully Submitted,

New York Civil Liberties Union Foundation, by:

s/ Daniel R. Lambright

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PRINTING SPECIFICATIONS STATEMENT

I certify in compliance with Rule 1250.8(j) of the Practice Rules of the Appellate Division that this brief was prepared on a computer using Microsoft Word, the typeface is Garamond, the font-size is 14-point type, and the text is double-spaced. The brief contains 4,775 words, excluding the sections listed in Rule 1250.8(f)(2).

Dated: November 1, 2021
New York, NY

s/Daniel R. Lambright
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