To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

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

—against—

CITY OF SYRACUSE and SYRACUSE POLICE DEPARTMENT,

Respondents-Respondents.

DOCKET NO. CA 21-00796

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QUESTIONS PRESENTED

1. Whether an agency is permitted to invoke the limited personal privacy exemption of Public Officers Law Section 87(2)(b) of FOIL as a facial, absolute bar to production of any records regarding complaints of police misconduct that have not resulted in discipline, or whether the agency is instead obliged to produce the records pursuant to the redaction scheme recently added to the FOIL statute pertaining to exactly these types of records.

2. Whether the trial court's judgment constitutes error of law when the court:

    a. issued an order that conflicts with the plain text of the FOIL statute after the repeal of Civil Rights Law § 50-a;

    b. mischaracterized the outcomes of precedential cases;

    c. substituted its own judgment for the judgment of the Legislature in resolving dispositive issues; and

    d. significantly based its judgment on arguments and grounds not briefed by the parties and not properly before it.

3. Whether denying the Petitioner-Appellant's request for attorneys' fees and litigation costs constitutes error of law.

I. PRELIMINARY STATEMENT

Petitioner-Appellant the New York Civil Liberties Union (the "NYCLU") challenges Respondents-Appellees the City of Syracuse's and Syracuse Police Department's (the "SPD's" or "Syracuse's") blanket denial of a Freedom of Information Law ("FOIL") request seeking records related to police misconduct complaints that did not result in officer discipline, or that have not yet been deemed final. In affirming that denial, the trial court ignored the plain text and purpose of the recently-amended FOIL statute, broke from the majority of courts to have decided the issue, and improperly based its judgment on arguments not before it.

For decades, police misconduct records had been shielded from disclosure by Section 50-a of the New York Civil Rights Law ("Section 50-a"). But in June 2020, the Legislature repealed Section 50-a in its entirety, made all police misconduct records presumptively public, and created a set of targeted privacy-related redaction requirements specifically for police misconduct records to address the privacy concerns of police officers. Instead of producing redacted versions of records consistent with FOIL as amended, Syracuse ignored the applicable statutory changes, issued a blanket denial, and withheld the records in full. The SPD justified its denial by invoking FOIL's longstanding general catch-all privacy exemption, arguing that production of any record related to any instance in which Syracuse

declined or failed to discipline its own officers constitutes an unwarranted invasion of privacy.

Syracuse's position is unsupported by the case law on which it relied below, is inconsistent with the 2020 FOIL amendments that addressed police-related privacy redactions, and contradicts binding Court of Appeals precedent requiring redaction instead of blanket withholding to address any additional valid privacy concerns in the records at issue. Since June 2020, multiple state and federal courts have agreed. Nevertheless, the trial court ignored those persuasive decisions, mischaracterized the relevant law and issues before it, and affirmed Syracuse's blanket denial. Accordingly, the NYCLU respectfully requests that this Court reverse and order Syracuse to produce responsive records subject to the redactions permitted under FOIL.

II. STATEMENT OF THE CASE

A. The FOIL Request, Administrative Proceedings, and the Article 78 Petition

On September 15, 2020, the NYCLU submitted a FOIL request (the "Request") to the FOIL Officer of the SPD. (*See* R.[1] 69-76.) The Request sought records relevant to police accountability in Syracuse—including information that might reveal patterns of inadequate SPD investigation into allegations of police

[1] R. refers to the Record on Appeal, which is the record provided by Petitioner-Appellant.

misconduct, inadequate internal disciplinary practices, or discriminatory policing, the existence of which would likely have been shielded by Section 50-a. Among the materials that the NYCLU sought were police disciplinary records, use of force records, records of citizen complaints about officer misconduct, and records concerning the diversity of SPD personnel.

During a meet-and-confer call on November 12, 2020, the SPD stated that they intended to produce records related only to what they called "substantiated" complaints—those that had resulted in the SPD imposing discipline on an officer—and would otherwise deny the NYCLU's request for "all law enforcement disciplinary records collected by the SPD," including police misconduct complaints that did not ultimately result in discipline.[2] The SPD's denial thus created two categories of documents that the agency categorically refused to produce in any form: records related to complaints that were fully reviewed but not "substantiated," and records related to claims that for whatever reason remained unresolved.

On November 17, 2020, the Corporation Counsel sent the NYCLU a letter memorializing its denial. (*See* R. 79-81.) The SPD categorically denied any

2 In the SPD's briefing below and in the trial court's decision, the phrase "unsubstantiated complaints" is used frequently and without precision. The denial of the Request applies to two distinct types of records–those dealing with complaints that the SPD finally considered but which did not result in the imposition of discipline on its officers ("unsubstantiated"), and those that remain open (sometimes for many years) but whose validity has not been finally determined. For convenience only, the NYCLU adopts the shorthand "unsubstantiated complaints" at times in text.

obligation to review, redact, produce, or provide access to any record related to "unfounded, unsubstantiated or open complaints" and to all Citizen Review Board records related to such complaints. (*Id*. at 79-80.) The SPD's stated bases for this denial were New York Public Officers Law ("POL") § 87 (2) (b) and a July 27, 2020 advisory opinion by the New York Committee on Open Government (the "COOG Advisory Opinion 19775"). (*See id*.) POL § 87 (2) (b), FOIL's longstanding general "invasion of privacy" provision, exempts from public disclosure information that "would constitute an unwarranted invasion of personal privacy." (Public Officers Law § 87 [2] [b].) The COOG Advisory Opinion 19775 suggested that POL § 87 (2) (b) could exempt material from certain complaint records if disclosure would "constitute an unwarranted invasion of personal privacy." (*See* R. 428-30.)

On December 10, 2020, the NYCLU filed an administrative appeal in which it challenged 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, as a categorical matter and without need for redaction, by POL § 87 (2) (b) and the COOG Advisory Opinion 19775. (*See* R. 84-88.) In its administrative appeal, the NYCLU indicated that it would be "amenable to discussing the receipt of documents redacted as permitted" by FOIL to the extent that the SPD believed the Request infringed on any legitimate privacy concerns with a proper statutory basis. (*See* R. 86 n 10.) On December 22,

2020, the Corporation Counsel issued its letter decision affirming the original FOIL response and denying the NYCLU's administrative appeal. (*See* R. 89-94.)

Following the denial of its administrative appeal, the NYCLU timely filed an Article 78 Petition. In its Petition, the NYCLU focused on a single issue: the SPD's categorical refusal to produce—even in redacted forms—any law enforcement disciplinary records if those records relate to complaints that were not "substantiated" or remain open. (R. 54.) The NYCLU's argument then, and now, is that the SPD erroneously relied on POL § 87 (2) (b) to withhold, categorically and in their entirety, all records of unsubstantiated and open complaints against officers. (*Id*. at 60-61.) In their answer, however, the SPD mischaracterized that position, representing that the NYCLU argued that the repeal of Section 50-a mandated disclosure of all unsubstantiated complaints without redaction. (R. 473.)

On April 29, 2021, the parties appeared (remotely) before the trial court in Onondaga County. At argument, the SPD introduced the flawed notion, never before mentioned as a basis for partial denial of the Request or in their papers opposing Article 78 relief, that the specific standalone statutory confidentiality protections afforded lawyers and judges in disciplinary proceedings—which do not apply to police officers—should control the court's analysis of the issues raised by the Petition. (R. 560.) Also for the first time, the court, *sua sponte*, raised the idea that a different FOIL provision—§ 87 (2) (e)—might protect the requested

documents from disclosure. (*Id*. at 545.) As correctly pointed out by the NYCLU, these issues were not properly before the court, as they were not asserted by the SPD or the City of Syracuse in denying the Request and had not even been raised in the Answer to the Article 78 Petition or the motion to dismiss. (*Id*.)

B. The Trial Court Decision

On May 5, 2021, the trial court issued an 11-page Opinion denying the NYCLU's Petition in its entirety and granting the SPD's motion to dismiss. (*See* R. 5-15.) The NYCLU now appeals from those orders.

ARGUMENT

III. STANDARDS OF REVIEW

Under CPLR 7803 (3), Article 78 relief should be granted whenever an agency determination "was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." With specific regard to FOIL, Article 78 relief is appropriate when a reviewing court determines the agency's determination was "affected by an error of law." (*Jewish Press, Inc. v N.Y. City Police Dept.*, 190 AD3d 490, 490 [1st Dept 2021], *lv to app den by* 37 NY3d 906; *see also Spring v County of Monroe*, 141 AD3d 1151, 1151 [4th Dept 2016].) In reviewing the trial court's disposition in an Article 78 proceeding, the Appellate Division reviews legal conclusions of the trial court *de novo*. (*See id*.

[conducting "de novo review applying [error of law] standard relating to the disputed documents"].)

For the following reasons, the agency's categorical refusal to review or produce any record related to any instance in which Syracuse declined or failed to discipline its own officers was affected by an error of law and should be reversed.

IV. FOIL'S LIMITED PRIVACY EXEMPTION DOES NOT JUSTIFY WITHHOLDING ALL POLICE MISCONDUCT RECORDS THAT DID NOT RESULT IN DISCIPLINE AND INSTEAD MANDATES THAT RECORDS BE PRODUCED WITH APPROPRIATE REDACTION.

A. The New York State Legislature repealed Section 50-a to make police misconduct records public and amended the FOIL to establish a detailed redaction scheme addressing officer privacy concerns.

In June 2020, well-publicized examples of police misconduct prompted the Legislature of this State to reexamine the balance between the public's interest in transparency and accountability as to the conduct of law enforcement personnel and the privacy rights of those personnel. Following extensive hearings and debate, the Legislature repealed Section 50-a and amended FOIL.

Prior to that legislative action, Section 50-a broadly insulated police personnel records from public disclosure. It created an exception to the default rule embodied in POL § 87 (2) of FOIL, which provides that "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records" unless a specific statutory exemption applies. (Public Officers Law § 87

[2].) When initially enacted, Section 50-a had imposed relatively modest limitations to the public disclosure of police misconduct records. Over time, however, the cloak it placed over official records expanded.[3] Police departments and unions increasingly utilized the provision to shield records that described the conduct and oversight 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 conduct or misconduct essentially invulnerable." (*Schenectady Police Benevolent Ass'n v City of Schenectady*, No. 2020-1411, 2020 WL 7978093 *8 [Sup Ct, Schenectady County Dec. 29, 2020].)

Last year, therefore, 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 POL § 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* 2020 McKinney's Session Law News of NY, No. 96 at § 2 [June 2020]; Public Officers Law § 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

3 Brendan J. Lyons, *Court rulings shroud records*, TIMES UNION, [Dec. 15, 2016], available at https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php [last accessed Nov. 17, 2021].

> 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.

(Public Officers Law § 86 [6].) "'Law enforcement disciplinary proceeding' means the commencement of any investigation and subsequent hearing *or* disciplinary action conducted by a law enforcement agency." (Public Officers Law § 86 [7] [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 POL § 87. Those new provisions created targeted privacy protections for a "law enforcement agency responding to a request for law enforcement disciplinary records." (2020 McKinney's Session Law News of NY, No. 96 at § 3 [June 2020]). First, the new statute 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 [POL § 89 (2-b)] prior to disclosing such record." (Public Officers Law § 87 [4-a].) POL § 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. (Public Officers Law § 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* Public Officers Law §§ 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. (Public Officers Law § 86 [9].) They do not 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. (*Id*.)

The law that governs the NYCLU's FOIL request, therefore, reflects a new, finely-honed legislative judgment as to the appropriate scope of FOIL exemptions for law-enforcement related records. Nowhere does the statute distinguish between substantiated, unsubstantiated, unfounded, or unresolved complaints, and nowhere does it create a categorical exemption for any type of law enforcement record. Most importantly, by creating a detailed new redaction scheme that applies exclusively to law enforcement records, the amended law plainly established that redaction—not categorical withholding—is the appropriate method to address privacy concerns associated with the production of those records.

B. The text and legislative history of the Section 50-a repeal bill require a presumption of disclosure of the SPD's disciplinary records, including complaints that did not result in discipline.

In New York, government records are "presumptively open for public inspection . . . unless they fall within one of the enumerated exemptions of [FOIL]." (*Gould v N.Y. City Police Dept.*, 89 NY2d 267, 274-75 [1996].) After the repeal of Section 50-a, the SPD lacked a valid basis on which to withhold production of police misconduct complaints that have not resulted in discipline. The text of the Section 50-a repeal bill established a disclosure regime for 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." (2020 McKinney's Session Law News of NY, No. 96 at § 2 [June 2020] [emphasis added].) The purpose of the repeal was to 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 WL 7978093, *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 to provide the public with access to redacted versions of all law enforcement records.[4]

The SPD's interpretation of the amended statutory scheme would enable police departments to nullify the repeal of Section 50-a by maintaining the secrecy of the vast majority of police misconduct complaints. If affirmed, the trial court's decision 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 where discipline was imposed. The repeal of Section 50-a not only empowers the public to hold individual officers accountable for past and repeat offenses, but just as importantly provides for inspection into the broader departments' policies and procedures (or lack thereof) for investigating and substantiating civilian complaints about such offenses.

For example, the fact that a complaint of police misconduct *did not* result in discipline, or remained mired for years in some murky procedural limbo, can reveal vital information to the public about failures of police accountability systems.

[4] 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 the SPD's position.

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 [June 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].)

Ignoring both the text and the purpose of the changed statutory scheme, the SPD argues that FOIL's preexisting privacy provision—POL § 87 (2) (b), which protects material that would constitute an "unwarranted invasion of privacy"—should be read to categorically bar the release of any records of misconduct complaints that did not result in the SPD disciplining its own officers. The SPD's blanket invocation of FOIL's general privacy exemption is inconsistent with the amended statute, which prescribes a redaction scheme that applies to exactly these types of records, and with Court of Appeals precedent that prohibits the categorical withholding of records pursuant to § 87 (2) (b) and mandates targeted redaction instead.

In amending POL § 87, the Legislature prescribed a balance between public access to police records and privacy. Thus, POL § 87 now requires certain identifying information to be redacted from law enforcement disciplinary records before production and permits other potentially sensitive information to be redacted at the discretion of the responding agency. (*See* Public Officers Law §§ 87 [4-a, 4-b].) Agencies and courts are obligated to respect the Legislature's reasoned determination regarding the disciplinary records that must be made publicly available and the limited categories of information that can be redacted from such records to protect the privacy of individual officers.

The NYCLU does not dispute that the SPD could be permitted to redact certain other information under the general privacy provision of POL § 87 (2) (b). For example, it may do so if that information falls within a non-exhaustive list of explicit categories found in POL § 89 (2) (b), including "medical or credit histories," "personal information" that is irrelevant to agency work, and certain personal contact information. In addition, where information does not fall into one of these enumerated categories, courts determine whether that information might be "private" and whether disclosure is "unwarranted" based on an analysis of the privacy interests at stake balanced against the competing (and often compelling) public interest in disclosure of the information. (*N.Y. Times Co. v N.Y.C. Fire Dept.*, 4 NY3d 477, 485 [2005].) This analysis is fact-specific, and "blanket exemptions

for particular types of documents are inimical to FOIL's policy of open government." (*Gould*, 89 NY2d at 275.)

Here, pursuant to this statutory scheme, the disclosure of alleged police misconduct that—for many different reasons, including possible lackluster investigations or faulty oversight systems—did not result in the SPD imposing discipline, does not and cannot rise to the level of an unwarranted invasion of privacy justifying the categorical withholding of every single complaint record. That is true especially because FOIL tilts generally in favor of disclosure: 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, *13.) New York courts thus recognize 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 Sch. Dist. of the City of N.Y.*, 87 AD3d 506, 508 [1st Dept 1995]; *see also Gray Media Grp., Inc. v City of Watertown*, No. EF2020-0862, 2020 WL 8464437, *5 [NY Sup Ct Aug 17, 2020] ["privacy interest" in how city manager "conducts his duties . . . should be minimal."].) 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 the Jericho Union Free Sch. Dist.*, 220 AD2d 424,

429 [2d Dept 1995] [finding the school district did not have a privacy interest in employee disciplinary records because employee discipline "is clearly relevant to the work of the School District."].)

Consistent with these key principles, since the repeal of Section 50-a the majority of New York courts to have considered the question have held that "unsubstantiated" 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, *17 [holding that police officer's disciplinary record, including "unsubstantiated" complaints, must be disclosed in response to a FOIL request because withholding such records "would render the [L]egislature's repeal of CRL §50-a utterly meaningless"]; *People v Herrera*, 71 Misc 3d 1205(A), 2021 WL 1247418, *5 [Nassau 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 [Erie 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), 2021 NY Slip Op 50374[U], *4 [Crim Ct, Bronx County 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 De Blasio*, 846 F. Appx 25, 30 [2d Cir. 2021] [rejecting police union's privacy argument]; *Buffalo Police Benevolent Ass'n. v Brown*, 69 Misc 3d 998, 1004 [Sup Ct, Erie County 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].)

Similarly, the SPD'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 N.Y.*, 198 AD3d 504 [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 unsubstantiated 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." (NYSCEF Doc. No. 245, decision & order, in *Zhang v City of N.Y.*, Sup Ct, NY County, Nov. 9, 2020, index No. 157088/2015.) The First Department unanimously affirmed. (*Zhang*, 198 AD3d at 504.)

These decisions are consistent with the text and structure of the amended FOIL statute and with its purpose. Unlike the SPD's position and the decision of the trial court, these decisions are also consistent with Court of Appeals authority that mandates redaction instead of categorical withholding when an agency invokes the privacy exemption. POL § 87 (2) (b) does not permit agencies to "refuse to produce the whole record simply because some of it may be exempt from disclosure" pursuant to the privacy exemption. (*Schenectady City Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011].)

C. The Committee on Open Government authority relied on by the SPD directly contradicts the SPD's position.

The SPD also argued that its categorical refusal to produce the materials at issue was supported by guidance from the Committee on Open Government ("COOG") in its Advisory Opinion 19775. (*See* R. 428-30; R. 12.) However, a more recent COOG Advisory Opinion explicitly interpreting Advisory Opinion 19775 states that that opinion does *not* justify the categorical withholding of "unsubstantiated" complaints, and that 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."

(Comm on Open Govt. FOIL-AO-19805 [2021].) In other words: even pursuant to the authority cited by the SPD, targeted redaction, as proposed by the NYCLU, not wholesale refusal to produce, is the appropriate prophylactic to be employed here.

The COOG also suggests that categorical withholding is particularly unsupportable because, if an agency wished to shield officers from any possible invasion of privacy, that agency could redact all identifying details and *anonymize* the records. (*See* Comm on Open Govt. FOIL-AO-19805 at 2.) While such extensive redactions would be a drastic means to address privacy concerns—though, of course, far less drastic than the categorical withholding that the SPD chose—the COOG is correct that, pursuant to the plain text of FOIL, an agency can no longer invoke § 87 (2) (b)'s privacy exemption if identifying details have been redacted. (Public Officers Law § 89 [2] [c] [i] ["[D]isclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted."].) The SPD's refusal to produce even anonymized versions of the disputed records cannot be squared with this basic FOIL principle.

To be clear: the NYCLU does not agree with those portions of the COOG's analysis seeming to suggest that all the names of individual officers should or must be redacted before records are produced. That result would be preferable to the SPD's blanket withholding, but it is not what the amended statute requires or permits. The Legislature notably did *not* add officer names to the list of information

that must or could be redacted from law enforcement discipline records (*see* Public Officers Law §§ 89 [2-b], [2-c]) and none of the persuasive post-50-a decisions cited in the previous section suggested that identifying information could be withheld, *see above* at Section IV.B [citing multiple cases in which officers' identities were known and the court ordered production of unsubstantiated complaint records]. COOG opinions are not binding on this Court (*see 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"]) and the NYCLU submits that officer identities are not the type of information that the SPD should be permitted to redact in the event this Court orders it to produce the disputed records.

V. THE TRIAL COURT ERRONEOUSLY RELIED ON STATUTES INAPPLICABLE TO LAW ENFORCEMENT RECORDS, ARGUMENTS NOT RAISED IN THE FOIL APPEAL, AND GROUNDS NOT BRIEFED BY THE PARTIES.

A. The trial court misconstrued the law and applicable precedent.

1. *The trial court mischaracterized persuasive authority.*

As discussed above in Section IV.B., the majority of courts to have considered whether FOIL's privacy exemption can justify the withholding of "unsubstantiated" police conduct complaints have found that it cannot.[5] The trial court explicitly

[5] Since the Supreme Court decided this case, two other courts have broken from the majority view. Neither decision is grounded in a faithful analysis of FOIL or the legislative intent in repealing

considered two of those cases (*Schenectady PBA*, 2020 WL 7978093) and (*Buffalo PBA*, 69 Misc 3d 998) but in its discussion of them the court misconstrued the controlling precedent on which they relied and, in the case of *Buffalo PBA*, misconstrued the holding itself.

The Schenectady County court's decision is particularly instructive. In *Schenectady*, the Schenectady Police Union invoked the "personal privacy" exemption of POL § 89 (2) (b) in an effort to shield the disciplinary records of a particular officer from disclosure under FOIL in their entirety. (*See* 2020 WL 7978093, *10.) That court correctly observed that, with the repeal of Section 50-a, "FOIL requests for law enforcement personnel records are now to be considered in a light that makes them available *unless* a particular record" falls within a statutory exemption. (*Id*. at *11.) Turning to the disciplinary records at issue, the *Schenectady* court found itself "hard-pressed to find that any of these particular documents fall within the types of records to which [FOIL] ascribes a right of 'personal privacy.'" (*Id*.) The court recognized that "[t]he current statutory scheme, while recognizing a

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Section 50-a. (*See* NYSCEF Doc No. 47, order, in *NYCLU v City of Rochester et al.*, Sup Ct, Monroe County, Aug. 10, 2021, index No. E2020009879 [in a one-page opinion, adopting the reasoning of the Supreme Court in this action and omitting mention of any other precedent]; NYSCEF Doc No. 38 at 4, order, in *Newsday LLC v Nassau County Police Dept.*, Sup Ct, Nassau County, Nov. 3, 2021, index No. 601813/2021 [noting that an agency asserting the personal privacy exemption "has an obligation to redact those invasive details and disclose the remainder of the records," yet affirming the agency's determination to withhold such records in full].)

privacy invasion [occasioned by the disclosure of police records], clearly does not deem it to be 'unwarranted.'" (*Id*. at *13.)

The trial court here summarily dismissed the *Schenectady* decision, and thus did not engage with *Schenectady*'s discussion of how the "current statutory scheme" (*i.e.*, the newly-amended FOIL law, with specific disclosure and redaction requirements for police misconduct records) makes police records unique. (*See id.*) Instead, it incorrectly stated that *Schenectady* had "go[ne] against the previous decisions on unsubstantiated complaints." (R. 13.) But those "previous decisions," fact-specific applications of POL § 87 (2) (b) to records of disciplinary cases against *educators*, are not in conflict with *Schenectady*. (*See* R. 8 [citing *Herald Co. v Sch. Dist. of City of Syracuse*, 104 Misc 2d 1041 [Sup Ct, Onondaga County 1980]; *LaRocca*, 220 AD2d at 424; *Western Suffolk Bd. of Co-op. Educ. Servs. v Bay Shore Union Free Sch. Dist.*, 250 AD2d 772 [2d Dept 1998]; and *Santomero v Bd. of Educ. of the Bedford Cent. Sch. Dist.*, No. 08-25405 2009 WL 6860644 [Sup Ct, Westchester County, Dec. 23, 2009]].)

FOIL requests for educational records are subject to a different statutory scheme—reflecting distinct legislative judgments—than that applicable to requests for police records. (*See, e.g.*, *Herald Co.*, 104 Misc 2d at 1045-46 [shielding records from disclosure pursuant to Education Law § 3020-a[3] [c]].) Moreover, the decisions cited by the trial court here all predate the 2020 amendments to FOIL at

issue—amendments that specifically enumerated "law enforcement disciplinary records" as part of a class of records presumptively available for disclosure and that created an entire redaction regime specific to those records. (Public Officers Law § 86 [6].) Finally, the trial court's characterization of the outcome of those cases—that "courts determined that POL § 87 (2) (b) required unsubstantiated records to be shielded," Op. at 4—is factually incorrect as to the *Herald Co.* case. In *Herald Co.*, the court declined to consider whether POL § 87 (2) (b) applied to shield the records from disclosure. (104 Misc 2d at 1047.)

The trial court's treatment of *Buffalo* was similarly flawed: the court started the *Buffalo* decision did "not support [the NYCLU's] position" (R. at 12) despite that court's holding that the repeal of Section 50-a and concurrent amendment of POL § 86 (6) *specifically authorized* the disclosure of unsubstantiated complaints. (*See Buffalo*, 69 Misc 3d at 1004 ["What petitioners find objectionable is specifically authorized by statute. POL § 86 (6) (a) defines as presumptively disclosable any record created in furtherance of a law enforcement disciplinary proceeding, including allegations, regardless of whether they were substantiated or unsubstantiated."].) The *Buffalo* court went on to hold that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated' [was] not merely a drastic remedy, [but] an inappropriate one." (*Id*.) The court below did not explain how that result was not inconsistent with its

own order affirming a blanket prohibition on the release of any and all information regarding any complaint the SPD deemed "unsubstantiated."

2. *Statutes governing complaints against lawyers and judges provide no basis for the denial of the NYCLU's request for police records.*

At oral argument, the SPD offered an argument that had not been advanced in the administrative proceedings or, indeed, their papers opposing Article 78 relief. At argument, without notice, counsel suggested that the protections afforded lawyers and judges in disciplinary proceedings should dictate, or at least inform, the privacy protections FOIL affords police misconduct records. (*See* R. 560-61.) The trial court was influenced by this untimely, novel argument, and noted that it "agree[d] with respondent in its analogy with attorney and judicial grievances," (R. 14.) Even if properly raised and considered, it was error for the trial court to base its decision on the flawed analogy posited by counsel.

The confidentiality afforded to lawyers' and judges' disciplinary proceedings is a creature of an entirely separate statutory scheme that requires sealing such records. (R. 14 [quoting Judiciary Law § 90 [1]].) Thus, lawyers' and judges' disciplinary records do not fall within the privacy exemption claimed by the SPD; rather, those records must be withheld because they are "specifically exempted from disclosure by state or federal statute." (Public Officers Law § 87 [2] [a].) Accordingly, the SPD (and the trial court) got the import of the analogy exactly

backwards: prior to its repeal, Section 50-a *did* represent the same "state or federal statute" exempting police misconduct records from disclosure. But, unlike Judiciary Law § 90 (1), *Section 50-a was repealed*. Thus, the analogy demonstrates only that the Legislature makes specific judgments about the protections properly afforded different categories of state workers and other individuals subject to FOIL, and the Legislature has chosen to treat law enforcement personnel differently than judicial officers.

That legislative judgment must be respected, and it is a sound one. The public has a unique interest in disciplinary complaints against police officers, who, unlike lawyers or judges, are routinely empowered to use physical force in the discharge of their duties. (*See* NY Senate, Floor Debate, 243rd NY Leg, Reg Sess 1846 [June 9, 2020] ["[W]ith police officers, because they are given the power to make arrests and use deadly force when necessary, they must also be held to a very high standard and oversight of their conduct."]; N.Y. Assembly, Floor Debate, 243rd N.Y. Leg Sess 99 [June 9, 2020] ["And when somebody has the power to take a human life, I believe there should be more light shining on that person and what he does."].) And with recent legislative action focused on bringing light to the potential inadequacies of a police discipline system that has historically resulted in a high number of "unsubstantiated" complaints, the public has a particularly strong interest in the records at issue in the appeal. (*See* R. 60 [mem of law in support of verified petition

citing N.Y. Assembly, Floor Debate, 243rd N.Y. Leg, Reg Sess at 98, 168-69] [June 9, 2020] [noting not one of the 4,000 complaints of police racial profiling before New York City's Civilian Complaint Review Board over the preceding two years was substantiated]; NY Senate, Floor Debate, 243rd N.Y. Leg, Reg Sess 1805-06 [June 9, 2020] [same, but giving the figure as "roughly 3,000" complaints; "Is it anyone's belief within the sound of my voice that nobody out of those 3,000 people was profiled?"]].[6])

B. The trial court's reliance on FOIL exemptions not asserted by the SPD to support denial of the FOIL request was improper and barred by Court of Appeals precedent.

In denying the Article 78 Petition, the trial court held that, in addition to POL § 87 (2) (b), POL §§ 87 (2) (e), (i), and (g) shielded some of the withheld records from disclosure. (*See* R. 15.) Those provisions exempt from disclosure law enforcement records that, if disclosed, "would interfere with law enforcement investigations or judicial proceedings," and records that constitute "inter-agency or intra-agency materials," respectively. (Public Officers Law §§ 87 [2] [e], [i], [g]; R. 15.) By introducing justifications to withhold documents that were neither raised by the SPD during the administrative phase of these proceedings nor of record on the Article 78 Petition, the trial court erred in considering and relying on them.

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6 *See also* 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 [June 2019].

The "law-enforcement" and "inter-/intra-agency" exemptions were never invoked by the SPD in rejecting the FOIL request, in denying the subsequent administrative appeal, or as a basis to seek dismissal of the Petition. (*See* R. 79-81; R. 89–94; R. 121-42; R. 439-58; R. 469-98.) The court raised the law-enforcement exemption *sua sponte* at oral argument, and the NYCLU correctly pointed out that the SPD had never invoked it, and it was not a proper basis for denying any portion of the FOIL request. (R. 545-46.) The court did not even mention the inter- and intra-agency records exemption at all during oral argument, and invoked it for the first time in issuing its decision, even though it too had never been asserted by the SPD as a basis for their denial of the FOIL request or of the NYCLU's subsequent administrative appeal. (R. 15.)

This was error. In *Madeiros v N.Y. State Educ. Dept.*, the Court of Appeals held that, in reviewing a FOIL denial, a court is not permitted to raise its own justifications for agency action; in fact, it is limited to the specific FOIL exemption invoked by the agency in that agency's administrative denial. (*See* 30 NY3d 67, 74 [2017] [prohibiting consideration of an exemption "because the Department failed to invoke that particular exemption," and holding that "judicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."]; *see also Union Carbide Corp. v*

N. Y. State Dept. of Envtl. Conservation, 189 AD3d 1805, 1809 [3d Dept 2020] [reversing Supreme Court decision and instructing the court to "judge the propriety of [the agency's] action solely by the grounds invoked by the agency"].) Here, the trial court did not just introduce two new potential grounds for denying the FOIL request; it made a finding of fact that its posited grounds would apply—asserting without analysis (much less a record basis) that "open claims" against officers would "certainly" fall into the 87 (2) (e) (i) exemption for documents interfering with law enforcement investigations or judicial proceedings and the 87 (2) (g) exemption for inter- and intra-agency materials. (R. 15.) The court's holding on these issues was speculative, improper, and foreclosed as a matter of law by *Madeiros*¸ and it therefore warrants reversal.

C. The trial court's failure to consider redaction to address valid privacy concerns was error.

The trial court's decision neither discussed the possibility of redaction nor explained why redaction would be insufficient to address any valid privacy concerns raised by the contents of the materials the SPD declined to produce in response to the FOIL Request. Instead, the court framed the question before it as only the choice between whether "the subject records should be disclosed wholesale" or withheld wholesale. (*See* R. 12.) In so doing, the court ignored the NYCLU's position that it should order the production of *redacted* records. That too was error, as the Court of Appeals has instructed that redaction be prioritized over categorical withholding.

(*See Schenectady County Soc'y for Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46 [POL § 87 (2) (b) does not permit agencies to "refuse to produce the whole record simply because some of it may be exempt from disclosure"]; *see also Gould*, 89 NY2d at 275 ["[B]lanket exemptions for particular types of documents are inimical to FOIL's policy of open government."]; *Westchester Rockland Newspapers, Inc. v Kimball*, 50 NY2d 575, 582 [1980] [upholding the lower court's decision to review the requested documents in camera and redact them]; *Scott, Sardano & Pomerantz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 298 [1985] [holding that § 89 (2) required the disclosure of redacted versions of police accident reports]; *Data Tree LLC v Romaine*, 9 NY3d 454, 464 [2007] [finding "even when a document subject to FOIL contains such private protected information [like Social Security numbers and dates of birth], agencies may be required to prepare a redacted version with the exempt material removed"].)

Mindful of this precedent, the NYCLU throughout this proceeding noted that FOIL would permit the SPD to redact any legitimately sensitive personal information that would trigger an exemption. (*See* R. 56 [observing that the law permits redaction of personal details and "technical infractions"]; R. 57-58 ["[T]he NYCLU expressed in its administrative appeal that it would be 'amenable to discussing the receipt of documents redacted as permitted under Section 89(2)(a)'"]; R. 61 n 2 ["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."]; R. 509 ["Petitioner has repeatedly acknowledged that narrow privacy exemptions exist under FOIL and therefore offered to discuss redactions that could address specific privacy concerns"]; R. 514 ["Respondents [] can invoke particular privacy exemptions found in the statute, and can suggest redactions as a potential curative measure for any statutorily grounded claims."].[7])

Limited redaction is especially appropriate as the remedy here: it would be consistent with the carefully crafted legislative balance between personal privacy and public access. The trial court erred in not ordering—and indeed not even considering—the production of documents with redaction here.

VI. THE LOWER COURT ERRED IN DENYING PETITIONER-APPELLANT'S REQUEST FOR ATTORNEYS' FEES AND COSTS.

The trial court erred in denying the NYCLU's request for attorneys' fees and litigation costs. The NYCLU is entitled to attorneys' fees and costs because the SPD failed to provide a reasonable basis for denying access to the records at issue. Courts must assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the

[7] *See also* R. 544:13-20, 546:18-25, 547:1-11, 547:23-25, 548:1-3, and 551:5-8.

records in dispute. (Public Officers Law § 89 [4] [c].)[8] An award of fees and costs is warranted where, as here, a government agency "seek[s] to broaden" a well-established FOIL exemption without a reasonable basis for doing so. (*See Rauh v DeBlasio*, 161 AD3d 120, 126 [1st Dept 2018].) Therefore, in the event this Court grants the relief sought herein, such that the NYCLU can be said to have substantially prevailed in this action, this Court should also reverse the trial court's decision to deny NYCLU's request for attorney's fees and costs.

VII. CONCLUSION

For all these reasons, the NYCLU respectfully requests that the Court reverse the trial court's orders, with instructions that the trial court grant the NYCLU's Petition, deny the SPD's motion to dismiss, enter an order requiring the SPD to comply with the NYCLU's request to produce all disciplinary records subject to the redactions permitted by the statute; and reverse the denial of NYCLU's request for attorney's fees and costs with instructions that the trial court grant the same.

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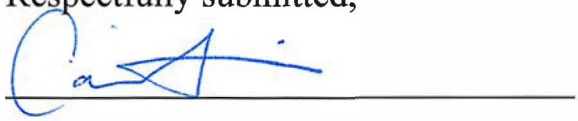
[8] Prior to 2017, POL § 89 (4) (c) merely *permitted* courts to assess attorneys' fees upon a successful challenge to the denial of a FOIL request if an agency lacked a reasonable basis for the denial. In December 2017, the New York Legislature amended § 89 (4) (c) of the Public Officers Law to *require* 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*, 161 AD3d 120, 127 [1st Dept 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 . . . ."].)

Respectfully submitted,



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