

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,

DOCKET NO.
CA 21-00796

—against—

CITY OF SYRACUSE and SYRACUSE POLICE DEPARTMENT,
Respondents-Respondents.

RECORD ON APPEAL

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Statement Pursuant to CPLR 5531

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
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

1. The index number of the case is 002602/21.
2. The full names of the original parties are as set forth above. There has been no change in the parties.
3. The action was commenced in Supreme Court, Onondaga County.
4. The action was commenced on March 18, 2021 by the filing of verified petition. A motion to dismiss was served by respondents on April 14, 2021. A verified answer to the article 78 petition with counterstatement of material facts and objections in points of law was served on April 14, 2021.
5. The nature and object of the action is the submission of a FOIL Request from New York Civil Liberties Union seeking disciplinary records, records relating to the use of force, records relating to stops/temporary detentions/field interviews, complaints about misconduct, immigration-related enforcement, to Syracuse Citizen Review Board Records, records concerning diversity in ranks, and additional policies and agreements.
6. This appeal is from a decision and order of the Honorable Gerard J. Neri, entered in favor of respondents, against petition, on May 5, 2021, which granted respondents’ motion to dismiss and thereby denied the petition.
7. The appeal is on a full reproduced record.

Petitioner's Notice of Appeal, dated May 21, 2021 (Motion Seq. 001)
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NYSCEF DOC. NO. 48

INDEX NO. 002602/2021

RECEIVED NYSCEF: 05/21/2021

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

NEW YORK CIVIL LIBERTIES UNION,

 Petitioner,

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

 v.

CITY OF SYRACUSE and SYRACUSE
POLICE DEPARTMENT,

 Respondents.

Index No.: 002602/2021
Hon. Gerard J. Neri, J.S.C.
Motion Sequence: 001

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Petitioner New York Civil Liberties Union (“Petitioner”), by its undersigned counsel, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, from the Decision and Order (the “Order”) issued in this action by the Honorable Gerard J. Neri, Justice of the Supreme Court, County of Onondaga, dated May 5, 2021 (attached hereto as Exhibit 1), which was entered in the Office of the Clerk of the County of Onondaga on May 5, 2021, denying Petitioner’s petition for relief under Article 78 of the Civil Practice Law and Rules and granting Respondents City of Syracuse and Syracuse Police Department’s motion to dismiss. Petitioner appeals from the denial of its petition for relief and from the whole of this order.

Dated: May 21, 2021
New York, New York

Respectfully submitted,

/s/ Michael Lacovara

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Decision and Order of the Honorable Gerard J. Neri Appealed From,
dated May 5, 2021, with Notice of Entry, dated May 5, 2021
(Motion Seq. 001)
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NYSCEF DOC. NO. 42

INDEX NO. 002602/2021

RECEIVED NYSCEF: 05/05/2021

At a term of the Supreme Court of the State
of New York, held in and for the County of
Onondaga, at 401 Montgomery Street,
Syracuse, New York, on April 29, 2021.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY
In the matter of the Petition of

DECISION and ORDER

NEW YORK CIVIL LIBERTIES UNION,

Index No: 002602/2021

Petitioner,

-against-

**CITY OF SYRACUSE
and SYRACUSE POLICE DEPARTMENT,**

Respondents.

On March 18, 2021, Petitioner New York Civil Liberties Union (“NYCLU”) filed a
Petition (NYSCEF Doc. No. 1) with a Notice of Petition (NYSCEF Doc. No. 2) seeking to
compel Respondents to release certain documents pursuant to Public Officers Law (“Public O.”)
§84 *et seq.*, commonly known as the Freedom of Information Law (“FOIL”), and are now
seeking enforcement via Article 78 of the CPLR for an order of mandamus. The Parties
requested a brief adjournment of the matter (NYSCEF Doc. No. 25), which was granted and the
matter was placed on the Court’s calendar for April 29, 2021 (NYSCEF Doc. No. 26). On April
14, 2021, Respondents answered the Petition (NYSCEF Doc. No. 36) and moved to dismiss the
Petition (NYSCEF Doc. No. 27, *et seq.*).

Petitioner alleges that on September 15, 2020, it submitted a FOIL request to the
Syracuse Police Department (“SPD”) seeking, *inter alia*, disciplinary records, records relating to
the use of force, records relating to stops/temporary detentions/field interviews, complaints about

misconduct, immigration-related enforcement, Syracuse Citizen Review Board Records, records concerning diversity in ranks, and additional policies and agreements (the “FOIL Request”, NYSCEF Doc. No. 5). On September 23, 2020, Respondents acknowledged receipt of the FOIL Request and stated that “our initial estimate is that the collection, review, and redaction of these records will require one (1) year from the date of this letter” (the “Acknowledgment”, NYSCEF Doc. No. 6). In November 2020, the Parties met concerning the FOIL Request, whereat Respondent allegedly committed to a “rolling production of documents partially responsive to the Request” (*see* Petition, NYSCEF Doc. No. 1, ¶2). In a letter dated November 17, 2020, Respondents denied that portion of the FOIL Request seeking disciplinary records related to complaints not yet substantiated (NYSCEF Doc. No. 7). Petitioner alleges this denial is unlawful and is the focus of this proceeding (*see* Petition, NYSCEF Doc. No. 1, ¶3). Petitioner alleges Respondents’ partial denial contravenes the plain language of the recent repeal of Civil Rights Law (“CRL”) §50-a (*ibid* at ¶6).

Petitioner notes that under FOIL, government records are “presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public O. §87(2)” (*Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 274–75 [1996]). Petitioner asserts that the repeal of CRL §50-a “commands the disclosure of all disciplinary records, regardless of status or disposition” (*see* Memorandum of Law, NYSCEF Doc. No. 3, p. 5). Petitioner alleges that the Legislature considered and rejected a narrower version of the CRL §50-a repeal which would have limited the release of documents to substantiated claims (*see* S.4213). Petitioner notes that Public O. §89 was also amended to create limited disclosure shields for certain personal information relative to police officers (*see e.g.* Public O. §§89(2-b) and 89(2-c)).

Petitioner argues that Respondents' interpretation of Public O. §87(2)(b) would nullify the repeal of CRL §50-a. Petitioner points to comments made during the debate of the bills it was proffered that the intent was specifically to look at the process, not just the results, of disciplinary proceedings (*see* N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1805-06 (June 9, 2020)). Petitioner further alleges that other courts have rejected Respondents' interpretation (*see* Schenectady PBA v. City of Schenectady, 2020 N.Y. Misc. LEXIS 10947, at 12-13 [Sup. Ct. Schenectady Cty 2020]; *see also* Buffalo Police Benevolent Ass'n. v. Brown, 134 N.Y.S.3d 150, 154 [Sup. Ct. Erie Cty. 2020]). Petitioner urges the Court to grant the relief sought.

Petitioner further argues it is entitled to attorneys' fees. Petitioner notes the Court:

“may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access” (Public O. §89(4)(c)).

Petitioner asserts that SPD has invoked a “personal privacy” exemption that was specifically rejected by the Legislature and therefore the denial was done without a reasonable basis.

Respondents answered and generally denied (*see* Answer, NYSCEF Doc. No. 36).

Respondents further move to dismiss the petition pursuant to CPLR §§7804(f) and 409(b) (NYSCEF Doc. No. 27, *et seq.*). Respondents assert that the repeal of CRL §50-a did not result in a change of FOIL resulting in police officers being treated less favorably than other public employees (*see* Affirmation, NYSCEF Doc. No. 28, ¶¶3-4). Respondents note the repeal did not change, let alone mention Public O. §87(2)(b), the personal privacy exemption (*ibid* at ¶5, *see*

also L 2020, ch. 96). Respondents cite numerous cases where courts determined that Public O. §87(2)(b) required unsubstantiated records to be shielded (*see Wester Suffolk Bd. of Co-op. Educ. Servs. V. Bay Shor Union*, 250 AD.2d 772, 773 [Second Dept. 1998]; *LaRocca v. Bd. of Educ.*, 220 A.D.2d 424, 427 [Second Dept. 1995]; *Santomero v. Board of Educ.*, 2009 WL 6860644 [Sup. Ct. Westchester Cty. 2009]; *Herald Company v. School District of City of Syracuse*, 104 Misc.2d 1041 [Sup. Ct. Onondaga Cty. 1980]). Respondents also point to an Advisory Opinion (“AO”) from the Committee on Open Government which similarly found Public O. §87(2)(b) affords public employees, including police officers, certain privacy protections in regards to “unsubstantiated and unfounded complaints” (*see* AO 19775, NYSCEF Doc. No. 31). Respondents also point to the floor debate of the repeal of CRL §50-a which they claim supports their position (*see* Assembly Floor Debate, June 9, 2020, NYSCEF Doc. No. 29, pp. 60, 170, 176, & 211).

Respondents argue the cases cited by Petitioner are irrelevant to the issues at bar. The Committee on Open Government reviewed the same cases proffered by Petitioner and dismissed them as not being on point (*see* AO 17985, NYSCEF Doc. No. 32). Respondents urge the Court grant deference to the Committee on Open Government’s interpretation of the relevant statutes (*see Forsyth v. City of Rochester*, 185 A.D.3d 1499 [Fourth Dept. 2020]). Respondents proceed to distinguish the Petitioner’s proffered cases from the facts at issue.

Respondents also argue that Petitioner failed to preserve the issue as they did not take an administrative appeal (*see Ayuso v. Graham*, 177 A.D.3d 1389, 1340 [Fourth Dept. 2019]). Respondents allege that Petitioner only appeals two issues: a) whether the SPD’s response was deficient because it did not fully articulate the reasons for the denial; and b) whether the repeal of CRL §50-a mandated disclosure of all police disciplinary records regardless of the existence of

other applicable FOIL exemptions. Respondents argue any challenge to SPD's application of Public O. §87(2)(b), outside of the Petitioner's argument concerning the repeal of CRL §50-a, was waived.

Respondents argue that their denial of Petitioner's FOIL request was reasonable in light of Respondents' reliance on the opinion from the Committee on Open Government, thus, Petitioner is not entitled to an award of attorneys' fees and costs.

Petitioner replies and notes the singular issue before the Court concerns "SPD's categorical refusal to produce enforcement disciplinary records if those records relate to complaints that were not substantiated or remain open" (Memorandum of Law, NYSCEF Doc. No. 40, p. 1). Petitioner further asserts: "All the NYCLU seeks is to hold the SPD to the strictures of FOIL in a manner consistent with (a) the text and structure of the statute, (b) other recent court decisions, and (c) the "Advisory Opinion" that the SPD invokes repeatedly" (*ibid*). Petitioner asserts Respondents have taken an overbroad approach to Public O. §§87(2)(b) and 89(2) (*ibid* at p. 2). Petitioner relies on opinions from courts which are not binding upon this Court to substantiate their opinion (*see e.g. People v. Herrera*, No. CR-004539-20NA, 2021 WL 1247418, at *5 (N.Y. Dist. Ct. Apr. 5, 2021). Petitioner argues that the privacy exceptions of Public O. §87 do not exist in a vacuum but must be read in concert with Public O. §89. Petitioner further argues that Public O. §89 defines the scope of the privacy exception (Memorandum of Law, NYSCEF Doc. No. 40, p. 6).

Petitioner further argues that the cases cited by Respondents are irrelevant to the matter at hand and "misdirection" (*ibid* at p. 7). Petitioner argues that Herald Co. v. School Dist. of City of Syracuse was decided based upon the exceptions in Public O. §87(2)(a) and (g), not Public O. §87(2)(b) (*ibid* at p. 8; *see also Herald Co.* at 1045-1047). The court in Herald Co. specifically

declined to “determine whether the records sought would constitute an unwarranted invasion of privacy if disclosed” (Herald Co. at 1047). Petitioner also argues that the legislative intent of the repeal of CRL §50-a was to open all records to public inspection, regardless of whether the claims were substantiated (*see Schenectady v. PBA, supra*). Petitioner prays this Court grant the requested relief.

The matter was heard virtually on April 29, 2021. The Parties reiterated their arguments and highlighted what they believed to be their strongest points. Petitioner denied that they waived any arguments as alleged by Respondents. Petitioner further noted the issue before the Court was the narrow question regarding the release of “unsubstantiated” records. Upon questioning by the Court, Petitioner acknowledged there were two categories, unsubstantiated and open claims, but that Petitioner generally believed both categories fell under the heading of unsubstantiated. Petitioner further argued that the Legislature defined what the privacy interests of the subject police officers were in Public O. §89.

Respondents argued that the information protected under Public O. §§89(2-b), and 89(2-c) is the minimum an agency should redact, not a maximum. A point Petitioner later conceded: that Public O. §89(2) was not an exhaustive list. Respondent further argued that the documents sought by Petitioner did not need to be itemized if they fell into a category of information protected by Public O. §87, such as unsubstantiated claims against police officers.

Respondent analogized the release of unsubstantiated claims against police officers to the attorney and judicial grievance processes. Respondent noted that in both those instances, unsubstantiated attorney and judicial grievances are not publicly released. Respondent argues the same logic applies in that unsubstantiated claims are just that, unsubstantiated and that the potential injury to an individual’s reputation outweighs the public’s right to know.

Both Parties conceded that records related to unsubstantiated and open claims may fall into more than one category of protected information, as exemplified by Herald Co.

Discussion:

Petitioner seeks an order of the Court “directing Respondents to comply with its duty under FOIL to disclose copies of all law enforcement disciplinary records collected by the SPD, regardless of disposition, sought by Petitioner in the FOIL Request dated September 15, 2020” (*see* Petition, NYSCEF Doc. No. 1, p. 10). The subject matter of the Petition is focused on Respondents’ November 17, 2020 denial letter (*see* Petition, NYSCEF Doc. No. 1, ¶3; *see also* Denial Letter, NYSCEF Doc. No. 7; *see also* Memorandum of Law, NYSCEF Doc. No. 40, p. 1). The documents denied fall into two categories: 1) matters which are “open”; and 2) closed matters which were not substantiated. Collectively, the Court considers these categories to be collectively “unsubstantiated” matters. Petitioner alleges that the repeal of CRL §50-a means that both categories of documents are now open for public review.

CRL §50-a allowed agencies to deny FOIL requests which sought personnel records of, *inter alia*, police officers (*see generally* NYCLU v. New York City Police Dept., 32 N.Y.3d 556 [2018]). “Personnel records include documents relating to misconduct or rule violations by police officers” (Matter of Columbia-Greene Beauty Sch, Inc. v. City of Albany, 121 A.D.3d 1369, 1370 [Third Dept. 2014]). CRL §50-a was repealed effective June 12, 2020 (*see* L 2020, ch. 96). In the same law, the Legislature also defined “law enforcement disciplinary records” (*see* Public O. §86(6)). The Legislature also provided that certain personal information must be redacted from any law enforcement disciplinary records which an agency releases (*see* Public O. §§87(4-a), 87(4-b), 89(2-b), and 89(2-c)). The repeal of CRL §50-a made no other changes (*see* L 2020, ch. 96).

Public O. §87(2)(b) exempts from disclosure any record or part of a record which “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article” (Public O. §87(2)(b)). As noted by Respondents, the disclosure of unsubstantiated complaints have been considered exempt as an invasion of personal privacy (*see e.g. LaRocca v. Board of Educ.*, 220 A.D.2d 424, 427 [Second Dept. 1995]). This view is also held by the Committee on Open Government (*see* AO 19775, NYSCEF Doc. No. 31). The Committee on Open Government specifically states, “there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees” (*ibid, emphasis in original*).

The cases cited by Petitioner do not support its position. For example, in Buffalo Police Benevolent Assn., Inc. v. Brown, the issue to be determined was a temporary restraining order (“TRO”) and other injunctive relief and such relief was denied as the petitioners had failed to exhaust their administrative remedies (*see Buffalo Police Benevolent Assn., Inc. v. Brown*, 69 Misc.3d 998, 1001 [Sup. Ct. Erie Cty. 2020]). While the court in Buffalo Police Benevolent Assn. declined to provide a “blanket prohibition”, in the form of a TRO, on the disclosure of certain employment records, neither did it hold that the subject records should be disclosed wholesale:

“Finally, it should be noted that the court's rulings do not mean that police disciplinary records — whether requested by the Buffalo Common Council or whether demanded by some other entity by some other method — shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including §87(2)(b)” (Buffalo Police Benevolent Assn. at 1004-1005).

Buffalo Police Benevolent Assn. does not purport to stand for the proposition that records must be released.

In Schenectady PBA, the court noted the repeal of CRL 50-a resulting in “access to law enforcement personnel records, including disciplinary history is now governed by FOIL alone” (Schenectady PBA at 10). However, our sister court in Schenectady PBA then goes against the previous decisions on unsubstantiated complaints by stating: “In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct” (Schenectady PBA at 12). The court in Schenectady PBA further relies on its interpretation of “legislative intent”:

“In our current times, our state lawmakers have seen fit to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations. They, presumably, did so in the name of opening the door to transparency, and having done so, it would be palpably improper for this Court to close it. It strikes the Court that the legislature intended not just a change in law but, rather, a change in culture. It is the Court's function to enforce the current laws in a manner that reflects that intention” (Schenectady PBA at 15).

This Court respectfully disagrees.

Legislative intent is not something easily divined from the minds of dozens of legislators.

“The traditional view is that an enacted text is itself the law. As the Supreme Court of the United States wrote in 1850: ‘The sovereign will is made known to us by legislative enactment.’ And it is made known in no other way. Or as an early-20th-century theorist put the point: ‘[w]henver a law is adopted, all that is really agreed upon is the words’” (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, §68 at p. 397, *citing* Wheeler v. Smith, 50 U.S. 55, 78 [1850], and Josef Kohler, “Judicial Interpretation of Enacted Law,” in *Science of Legal Method: Select Essays by Various Authors* 187, 196 (1917)).

Both sides have proffered examples from the legislative record which they purport to support their respective positions. All this Court can base its determination on is the final product: *the law as enacted*.

The law clearly repealed CRL §50-a (L 2020 ch. 96, §1). The law also provided added definitions (*ibid*, §2), as well as providing certain items which must be redacted prior to release (*ibid*, §§3 and 4). What the law did not provide for was altering previously existing privacy considerations. The release of unsubstantiated claims have been previously found to be prohibited by Public O. §87(2) as an unwarranted invasion of privacy (*see Matter of LaRocca supra*). When considering the repeal of CRL §50-a through the lens of previous caselaw, the Court has no choice but to deny the request for an order releasing all unsubstantiated discipline records.

The Court further agrees with respondent in its analogy with attorney and judicial grievances. For example, Judiciary Law §90(1) states in pertinent part: “all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential”. The Court of Appeals in Nichols v. Gamso (35 NY2d 35, 38 [1974]) stated: “Internal judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggests otherwise. When, however, such charges or complaints are sustained and the determinations are made public by the court with jurisdiction of the charges, it may be an abuse of discretion, as a matter of public policy, absent compelling circumstances affecting the public interest, not to make available to public scrutiny so much of the record and proceedings as bear on the charges sustained”. The logic is persuasive. Certainly there is no greater public interest in fairness and justice than our own courts and legal system which should also be weighted similarly among police officers’ and other public employees’ right to privacy including those other exemptions to disclosure under the

Public Officers Law. Contrary to Petitioner's assertions, the repeal of CRL §50-a does not require documents related to unsubstantiated claims against police officers to be released. Further, the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers.

Another point conceded by the Parties was that records related to unsubstantiated and open claims may also fall into other categories of restricted material. Public O. §87(2)(e) restricts the release of information which would interfere with law enforcement investigations or judicial proceedings. Certainly open claims would fall into this category. Further, as relied upon in Herald Co., Public O. §87(2)(g) precludes certain inter- and intra-agency documents which are not final determinations.

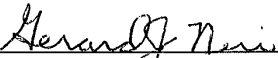
As the Court has denied the release of documents pursuant to FOIL, the request for attorneys fees and costs is moot. However, even had the Court granted the release of documents, the Respondents have demonstrated a reasonable basis to withhold the documents based upon the opinions of the Committee on Open Government and other relevant caselaw (*see* Public O. §89(4)(c)). The foregoing constitutes the decision of the Court.

NOW, THEREFORE, upon reading and filing the papers and the arguments held on April 29, 2021 with respect to the Petition and Motion, and due deliberation having been had thereon, it is hereby

ORDERED, that the motion to dismiss made by Respondents City of Syracuse and Syracuse Police Department is hereby GRANTED; and it is further

ORDERED, that the Petition is DENIED in its entirety.

Dated: May 5, 2021


HON. GERARD J. NERI, J.S.C.

ENTER.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

NOTICE OF ENTRY

Index No. 002602/2021
Hon. Gerard J. Neri

PLEASE TAKE NOTICE that the within is a true and accurate copy of the Decision and Order signed by the Honorable Gerard J. Neri, Supreme Court Justice on May 5, 2021, and entered in the Office of the Onondaga County Clerk on May 5, 2021.

Dated: May 5, 2021

HANCOCK ESTABROOK LLP

By:



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FILED: ONONDAGA COUNTY CLERK 05/05/2021 03:43 PM

NYSCEF DOC. NO. 44

INDEX NO. 002602/2021

RECEIVED NYSCEF: 05/05/2021

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Petitioner's Notice of Appeal, dated May 21, 2021 (Motion Seq. 002)
[pp. 18 - 20]

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NYSCEF DOC. NO. 51

INDEX NO. 002602/2021
RECEIVED NYSCEF: 05/21/2021

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

v.

CITY OF SYRACUSE and SYRACUSE
POLICE DEPARTMENT,

Respondents.

Index No.: 002602/2021

Hon. Gerard J. Neri, J.S.C.

Motion Sequence: 002

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Petitioner New York Civil Liberties Union (“Petitioner”), by its undersigned counsel, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, from the Decision and Order (the “Order”) issued in this action by the Honorable Gerard J. Neri, Justice of the Supreme Court, County of Onondaga, dated May 5, 2021 (attached hereto as Exhibit 1), which was entered in the Office of the Clerk of the County of Onondaga on May 5, 2021, denying Petitioner’s petition for relief under Article 78 of the Civil Practice Law and Rules and granting Respondents City of Syracuse and Syracuse Police Department’s motion to dismiss. Petitioner appeals the grant of Respondents’ motion to dismiss and from the whole of this order.

Dated: May 21, 2021
New York, New York

Respectfully submitted,

/s/ Michael Lacovara

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**Decision and Order of the Honorable Gerard J. Neri Appealed From,
dated May 5, 2021, with Notice of Entry, dated May 5, 2021
(Motion Seq. 002)
[pp. 21 - 33]**

FILED: ONONDAGA COUNTY CLERK 05/05/2021 03:43 PM

NYSCEF DOC. NO. 43

INDEX NO. 002602/2021

RECEIVED NYSCEF: 05/05/2021

At a term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on April 29, 2021.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

In the matter of the Petition of

DECISION and ORDER

NEW YORK CIVIL LIBERTIES UNION,

Index No: 002602/2021

Petitioner,

-against-

**CITY OF SYRACUSE
and SYRACUSE POLICE DEPARTMENT,**

Respondents.

On March 18, 2021, Petitioner New York Civil Liberties Union (“NYCLU”) filed a Petition (NYSCEF Doc. No. 1) with a Notice of Petition (NYSCEF Doc. No. 2) seeking to compel Respondents to release certain documents pursuant to Public Officers Law (“Public O.”) §84 *et seq.*, commonly known as the Freedom of Information Law (“FOIL”), and are now seeking enforcement via Article 78 of the CPLR for an order of mandamus. The Parties requested a brief adjournment of the matter (NYSCEF Doc. No. 25), which was granted and the matter was placed on the Court’s calendar for April 29, 2021 (NYSCEF Doc. No. 26). On April 14, 2021, Respondents answered the Petition (NYSCEF Doc. No. 36) and moved to dismiss the Petition (NYSCEF Doc. No. 27, *et seq.*).

Petitioner alleges that on September 15, 2020, it submitted a FOIL request to the Syracuse Police Department (“SPD”) seeking, *inter alia*, disciplinary records, records relating to the use of force, records relating to stops/temporary detentions/field interviews, complaints about

misconduct, immigration-related enforcement, Syracuse Citizen Review Board Records, records concerning diversity in ranks, and additional policies and agreements (the “FOIL Request”, NYSCEF Doc. No. 5). On September 23, 2020, Respondents acknowledged receipt of the FOIL Request and stated that “our initial estimate is that the collection, review, and redaction of these records will require one (1) year from the date of this letter” (the “Acknowledgment”, NYSCEF Doc. No. 6). In November 2020, the Parties met concerning the FOIL Request, whereat Respondent allegedly committed to a “rolling production of documents partially responsive to the Request” (*see* Petition, NYSCEF Doc. No. 1, ¶2). In a letter dated November 17, 2020, Respondents denied that portion of the FOIL Request seeking disciplinary records related to complaints not yet substantiated (NYSCEF Doc. No. 7). Petitioner alleges this denial is unlawful and is the focus of this proceeding (*see* Petition, NYSCEF Doc. No. 1, ¶3). Petitioner alleges Respondents’ partial denial contravenes the plain language of the recent repeal of Civil Rights Law (“CRL”) §50-a (*ibid* at ¶6).

Petitioner notes that under FOIL, government records are “presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public O. §87(2)” (Gould v. New York City Police Dep’t, 89 N.Y.2d 267, 274–75 [1996]). Petitioner asserts that the repeal of CRL §50-a “commands the disclosure of all disciplinary records, regardless of status or disposition” (*see* Memorandum of Law, NYSCEF Doc. No. 3, p. 5). Petitioner alleges that the Legislature considered and rejected a narrower version of the CRL §50-a repeal which would have limited the release of documents to substantiated claims (*see* S.4213). Petitioner notes that Public O. §89 was also amended to create limited disclosure shields for certain personal information relative to police officers (*see e.g.* Public O. §§89(2-b) and 89(2-c)).

Petitioner argues that Respondents' interpretation of Public O. §87(2)(b) would nullify the repeal of CRL §50-a. Petitioner points to comments made during the debate of the bills it was proffered that the intent was specifically to look at the process, not just the results, of disciplinary proceedings (*see* N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1805-06 (June 9, 2020)). Petitioner further alleges that other courts have rejected Respondents' interpretation (*see* Schenectady PBA v. City of Schenectady, 2020 N.Y. Misc. LEXIS 10947, at 12-13 [Sup. Ct. Schenectady Cty 2020]; *see also* Buffalo Police Benevolent Ass'n. v. Brown, 134 N.Y.S.3d 150, 154 [Sup. Ct. Erie Cty. 2020]). Petitioner urges the Court to grant the relief sought.

Petitioner further argues it is entitled to attorneys' fees. Petitioner notes the Court:

“may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access” (Public O. §89(4)(c)).

Petitioner asserts that SPD has invoked a “personal privacy” exemption that was specifically rejected by the Legislature and therefore the denial was done without a reasonable basis.

Respondents answered and generally denied (*see* Answer, NYSCEF Doc. No. 36).

Respondents further move to dismiss the petition pursuant to CPLR §§7804(f) and 409(b) (NYSCEF Doc. No. 27, *et seq.*). Respondents assert that the repeal of CRL §50-a did not result in a change of FOIL resulting in police officers being treated less favorably than other public employees (*see* Affirmation, NYSCEF Doc. No. 28, ¶¶3-4). Respondents note the repeal did not change, let alone mention Public O. §87(2)(b), the personal privacy exemption (*ibid* at ¶5, *see*

also L 2020, ch. 96). Respondents cite numerous cases where courts determined that Public O. §87(2)(b) required unsubstantiated records to be shielded (*see Wester Suffolk Bd. of Co-op. Educ. Servs. V. Bay Shor Union*, 250 AD.2d 772, 773 [Second Dept. 1998]; *LaRocca v. Bd. of Educ.*, 220 A.D.2d 424, 427 [Second Dept. 1995]; *Santomero v. Board of Educ.*, 2009 WL 6860644 [Sup. Ct. Westchester Cty. 2009]; *Herald Company v. School District of City of Syracuse*, 104 Misc.2d 1041 [Sup. Ct. Onondaga Cty. 1980]). Respondents also point to an Advisory Opinion (“AO”) from the Committee on Open Government which similarly found Public O. §87(2)(b) affords public employees, including police officers, certain privacy protections in regards to “unsubstantiated and unfounded complaints” (*see* AO 19775, NYSCEF Doc. No. 31). Respondents also point to the floor debate of the repeal of CRL §50-a which they claim supports their position (*see* Assembly Floor Debate, June 9, 2020, NYSCEF Doc. No. 29, pp. 60, 170, 176, & 211).

Respondents argue the cases cited by Petitioner are irrelevant to the issues at bar. The Committee on Open Government reviewed the same cases proffered by Petitioner and dismissed them as not being on point (*see* AO 17985, NYSCEF Doc. No. 32). Respondents urge the Court grant deference to the Committee on Open Government’s interpretation of the relevant statutes (*see Forsyth v. City of Rochester*, 185 A.D.3d 1499 [Fourth Dept. 2020]). Respondents proceed to distinguish the Petitioner’s proffered cases from the facts at issue.

Respondents also argue that Petitioner failed to preserve the issue as they did not take an administrative appeal (*see Ayuso v. Graham*, 177 A.D.3d 1389, 1340 [Fourth Dept. 2019]). Respondents allege that Petitioner only appeals two issues: a) whether the SPD’s response was deficient because it did not fully articulate the reasons for the denial; and b) whether the repeal of CRL §50-a mandated disclosure of all police disciplinary records regardless of the existence of

other applicable FOIL exemptions. Respondents argue any challenge to SPD's application of Public O. §87(2)(b), outside of the Petitioner's argument concerning the repeal of CRL §50-a, was waived.

Respondents argue that their denial of Petitioner's FOIL request was reasonable in light of Respondents' reliance on the opinion from the Committee on Open Government, thus, Petitioner is not entitled to an award of attorneys' fees and costs.

Petitioner replies and notes the singular issue before the Court concerns "SPD's categorical refusal to produce enforcement disciplinary records if those records relate to complaints that were not substantiated or remain open" (Memorandum of Law, NYSCEF Doc. No. 40, p. 1). Petitioner further asserts: "All the NYCLU seeks is to hold the SPD to the strictures of FOIL in a manner consistent with (a) the text and structure of the statute, (b) other recent court decisions, and (c) the "Advisory Opinion" that the SPD invokes repeatedly" (*ibid*). Petitioner asserts Respondents have taken an overbroad approach to Public O. §§87(2)(b) and 89(2) (*ibid* at p. 2). Petitioner relies on opinions from courts which are not binding upon this Court to substantiate their opinion (*see e.g. People v. Herrera*, No. CR-004539-20NA, 2021 WL 1247418, at *5 (N.Y. Dist. Ct. Apr. 5, 2021). Petitioner argues that the privacy exceptions of Public O. §87 do not exist in a vacuum but must be read in concert with Public O. §89. Petitioner further argues that Public O. §89 defines the scope of the privacy exception (Memorandum of Law, NYSCEF Doc. No. 40, p. 6).

Petitioner further argues that the cases cited by Respondents are irrelevant to the matter at hand and "misdirection" (*ibid* at p. 7). Petitioner argues that Herald Co. v. School Dist. of City of Syracuse was decided based upon the exceptions in Public O. §87(2)(a) and (g), not Public O. §87(2)(b) (*ibid* at p. 8; *see also Herald Co.* at 1045-1047). The court in Herald Co. specifically

declined to “determine whether the records sought would constitute an unwarranted invasion of privacy if disclosed” (Herald Co. at 1047). Petitioner also argues that the legislative intent of the repeal of CRL §50-a was to open all records to public inspection, regardless of whether the claims were substantiated (*see Schenectady v. PBA, supra*). Petitioner prays this Court grant the requested relief.

The matter was heard virtually on April 29, 2021. The Parties reiterated their arguments and highlighted what they believed to be their strongest points. Petitioner denied that they waived any arguments as alleged by Respondents. Petitioner further noted the issue before the Court was the narrow question regarding the release of “unsubstantiated” records. Upon questioning by the Court, Petitioner acknowledged there were two categories, unsubstantiated and open claims, but that Petitioner generally believed both categories fell under the heading of unsubstantiated. Petitioner further argued that the Legislature defined what the privacy interests of the subject police officers were in Public O. §89.

Respondents argued that the information protected under Public O. §§89(2-b), and 89(2-c) is the minimum an agency should redact, not a maximum. A point Petitioner later conceded: that Public O. §89(2) was not an exhaustive list. Respondent further argued that the documents sought by Petitioner did not need to be itemized if they fell into a category of information protected by Public O. §87, such as unsubstantiated claims against police officers.

Respondent analogized the release of unsubstantiated claims against police officers to the attorney and judicial grievance processes. Respondent noted that in both those instances, unsubstantiated attorney and judicial grievances are not publicly released. Respondent argues the same logic applies in that unsubstantiated claims are just that, unsubstantiated and that the potential injury to an individual’s reputation outweighs the public’s right to know.

Both Parties conceded that records related to unsubstantiated and open claims may fall into more than one category of protected information, as exemplified by Herald Co.

Discussion:

Petitioner seeks an order of the Court “directing Respondents to comply with its duty under FOIL to disclose copies of all law enforcement disciplinary records collected by the SPD, regardless of disposition, sought by Petitioner in the FOIL Request dated September 15, 2020” (*see* Petition, NYSCEF Doc. No. 1, p. 10). The subject matter of the Petition is focused on Respondents’ November 17, 2020 denial letter (*see* Petition, NYSCEF Doc. No. 1, ¶3; *see also* Denial Letter, NYSCEF Doc. No. 7; *see also* Memorandum of Law, NYSCEF Doc. No. 40, p. 1). The documents denied fall into two categories: 1) matters which are “open”; and 2) closed matters which were not substantiated. Collectively, the Court considers these categories to be collectively “unsubstantiated” matters. Petitioner alleges that the repeal of CRL §50-a means that both categories of documents are now open for public review.

CRL §50-a allowed agencies to deny FOIL requests which sought personnel records of, *inter alia*, police officers (*see generally* NYCLU v. New York City Police Dept., 32 N.Y.3d 556 [2018]). “Personnel records include documents relating to misconduct or rule violations by police officers” (Matter of Columbia-Greene Beauty Sch, Inc. v. City of Albany, 121 A.D.3d 1369, 1370 [Third Dept. 2014]). CRL §50-a was repealed effective June 12, 2020 (*see* L 2020, ch. 96). In the same law, the Legislature also defined “law enforcement disciplinary records” (*see* Public O. §86(6)). The Legislature also provided that certain personal information must be redacted from any law enforcement disciplinary records which an agency releases (*see* Public O. §§87(4-a), 87(4-b), 89(2-b), and 89(2-c)). The repeal of CRL §50-a made no other changes (*see* L 2020, ch. 96).

Public O. §87(2)(b) exempts from disclosure any record or part of a record which “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article” (Public O. §87(2)(b)). As noted by Respondents, the disclosure of unsubstantiated complaints have been considered exempt as an invasion of personal privacy (*see e.g. LaRocca v. Board of Educ.*, 220 A.D.2d 424, 427 [Second Dept. 1995]). This view is also held by the Committee on Open Government (*see* AO 19775, NYSCEF Doc. No. 31). The Committee on Open Government specifically states, “there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees” (*ibid, emphasis in original*).

The cases cited by Petitioner do not support its position. For example, in Buffalo Police Benevolent Assn., Inc. v. Brown, the issue to be determined was a temporary restraining order (“TRO”) and other injunctive relief and such relief was denied as the petitioners had failed to exhaust their administrative remedies (*see Buffalo Police Benevolent Assn., Inc. v. Brown*, 69 Misc.3d 998, 1001 [Sup. Ct. Erie Cty. 2020]). While the court in Buffalo Police Benevolent Assn. declined to provide a “blanket prohibition”, in the form of a TRO, on the disclosure of certain employment records, neither did it hold that the subject records should be disclosed wholesale:

“Finally, it should be noted that the court's rulings do not mean that police disciplinary records — whether requested by the Buffalo Common Council or whether demanded by some other entity by some other method — shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including §87(2)(b)” (Buffalo Police Benevolent Assn. at 1004-1005).

Buffalo Police Benevolent Assn. does not purport to stand for the proposition that records must be released.

In Schenectady PBA, the court noted the repeal of CRL 50-a resulting in “access to law enforcement personnel records, including disciplinary history is now governed by FOIL alone” (Schenectady PBA at 10). However, our sister court in Schenectady PBA then goes against the previous decisions on unsubstantiated complaints by stating: “In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct” (Schenectady PBA at 12). The court in Schenectady PBA further relies on its interpretation of “legislative intent”:

“In our current times, our state lawmakers have seen fit to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations. They, presumably, did so in the name of opening the door to transparency, and having done so, it would be palpably improper for this Court to close it. It strikes the Court that the legislature intended not just a change in law but, rather, a change in culture. It is the Court's function to enforce the current laws in a manner that reflects that intention” (Schenectady PBA at 15).

This Court respectfully disagrees.

Legislative intent is not something easily divined from the minds of dozens of legislators.

“The traditional view is that an enacted text is itself the law. As the Supreme Court of the United States wrote in 1850: ‘The sovereign will is made known to us by legislative enactment.’ And it is made known in no other way. Or as an early-20th-century theorist put the point: ‘[w]henver a law is adopted, all that is really agreed upon is the words’” (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, §68 at p. 397, *citing* Wheeler v. Smith, 50 U.S. 55, 78 [1850], and Josef Kohler, “Judicial Interpretation of Enacted Law,” in *Science of Legal Method: Select Essays by Various Authors* 187, 196 (1917)).

Both sides have proffered examples from the legislative record which they purport to support their respective positions. All this Court can base its determination on is the final product: *the law as enacted*.

The law clearly repealed CRL §50-a (L 2020 ch. 96, §1). The law also provided added definitions (*ibid*, §2), as well as providing certain items which must be redacted prior to release (*ibid*, §§3 and 4). What the law did not provide for was altering previously existing privacy considerations. The release of unsubstantiated claims have been previously found to be prohibited by Public O. §87(2) as an unwarranted invasion of privacy (*see Matter of LaRocca supra*). When considering the repeal of CRL §50-a through the lens of previous caselaw, the Court has no choice but to deny the request for an order releasing all unsubstantiated discipline records.

The Court further agrees with respondent in its analogy with attorney and judicial grievances. For example, Judiciary Law §90(1) states in pertinent part: “all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential”. The Court of Appeals in Nichols v. Gamso (35 NY2d 35, 38 [1974]) stated: “Internal judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggests otherwise. When, however, such charges or complaints are sustained and the determinations are made public by the court with jurisdiction of the charges, it may be an abuse of discretion, as a matter of public policy, absent compelling circumstances affecting the public interest, not to make available to public scrutiny so much of the record and proceedings as bear on the charges sustained”. The logic is persuasive. Certainly there is no greater public interest in fairness and justice than our own courts and legal system which should also be weighted similarly among police officers’ and other public employees’ right to privacy including those other exemptions to disclosure under the

Public Officers Law. Contrary to Petitioner's assertions, the repeal of CRL §50-a does not require documents related to unsubstantiated claims against police officers to be released. Further, the public interest in the release of unsubstantiated claims do not outweigh the privacy concerns of individual officers.

Another point conceded by the Parties was that records related to unsubstantiated and open claims may also fall into other categories of restricted material. Public O. §87(2)(e) restricts the release of information which would interfere with law enforcement investigations or judicial proceedings. Certainly open claims would fall into this category. Further, as relied upon in Herald Co., Public O. §87(2)(g) precludes certain inter- and intra-agency documents which are not final determinations.

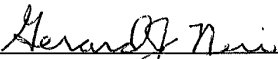
As the Court has denied the release of documents pursuant to FOIL, the request for attorneys fees and costs is moot. However, even had the Court granted the release of documents, the Respondents have demonstrated a reasonable basis to withhold the documents based upon the opinions of the Committee on Open Government and other relevant caselaw (*see* Public O. §89(4)(c)). The foregoing constitutes the decision of the Court.

NOW, THEREFORE, upon reading and filing the papers and the arguments held on April 29, 2021 with respect to the Petition and Motion, and due deliberation having been had thereon, it is hereby

ORDERED, that the motion to dismiss made by Respondents City of Syracuse and Syracuse Police Department is hereby GRANTED; and it is further

ORDERED, that the Petition is DENIED in its entirety.

Dated: May 5, 2021


HON. GERARD J. NERI, J.S.C.

ENTER.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

NOTICE OF ENTRY

Index No. 002602/2021
Hon. Gerard J. Neri

PLEASE TAKE NOTICE that the within is a true and accurate copy of the Decision and Order signed by the Honorable Gerard J. Neri, Supreme Court Justice on May 5, 2021, and entered in the Office of the Onondaga County Clerk on May 5, 2021.

Dated: May 5, 2021

HANCOCK ESTABROOK LLP

By:



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FILED: ONONDAGA COUNTY CLERK 05/05/2021 03:43 PM

NYSCEF DOC. NO. 45

INDEX NO. 002602/2021

RECEIVED NYSCEF: 05/05/2021

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Notice of Petition and Verified Petition, dated March 18, 2021
[pp. 34 - 49]

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM
 NYSCEF DOC. NO. 2

INDEX NO. 002602/2021
 RECEIVED NYSCEF: 03/18/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

v.

CITY OF SYRACUSE and SYRACUSE
 POLICE DEPARTMENT,

Respondents.

INDEX NO: _____

NOTICE OF VERIFIED PETITION

PLEASE TAKE NOTICE that upon the Verified Article 78 Petition of New York Civil Liberties Union, sworn to on March 18, 2021, the Memorandum of Law in Support of the Verified Petition, the Affirmation of Michael Lacovara, and the exhibits attached thereto, an application will be made to this Court, by the undersigned attorneys for the New York Civil Liberties Union (“Petitioner”), at the Courthouse located at 401 Montgomery Street, Syracuse, NY 13202, on April 14, 2021 at 9:30 a.m., for an order and judgment, pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), granting the relief requested in the Verified Petition as follows:

(a) Pursuant to CPLR Section 7806, directing the City of Syracuse and the Syracuse Police Department (the “SPD”) (together, “Respondents”) to comply with their duty under the Freedom of Information Law (“FOIL”) and disclose copies of all law enforcement disciplinary records collected by the SPD, regardless of the disposition of the applicable disciplinary

proceedings or initiating complaints, sought by Petitioner in its FOIL request dated September 15, 2020;

(b) Awarding reasonable attorneys' fees and litigation costs as allowed under CPLR Sections 8101 and 8601 and New York Public Officers Law Section 89(4)(c); and

(c) Granting other such relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR Section 7804(c), any answer and supporting affidavits shall be served and filed at least five (5) days before the return date of this application, and any reply shall be served and filed at least one day before the return date of this application.

PLEASE TAKE FURTHER NOTICE that Onondaga County is designated as the venue of this Proceeding pursuant to CPLR Sections 7804(b) and 506(b), as it is the County in which the material events giving rise to this proceeding took place.

Dated: March 18, 2021
New York, New York

Respectfully submitted,

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NYSCEF DOC. NO. 2

INDEX NO. 002602/2021

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NYSCEF DOC. NO. 1

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

v.

CITY OF SYRACUSE and SYRACUSE
POLICE DEPARTMENT,

Respondents.

INDEX NO: _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. Following the June 2020 repeal of Civil Rights Law (“CRL”) Section 50-a, which had shielded certain police records from disclosure, thus insulating law enforcement departments from public accountability, the New York Civil Liberties Union (the “NYCLU” or “Petitioner”) filed a request pursuant to New York Public Officers Law Section 84 *et seq.* (the “Freedom of Information Law” or “FOIL”) to the Syracuse Police Department (the “SPD”). That request (the “Request”), submitted on September 15, 2020, in part sought records that might reveal patterns of discriminatory policing. A true and correct copy of the Request is attached as Exhibit A. On September 23, 2020, the City of Syracuse (together with the SPD, “Respondents”) replied to the Request, informing the NYCLU it would take up to one full year to respond to even those aspects of the Request to which the SPD did not object. A true and correct copy of the Respondents’ September 23 letter is attached as Exhibit B.

2. After a meet and confer among counsel for Petitioner and Respondents in November 2020, Respondents committed to a rolling production of documents partially responsive to the Request; Respondents anticipate that their response will not be completed until July 2021, ten months after the Request was submitted.

3. Respondents also categorically denied the NYCLU's request for officer disciplinary records and instead sought to produce materials associated only with complaints that were both finally adjudicated and substantiated. A true and correct copy of the denial is attached as Exhibit C. That denial—the focus of this petition—is unlawful.

4. By precluding the disclosure of complaints that remain “open,” which may be due to unilateral decisions by the SPD as to how and when to advance the disciplinary process, and disclosure of complaints as to which the SPD concluded the alleged misconduct did not occur, the SPD has created an exception that allows it to selectively withhold disciplinary records for certain matters.

5. This Article 78 proceeding seeks to compel the SPD to respond to the FOIL Request by the NYCLU because Respondents inappropriately have denied the NYCLU's request under FOIL for SPD disciplinary records, based solely on the SPD's own assertion that the conduct, which warranted creating certain disciplinary records, has not been “substantiated.” The records requested are crucial not only to inform the public understanding of the effects of the SPD's policies and practices on the Syracuse community, but also to encourage increased transparency and police accountability, as the Legislature intended when it repealed CRL Section 50-a.

6. In denying the NYCLU's request, the SPD ignored the plain language of the statute, as well as its legislative history, which support the NYCLU's right to the requested records. Furthermore, every court that has considered the issue has rejected the SPD's reasoning and

position. See *Uniformed Fire Officers Ass'n v. de Blasio*, No. 20-2789-cv(L), 2021 U.S. App. LEXIS 4266 (2d Cir. Feb. 16, 2021); *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 N.Y. Misc. LEXIS 10947 (N.Y. Sup. Ct. Dec. 29, 2020).

7. The NYCLU promptly responded to the SPD on November 30, 2020 to inform Respondents that it disagreed with the SPD's analysis that the Public Officers Law ("POL") and a July 27, 2020 advisory opinion from the New York Committee on Open Government (the "July 27 Advisory Opinion"), as Respondents claimed, supported the SPD's decision to withhold materials relevant to complaints that had not been finally adjudicated or substantiated. In that letter, the NYCLU alerted the SPD that it planned to file an administrative appeal. A true and correct copy of the November 30 letter is attached as Exhibit D.

8. The SPD did not respond to the NYCLU's November 30, 2020 letter.

9. On December 10, 2020, the NYCLU timely and properly appealed the SPD's partial denial of the Request, via a letter to the Office of Corporation Counsel for the City of Syracuse ("Corporation Counsel"), and to the Office of Syracuse Mayor Ben Walsh. A true and correct copy of that appeal is attached as Exhibit E.

10. On December 22, 2020, the Corporation Counsel denied the NYCLU's FOIL appeal and affirmed the SPD's original FOIL response. A true and correct copy of that denial is attached as Exhibit F.

11. Having exhausted its administrative remedies, the NYCLU now seeks judicial relief to require Respondents to produce records responsive to its request for all law enforcement disciplinary records, including any unsubstantiated complaints.

12. Petitioner also seeks an award of attorneys' fees and costs in light of Respondents' failure to adhere to FOIL.

VENUE

13. Pursuant to Civil Practice Law and Rules (“CPLR”) Sections 7804(b) and 506(b), venue in this proceeding lies in Onondaga County, the judicial district in which Respondents took the action challenged here and in which the offices of Respondents are located.

PARTIES

14. Petitioner, the New York Civil Liberties Union, is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For almost seventy years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

15. Respondent City of Syracuse is a public body subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

16. Respondent Syracuse Police Department is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 84 *et seq.*

FACTUAL BACKGROUND

17. Until June 2020, Civil Rights Law Section 50-a posed a substantial obstacle to transparency in the conduct of law enforcement in the State of New York. That statute generally excluded from disclosure under FOIL police “personnel records used to evaluate performance toward continued employment or promotion” that were otherwise presumptively public.

18. Although the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope quickly expanded, with police departments and unions utilizing the provision to shield the conduct of law enforcement personnel from public scrutiny and civilian oversight.

19. Nationwide protests following the police killing of George Floyd in Minnesota

encouraged lawmakers to reexamine the public's interest in enhanced law enforcement transparency and accountability. On June 12, 2020, the repeal of Section 50-a became law. The text of the repeal bill permits disclosure of disciplinary records, without exceptions or carve-outs related to the status or ultimate disposition of disciplinary proceedings. The law states:

Section 86 of the public officers law is amended by adding four new subdivisions . . . to read as follows: “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 . . . (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. “Law enforcement disciplinary proceeding” means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

S. 8496, 243rd Leg., Reg. Sess. § 2 (N.Y. June 12, 2020) (emphasis added).

20. The extensive legislative history of the repeal shows that, consistent with the language of the statute, the legislature broadly defined “law enforcement disciplinary records” to include the “complaints, allegations and charges[,] . . . the name of the employee complained of or charged; the transcript of any disciplinary trial or hearing . . . [and] the disposition of any disciplinary proceeding.” *Id.*

21. Access to records related to unsubstantiated complaints was addressed during the Assembly debate on the repeal: the bill's sponsor noted that the proposed legislation did not distinguish between substantiated and unsubstantiated complaints; he explicitly recognized the value of unsubstantiated complaints as a potential means to establish patterns of misconduct and

to identify officers “who might be a risk to the public.” N.Y. Assembly Debate on Senate Bill S. 8496, June 9, 2020 at 61, 100. Moreover, opponents to the bill also recognized that with the repeal all disciplinary records would be open to the public regardless of the disposition of the officer disciplinary proceeding. *Id.* at 61-67.

22. Further, the legislature considered—and rejected—competing, narrower proposals that allowed for the release of narrow categories of records only in situations in which allegations had been substantiated. *See* S. 4213, 243rd Leg., Reg. Sess. (N.Y. Mar. 4, 2019).

23. Despite this push for transparency in New York, and the legislature’s decision to define law enforcement disciplinary records broadly, Respondents continue to withhold crucial information regarding potential police misconduct from the public by denying the Request in the manner challenged here.

The NYCLU’s FOIL Request to the SPD

24. The NYCLU submitted a FOIL request to the SPD on September 15, 2020, seeking records related to the SPD’s conduct that had previously been shielded from public scrutiny by Section 50-a. The request sought documents related to the SPD’s disciplinary records, use of force, stops, civilian complaints, policies, investigative reports, diversity, trainings, and collective bargaining agreements. *See* Exhibit A.

25. Corporation Counsel acknowledged the NYCLU’s request in a letter dated September 23, 2020. Its letter stated that “[the SPD’s] initial estimate is that the collection, review, and redaction of these records will require one (1) year from the date of this letter.” The letter did not clarify whether the City was granting or denying any part of the request. *See* Exhibit B.

26. Following that acknowledgement, the NYCLU’s counsel sent a letter to the Corporation Counsel on September 28, 2020 asking to meet and confer regarding the scope of the

FOIL request. A true and correct copy of the September 28 letter from the NYCLU's counsel is attached as Exhibit G.

27. On October 14, 2020, the Corporation Counsel replied via email to the September 28 letter. In its response, the Corporation Counsel restated its view that the Request would impose substantial "administrative burden[s]" on Syracuse, but again did not state whether the City was granting or denying anything in the Request or whether the City would make any substantive determination earlier than one year from the September 23 letter. A true and correct copy of the City's communication is attached as Exhibit H.

28. In a call on November 12, 2020 between the NYCLU's counsel and counsel for Respondents, Respondents made clear for the first time that they intended to produce disciplinary records related only to "substantiated" complaints and were denying, in part, the NYCLU's request for "all law enforcement disciplinary records collected by the SPD." By agreeing to provide only "substantiated" complaints, the SPD refused to provide all records related both to complaints that are fully reviewed but not "substantiated," and to all claims that remain open and unresolved.

29. On November 17, 2020, Respondents sent the NYCLU a letter providing anticipated dates of completion for the department's rolling production of documents in response to the NYCLU's Request. In their letter, Respondents again denied the NYCLU's request for all disciplinary records, agreeing only to produce disciplinary records related to "substantiated complaints and other misconduct" and denying the request as related to "unfounded or unsubstantiated [complaints], or those that are still open." *See* Exhibit C.

30. In denying the NYCLU's request, the SPD relied, in part, on the July 27 Advisory Opinion, which was prepared at the request of the City of Syracuse to outline the City's obligations following the repeal of Section 50-a. That opinion contemplated withholding unsubstantiated or

unfounded complaints where disclosure would “constitute an unwarranted invasion of personal privacy.” Comm. on Open Gov’t FOIL AO 19775 (July 27, 2020).

31. The NYCLU’s counsel responded to the November 17 letter on November 30. In its response, the NYCLU noted its intent to file an administrative appeal, as provided by POL Section 89(4)(a). *See* Exhibit D.

32. The administrative appeal was lodged with the Office of Corporation Counsel on December 10, 2020. *See* Exhibit E.

33. The NYCLU’s administrative appeal was denied in a letter from the Office of Corporation Counsel dated December 22, 2020. *See* Exhibit F.

34. On February 1, 2021, the NYCLU’s counsel sent Respondents a letter further explaining the NYCLU’s position, and citing to recent and relevant authority in New York that was contrary to Respondents’ position. A true and correct copy of the February 1 letter from the NYCLU’s counsel is attached here as Exhibit I.

35. Having now exhausted its administrative remedies, the NYCLU files this Article 78 Petition seeking production of all of the SPD’s disciplinary records from 2014 to 2020, regardless of disposition.

Respondents’ Rolling Production

36. Respondents’ November 17 letter laid out anticipated completion dates for most of the categories from the Request and stated Respondents’ intent to produce documents on a rolling basis. *See* Exhibit C. Respondents continue to make rolling productions of documents responsive to portions of the NYCLU’s Request. The NYCLU reserves all administrative and judicial remedies should the NYCLU determine any further aspect of the SPD’s response to be deficient.

CAUSE OF ACTION UNDER ARTICLE 78

37. Petitioner repeats and realleges paragraphs 1 through 35 hereof as if fully set forth herein.

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

39. Petitioner has a clear right to production of the disciplinary records responsive to the section of the Request concerning disciplinary records.

40. Absent a statutory or other valid basis to withhold materials, Respondents' obligations under FOIL to respond to a FOIL request for records reasonably described, respond to a FOIL administrative appeal, and produce documents are mandatory, not discretionary.

41. There is no statutory or other valid basis on which Respondents can refuse to produce the materials subject to this Petition.

42. Petitioner exhausted its administrative remedies with Respondents as required by POL Section 89(4)(a) when it appealed Respondents' partial denial of its initial request and the appeal was denied.

43. Petitioner has no other remedy at law.

44. This Petition is timely under CPLR Section 217 as it is filed within four months of the City's denial of the NYCLU's administrative appeal on December 22, 2020.

REQUESTED RELIEF

WHEREFORE, Petitioner seeks judgment:

- (1) Pursuant to CPLR Section 7806, directing Respondents to comply with its duty under FOIL to disclose copies of all law enforcement disciplinary records collected by the SPD, regardless of disposition, sought by Petitioner in the FOIL Request dated September 15, 2020;
- (2) Awarding reasonable attorneys' fees and litigation costs as allowed under CPLR Sections 8101 and 8601 and POL Section 89(4)(c); and
- (3) Granting such other relief as the Court deems just and proper.

Dated: March 18, 2021
New York, New York

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

v.

CITY OF SYRACUSE and SYRACUSE
POLICE DEPARTMENT,

Respondents.

INDEX NO: _____

VERIFICATION

State of New York)
) ss.:
County of New York)

LISA LAPLACE hereby affirms under the penalties of perjury that:

1. I am a Senior Staff Attorney and Counsel for Pro Bono at New York Civil Liberties Union, the petitioner in this Article 78 proceeding.
2. I have read the petition and know the contents to be true, except to those statements made on information and belief, which I believe to be true.

DATED: March 18, 2021
 New York, New York


Lisa Laplace

Sworn to and subscribed before me,
this 18th day of March 2021

Notary Public

CHRISTINE E THOMSON
Notary Public - State of New York
NO. 01TH4636872
Qualified in Nassau County
Certificate filed in Nassau and New York Counties
My Commission Expires Aug 3, 2021

Petitioner's Memorandum of Law in Support of Verified Petition,
dated March 18, 2021

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

<p>NEW YORK CIVIL LIBERTIES UNION,</p> <p>Petitioner,</p> <p>vs.</p> <p>CITY OF SYRACUSE and SYRACUSE POLICE DEPARTMENT,</p> <p>Respondents.</p>
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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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I. PRELIMINARY STATEMENT

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

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

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

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

II. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Repeal of Section 50-a

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

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

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

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

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

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

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

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

B. Background to the Petition

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The NYCLU is Entitled to Attorneys' Fees

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

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

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

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

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

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

IV. CONCLUSION

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

DATED: New York, New York
March 18, 2021

By: /s/ Michael Lacovara
LATHAM & WATKINS LLP
Michael Lacovara
James Farrell
Douglas Yatter
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Howard Bruno
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885 Third Avenue
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NEW YORK CIVIL LIBERTIES UNION
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Robert Hodgson
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Telephone: (212) 607-3300

*Counsel for Petitioner the New York Civil Liberties
Union*

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Michael Lacovara, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 3,313 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: New York, New York
March 18, 2021

/s/ Michael Lacovara
Michael Lacovara

**Affirmation of Michael Lacovara, for Petitioner, in Support of
Verified Petition, dated March 18, 2021**

[pp. 66 - 68]

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

NYSCEF DOC. NO. 4

INDEX NO. 002602/2021

RECEIVED NYSCEF: 03/18/2021

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

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

v.

CITY OF SYRACUSE and SYRACUSE
POLICE DEPARTMENT,

Respondents.

INDEX NO: _____

**AFFIRMATION OF
MICHAEL LACOVARA**

I, MICHAEL LACOVARA, an attorney duly admitted to practice before the Courts of the State of New York and not a party to the above-captioned action, hereby affirm the following to be true, under penalty of perjury, pursuant to New York Civil Practice Law & Rules Section 2106:

1. I am a partner at the law firm of Latham & Watkins LLP, located at 885 Third Avenue, New York, New York 10022, counsel for the New York Civil Liberties Union (“Petitioner”) in the above-captioned litigation. I make this affirmation in support of Petitioner’s Verified Petition.

2. Attached hereto as Exhibit A is a true and correct copy of the FOIL request submitted by Petitioner to the Syracuse Police Department (the “SPD”) on September 15, 2020 (the “Request”).

3. Attached hereto as Exhibit B is a true and correct copy of the SPD’s letter response to the Request, dated September 23, 2020.

4. Attached hereto as Exhibit C is a true and correct copy of the letter from the SPD, dated November 17, 2020, denying Petitioner’s Request as related to unfounded, unsubstantiated and open complaints, and setting forth a rolling production schedule for the remaining requested documents.

5. Attached hereto as Exhibit D is a true and correct copy of the letter from the Petitioner,

dated November 30, 2020, acknowledging the SPD's partial denial of Petitioner's Request and noting its intent to file an administrative appeal.

6. Attached hereto as Exhibit E is a true and correct copy of the administrative appeal of the SPD's partial denial of Petitioner's Request, lodged with the Office of Corporation Counsel for the City of Syracuse on December 10, 2020.

7. Attached hereto as Exhibit F is a true and correct copy of the letter from the Office of Corporation Counsel for the City of Syracuse, dated December 22, 2020, denying the Petitioner's administrative appeal.

8. Attached hereto as Exhibit G is a true and correct copy of the letter from the Petitioner to the SPD, dated September 28, 2020, requesting a meet and confer.

9. Attached hereto as Exhibit H is a true and correct copy of the email from the SPD, dated October 14, 2020, agreeing to a conferral with the SPD.

Dated: March 18, 2021
New York, New York

/s/ Michael Lacovara

Michael Lacovara

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Michael Lacovara, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Affirmation complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 369 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: New York, New York
March 18, 2021

/s/ Michael Lacovara
Michael Lacovara

**Exhibit A to Lacovara Affirmation-
FOIL Request to Syracuse Police Department, dated September 15, 2020
[pp. 69 - 76]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

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NYSCEF DOC. NO. 5

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September 15, 2020

FOIL Officer
Syracuse Police Department
511 South State Street
Syracuse, NY 13202

Dear FOIL Officer,

On behalf of the New York Civil Liberties Union (“NYCLU”), we respectfully submit this request for records to the Syracuse Police Department (the “SPD”) under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 85, *et seq.* The NYCLU is deeply concerned about long-standing and pervasive racially biased policing throughout the state. For decades, documents bearing on these practices have been hidden behind N.Y. Civil Rights Law Section 50-a, a state law that the legislature recently repealed to encourage transparency and police accountability. The NYCLU now is moving forward with a project to investigate disciplinary records and other police records to identify patterns of discriminatory policing, including (but not limited to) records that had previously been kept secret under Section 50-a. To this end, we submit this FOIL request for the records requested below.

Unless otherwise indicated, the time period for all documents requested below is January 1, 2000 through the present. If records from January 1, 2000 are not available, we seek records from the earliest date after January 1, 2000 that such records are available.

A) Disciplinary Records

- 1) We request copies of all law enforcement disciplinary records collected by the SPD. For purposes of this request, “law enforcement disciplinary records” means “any record created in furtherance of a law enforcement disciplinary proceeding” as defined in Section 86, subdivision 6 of the Public Officers Law (the “Act”), 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 or other record of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
 - d. The disposition of any disciplinary proceeding; and

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- e. The final written opinion or memorandum supporting the disposition and, if applicable, the discipline imposed, including the agency's complete factual findings and analysis of the conduct and, if applicable, appropriate discipline of the covered employee.
- 2) Please produce all documents related to any trainings officers are required to complete regarding the handling of disciplinary records.
- 3) Please provide documents demonstrating the measures that SPD has in place to ensure that all officers complete the required trainings, including documents sufficient to show, per calendar year, the number and percentage of officers who have failed to complete any required trainings during the time-period set out in this request.

Pursuant to Section 86, subdivision 7 of the Act, a "law enforcement disciplinary proceeding" is defined as "the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency."

If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and the reason why.

B) Use of Force

We request copies of records collected by the SPD regarding use of force, including:

- 1) All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning officers' use of force, including any de-escalation strategies and tactics. This request includes, but is not limited to, any standalone policies addressing the use of firearms or Tasers.
- 2) All policies and guidelines concerning record-keeping requirements associated with the use of force, including the length of time those records must be retained by the SPD in an electronic database or in any other format. This request includes reporting and review that occurs both on-scene and after the incident.
- 3) Examples of all forms or reports (i.e., blank forms or reports) used to document uses of force, including but not limited to use of force reports and firearms discharge reports.
- 4) All records documenting uses of force that fall within this request's time period. If available, we request that this information be provided to us in electronic or database format. Please provide the names of employees involved in all incidents related to use of force.
- 5) All records sufficient to identify, by name and rank, every officer involved in a police-involved death¹ of a civilian, including all investigative reports about the incident.

¹ As used herein, the term "police-involved death" includes, but is not limited to: (1) any civilian death that is related to, or occurs during, the course of police "use of force" (as defined herein)—or threatened use of force; (2) any civilian death that occurs in the custody of the police; or (3) any

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- 6) All documents related to trainings that officers are required to complete regarding the use of force.
- a. As part of this request, please provide documents demonstrating the policies, guidelines, and procedures to ensure that all officers complete the required trainings.
 - b. Please also provide documents sufficient to show, per each calendar year, the number and percentage of officers who have failed to complete any required trainings during the time period set out in this request.

For purposes of this section, the term “use of force” means:

- The use of weapons such as firearms, Tasers, nightsticks, tactical batons, or the use of a chemical agent (e.g., mace, pepper spray) capable of causing discomfort, or pain.
- The use of bodily force that includes any degree of physical contact, such as striking, kicking, pushing, punching, biting, choking, the use of pressure point controls, and physical restraints, or the use of bicycles or other vehicles to physically control people’s movement.

If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and the reason why.

C) Stops/Temporary Detentions/Field Interviews

We request copies of records collected by the SPD regarding stops, temporary detentions, and field interviews, including:

- 1) All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning stops and/or field interviews.
- 2) All policies and guidelines concerning record-keeping requirements for stops and/or field interviews, including the length of time these records must be retained by the SPD in an electronic database or in any other format.
- 3) Examples of all forms or reports (i.e., blank forms or reports) that officers are required to complete to document stops and/or field interviews.
- 4) All records documenting stops and/or field interviews that fall within this request’s time period. If available, we request that this information be provided to us in electronic or database format. Please provide the names of all employees involved in incidents regarding stops, temporary detentions, or field interviews.

civilian death that is related to, or occurs during, the course of a “stop” (as defined herein), a field interview, or when fleeing from the police.

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- 5) All documents related to trainings that officers are required to complete regarding stops, temporary detentions, and field interviews.
 - a. As part of this request, please provide documents demonstrating the policies, guidelines, and procedures to ensure that all officers complete the required trainings.
 - b. Please also provide documents sufficient to show, per calendar year, the number and percentage of officers who have failed to complete any required trainings during the time period set out in this request.

For purposes of this section, the term “stops” means temporary detentions of pedestrians or vehicles by police officers employed by the SPD.

If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and why.

D) Complaints² about Misconduct

We request copies of records collected by the SPD regarding complaints about employee misconduct, including:

- 1) All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning the receipt, investigation, and adjudication of complaints alleging misconduct by the SPD or officers employed by the SPD.
- 2) All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy regarding disciplinary and monitoring systems, such as early-warning systems, for police officers.
- 3) All materials produced for the purpose of educating the public on the SPD’s complaint process.
- 4) Examples of all forms made available to members of the public to file a complaint against the SPD or specific officers.
- 5) Documents sufficient to show the total number of complaints per calendar year within this request’s time period, broken down by the subject of the complaint (categories used internally to categorize complaints are sufficient for the purposes of this request), including, but not limited to, complaints about racial profiling, the use of force, and stops or temporary detentions.

² Complaints in this section shall be defined as all categories of complaints, regardless of the outcome, and shall include all substantiated, unsubstantiated, or open complaints.

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- a. For each category of complaints, please also provide the data broken down by the outcome (e.g., substantiated, unsubstantiated, or open) of the complaints, and broken down by the race and gender of the complainant;
 - b. For substantiated complaints in each category, please also identify what disciplinary action was taken, if any;
 - c. For unsubstantiated complaints in each category, please identify what policies or procedures were used to determine that outcome, if any;
 - d. For all complaints, please provide any written explanations, decisions, or rationales related to the determination of the outcome (e.g., substantiated, unsubstantiated, or open) of the complaints.
- 6) Documents sufficient to show the total number of internal investigations concerning alleged misconduct by police officers opened by the SPD per calendar year within this request's time period, broken down by the subject of the investigation (categories used internally to categorize complaints are sufficient for the purposes of this request).
- a. For each category of investigations, please also provide the data broken down by the outcome (e.g., substantiated, unsubstantiated, or open) of the investigation;
 - b. For substantiated allegations in each category, please also identify what disciplinary action was taken, if any;
 - c. For unsubstantiated complaints in each category, please identify what policies or procedures were used to determine that outcome, if any;
 - d. For all complaints, please provide any written explanations, decisions, or rationales related to the determination of the outcome (e.g., substantiated, unsubstantiated, or open) of the complaints;
 - e. For each category of investigations, please also identify the names of all employees involved.
- 7) All investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints.
- 8) All documents related to trainings that officers are required to complete regarding the handling of complaints regarding police misconduct.
- a. As part of this request, please provide documents demonstrating the policies, guidelines, and procedures to ensure that all officers complete the required trainings.
 - b. Please also provide documents sufficient to show the number and percentage of officers who have failed to complete any required trainings during the time period set out in this request.

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If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and why.

E) SPD Immigration-Related Enforcement

We request copies of records collected by the SPD regarding immigration and citizenship related enforcement, including:

- 1) All directives, orders, guidance, procedures, memoranda, rules, regulations, training, explanatory materials, forms, and other statements of policy concerning whether, when, or how law enforcement officers affiliated with the SPD may question, investigate, or request proof regarding a person citizenship or immigration status or national origin;
- 2) All directives, orders, guidance, procedures, memoranda, rules, regulations, training, explanatory materials, forms, and other statements of policy concerning whether, when, or how law enforcement officers affiliated with the SPD may hold or detain an individual on suspicion of immigration violations or at the request of federal immigration officials;
- 3) All directives, orders, guidance, procedures, memoranda, rules, regulations, training, explanatory materials, forms, and other statements of policy concerning whether, when, or how law enforcement officers affiliated with the SPD may communicate with federal immigration officials;
- 4) All policies and guidelines concerning record-keeping requirements associated with the use of force, including the length of time those records must be retained by the SPD in an electronic database or in any other format. This request includes reporting and review that occurs both on-scene and after the incident;
- 5) All documents related to trainings that officers are required to complete regarding immigration and citizenship-related enforcement.
 - a. As part of this request, please provide documents demonstrating the policies, guidelines, and procedures to ensure that all officers complete the required trainings.
 - b. Please also provide documents sufficient to show, per calendar year, the number and percentage of officers who have failed to complete any required trainings during the time period set out in this request.

If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and why.

E) Syracuse Citizen Review Board Records

We request copies of records collected by the SPD regarding complaints filed with the Syracuse Citizen Review Board ("SCRB"), including:

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- 1) Records kept in the SCRB's case tracking system, including complete complaints and allegation histories of every active member of the SPD, and every former member of the SPD who left service for any reason since January 1, 2012.
- 2) Records demonstrating any trainings required by active SCRB members, including but not limited to the frequency of those trainings per year.

If any document is withheld or redacted, please provide a detailed log identifying what documents were withheld or redacted and why.

F) Diversity in the Ranks

We request copies of records collected by the SPD regarding diversity of personnel in the SPD, including:

1. Records sufficient to identify the total numbers of department personnel broken down by race and gender for the following ranks:
 - a. Police officer;
 - b. Detective;
 - c. Sergeant;
 - d. Lieutenant;
 - e. Captain; and
 - f. All ranks above captain.

G) Additional Policies and Agreements

We request copies of records collected by the SPD regarding certain policies and agreements, including:

1. All current policies governing officer conduct, including but not limited to all directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning:
 - a. Bias-based policing and/or racial profiling;
 - b. Asset forfeiture and property seizures;
 - c. Equal employment opportunity;
 - d. Interactions with protesters, including any policies related to the use of pepper spray, tear gas, and drones;

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- e. Strip searches and body searches; and
 - f. Mental health, including all SPD interactions with individuals experiencing a psychological emergency or otherwise demonstrating signs of emotional distress.
2. All collective bargaining agreements to which the SPD was a party during this request's time period.

* * *

As you may be aware, the Freedom of Information Law requires that an agency respond within five business days of receipt of a request. Therefore, we would appreciate a response as soon as possible and look forward to hearing from you shortly. If you determine that certain documents may be more quickly identified and produced than others, we are amenable to establishing a production schedule for documents that will take longer to produce.

The NYCLU agrees to compensate you for the cost of duplicating the records we request, as provided by law. Upon locating the requested documents, please contact us prior to photocopying and advise us of the actual costs of duplication so that we may decide whether a narrowing of the request will be necessary. Please provide all data in electronic spreadsheet format (.xls or .csv format where possible). Please furnish records to:

Michael Lacovara
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
michael.lacovara@lw.com

If for any reason any portion of this request is denied, please inform us of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed. If you determine that any portion of the requested records are exempt from disclosure pursuant to FOIL, please delete only the material claimed as exempt, inform us of the basis for the exemption claim, and furnish copies of those portions of the records that you determine not to be exempt.

If you have any questions in processing this request, please contact Michael Lacovara at (212) 906-1377 or michael.lacovara@lw.com. Thank you for your prompt attention to this matter.

Sincerely,



Michael Lacovara
of LATHAM & WATKINS LLP

**Exhibit B to Lacovara Affirmation-
Response Letter from Office of the Corporation Counsel for
the City of Syracuse to Michael Lacovara re: FOIL Request,
dated September 23, 2020
[pp. 77 - 78]**

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NYSCEF DOC. NO. 6

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**DEPARTMENT OF LAW
OFFICE OF THE CORPORATION COUNSEL
CITY OF SYRACUSE, MAYOR BEN WALSH**

September 23, 2020

Kristen E. Smith
Corporation Counsel

Joseph W. Barry III
First Assistant
Corporation Counsel

Christina F. DeJoseph
Senior Assistant
Corporation Counsel

Lee R. Terry
Senior Assistant
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Amanda R. Harrington
John C. Black Jr.
Kathryn M. Ryan
Ramona L. Rabeler
Todd M. Long
Sarah A. Lafen
Sophie West
Sarah M. Knickerbocker
Danielle B. Pires
Finney Raju
Patrick R. Blood
Amelia McLean-Robertson
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Michael Lacovara, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, New York 10022

RE: Freedom of Information Law (FOIL) Reference #2020-01214

Dear Mr. Lacovara,

This letter is in response to the FOIL request you submitted to the Office of the Corporation Counsel, dated September 15, 2020 and received by our office on September 15, 2020. Your request is being reviewed, and complete or partial access to the records will be permitted in accordance with Article 6 of New York Public Officers Law.

Due to the extreme breadth and scope of your request, more analysis is required to determine the number of records implicated, and the amount of staff time needed to collect, review, and process the request. Additionally, due to the repeal of New York Civil Rights Law §50-a, the City of Syracuse (the "City") has already received a large number of broad and complex requests for similar records. Legal and administrative staff are processing such requests as they are received, with completion dates already pushing the City's response timeline into 2021. Beyond that, your request demands significantly more than just disciplinary records, making it more time consuming and resource intensive than others recently received. As a result, your request will require additional time for research and processing.

With that context, our initial estimate is that the collection, review, and redaction of these records will require one (1) year from the date of this letter. As we continue our analysis, we will update you if this estimated completion date needs to be adjusted. We will also attempt to provide available records on a rolling basis.

As for cost, we will follow up with an estimate of the charges that will apply pursuant to Public Officers Law once we are better able to estimate the size of the collection.

We appreciate your patience and understanding as we diligently work to provide accurate and thorough responses to all of the requests we have received. While the City has finite resources to respond to a request of this scope, we will endeavor to respond as promptly as possible under the circumstances.

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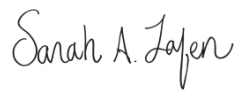
FOIL Reference #2020-01214

23 September 2020

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If you have any questions, or require further information, please do not hesitate to contact me.

Sincerely,



Sarah A. Lafen, Esq.
Assistant Corporation Counsel

**Exhibit C to Lacovara Affirmation-
Letter from Office of the Corporation Counsel for the City
of Syracuse to Michael Lacovara, dated November 17, 2020
[pp. 79 - 81]**

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NYSCEF DOC. NO. 7

RECEIVED NYSCEF: 03/18/2021



DEPARTMENT OF LAW
OFFICE OF THE CORPORATION COUNSEL
CITY OF SYRACUSE, MAYOR BEN WALSH

VIA ELECTRONIC MAIL

November 17, 2020

Kristen E. Smith
Corporation Counsel

Michael Lacovara
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022-4834

Joseph W. Barry III
First Assistant
Corporation Counsel

Christina F. DeJoseph
Senior Assistant
Corporation Counsel

Dear Michael,

Lee R. Terry
Senior Assistant
Corporation Counsel

This letter is a follow-up to our discussion on November 12, 2020 regarding the Freedom of Information Law ("FOIL") request submitted on behalf of the New York Civil Liberties Union ("NYCLU") for various records of the Syracuse Police Department ("SPD" or the "Department"), dated September 15, 2020 (the "FOIL Request").

Catherine E. Carnrike
Meghan E. Ryan
Amanda R. Harrington
John C. Black Jr.
Kathryn M. Ryan
Ramona L. Rabeler
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Sarah M. Knickerbocker
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Finney Raju
Patrick R. Blood
Amelia McLean-Robertson
Patrick J. Parkinson

Given the massive depth and breadth of the FOIL Request, and the considerable strain it would place on the limited resources in the City of Syracuse's Law Department and SPD, we discussed how the request could be narrowed and prioritized.

We first discussed that the responsive time period would be reduced from ten years to six, without prejudice to your right to renew your request for older documents at a later date. Therefore, **responses to each request will cover the years 2014 – 2020**. We also agreed that any documents would be provided in the form they are kept, with no obligation to engineer new records to express data in the manner requested (except for stop data, as noted under number 3 below), or to organize the records in certain manner.

Training records are included within several of your enumerated requests. See A(2)-(3); B(6); C(5); D(8). Given the volume of training records and material maintained by SPD, covering multiple police academy classes, annual in-service training, regular roll-call trainings, and other miscellaneous training avenues, we asked that these requests be considered secondary. We agreed you would revisit the requests for training records after we provide the primary documents discussed below. Therefore, the anticipated completion dates below do not include the release of training records.

Following is a discussion of the document request categories and an anticipated completion date for each category. We reserve the right to revise these completion dates as our collection and review process progresses and we have a clearer sense of the number of work hours needed to prepare the records.

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1. **Disciplinary Records & Complaints about Misconduct:** With respect to law enforcement disciplinary records and complaints about police conduct, consistent with our analysis of Public Officers Law § 87(2)(b) and the advisory opinion from

NYCLU FOIL Request

November 17, 2020

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the New York Committee on Open Government, dated July 27, 2020, SPD will not release records related to complaints that were ultimately determined to be unfounded or unsubstantiated, or those that are still open. Therefore, to the extent your request seeks records related to unfounded, unsubstantiated or open complaints, your request is denied.

Anticipated Completion Date: Complaints and disciplinary records related to *substantiated* complaints and other misconduct will be provided by **March 31, 2021**.

2. **Use of Force:** We will release the “Blue Team” reports, which document officers’ uses of force. These will be provided in PDF form. As discussed on our call, to the extent the reports reference a police report for the underlying incident, we will not be providing the police report, as the cross-referencing process would take an inordinate amount of additional time and resources. If, upon receipt and review of the Blue Team reports, your client desires the related police reports, they can renew their request at that time.

Anticipated Completion Date: Following our call, I learned there are between 300 and 400 documented uses of force each year. Extrapolating over six years, we anticipate there will be over 2000 multi-page documents for our team to review prior to release. This alone will be an extremely time-consuming project. At this time, any anticipated completion date I provide you for this topic would be completely speculative. Instead of setting unrealistic expectations, we will follow-up with an anticipated completion date after we have time to review a sampling of these reports to better estimate how long it will take our team to review each report. We will provide this date by **December 11, 2020**.

3. **Stops/Temporary Detentions/Field Interviews:** This request calls for a massive number of documents, as it seeks every report of every stop conducted by SPD over a number of years. This would encompass many thousands of records. Therefore, you agreed to place a low priority on this request, and table it while we furnish responses to the other requests, provided we preserve the data. In the meantime, we agreed to provide aggregated data on stops.

Anticipated Completion Date: Based on further discussion with our crime analysis group, a report of aggregated stop data is not as readily available as we initially suggested to you on our call. An SPD data analyst would need to create a new report. While we have no obligation under FOIL to create new records, we will agree to create and produce such a report in return for your agreement to table the broader request for all records recording all stops. With respect to timing, we are constrained by the availability of the data analyst to divert time away from her primary projects and responsibilities. Based on these considerations, we will produce a report by **January 15, 2021**.

4. **Citizen Review Board (“CRB”) Records:** All citizen complaints filed with the CRB are forwarded to the Department’s Office of Professional Affairs for investigation. Therefore, the request for CRB complaints will be covered by the response to your requests A and D (discussed under paragraph 1, above.) As noted above, only substantiated complaints will be released.

NYCLU FOIL Request

November 17, 2020

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Anticipated Completion Date: See paragraph number 1, above.

5. ***Immigration-Related Enforcement:*** While we need to conduct further due diligence to confirm this, we believe there will be no responsive documents to this request.

Anticipated Completion Date: We will confirm there are no responsive records by **January 8, 2021**.

6. ***Diversity in the Ranks:*** These records are readily available and will be provided.

Anticipated Completion Date: December 11, 2020

7. ***Additional Policies and Agreements:*** We discussed that collecting six or ten years of versions of policies would be onerous. We agreed to provide the current policy on each of the topics requested, if they exist, without prejudice to your right to renew a request for earlier versions of these policies.

Anticipated Completion Date: December 11, 2020. Please note that one sub-category of this request—collective bargaining agreements—is already publicly available at <https://www.syracusepolice.org/listing.asp?orgId=332>.

We appreciate your understanding of the resource limitations of SPD and the City of Syracuse. We believe the completion dates provided above are reasonable given the scope of your requests. If you wish to discuss any of these issues further, please contact me at ksmith@syrgov.net or 315-448-8494.

Best regards,



Kristen E. Smith
Corporation Counsel

CC: Sarah Bartels, Assistant Corporation Counsel
Sgt. Mark Rusin, Syracuse Police Department

**Exhibit D to Lacovara Affirmation-
Letter from Michael Lacovara to Office of the Corporation
Counsel for the City of Syracuse, dated November 30, 2020
[pp. 82 - 83]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

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NYSCEF DOC. NO. 8

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Seoul

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Los Angeles

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Madrid

Washington, D.C.

Milan

November 30, 2020

Kristen E. Smith, Esq.
Corporation Counsel
Department of Law
Office of Corporation Counsel
233 East Washington Street
City Hall, Room 300
Syracuse, NY 13202

Via Email – ksmith@syr.gov.net

Re: Freedom of Information Law Ref. #2020-01214

Dear Ms. Smith:

I acknowledge receipt of your letter dated November 17, 2020 (the “Letter”) that responded to the Freedom of Information Law request we submitted on behalf of the New York Civil Liberties Union on September 15, 2020 (the “Request”). Thank you to you and your colleagues for speaking with us by telephone regarding the Request on November 11, 2020, and for your commitment to continue to engage constructively.

With reference to Paragraph 1 of the Letter, we note that, on behalf of the City of Syracuse (the “City”), you have “denied” in large measure our request for certain disciplinary records and complaints about misconduct. In particular, you indicated that the Syracuse Police Department will not release “records related to complaints that were ultimately determined to be unfounded or unsubstantiated, or those that are still open,” purportedly based upon Public Officers Law (“POL”) § 87(2)(b) and the advisory opinion from the “New York Committee on Open Government.” Letter at 1-2. We disagree that the POL, the analysis of the advisory opinion, and the other issues you mention provide valid grounds for denial of NYCLU’s request. Accordingly, we shall file an administrative appeal consistent with POL § 89(4)(a).

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LATHAM & WATKINS LLP

As the administrative and, if necessary, judicial processes play out with respect to the points above, we look forward to reviewing the documents you have agreed to make available starting on December 11, 2020. If you wish to discuss any of the above further, please feel free to contact me at michael.lacovara@lw.com or (212) 906-1377.

Sincerely,



Michael Lacovara
of LATHAM & WATKINS LLP

cc: FOIL Office (FOIL@syrgov.net)

**Exhibit E to Lacovara Affirmation-
Administrative Appeal of Syracuse Police Department's Partial
Denial, dated December 10, 2020
[pp. 84 - 88]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

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NYSCEF DOC. NO. 9

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Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

December 10, 2020

Kristen E. Smith, Esq.
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Department of Law
Office of Corporation Counsel
233 East Washington Street
City Hall, Room 300
Syracuse, NY 13202

Via Email – ksmith@syrgov.net

Re: Appeal of Denial of Freedom of Information Law Request #2020-01214

Dear Ms. Smith:

The New York Civil Liberties Union (“NYCLU”) appeals from the Syracuse Police Department’s (“SPD’s”) partial denial of the NYCLU’s Freedom of Information Law (“FOIL”) request.

As you know, on June 12, 2020, Governor Andrew Cuomo signed into law the repeal of Section 50-a of the New York Civil Rights Law (“Section 50-a”). Section 50-a had allowed police departments in the State of New York to withhold disclosure of disciplinary and performance records to which the public were otherwise entitled. The legislation effected a *full* repeal of Section 50-a, meaning that police departments, including the Syracuse Police Department, have no basis on which to shield police records from public scrutiny.

On September 15, 2020, following the repeal of Section 50-a, the NYCLU sent a FOIL request (the “Request”) to the FOIL Officer of SPD seeking information that included police disciplinary records, use of force records, records of citizen complaints, and records concerning the diversity of SPD personnel.

In a letter dated November 17, 2020, SPD, through the Office of Corporation Counsel, responded to the Request. In part, that response denied access to all “unfounded, unsubstantiated or open complaints” and Citizen Review Board records relating to the same, citing Public Officers Law (“POL”) § 87(2)(b) and a July 27, 2020 advisory opinion from the New York Committee on Open Government.¹ (For convenience, we refer to this aspect of the response as the “Denial.”)

¹ Letter from K. Smith to M. Lacovara (Nov. 17, 2020), 1-2 (citing POL § 87(2)(b)).

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We appeal the Denial on two grounds. *First*, the articulated basis for the Denial is a citation to a subsection of FOIL; that does not meet the SPD's statutory obligation to provide particularized and specific justification for the nondisclosure of records requested under FOIL. *Second*, SPD's contention that the material sought would invade "personal privacy" both contradicts the mandate of the repeal of Section 50-a and ignores the existence of other means potentially to protect legitimate privacy interests.

I. SPD'S DENIAL DOES NOT MEET THE STANDARD REQUIRED BY FOIL

SPD has not met its burden to show that the requested material is exempt from disclosure under FOIL. In denying the NYCLU's Request for certain records, SPD cited a section of FOIL that purportedly exempts records from disclosure.² SPD provided no further information, explanation, or justification beyond an unadorned citation. Such a response is insufficient under FOIL, which requires SPD to provide more than a blanket statement that its "analysis of Public Officers Law § 87(2)(b) and the advisory opinion" permits the agency to deny FOIL requests.³ In responding to a facially valid FOIL request, the agency responding bears the burden to show that the material requested falls within a statutory exemption.⁴

We note also that FOIL disclosure obligations should be read broadly. As the Court of Appeals stated in *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, "all records of an agency are presumptively available for public inspection" and "statutory exemptions are narrowly interpreted."⁵ Accordingly, "FOIL is liberally construed and its statutory exemptions are narrowly interpreted."⁶

The Denial's mere recitation of the FOIL statute is inadequate. Because the SPD "merely parrot[s]" the statutory language, it has not met its burden to articulate fully the reasons for its denial.⁷ Rather, the SPD has done what the Court of Appeals has prohibited by doing no more than merely recite "sections, subdivisions and subparagraphs of the applicable statute and conclusory characterization of the records sought to be withheld."⁸

² Letter from K. Smith to M. Lacovara (Nov. 17, 2020), 1-2.

³ *See, e.g., Allen Group, Inc. v. New York State Dept. of Motor Vehicles*, 147 A.D.2d 856, 857 (N.Y. Sup. Ct. App. Div. 3rd Dept. 1989).

⁴ *Id.* at 856-57.

⁵ *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 79-80 (1984).

⁶ *In the Matter of Talib W. Adbur-Rashid v. New York City Police Dept.*, 31 N.Y.3d 217, 225 (2018).

⁷ *West Harlem Business Group v. Empire State Development Corp.*, 13 N.Y.3d 882, 844-85 (2009).

⁸ *Church of Scientology v. State*, 46 N.Y.2d 906, 907-08 (1979); *see also Allen Group, Inc. v. New York State Dept. of Motor Vehicles*, 147 A.D.2d 856, 857 (N.Y. Sup. Ct. App. Div. 3rd Dept. 1989) (an agency response consisting of "general details" and conclusory allegations "was totally

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SPD's Denial is not only procedurally deficient, it circumvents the law by blocking public access to disciplinary records. We therefore appeal the SPD's Denial on the basis that it is insufficient.

II. THE SPD'S PERSONAL PRIVACY CLAIM IS MERITLESS

Public scrutiny of internal departmental review is critical to ensure both the adequacy and *bona fides* of those processes and that allegations of misconduct are treated in a serious way. Further, the text of the repeal bill allows disclosure of disciplinary records regardless of disposition; the text suggests no grounds for the implicit exception the SPD apparently now claims. To the contrary, the legislature created a broad definition of "law enforcement disciplinary records," including the "complaints, allegations and charges[,] . . . the name of the employee complained of or charged, the transcript of any disciplinary trial or hearing . . . [and] the disposition of any disciplinary proceeding."⁹ The legislature included provisions to protect sensitive personal information,¹⁰ and exempted from disclosure minor rule violations of little public interest.¹¹ However, the legislature did *not* include any exemption based on the disposition of a complaint.

Not surprisingly, the applicable legislative history is consistent with the language of the statute and does support the implicit exceptions the Denial seeks to read into the repeal. The New York State Assembly and Senate floor debates of the repeal bill demonstrate the legislature's intent to allow public release of unsubstantiated, unfounded, and exonerated records.¹²

During the Assembly debate, the bill's sponsor (Assemblymember O'Donnell) said that the bill did not distinguish between substantiated and unsubstantiated records, and noted the value of unsubstantiated complaints in establishing patterns of misconduct and in identifying officers "[w]ho might be a problem and who might be a risk to the public."¹³ To demonstrate the need for

inadequate to permit the conclusion that respondents sustained their burden of showing that the requested material fell within a statutory exemption.").

⁹ N.Y. Senate Bill S.8496, 243rd N.Y. Leg. Sess. § 2.

¹⁰ See § 89(2-b) (requiring agencies disclosing officer records to redact home addresses and personal contact information of officers). While FOIL exempts from disclosure information that "would constitute an unwarranted invasion of personal privacy," see POL § 87(2)(b), SPD has not claimed that the disclosure of disciplinary records would constitute such an invasion. Moreover, in New York, "public employees enjoy a lesser degree of privacy than others." See Comm. on Open Govt. FOIL AO 19775 [July 27, 2020]. To the extent SPD will claim the Request infringes on any valid privacy concerns, the NYCLU is amenable to discussing the receipt of documents redacted as permitted under § 89(2)(a).

¹¹ § 89(2-c) (permitting withholding records of "technical infractions").

¹² New York courts have consistently recognized the importance of considering legislative history in interpreting laws. See, e.g., *Morales v. Gross*, 230 A.D.2d 7, 10 (2d Dep't 1997) (reviewing legislative history in interpreting law); *Gerry v. Volger*, 252 A.D. 217, 221 (4th Dep't 1937) (interpreting a law's meaning by reviewing the legislative debate).

¹³ N.Y. Assembly, Floor Debate, 61, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020) at 61, 100.

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such records to assess oversight structures, Assemblymember O'Donnell and Senator Bailey each noted the example of the NYPD's Internal Affairs Bureau—which, from 2014 to 2018, substantiated *none* of the 2,495 complaints against officers alleging biased policing. Cognizant of that history, the legislators stressed the importance of examining all records regardless of disposition.¹⁴

SPD's apparent reading of the breadth of the repeal likewise cannot be reconciled with the fact that 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 depending on the type or severity of misconduct alleged, but only in situations in which allegations had been substantiated.¹⁵ The legislature's consideration of—and decision not to advance—S.4213 reflects a rejection of the arguments that limiting release to only narrower, substantiated allegations struck the appropriate balance between transparency and officer privacy. The legislature had ample opportunity to consider these arguments, and made a reasoned policy choice favoring the stronger public interest in transparency and rejecting the policies reflected in competing, but failed, legislative proposals.

Accordingly, the NYCLU appeals SPD's refusal to provide unsubstantiated records, a decision unsupported by law and in violation of the legislature's intent with the repeal of Section 50-a.

* * *

For the foregoing reasons, we appeal both the sufficiency and the merits of SPD's determination of November 17, 2020 that certain of the requested records are exempt from disclosure under POL § 87(2)(b). SPD has ten business days to decide this appeal, *see* POL § 89(4)(a), and we look forward to an early and favorable response. Because the NYCLU has agreed to SPD's request that it produce materials on a staggered basis, the NYCLU reserves the right to file any additional administrative appeals that might become necessary in the event that more FOIL exemptions are claimed or information is otherwise withheld without proper basis. In addition, please be advised that the Freedom of Information Law directs agencies to send all appeals and the determinations that follow to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

¹⁴ N.Y. Assembly, *supra* at 98, 168; N.Y. Senate, Floor Debate, 1805-06, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020), <https://legislation.nysenate.gov/pdf/transcripts/2020-06-09T11%3A53/>.

¹⁵ *See* N.Y. Senate Bill S.4213, 243rd N.Y. Leg. Sess.

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December 10, 2020
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LATHAM & WATKINS LLP

Please feel free to contact me at michael.lacovara@lw.com or (212) 906-1377.

Sincerely,



Michael Lacovara
of LATHAM & WATKINS LLP

cc: FOIL Office (FOIL@syr.gov.net)

**Exhibit F to Lacovara Affirmation-
Letter from Office of the Corporation Counsel for the City
of Syracuse to Michael Lacovara, dated December 22, 2020
[pp. 89 - 94]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

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NYSCEF DOC. NO. 10

RECEIVED NYSCEF: 03/18/2021



**DEPARTMENT OF LAW
OFFICE OF THE CORPORATION COUNSEL
CITY OF SYRACUSE, MAYOR BEN WALSH**

VIA ELECTRONIC MAIL

Kristen E. Smith
Corporation Counsel

December 22, 2020

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First Assistant
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Michael Lacovara, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, New York 10022-4834

Lee R. Terry
Senior Assistant
Corporation Counsel

Re: **Decision on Freedom of Information Law appeal, FOIL # 2020-00793**

Catherine E. Carrnike
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Amanda R. Harrington
John C. Black Jr.
Kathryn M. Ryan
Ramona L. Rabeler
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Sophie West
Sarah M. Knickerbocker
Danielle B. Pires
Finney Raju
Patrick R. Blood
Amelia McLean-Robertson
Patrick J. Parkinson
Danielle R. Smith

Dear Mr. Lacovara:

This constitutes the decision of the City of Syracuse Police Department (the "SPD") on the New York Civil Liberties Union's ("NYCLU's") Freedom of Information Law ("FOIL") appeal dated December 10, 2020, challenging certain aspects of SPD's FOIL response dated November 17, 2020. As an initial matter, pursuant Public Officers Law § 89(4)(a), I am the SPD's designee for purposes of responding to your appeal. For the reasons set forth below, your FOIL appeal is denied, and the original FOIL response is affirmed.

I. Background:

On September 15, 2020, your office served the SPD with a FOIL request containing eight single-spaced pages of particularized document requests, with over 60 individual requests. As we previously discussed, the requests were expansively broad. For example, the first such request demanded "all law enforcement disciplinary records collected by the SPD" for an approximately 400-officer police force over the span of 20 years. That first request was representative of the breadth of the remainder of the requests, which touched on nearly every topic of police activity over the same 20-year span, necessarily implicating a massive investment of time, manpower, and resources in response.

On November 17, 2020, through the Office of Corporation Counsel, SPD responded to the FOIL request, outlining a schedule for the rolling production of materials collected in response to the request. Relying on a formal advisory opinion from the *New York Committee on Open Government* and the text of Public Officers Law § 87(2)(b), the response carved out of the SPD's production those records related to unsubstantiated, unfounded, or pending complaints against SPD officers.

The NYCLU has now appealed this limited aspect of the SPD's November 17, 2020 response. And, while the appeal characterizes the SPD's November 17, 2020 response in

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FOIL Appeal Response #2020-00793

22 December 2020

Page 2

general as a “denial,” that label is misleading as the SPD’s response indicated it would produce the vast majority of the voluminous categories of documents demanded in the original FOIL request. Properly framed, the NYCLU appeals only the SPD’s intent to withhold those disciplinary records related to charges or complaints that were ultimately found to be unsubstantiated or unfounded, or those for which a final resolution has not yet been reached (the “Withheld Records”).

The NYCLU advances two grounds for its appeal: (1) that SPD has not adequately explained its justification for exempting the Withheld Records from its response, and (2) that SPD’s exemption of the Withheld Records is not legally valid in light of the June 2020 repeal of New York Civil Rights Law § 50-a.

II. Discussion:

A. SPD has adequately set forth the basis for exemption of the Withheld Records:

The NYCLU argues that SPD’s justification for exempting the Withheld Records is procedurally insufficient because it does nothing more than point to a section of the Public Officers Law without further explanation. The NYCLU describes the SPD’s justification as “a mere recitation of the FOIL statute”; and on that premise, it contends the SPD’s written justification was procedurally inadequate.

The text of the Public Officers Law sets forth no specific standard for the content of an initial FOIL denial. See Public Officers Law § 89(3)(a) (merely noting that the agency must “deny such request in writing.”). However, it is generally accepted that an agency must “fully explain in writing” the reasons for denying access to the requested documents in a manner which does more than point to a statutory citation. See *Matter of West Harlem Business Group v. Empire State Development Corp.*, 13 N.Y.3d 882, 885 (2009).

In considering this standard here, the threshold problem with the NYCLU’s first challenge is that it has misleadingly described the written justification for exempting the Withheld Documents. The appeal suggests that all SPD did was cite to § 87(2)(b) of the FOIL statute. In fact, SPD did more than just cite to Public Officers Law § 87(2)(b) as the basis for its withholding. It *also* cited with specificity to an advisory opinion by the *Committee on Open Government* dated June 27, 2020. That decision addresses the precise category of documents being withheld and the precise issue being raised in this appeal—*i.e.*, whether the repeal of § 50-a renders FOIL requests “relating to unsubstantiated and unfounded complaints against a police officer” subject to production notwithstanding Public Officers Law § 87(2)(b). In considering this exact issue, the Committee quoted a prior advisory opinion with approval, which held:

when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld [under § 87(2)(b)], for

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disclosure would result in an unwarranted invasion of personal privacy.¹

In also finding this view to be valid with respect to police officer records, the Committee reasoned that the repeal of § 50-a did not otherwise affect the scope of § 87(2)(b), which applied equally to police officer records as it has been held to apply to other employee records. *See id.* The Committee opined that the repeal of § 50-a was unrelated to the interpretation, and separate application, of § 87(2)(b) to the question at hand.

Thus, the opinion cited in the November 17, 2020 FOIL response addresses the specific category of documents being withheld and provides a reasoned and particularized justification, with cited authority, supporting the SPD's decision to withhold from its response "unsubstantiated and unfounded complaints" against police officers. *See id.* ("it is our opinion, in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose 'unsubstantiated and unfounded complaints against an officer' where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy"). In light of the content of the advisory opinion, it is simply unsustainable to contend that the NYCLU was not placed on fair notice of the basis for the denial.

The NYCLU's appeal seems to recognize this as it is completely silent on the content of the advisory opinion. And so, when it characterizes the explanation as a "mere recitation of the FOIL statute," it has plainly mischaracterized that response to such an extent that the basis for its challenge lacks even facial merit. In fact, the NYCLU's first challenge does not survive even a casual reading of the cited advisory opinion. For these reasons, the first basis for the NYCLU's appeal is rejected.

B. The SPD has an adequate legal justification for exempting the Withheld Records

As to the substantive legal basis for the NYCLU's appeal, it argues that it is entitled to all "complaints, allegations and charges against an employee[]" and all complaints of employee misconduct whether "substantiated, unsubstantiated or open," arguing that when Civil Rights Law § 50-a was repealed, the legislature created a untethered definition of "law enforcement disciplinary records" that necessarily includes all "complaints, allegations, and charges" regardless of their status.

This argument, however, fails to acknowledge the unaffected FOIL provisions—which were left undisturbed by the repeal of §50-a—that still allow agencies to withhold information that poses an unwarranted invasion into personal privacy, or that are otherwise classified as pre-determination inter-agency materials.

As recited in the advisory opinion by the *Committee on Open Government*, "[t]he new provisions of FOIL *did not make changes* to provisions concerning personal privacy as defined in § 87(2)(b)." (emphasis added). Thus, just as the law provided prior to the repeal of Public Officer's Law §

¹ See N.Y. Dep't of State, Comm. on Open Gov't, Opinion Letter on Unsubstantiated Law Enforcement Disciplinary Records under the Freedom of Information Law (July 27, 2020).

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50-a, where an agency weighs the interest of disclosure against the unwarranted invasion into personal privacy and finds that the latter outweighs the public interest in disclosure, records of “unsubstantiated and unfounded complaints” are properly withheld under § 87(2)(b). The *Committee on Open Government* expressly found that the repeal of § 50-a had no effect on that principle.

Thus, the SPD’s position on this issue is directly supported by an *Open Government* advisory opinion on the interpretation of FOIL that is on point. The express purpose of *Committee on Open Government* under the FOIL statute is to “furnish to any agency advisory guidelines, opinions or other appropriate information regarding” the FOIL requirements. See Public Officer Law § 89(1)(b)(i). New York courts give deference to opinions of the *Committee* regarding interpretation of the scope and requirements of FOIL. See *Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep’t 1999) (courts “should defer” to opinions of the *Committee on Open Government*); *TJS of New York, Inc. v. New York State Dep’t of Taxation & Fin.*, 89 A.D.3d 239, 242, 932 N.Y.S.2d 243, 246 (3rd Dep’t 2011) (advisory opinions of the *Committee on Open Government* provide persuasive authority to the court regarding the interpretation of FOIL); *Daily News Pub. Co. of Memphis, Tenn. v. Office of Court Admin. of State of N.Y.*, 186 Misc. 2d 424, 427 (Sup. Ct., N.Y. Cty., 2000) (“formal opinions of the Committee on Open Government are viewed as authoritative in interpreting FOIL.”) (emphasis added).

Nor is there is any authority to suggest that police officers should be treated any differently than any other type of public employee. Accordingly, where disciplinary charges were never filed, or if filed, were unproven or resulted in no disciplinary action, such records have been properly withheld on the basis that they pose an unwarranted invasion into personal privacy, as they have in cases involving other public employees. See *Western Suffolk Bd. of Co-op. Educ. Servs. v. Bay Shore Union Free Sch. Dist.* 250 A.D.2d 772, 773 (2d Dept 1998); see also *LaRocca v. Bd. Of Educ. Of Jericho Union Free Sch. Dist.*, 220 A.D. 424, 427 (2d Dept 1995); see also *Santomero v. Board of Education of the Bedford Central School District*, 2009 WL 6860644, *2 (Sup. Ct. Westchester Cty., 2009); see also *Herald Company v. School District of City of Syracuse*, 430 N.Y.S. 2d 460 (Sup. Ct. Onondaga Cty., 1980).

Similarly, disciplinary records which reflect pending or unfiled charges are not final agency policy or determinations, and as such, are also not subject to disclosure. See Public Officers Law § 87(2)(g); see also *Herald Company v. School District of City of Syracuse*, 104 Misc. 2d 1041, 1046 (N.Y. Sup. Ct., Onon. Cty., 1980) (name and charges of school superintendent part of unproved allegation that was not yet part of a binding hearing panel determination were exempt from disclosure).

Thus, regardless of NYCLU’s argument that Public Officers Law § 86(6)(a) defines the records available without regard to their status, the balance of Public Officers Law § 87(2)(b) is still in effect and justifiably permits SPD to withhold such records on the basis that disclosure of such records constitutes an unwarranted invasion into personal privacy Likewise, pending charges are necessarily inter-agency non-final determinations which may permissibly be withheld under Public Officers Law § 87 (2)(g)(iii).²

² As an aside, NYCLU also challenges that SPD made no effort to redact relevant records to enable them to be produced despite the personal privacy concern. However, redaction would not be sufficient to protect the SPD officers’ personal privacy. In certain circumstances, public news coverage reveals the names of SPD officers

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Finally, the NYCLU's argument based on the legislative history of the § 50-a repeal is not persuasive. The argument cites to a competing bill (S.4213) that purportedly would have allowed for only a partial repeal of § 50-a, while allowing continuing protection for certain records, including misconduct records where the allegations had not been substantiated. According to the NYCLU's argument, because the Legislature chose not to pursue this bill, but opted instead for a complete repeal, the Legislature must have impliedly rejected the proposition that officer privacy is a legitimate concern that must be balanced against the right of public access and transparency.

This argument lacks merit for several reasons. As an initial matter, the argument fails because review of Senate Bill S.4213 reveals that does not differentiate between substantiated and unsubstantiated proceedings. But even assuming *arguendo* that the underlying factual premise of the NYCLU's argument was correct, the conclusion would still not follow. There is simply no way to know why the Legislature, as a collective body, chose the legislation that it pursued rather than the various competing bills under consideration. The NYCLU's speculation³ that the decision *must* have reflected a general disapproval of the withholding *any* police records ignores a much more obvious conclusion—*i.e.*, that the Legislature understood there were other provisions within the existing FOIL statute, like § 87(2)(b), which would preserve officer's privacy interests, even in the face of a complete repeal § 50-a. And it is this view, not the NYCLU's, which is consonant with the existing state of the law as described above and provides a more rational explanation for the Legislature's choices.

For all of these reasons, the second basis for the NYCLU's appeal is also rejected.

III. Conclusion:

For the reasons more fully set forth herein, NYCLU's FOIL appeal is been denied in its entirety. A copy of this appeal determination is also being sent to the Committee on Open Government. Please do not hesitate to contact me should you have any questions regarding this determination.

without details of an investigation. By redacting the names of the SPD officers from the FOIL response, but providing the details of the investigation or complaint, SPD is effectively disclosing the personally identifying information of the officer along with the circumstances of the investigation or incident. In this case, the Records cannot be redacted in such a manner to protect the SPD officers' identities and must be withheld in their entirety pursuant to Public Officers Law 87(2)(b) instead.

³ New York case law cautions against drawing definitive conclusions from legislative inaction on a bill where there is no written record of the reasons for the inaction. *Ross v. Arbury*, 206 Misc. 74, 77 (Sup. Ct., N.Y. Cty., 1954), *aff'd*, 285 A.D. 886, 139 N.Y.S.2d 245 (App. Div. 1955) (“The plaintiff argues that the legislature, by not acting, intended to deny the Commission such power or authority. The rules of statutory construction on implications from legislative inaction must be applied cautiously, particularly in instances where bills have not been reported to the floor, or where there is no record indicating the reasons for the disposition of them.”).

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NYSCEF DOC. NO. 10

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Sincerely,

A handwritten signature in black ink, appearing to read 'K E Smith', is written over a light gray rectangular background.

Kristen E. Smith
Corporation Counsel
City of Syracuse

cc: Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Avenue
Albany, New York 12231

**Exhibit G to Lacovara Affirmation-
Letter from Michael Lacovara to Office of the Corporation
Counsel for the City of Syracuse, dated September 28, 2020
[pp. 95 - 96]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

INDEX NO. 002602/2021

NYSCEF DOC. NO. 11

Michael Lacovara

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September 28, 2020

Sarah A. Lafen, Esq.
Assistant Corporation Counsel
Department of Law
Office of Corporation Counsel
233 East Washington Street
City Hall, Room 300
Syracuse, NY 13202

Via Email – law@syrgov.net

Re: Freedom of Information Law Ref. #2020-01214

Dear Ms. Lafen:

I have your letter of September 23, 2020. I am grateful that the Office of Corporation Counsel has noted receipt of our request (#2020-01214) (the “Request”). I was, however, surprised and dismayed at your statement that “the collection, review, and redaction of [the requested] records will require one (1) year from the date” of your letter. You attribute that estimate (which I regard as unreasonable on its face) in part to the fact that “the City of Syracuse (the “City”) has already received a large number of broad and complex requests for similar records.” I would have thought that the fact that the City has received other requests for “similar records” would hasten response to the Request, not delay it. I note also your commitment to “attempt to provide available records on a rolling basis,” which (given the existence of other pending requests) logically suggests that the City, acting in good faith and with available resources, can at least begin material compliance with the Request far more quickly than a year.

It is constructive that you have acknowledged that the Request seeks, in part, records made available following the Legislature’s repeal of New York Civil Rights Law §50-a. Lengthy delays in FOIL requests, we believe, would frustrate the legislative judgment reflected in that repeal that transparency is both a core aspect of good government, and a public right of the highest order. We are prepared to vindicate that right should we need to do so.

Let us hope that we can work together to find reasonable accommodations and a sensible way forward. We are willing to consider both narrowing the request (either temporally or in scope), as well as setting priorities/sequencing in a manner that balances the rights afforded under FOIL with the City’s resources and legitimate interests.

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Please let me know if the City is willing to have a discussion. We are not prepared to sit for a year (or for an “update . . . if [the City’s] estimated completion date needs to be adjusted”), and therefore reserve all rights under FOIL and other statutes.

Please contact me at Michael.lacovara@lw.com or at 212.906.1377. And if there is a better way to reach you than the general law@syrgov.net, please do let me know.

Sincerely,



Michael Lacovara
of LATHAM & WATKINS LLP

cc: FOIL Office (FOIL@syrgov.net)

**Exhibit H to Lacovara Affirmation-
Email from Office of the Corporation Counsel for the City
of Syracuse to Michael Lacovara, dated October 14, 2020
[pp. 97 - 98]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

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NYSCEF DOC. NO. 12

RECEIVED NYSCEF: 03/18/2021

From: Smith, Kristen <KSmith@syrgov.net>
Date: Wednesday, Oct 14, 2020, 2:02 PM
To: Lacovara, Michael (NY-LO) <Michael.Lacovara@lw.com>
Cc: Bartels, Sarah <SBartels@syrgov.net>
Subject: Syracuse PD FOIL

Mr. Lacovara,

I am writing in response to your September 28, 2020 letter to Assistant Corporation Counsel Sarah Lafen (now Sarah Bartels, cc'd here). We appreciate your desire for a faster response on your FOIL request on behalf of NYCLU, and understand the legislative intent of the repeal of CRL 50-a. We must balance that, however, with our resource limitations. Your request goes far beyond the types of records requested by others in the wake of the 50-a repeal; it is much more onerous. It essentially calls for the collection of all documents and data held by SPD on a host of subjects. It's no exaggeration to state that responding to this FOIL could occupy a full-time employee for months. We do not have the resources to assign a full-time employee exclusively to this FOIL request. This is why we responded with a delayed anticipated completion date. With that context, your offer to narrow and prioritize your request is helpful. I would like to schedule a time to talk through the request so that it can be narrowed, and so that we can describe the particular challenges with some of the requests. Hopefully we can come to a common understanding that meets your client's needs without imposing an impossible administrative burden on our city.

I've cc'd my assistant on this email, Anna Dussing, for purposes of coordinating a date/time for a WebEx conference between me, Sarah and you.

Regards,

Kristen Smith

Kristen E. Smith, Esq.

Corporation Counsel
City of Syracuse
233 E. Washington Street, Room 300
Syracuse, NY 13202
315.448.8400

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NYSCEF DOC. NO. 12

INDEX NO. 002602/2021

RECEIVED NYSCEF: 03/18/2021



**Exhibit I to Lacovara Affirmation-
Letter from Michael Lacovara to Office of the Corporation
Counsel for the City of Syracuse, dated February 1, 2021, with
attached Decision and Order, Schenectady Police Benevolent
Assn v. City of Schenectady, No. 2020-1411, (N.Y. Sup.
Ct. Dec. 29, 2020)
[pp. 99 - 118]**

FILED: ONONDAGA COUNTY CLERK 03/18/2021 03:29 PM

INDEX NO. 002602/2021

NYSCEF DOC. NO. 13

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Milan	

February 1, 2021

Kristen E. Smith, Esq.
Corporation Counsel
Department of Law
Office of Corporation Counsel
233 East Washington Street
City Hall, Room 300
Syracuse, NY 13202

Via Email – ksmith@syrgov.net

Dear Ms. Smith:

On behalf of the NYCLU, I acknowledge receipt of several batches of documents responsive to the New York Civil Liberty Union’s Freedom of Information Law (“FOIL”) request of September 15, 2020 (the “Request”). Most recently, on January 29, 2021, the Syracuse Police Department (the “SPD”) produced an installment of aggregated data responsive to the NYCLU’s request for records regarding use of force from January and February of 2020. We appreciate your ongoing efforts to complete the production of materials responsive to the NYCLU’s FOIL request.

I am sure you can appreciate that a number of questions have arisen as we review the productions. In particular, there are a few issues (described below) that we would like to discuss at your early convenience. Accordingly, please let me know of your availability for a telephone conference during the week of February 8, 2021.

A. Destruction of Inadvertently Produced Data

On January 25, 2021, your office informed the New York Civil Liberties Union (“NYCLU”) that the SPD had inadvertently produced versions of stop data documents that contained information that identified the subjects of the stops. The NYCLU will destroy the data that was inadvertently produced, provided that the SPD agrees to preserve, in unredacted form, all produced data. Please also note that agreement to destroy the unredacted data does not waive the NYCLU’s right to seek such data in the future; the NYCLU reserves all rights in this regard.

In anticipation of your agreement to retain the data in unredacted form, Latham & Watkins has engaged its technology team to delete and destroy the unredacted stop data produced via DropBox on January 15, 2021 and via Latham Secure Transfer on January 19, 2021.

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B. Questions Regarding the SPD Interim Productions

1. The SPD's Document Collection

The NYCLU needs clarification with regard to the SPD's process for identifying documents responsive to the FOIL Request. For certain productions, the SPD stated that it produced documents that contained certain terms. For example, the completion letter in respect of the SPD's January 15, 2021 production of documents related to stops, temporary detentions, and field interviews, states that "[p]olicies that reference 'stops/temporary detentions/field interviews'" were produced. *See* Jan. 15, 2021 SPD Completion Letter; *see also* Jan. 8, 2021 SPD Completion Letter (producing "[p]olicies that reference immigration"). We wish to discuss, among other things: (1) where the SPD's policies are catalogued; (2) whether all policies are stored on a single database and how routinely that database is updated; and (3) what search terms, if any, were used to collect the policies produced.

2. The SPD's Productions of Stop Data

On January 15, January 19, and January 25, 2021, the SPD produced documents concerning law enforcement stops, temporary detentions, and field interviews. The documents produced included spreadsheets that aggregated data for all stops conducted between 2014 and 2020. Regarding those spreadsheets, we wish to discuss the following:

First, in order to understand the information produced, we need clarification as to the meaning and content of columns, including those entitled "Incident Reporting Official ID," "Assist Officer IBM1," "UniqueNumber," "CNYLeadsNumber," "PersonTypeCode," "ACTUINCD," "IncidentReportingOfficialID," "AssistOfficerIBM1," and "Clearing Codes." Many of the columns appear to include data codes, including the use of letters to define race (with codes including B, W, I, O, etc.) and ethnicity (with codes including N, U, H, etc.).

Second, in some instances the SPD produced stop data in an "Incident" file without any corresponding data in a "Persons" file for that same month and year. We need to discuss whether this is due to missing or incomplete data, or whether there are other reasons that Incident data appears not to have accompanying "Persons" data.

Third, every policy produced on January 15, 2021 is undated within the document, but appears to be dated in the file name, with a notation of "current." *See, e.g.*, V1A2S06 Central Records Division_051220_current.pdf. Because it was not explicitly stated in the SPD's January 15, 2021 Completion Letter, please confirm that the file-name dates are the operative dates for each document's latest final draft, and each policy produced is the Department's current and operative policy.

C. Recent *Schenectady* Article 78 Decision

Finally and just for good order, attached is a copy of a recent decision, *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, (N.Y. Sup. Ct. Dec. 29, 2020). The facts in that case mirror those that will be presented in the NYCLU's forthcoming Article 78 petition based on the denial of its request for documents concerning all allegations of SPD

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misconduct, not merely those that the Department substantiated or has finally resolved. The NYCLU could not have articulated its position any more clearly than the Court in *Schenectady*:

“[T]here is simply no ambiguity . . . as to the legislature’s instructions when responding to FOIL requests. In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct. . . . It is not the veracity of the allegations but, instead, whether they relate to the discharge of public duties which guides the analysis.” *Id.* at 10-11.

The court further confirmed that “where records relate to performance of public duties, no privacy right exists.” *Id.* at 11.

I therefore ask that you reconsider your position with respect to the NYCLU’s request for documents related to allegations of misconduct by SPD officers that have not been finally adjudicated or were not “substantiated.” The NYCLU is prepared to enforce its right to access these records through an Article 78 proceeding and to seek attorneys’ fees and costs, as permitted under applicable statutes and authority.

* * *

I remain hopeful that a collaborative discussion on the topics above (and any others you wish to raise) will continue our progress and obviate the need for litigation, and I look forward to speaking to you soon. Please feel free to contact me at michael.lacovara@lw.com or (212) 906-1377.

Sincerely,



Michael Lacovara
of LATHAM & WATKINS LLP

cc: FOIL Office (FOIL@syrgov.net)

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SCHENECTADY

PRESENT: HON. MARK L. POWERS
SUPREME COURT JUSTICE

DECISION AND ORDER

Index No. 2020-1411
RJI No. 46-1-2020-0598

**SCHENECTADY POLICE BENEVOLENT ASSOCIATION, On Behalf of
BRIAN POMMER and On Behalf of All Other Similarly Situated Members of
the SCHENECTADY POLICE BENEVOLENT ASSOCIATION, and
BRIAN POMMER,**

Petitioners-Plaintiffs,

-against-

**CITY OF SCHENECTADY, MICHAEL C. EIDENS, in his official capacity
as Public Safety Commissioner for the City of Schenectady, CITY OF
SCHENECTADY POLICE DEPARTMENT,**

Respondents-Defendants.

NOTICE:

**PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND
RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN
WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE
APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF
ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY
MAIL PURSUANT TO RULE 2103(B)(2) or 2103(B)(6), THE
ADDITIONAL FIVE DAYS PROVIDED SHALL APPLY, REGARDLESS
OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF
ENTRY.**

APPEARANCES:

John P. Calareso, Jr., Esq., Gleason, Dunn, Walsh & O'Shea, 40 Beaver Street, Albany, N.Y. 12207; Counsel for Petitioners-Plaintiffs, Schenectady Police Benevolent Association, on behalf of Brian Pommer and on behalf of all other similarly situated members of the Schenectady Police Benevolent Association, and Brian Pommer;

Andrew B. Koldin, Esq., Assistant Corporation Counsel, City Hall, 105 Jay Street, Room 201, Schenectady, New York 12305; Counsel for Respondents-Defendants, City of Schenectady, Michael C. Eidens, in his official capacity as Public Safety Commissioner for the City of Schenectady, and the City of Schenectady Police Department;

Michael Sisitzky, Esq., Julissa Reynoso, Esq., Sofia Arguello, Esq., Lauren E. Duxstad, Esq., Brett Waters, Esq., Erin Baldwin, Esq., Samantha Ruppenthal, Esq., WINSTON & STRAWN LLP, 200 Park Avenue, New York, New York 10016; Counsel for Intervenor-Party, New York Civil Liberties Union.

HON. MARK L. POWERS, JSC

The issue before this Court is 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 *Freedom of Information Law (FOIL)* request, in light of the repeal of *Civil Rights Law (CRL) §50-a*, on June 12, 2020.

Certainly, the repeal, which took effect immediately, removed the blanket of secrecy with which law enforcement records, statewide, were previously cloaked in their entirety. However, the scope of the general public's reach, through the simple submission of a *FOIL* request, as far as the content of such records is the question now

put to municipalities around the state.¹

At the outset, the 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*. Indeed, our nation's recent history is forever marked by anger and sorrow surrounding controversial arrests involving the use and degree of force, particularly as against black men, women and children. Although not an exhaustive rendition, police-caused fatalities of minorities, which garnered national media attention, peaceful public outcry and/or violent social unrest include: the death of Eric Garner, on July 17, 2014, resulting from police choke hold, during arrest for selling untaxed cigarettes; the death of Tamir Rice, a child, on November 22, 2014, who was carrying a toy gun; the death of Freddie Gray, on April 19, 2015, caused by spinal cord injuries sustained while already in police custody; the death of Elijah McClain, on August 24, 2019, after being cuffed, administered ketamine (a sedative), and then held against the ground in a choke hold for more than fifteen minutes; the death of Breonna Taylor, on March 13, 2020, after officers blindly fired multiple shots into her home while executing a search warrant; the death of Daniel Prude, on March 23, 2020, after being held face down to the pavement in excess of two minutes with a "spit hood" over his head; and the death of George Floyd, on May 25,

1

Upon information and belief, at the time of this writing, on-line databases are in the process of development, geared toward improved and more efficient responses to FOIL requests, as well as reduced costs for compilation, reproduction, and consistent records retention policies. The extent, if any, to which such database design has been delayed by the on-going global health pandemic (COVID-19) is unknown to this Court.

2020, while pinned to the ground with an officer's knee against his neck for more than eight minutes, during arrest for possession of a counterfeit \$20.00 bill. Each of these deaths (and others not specifically referenced herein) sparked large-scale demonstrations decrying police brutality and systemic racism.

The circumstances from which the instant matter emanates is, gratefully, not one in which a death resulted. However, on July 6, 2020, Patrolman Brian Pommer (hereinafter, "Patrolman Pommer"), a 46 year old white police officer, employed by the City of Schenectady Police Department since 2013, arrested Yugeshwar Gaidarpersaud (hereinafter, "Gaidarpersaud"), a 31 year old Indian man, in the course of questioning him about a neighbor dispute. Gaidarpersaud, who was unarmed, ran from Patrolman Pommer and, in response, Patrolman Pommer pursued Gaidarpersaud, subduing him with the use of physical force.²

Given that our nation was gripped in demonstrations over the death of George Floyd merely six weeks earlier, parallels were drawn, locally, with respect to Patrolman Pommer's arrest of Gaidarpersaud, prompting public interest in Patrolman Pommer's prior disciplinary record, if any. Specifically, on July 8, 2020, Michael Goodwin, a journalist with the Times Union, a newspaper in wide general circulation within New York State's Capital District, submitted a *FOIL* request to the City's Records Access

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Upon information and belief, Gaidarpersaud was charged with criminal mischief as to his neighbor and with resisting arrest as to Patrolman Pommer. These charges have since been dismissed or adjourned in contemplation of dismissal. Upon further information and belief, an internal investigation resulted in disciplinary charges brought against Patrolman Pommer, which have since been resolved with a six day suspension, without pay, and mandatory additional training.

Officer, seeking Patrolman Pommer's personnel record. On July 15, 2020 and September 30, 2020, respectively, the New York Civil Liberties Union (hereinafter, "the NYCLU") submitted *FOIL* requests, initially seeking Patrolman Pommer's disciplinary records and, subsequently, seeking the disciplinary records of all officers in the City's employ.

The instant combined *Civil Practice Law and Rules (CPLR) Article 78* special proceeding and declaratory judgment action, was brought on September 9, 2020, by the Schenectady Police Benevolent Association (hereinafter, "the PBA"), a labor organization and the exclusive representative for all police officers of the City of Schenectady, including Patrolman Pommer, (collectively, "the petitioners") seeking to prevent the City of Schenectady, its Public Safety Commissioner and its Police Department (hereinafter, collectively, "the respondents") from including particular documents, and those associated with them, within their response to the pending *FOIL* requests. The petitioners further seek to have this Court direct the respondents to redact any and all references to conduct which was uncharged, unfounded, unsubstantiated, settled without discipline and/or otherwise resolved or exonerated, from the records of all officers, including Patrolman Pommer, prior to any disclosure.

The particular documents at issue are: a Counseling Notice, dated April 15, 2020, which Patrolman Pommer received relative to his response to a domestic call on November 10, 2019; and a Notice of Potential Charges, drafted on May 4, 2020, which was never signed, dated, nor served upon Patrolman Pommer, but arose from his handling of a group gathering outside a local business (Bumpy's Polar Freeze), relative to COVID-19 restrictions and for which he received a Notice of Discipline on May 21,

2020, which was, in turn, resolved via a Settlement Agreement on June 1, 2020.

Based upon a good cause showing by petitioners that there was an imminent intention, on the respondents part, to disclose these records, in response to the *FOIL* requests, albeit in redacted form, this Court granted, on September 9, 2020 (commensurate with the commencement of the proceeding) a temporary restraining Order prohibiting any further release of information from Patrolman Pommer's personnel record. The Court also directed the Schenectady County Clerk to seal the filings relative to this matter, pursuant to *22 New York Code of Rules and Regulations (NYCRR) §216.1*.

Shortly thereafter, by a bench ruling on September 23, 2020, which was reduced to writing and signed as an Order of this Court on September 30, 2020, the respondents were directed to release those portions of Patrolman Pommer's disciplinary records as pertain to actual findings of misconduct, together with the evidence underlying such findings.

The New York Civil Liberties Union (NYCLU) submitted a formal motion seeking intervenor-party status, via Order to Show Cause (OSC) filed on October 13, 2020. This application was granted, without genuine opposition, and pursuant to this Court's discretion, under *CPLR §7802(d)*.

THE LAW AND DISCUSSION

The *Freedom of Information Law (FOIL)*, codified at *New York State Public Officers Law Article 6, §§84-90*, is rooted in a presumption favoring access to all agency records,

without the need of the person requesting access to provide any reason. In short, absent an express statutory exception allowing an agency to withhold disclosure of any requested public record, its availability is presumed. The theory is that “public records belong to the public.”

The implementation of *FOIL* is overseen by the New York State Committee on Open Government and this Committee issues advisory opinions, extolling the importance of transparency so as to expose agency abuses which pose threats to public health and safety.

Throughout the more than 40 year reign of *CRL 50-a*, - - from its enactment in 1976 until its repeal in 2020 - - , police disciplinary records were shielded from the public eye (unless an officer consented to their disclosure or a Court Order was obtained). *CRL §50-a's* existence squarely secured police misconduct records and, especially, placed them beyond the reach of those who might otherwise use them for impeachment purposes. Importantly, their non-disclosure did not turn on whether misconduct was substantiated, nor whether discipline was imposed, nor whether charges were merely under consideration. Rather, *CRL §50-a* rendered all records of police conduct or misconduct essentially invulnerable.

Moreover, despite litigation to repudiate or, at least, scale back *CRL 50-a's* blanket safeguard against disclosure, its protections, prior to 2020, continued to receive expansive interpretation by the New York State Court of Appeals. *See, e.g., Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. of Correctional Services*, 73 NY2d 26 [Ct.

of Appeals, 1988], wherein the high Court ruled that inmate grievances against correction officers constituted the “very sort of record intended to be kept confidential under CRL §50-a. See also *Matter of Daily Gazette Co. v. City of Schenectady*, 93 NY2d 145 [*Ct. of Appeals, 1999*], wherein the high Court ruled that records of police officers, who engaged in unruly conduct while off-duty, were protected from disclosure in light of the risk that such records might otherwise be used to “embarrass or humiliate” them. In fact, it was merely two years ago, in a holding viewed as “the high water mark” for the protection afforded police personnel records, that the high Court again reiterated the need to shield police officers from the disclosure of potentially embarrassing records. See *Matter of New York Civ. Liberties Union v. New York City Police Dept*, 32 NY3d 556 [*Ct. of Appeals, 2018*], wherein civilian complaints made to a review board, which may or may not be referred for discipline, were held non-disclosable based upon CRL §50-a.

In a nutshell, CRL §50-a was interpreted broadly and applied so as to afford maximum confidentiality to all law enforcement disciplinary records. State lawmakers, however, responding to public demand, dramatically changed the landscape on June 12, 2020. On this date, a package of sweeping statutory reforms was enacted in combination with the complete repeal of CRL §50-a. The measures taken by the legislature were widely lauded as a giant leap forward in government accountability and transparency, focused on restoring the public’s trust in the integrity of our police force.

As a result, access to law enforcement personnel records, including disciplinary history, is now governed by FOIL alone, with key provisions of FOIL having been

amended accordingly. Specifically, there are newly enacted provisions to *POL §86*, to wit: the addition of subdivision (6) [*defining “law enforcement disciplinary records”*]; the addition of subdivision (7) [*defining “law enforcement disciplinary proceeding”*]; the addition of subdivision (8) [*defining “law enforcement agency”*] and the addition of subdivision (9) [*defining “technical infraction”*]. There are also newly enacted provisions to *POL §87* to wit: the addition of subdivisions (4-a) and (4-b) [*providing for the mandatory or discretionary redaction of certain information prior to release*]. New provisions were also adopted in *POL §89*, to wit: the addition of subdivisions (2-b) and (2-c) [*likewise each providing for certain redactions prior to release*].³ At the same time, *POL §87(2)(b)*, which provides an exemption for records which “if disclosed, would constitute an unwarranted invasion of personal privacy,” was not changed. It is, however, *POL §89(2)(b)* which sets forth a non-exhaustive list of the types of information which, if released, would constitute “an unwarranted invasion of personal privacy.”

Thus, with the repeal of *CRL §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, or portion thereof, falls within a recently enacted statutory exception or a pre-existing one which the legislature left unaltered. It is *POL §87(2)(b)*'s exceptions for records that, if disclosed, would constitute an “unwarranted invasion of personal

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Within three days of these amendments, compatible statutory revisions were made to the *CRL* at §§79-n(2) and 79-p; *Executive Law §70-b*; and the *Police Statistics and Accountability Act (STAT)*, the latter of which itself amends provisions of the *Criminal Procedure Law*, the *Judiciary Law* and the *Executive Law*.

privacy,” that occupies the greatest significance to the instant matter.

Here, albeit the petitioners insistence that no public interest is served by the disclosure of the Counseling Notice, the Notice of Potential Charges, the Notice of Discipline and/or the Settlement Agreement, this Court is hard-pressed to find that any of these particular documents fall within the types of records to which *POL §89(2)(b)(I-viii)* ascribes a right of “personal privacy.” Nor does it particularly strengthen petitioners position to emphasize that *POL §89(2)(b)(I-viii)*, by its express language, does not provide an exhaustive list of personally private materials.

While there is no argument that the Settlement Agreement contains disciplinary information based on a founded charge(s), this Court acknowledges, and concurs with, the petitioners assertion that the Counseling Notice was not discipline but, merely, the noting of a job deficiency. Likewise, the Notice of Potential Charges does not contain any specifications, nor was it even served upon Patrolman Pommer. The assertion by petitioners that unsubstantiated charges, if disclosed, have the potential to cause embarrassment and/or give rise to officer safety issues is, indeed, made even more concerning by the possibility that veracity may be completely lacking. These points advanced by the petitioners are well-taken and credited by the Court. However, there is simply no ambiguity, in this Court’s view, as to the legislature’s instructions when responding to *FOIL* requests. In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct. Where counseling pertains to job performance, or allegations relate to public duty, such records

are publicly accessible, via *FOIL* request, regardless of reputational injury or validity. It is not the veracity of the allegations but, instead, whether they relate to the discharge of public duties which guides the analysis. (*See Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 NY3d 477 [Ct. of Appeals, 2005]).

“Privacy” is, of course, a subjective issue for individuals but it is not as to public employee records. Public employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned. This is due to the high priority placed on accountability. Stated otherwise, where records relate to performance of public duties, no privacy right exists. It may well be true that a public employee (including a police officer) and/or his collective bargaining unit or labor union, views a particular record as private or embarrassing or its disclosure as a personal safety risk but, it is nonetheless now within the ambit of disclosure. The current statutory scheme, while recognizing a privacy invasion, clearly does not deem it to be “unwarranted.”

Indeed, pursuant to *POL* §89(2-c), the public’s right of access may even extend to “technical infractions” (minor rule violations related solely to administrative departmental rules and not of public concern), as included within the meaning of “law enforcement disciplinary records,” albeit with the agency having some discretion for redactions. Similarly, the documents sought by the pending *FOIL* requests do not fall within the exception to disclosure for materials that are “inter-agency or intra-agency,” under *POL* §87(2)(g)(iii),

In the balance between the public’s right of access and the impact of disclosure

upon the officer, the legislature has now made clear that the latter (the impact upon the officer) must bow to the former (the public's right of access). It is unavailing as a basis to deny disclosure that an officer may not have had a full and fair opportunity to contest any misconduct charge.

Therefore, while the petitioners posit that the items sought herein are, at least in part, not disclosable due to the lack of a hearing, the new statutory scheme does not deem an officer's lack of opportunity to contest allegations, at a fair hearing, to serve as a basis to deny public disclosure. In other words, such lack of opportunity to the officer does not, standing alone, establish an unwarranted invasion of privacy. Thus, although this Court concurs with the petitioners that a fair determination as to the veracity of a misconduct complaint would seem to be appropriate, such course is not compatible with the legislature's clear directives.

This Court also declines to adopt the petitioners reliance upon the *Taylor Law*. It is axiomatic that the public right of access to records under *FOIL* cannot be bargained away in collective bargaining between management and labor.

Next, the Petitioners allege a denial of due process (*New York Constitution, Article 1, §6*) since the *Second Class Cities Law (SCCL) §137* and the Schenectady Police Department Manual, Policy 1038, were not followed. However, the disclosure of police personnel records, albeit possessing the potential for reputational damage, does not amount to a cognizable protected interest under the federal or state constitutions, without more, such as, for example, the loss of employment. (*See, Patterson v. City of Utica,*

370 F.3d 322 [2d Circuit 2004]; and *DiBlasio, M.D. v. Novello*, 344 F.3d 292 [2d Circuit 2003]).⁴ Here, the petitioners cannot develop a valid claim upon constitutional arguments because Pommer has not suffered a tangible loss. Moreover, it is beyond cavil that legislative acts enjoy a strong presumption of constitutionality.

This Court finds that the petitioners have not advanced a persuasive argument as to the governing statutes being in conflict with due process, equal protection or any other provision of the federal or state constitutions. As with their arguments sounding in the unwarranted invasion of privacy, the petitioners claims that the respondents intended compliance with the *FOIL* requests would be arbitrary and capricious, or an error of law, also fail.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” (*Majewski v. Broadalbin-Perth Cent. School Dist*, 91 NY2d 577, 583 (Ct. of Appeals, 1998) quoting *Tompkins v. Hunter*, 149 NY117 (Ct. of Appeals, 1896). The repeal of *CRL §50-a* reflects the legislature’s intention to alter the processing of *FOIL* requests seeking law enforcement disciplinary records from disclosure of the least possible material to the greatest permissible disclosure.

As for retroactivity, it is generally true that new statutes are presumed to apply prospectively. *General Construction Law (GCL) §§93 and 94*; see also *Matter of Regina Metro*.

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Such claims are often referred to as “stigma-plus claims,” because they involve an injury to reputation (the “stigma”) coupled with loss of a property interest (the “plus”). Stigma-plus claims require a showing of both a derogatory statement, false in nature, which injures reputation and the taking or alteration of a property interest, status or right. (See *Paul v. Davis*, 424 U.S. 693 [Supreme Court of the United States, 1976]).

Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 NY3d 332 (Ct. of Appeals, 2020) quoting *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 (Ct. of Appeals, 1998), thereby affording individuals an opportunity to know what the law is and to conform accordingly. [*Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 265 (United States Supreme Court, 1994)]. Nevertheless, it is also true that statutory retroactivity to matters preceding enactment is often sanctioned, particularly where, as here, strong public policy considerations serve as the foundation for the new statutory scheme.

In this Court's view, even despite a risk of "over-transparency," our state legislature has spoken loudly toward its stated goal of improving racial discourse, particularly with regard to policing and especially as to policing of minorities and those suffering with mental health disorders. Here, there is strong evidence that retroactive effect was intended by the legislature.

Therefore, regardless whether unsubstantiated or unfounded or exonerated or dismissed, or regardless of whether not yet fully 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 *CRL §50-a* utterly meaningless simply by the respondents theorizing that the record (or any portion thereof) is, in their opinion, "private." Given that an easy ability to render the new statutory scheme meaningless

could not possibly have been the intended by the legislature, this Court is constrained to deny the petition and complaint in their entirety.

In conclusion, the last thing intended by this Court's decision herein is that it be viewed as a vilification of law enforcement officers, who, bravely dedicated to public service, are also all too often losing their lives in the line of duty. This Court appreciates petitioners position that the reputational harm which can result from the disclosure of unsubstantiated allegations, can be irreparable. It is, however, the Court's role to apply the current statutory scheme to the facts before it and, on these specific facts, to credit petitioners' interpretation would be to sub-vert *CRL §50-a's* repeal. In our current times, our state lawmakers have seen fit to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations. They, presumably, did so in the name of opening the door to transparency, and having done so, it would be palpably improper for this Court to close it. It strikes the Court that the legislature intended not just a change in law but, rather, a change in culture. It is the Court's function to enforce the current laws in a manner that reflects that intention.

Finally, notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular *FOIL* requests outstanding as to Patrolman Pommer and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits.

THE COURT'S RULING

NOW, therefore, based upon the foregoing, it is hereby

ORDERED that the petition/complaint is **DENIED** and **DISMISSED** with prejudice; and it is further

ORDERED that, effective with the entry of this Decision by the Intervenor-Party (the NYCLU), with the Schenectady County Clerk, and service of an entered copy upon counsel for the named Petitioners and Respondents, the Temporary Restraining Order shall be automatically vacated and be of no further force or effect, whereupon Respondents shall proceed swiftly in complying with the pending FOIL requests to include Patrolman Pommer's counseling notice, (draft) notice of potential charges, Notice of Discipline and Settlement Agreement, all of which shall be without redaction except insofar as Patrolman Pommer's, and any other officer(s), home address, personal contact information (cell phone and email) and Social Security Numbers; and it is further

ORDERED that, as the Court is aware that disciplinary charge(s) pertaining to Patrolman Pommer's arrest of Yugeshwar Gaidarpersaud, which prompted the existing FOIL requests, have been resolved during the pendency of this special proceeding, the Court's decision herein shall be deemed to include the records as to such discipline, without the need for an amended or supplemental FOIL request to those already pending; it is further

ORDERED that, there being no further relief sought, this matter is closed with this Decision constituting the final Order of this Court.



HON. MARK L. POWERS
SUPREME COURT JUSTICE

Signed: December 29, 2020
at Schenectady, New York

PAPERS CONSIDERED

Petitioners-Plaintiffs' Verified Petition and Complaint, dated September 3, 2020, with annexed Exhibits A - E;

Petitioners-Plaintiffs' Memorandum of Law, dated September 9, 2020;

Intervenor-Party Order to Show Cause, dated October 13, 2020, Attorney Affirmation of Michael Sisitzky, Esq., dated October 7, 2020, in Support of NYCLU's Motion to Intervene, with annexed exhibits 1 - 8; and Attorney Affirmation of Brett Waters, Esq., dated October 7, 2020, in Support of NYCLU's Motion to Intervene, with annexed exhibits A - C;

Petitioners-Plaintiffs' Reply, dated October 27, 2020, to Respondents-Defendants' Supplemental Brief in Support of Verified Answer, with annexed Exhibit A;

Intervenor-Party Memorandum of Law, dated November 10, 2020, in Opposition to Petitioners-Plaintiffs' Verified Petition and Complaint, with annexed Exhibits A and B;

Attorney Affirmation of Brett Waters, Esq., dated November 10, 2020, in Support of Intervenor-Party's Memorandum of Law in Opposition to Petitioner-Plaintiffs' Verified Petition and Complaint, with annexed Exhibits A and B;

Petitioners-Plaintiffs' Reply, dated November 18, 2020, to Intervenor's Memorandum of Law in Opposition to Petitioners-Plaintiffs' Verified Petition and Complaint.

Respondents' Notice of Motion to Dismiss, dated April 14, 2021

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FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

INDEX NO. 002602/2021

NYSCEF DOC. NO. 27

RECEIVED NYSCEF: 04/14/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

NOTICE OF MOTION


Index No. 002602/2021
Hon. Gerard J. Neri

- MOTION BY:** Respondents City of Syracuse and the Syracuse Police Department, by its undersigned counsel.
- DATE, TIME & PLACE OF HEARING:** The Motion will be returnable on **April 29, 2021 at 11:30 a.m.**, before the Hon. Gerard J. Neri, J.S.C. *via* Microsoft Teams.
- SUPPORTING PAPERS:** Verified Answer with Counterstatement of Material Facts and Objections in Point of Law; Certified Article 78 Record; the Affirmation of John G. Powers with Exhibits; and a supporting Memorandum of Law.
- RELIEF REQUESTED:** An Order pursuant to CPLR §§ 7804(f) and 409(b) dismissing the Verified Petition on the merits and/or granting Respondent judgment on the merits.
- RESPONDING PAPERS:** If any, must be served in accordance with CPLR §§ 2214(b), 7804.

Dated: April 14, 2021

Respectfully submitted,

HANCOCK & ESTABROOK, LLP

By: 

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**Affirmation of John G. Powers, for Respondents, in Support of
Motion to Dismiss, dated April 14, 2021**

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NYSCEF DOC. NO. 28

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

AFFIRMATION

Index No. 002602/2021

Hon. Gerard J. Neri

JOHN G. POWERS, under penalties of perjury, affirms and says:

1. I am an attorney at law duly licensed to practice in the State of New York and a member of the law firm of Hancock Estabrook LLP, attorneys for Respondents City of Syracuse (the “City”) and the Syracuse Police Department (the “SPD”) (collectively, “Respondents”).

2. I respectfully submit this Affirmation in opposition to the Verified Petition of Petitioner New York Civil Liberties Union (“Petitioner” or “NYCLU”) and in support of Respondents’ Motion to Dismiss the NYCLU’s Verified Petition.

3. At bottom, the NYCLU raises a single argument. Specifically, the NYCLU contends that the repeal of New York Civil Rights Law § 50-a in June of 2020 somehow altered N.Y. Public Officers Law § 84, *et seq.* (hereinafter, “FOIL”) such that police officers are treated *less favorably* than any and all other public employees with respect to the application of the

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exemption found at N.Y. Public Officers Law § 87(2)(b) (the “personal privacy exemption”).

See Dkt. No. 3.

4. This sole contention is incorrect—and palpably so. Although it is true that Civil Rights Law § 50-a did provide an *extra layer of protection* for police discipline (independent of any applicable FOIL exemptions), it is equally true that the repeal of § 50-a did not alter the FOIL landscape in such a way that police officer records are somehow afforded *less protection* than similar records of other public employees.

5. The language repealing § 50-a does not mention, let alone change or limit, the personal privacy exemption contained at § 87(2)(b) of FOIL. Thus, despite the repeal of § 50-a, police officer records remain subject to well-settled FOIL exemptions, which apply with equal force to all other public employees.

6. More specifically, existing FOIL caselaw provides that unsubstantiated complaints of misconduct against *any* public employee—including *police officers*— may be withheld pursuant to FOIL’s personal privacy exemption. *See* N.Y. Public Officers Law § 87(2)(b).

7. The NYCLU’s position in this proceeding—that is, that the personal privacy exemption does not apply in the same way to unsubstantiated complaints *against police officers*—runs afoul of this well-settled FOIL precedent.

8. SPD’s application of the personal privacy exemption to police officers relative to the FOIL response challenged in this proceeding was hardly controversial, *let alone lacking in a reasonable basis*. In fact, the SPD’s position was adopted directly from an advisory opinion

issued by the New York State Department of State's *Committee on Open Government*¹ on July 27, 2020 and subsequently published at AO 19775. This advisory opinion is directly on point and requires rejection of the NYCLU's position.

9. Yet, the NYCLU persists, arguing that two trial level decisions from other state courts, as well as a federal appellate decision somehow undermine the SPD's FOIL position. But this cited authority does not address the precise issue raised in this case; indeed, it is largely irrelevant.

10. *Not one* of these three cited cases holds that the repeal of § 50-a somehow changed FOIL to provide law enforcement officers with less protection than other public employees. *Not one* of the three cases holds that the personal privacy exception was somehow limited by the § 50-a repeal statute. *Not one* of the three cases holds that the repeal of § 50-a was intended to place police officers in a less protected status under FOIL's personal privacy exemption than other public employees.

11. This inescapable conclusion is buttressed by the *Committee*'s recent advisory opinion, issued on March 19, 2021 and subsequently published at AO 19785. *See* R. 32-33. In AO 19785, the *Committee* was presented with the *exact same authority*—specifically *Buffalo Police Benevolent Association v. Brown*, 69 Misc. 3d 998 (Sup. Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup. Ct.,

¹ The *Committee* is the very public agency formed by the New York State Legislature for the express purpose of advising public agencies like the City on the appropriate interpretation of the FOIL statute. *See* N.Y. Pub. Off. Law § 89 (creating the *Committee* to, *inter alia*, (1) “furnish to any agency advisory guidelines, opinions or other appropriate information regarding” FOIL; and (2) “furnish to any person advisory opinions or other appropriate information regarding” FOIL).

Thus, the *Committee* is the relevant agency tasked with interpreting the scope of the FOIL statute. As a result, the *Committee*'s advisory opinions on the meaning and interpretation of FOIL statute are given deference by courts. *See Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep't 1999).

Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—and asked to revise the original conclusions and analysis contained within AO 19775.

12. In AO 19785, the *Committee* indicated that this cited authority *did not* change the conclusions set forth in AO 19775. *See* R. 32-33. That is, a municipality could continue to lawfully withhold law enforcement disciplinary records regarding unfounded or unsubstantiated complaints based on existing, well-settled FOIL precedent. *See id.*

13. Thus, while the NYLU’s position is unsustainable and must be rejected, the City’s position is supported by the plain language of the § 50-a repeal statute and two *Committee on Open Government* advisory opinions, each which address the exact issue before the Court.

14. For these reasons, it cannot be said that the City’s determination to withhold a limited number of police disciplinary records was affected by any error of law. Likewise, there was a reasonable basis for the City’s position. Therefore, it is respectfully submitted that the Verified Petition should be dismissed on the merits pursuant to CPLR § 409(b).

RELEVANT FACTUAL BACKGROUND

15. In June 2020 repeal the New York State Legislature repealed New York Civil Rights Law § 50. A true and accurate copy of the Assembly’s floor debate on June 9, 2020 regarding the repeal is annexed hereto as **Exhibit “A”**, while a true and accurate copy of Law 2020, chapter 96, effective June 12, 2020 is annexed hereto as **Exhibit “B”** (hereinafter referred to as the “§ 50-a repeal statute”).

16. Following that repeal § 50-a, the City sought an advisory opinion concerning the scope and interpretation of FOIL relative to whether requests for the disclosure of certain types of police officer personnel records would constitute an unwarranted invasion into personal

privacy such that they would be exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(b).

See R. 1.

17. More specifically, on July 13, 2020, the City submitted a formal request for an advisory opinion to the *Committee*—posing the question of whether “an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome.” R. 1.

18. The question posed to the *Committee* was whether law enforcement employees were to be treated similarly to other public employees relative to the interpretation of this FOIL exemption, *i.e.*, could a public employer “lawfully withhold unsubstantiated and unfounded complaints against [a police] officer, or [is] the employer [] obligated to disclose all complaints against an employee regardless of outcome?” R. 1.

19. On July 27, 2020, the *Committee* issued formal advisory opinion AO 19775. R. 2-4; *see also* R. 5-7.

20. That advisory opinion addressed the *precise question* that is at issue in the present Article 78 proceeding—*i.e.*, did the repeal of § 50-a require records concerning unsubstantiated complaints against police officers to be disclosed notwithstanding the applicability of other FOIL exemptions that would have otherwise applied. *See* R. 2-4.

21. In AO 19775, the *Committee* concluded that “[t]he new provisions of FOIL [included in the statute repealing § 50-a] *did not make changes* to provisions concerning personal privacy as defined in § 87(2)(b).” R. 3 (emphasis added).

22. Thus, the *Committee* observed that, just as FOIL had permitted prior to the repeal of Civil Rights Law § 50-a—where an agency weighs the interest of disclosure against the

unwarranted invasion into personal privacy and finds that the latter outweighs the public interest in disclosure—“*records unsubstantiated and unfounded complaints*” against police officers are properly withheld under § 87(2)(b). R. 2-4.

23. Put another way, the recent repeal of § 50-a had no impact on the personal privacy exemption contained in § 87(2)(b).

24. Thus, FOIL continues to apply *equally* to police officer employee records as it would to other public employees, and that the recent repeal of § 50-a had no effect on that particular application of § 87(2)(b). *See* R. 2-4.

25. A true and accurate copy of the *Committee*’s response to the City’s inquiry, which became AO 19775 is annexed hereto as **Exhibit “C.”** *See also* R. 2-7.

26. Following the issuance of AO 19775, the City relied in good faith on that advisory opinion in responding to FOIL requests submitted by various parties requesting disciplinary records concerning specific police officers. The City’s reliance was appropriate given the statutory mandate of the *Committee* to opine on the scope of FOIL as set forth in N.Y. Pub. Off. Law § 89. Ver. Ans. ¶ 10.

27. On or about September 15, 2020, the NYCLU served a FOIL request on the SPD containing eight single-spaced pages of particularized document requests, with over 60 individual requests. *See* R. 8-15.

28. The NYCLU FOIL requests were *expansively broad*—covering nearly every topic of police activity over the same 20-year span—necessarily implicating a massive investment of time, manpower, and resources in response.² *See* R. 8-15.

² For example, the first such request—which was representative of the breadth of the remainder of the requests—demanded “all law enforcement disciplinary records collected by the SPD” for an over 500 officer police force over the span of 20 years. *See* R. 8-9.

29. On November 17, 2020, through the Office of Corporation Counsel, the SPD served a timely response to the FOIL request, outlining a schedule for the rolling production of materials collected in response to the request. *See* R. 18-20.

30. With respect to the request for “law enforcement disciplinary records,” the SPD indicated that while it *would* disclose responsive police personnel records, its response would *not* include records concerning unfounded, unsubstantiated, or pending accusations under the personal privacy exemption. *See* R. 18-20. The response expressly cited to Public Officers Law § 87(2)(b) as well as AO 19775 as the rationale for this withholding. *See* R. 18-20.

31. The NYCLU appealed that determination on December 10, 2020. That appeal raised only two narrow issues:

- a. whether the FOIL response was procedurally deficient because it did not “fully articulate the reasons for [the SPD’s] denial” but merely “parrot[ed] the statutory language” in the FOIL statute; and
- b. whether the statutory repeal of Civil Rights Law § 50-a mandated the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. *See* R. 21-25.

32. On December 22, 2020, SPD denied the NYCLU’s appeal, expressly invoking the *Committee on Open Government’s* advisory opinion at AO 19775. *See* R. 26-31.

33. The SPD balanced its responsibility to both comply with FOIL and to protect the personal privacy of its employees, and relied in good faith on an advisory opinion from the government agency formed with the specific purpose of providing guidance on the interpretation of the FOIL statute. *Ver. Ans.* ¶ 20.

34. Thus, the SPD had a reasonable basis for its determination, which was unaffected by any error of law. *See id.*

35. More recently, on March 19, 2021, the *Committee on Open Government* issued a *second* advisory opinion applicable to this proceeding. *See* R. 32-33.

36. In that opinion, the *Committee* was presented with the exact same authority that the NYCLU presents to this Court—*Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998 (Sup. Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup. Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—and asked to revisit and revise the conclusions originally reached in AO 19775. *See id.*

37. The *Committee* adhered to its original position, noting that this authority *did not* change its previous opinion. A true and accurate copy of the *Committee*'s March 19, 2021 opinion, which became AO 19785 is annexed hereto as **Exhibit "D."** *See also* R. 32-33.

THE PARTIAL DENIAL OF THE NYCLU'S FOIL REQUEST WAS NOT AFFECTED BY ERROR OF LAW AND SHOULD NOT BE DISTURBED BY THE COURT.

38. The NYCLU's sole basis for its legal challenge is its contention that the repeal of § 50-a mandates the disclosure under FOIL of police disciplinary records related to unsubstantiated complaints, *without regard to the application of existing FOIL exemptions*. *See generally* Dkt. No. 3.

39. While the NYCLU argues that "text" of the statute *requires* the disclosure of *all* disciplinary records, the NYCLU curiously never points to the allegedly mandatory language contained within the § 50-a repeal statute. *See generally* Dkt. No. 3.

40. The first step in an appropriate consideration of the legal issue before the Court is determining whether any of the existing FOIL exemptions would allow a public agency to exempt employee disciplinary records relating to unsubstantiated or unproven misconduct. This is a step that the NYCLU ignores in its analysis.

41. The personal privacy exemption found at § 87(2)(b) exempts from FOIL disclosure certain personnel records of public employees that would constitute a “unwarranted invasion of personal privacy.” N.Y. Pub. Off. Law § 87(2)(b).

42. The case law interpreting this particular FOIL exemption illustrates that it is properly invoked to withhold disclosure of public employee records where a public employee’s disciplinary charges were never filed, or if filed, were unproven or resulted in no disciplinary action. *See, e.g., Western Suffolk Bd. of Co-op. Educ. Servs. v. Bay Shore Union Free Sch. Dist.* 250 A.D.2d 772, 773 (2d Dep’t 1998) (employee disciplinary records “which recite unproven disciplinary charges” are appropriately withheld); *see also* other case law cited in accompanying Memorandum of Law.

43. The SPD expressly relied on this FOIL exemption—§ 87(2)(b)—when it indicated that it would withhold a small subset of the police disciplinary files requested by the NYCLU—*i.e.*, those related to complaints that were ultimately found to be unsubstantiated or unfounded, or those for which a decision had not yet been reached. R. 18-20.

44. Thus, the SPD’s position regarding the application of Pub. Off. Law § 87(2)(b) to justify the withholding of this subset of records had support within established case law.

45. The SPD’s position was also supported by the analysis contained AO 19775. R. 2-4. That is, in considering this *exact issue*, the *Committee on Open Government* quoted a prior advisory opinion with approval, stating:

when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld [under § 87(2)(b)], for disclosure would result in an unwarranted invasion of personal privacy.

See AO 19775 (citing AO 17195).

46. And, importantly, the type of employee records being considered by the Committee in AO 19775 were *police employee records*. R. 2-4.

47. The NYCLU does not challenge the applicability of this exemption or the cited case law in general (which was cited in the City's FOIL appeal determination). *See generally* Dkt. No. 3.

48. None of the case law cited by the NYCLU disputes or undermines the existence or applicability of this body of authority. *See id.*

49. Thus, it is apparent that the City had relied on a well-settled legally established exemption for its withholding of the category of records challenged in this proceeding.

The repeal of § 50-a did not change the applicability of the personal privacy exemption.

50. The next question for the Court to consider is whether the Legislature's repeal of Civil Rights Law § 50-a: (a) altered the pre-existing case law interpreting the FOIL exemption under § 87(2)(b); or (b) somehow rendered § 87(2)(b) inapplicable to police officers as a class of public employees.

51. Indeed, as described above and considering the caselaw discussed immediately above, the practical application of the NYCLU's argument is that the repeal of § 50-a means that police officers are to be treated *less favorably* under FOIL than other public employees.

NYCLU points to no part of the § 50-a repeal statute altering or limiting § 87(2)(b).

52. First, it stands to reason that *if* the Legislature intended such a remarkable result—*i.e.*, enacting a *lower* standard of protection under FOIL for police officer records—then the

statute would have expressly stated so. It does not. The NYCLU does not cite to any text of the statute that would (a) affect the applicability of FOIL's personal privacy exemption; or (b) exempt police officers from the applicability of § 87(2)(b) to police officers.

53. Well settled New York law provides that absent *actual* statutory support in a statute for different treatment for different classes of persons, interpretation providing for such disparate treatment is invalid and constitutes a "manifest injustice." *See Prego v. City of New York*, 147 A.D.2d 165, 173 (2d Dep't 1989) ("If there are two possible interpretations of a statute, the court should adopt that which will produce equal results[, and a] construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination.") (quoting McKinney's Consolidated Laws of NY, Book 1, Statutes § 147).

The text of the § 50-a repeal statute does not alter or limit § 87(2)(b).

54. It is well-settled that the "clearest indicator of legislative intent is the statutory text" and "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

55. Nowhere within the § 50-a repeal statute: (1) is § 87(2)(b)'s personal privacy exemption mentioned at all, let alone changed or limited; (2) does the Legislature indicate that police agencies may not rely on § 87(2)(b) in response to FOIL requests; or (3) does the Legislature indicate police officer records are to be treated less favorably under FOIL than other public employee employment records. *See* Exh. B.

56. The text and plain language of this law *controls* its interpretation, which does not support the NYCLU's argument. *Compare* Dkt. No. 1, *with* Exh. B.

57. In fact, the § 50-a repeal statute, *does* alter *other aspects* of FOIL. *See* Exh. B. Rather, it merely adds new definitions to FOIL at Public Officers Law § 86. *See id.*

58. More specifically the law adds two new sections to FOIL § 89—requiring the redaction of certain parts of law enforcement records. *See* Exh. B. The law even goes so far as to change other parts of FOIL § 87—also allowing for redaction of law enforcement disciplinary records. *See id.*

59. *What the law does not do* is change the applicability and scope of the personal privacy exemption. *See* Exh. B. Where the Legislature had the ability to change any aspect of FOIL as part of the § 50-a repeal statute, and in fact did change *other* parts of FOIL unrelated to the personal privacy exemption, but chose not to change the personal privacy exemption—there is simply no basis for the Court to conclude that § 87(2)(b) has somehow been changed. *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (“courts are not to legislate under the guise of interpretation” and “the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended”).

The NYS Department of State has opined that the § 50-a repeal statute did *not* change § 87(2)(b)

60. In AO 19775, the *Committee on Open Government* opined that the “new provisions of FOIL [found in the § 50-a repeal statute] *did not make changes to provisions concerning personal privacy* as defined in § 87(2)(b).” *See* Exh. C (emphasis added); *see also* R. 2-7.

61. The *Committee* added that “absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent.” Exh. C; *see also* R. 3, 6.

The legislative history of the § 50-a repeal statute fails to support the NYCLU's argument.

62. There is simply no reason to examine the legislative history of a statute in the absence of some lack of clarity in the statute itself. Here, there is no limitation contained within the § 50-a repeal statute that either expressly or impliedly limits the application of the § 87(2)(b) to law enforcement disciplinary records. Thus, there is no need to look to the legislative history. *See Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 (2019) (“Absent ambiguity the courts may not resort to rules of construction to alter the scope and application of a statute because no such rule gives the court discretion to declare the intent of the law when the words are unequivocal”).

63. But even if the Court *were* to look to the legislative history, such history is entirely consonant with the SPD's FOIL determination, and the *Committee's* advisory opinions.

64. For example, the Legislative Memorandum issued with the § 50-a repeal statute, a true and accurate copy of which is annexed hereto as **Exhibit “E”**, *expressly* states that existing justifications under FOIL to “withhold information whose disclosure would constitute *an unwarranted invasion of privacy*” is one of the reasons why the Legislature felt that the “broad prohibition on disclosure created by § 50-a [was] unnecessary.” *See* Exh. E.

65. In other words, according to the Legislative Memorandum, because law enforcement records would be entitled to protection under the personal privacy exemption, additional layers of protection provided for in § 50-a were unnecessary.

66. Thus, Legislative Memorandum directly contradicts the NYCLU's position in this action.

67. Of course, the NYCLU *does* cite to a statement made on the floor of the Assembly by Assemblymember O'Donnell, where according to the NYCLU he stated “that the

bill did not distinguish between substantiated and unsubstantiated records.” Dkt. No. 3 at 6 (citing Exh. A). However, based on the text of the statute, this true statement has no bearing on the issue before the Court *and is entirely beside the point*.

68. Simply put, the bill did not have to differentiate between substantiated and unsubstantiated records because its purpose was to remove the *extra protections* under § 50-a. That is in fact what it did, leaving in place (as confirmed by the Legislative Memo) those already existing protections under FOIL, including “information whose disclosure would constitute *an unwarranted invasion of privacy*.” Exh. E. The NYCLU’s citation to stray comments in no way supports its position that the § 50-a repeal statute somehow limits that application.

69. It “is established law . . . that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes.” *Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916). To this end, the Supreme Court has noted that reliance on statements by individual legislators is a patently unreliable method for statutory interpretation:

it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; *the result being that the only proper way to construe a legislative act is from the language used in the act*

United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 318-19 (1897) (emphasis added).

70. Similarly, the Court of Appeals has also rejected the approach advocated by the NYCLU for the same reasons:

It has long been established that, since such statements [during a legislative debate] tend to show the thinking of a few legislators rather than the intent of [the

legislature] as a whole, *they are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body.*

People v. Newman, 32 N.Y.2d 379, 390 n.7 (1973) (emphasis added) (internal quotations and citations omitted).

71. The NYCLU's argued interpretation of these comments is directly contradicted by other statements made on in the Assembly floor.

72. For example, the same individual, Assemblymember O'Donnell, completely undermines the NYCLU's position here by opining that after the repeal of § 50-a police officers would be treated the same as *any other public employee* under FOIL:

- a. "In the repealing of 50-a, the people who are under 50-a are now subject to FOIL *like all other public servants.*" Exh. A at 60 (emphasis added).
- b. "There's nothing in this legislation that's going to fundamentally change that FOIL process. *Id.* at 170.
- c. "Yeah, but that is currently the law for every other employee. *We're not creating a specific negative thing for police officers.*" *Id.* at 176 (emphasis added).
- d. "This bill merely repeals 50-a and sets up the structures so that FOIL can be used for police officers." *Id.* at 211.

73. In addition, the following colloquy occurred between Assemblymembers O'Donnell and Garbarino during the floor debate:

MR. GARBARINO: So, my -- so the follow-up question to that is -- so now if -- can the police station now -- or the --the police have declined the FOIL request saying it's this is an un --we think this was unsubstantiated so then you have to now then go to-- you appeal that decision. If they deny it again it goes to court. Can the judge then say, you know, *We don't want to release this. Do we give -- do we give the judge the power, under this legislation, to not release unsubstantiated complaints or is it all or nothing?*

MR. O'DONNELL: Our legislation -- my legislation does not change the power dynamic in that sense. *And so, yes, a judge can make a determination that it was inappropriate to turn over that information.*

See Exh. A at 170 (emphasis added).

74. It should be clear from these exchanges that *even if the Court is inclined to consider the stray comments of legislators about their opinion of what the statute does*—a highly suspect proposition under New York law—the actual commentary paints a much different picture than what the NYCLU has represented in their papers.

75. The NYCLU also argues that the Legislature considered and rejected a prior version of the § 50-a repeal statute that included express protections against the disclosure of records of unsubstantiated police discipline. See NYCLU Brief at 6. The referenced bill—S.2413—is attached hereto as **Exhibit “F.”**

76. A review of the bill reveals that it is not a prior version of the § 50-a repeal statute at all, rather the bill had a completely different purpose—to amend § 50-a. See Exh. F.

77. Nowhere in the bill are the terms “substantiated” or “unsubstantiated” even mentioned. See Exh. F.

78. Nowhere does the bill address the protections otherwise afforded under the FOIL statute, or in particular FOIL § 87(2)(b). See Exh. F.

79. But even assuming *arguendo* that the text of the referenced bill *actually supported* the NYCLU’s argument, the conclusion it asks the Court to draw would still be inappropriate.

80. S.4213 never left committee. See Bill Tracking Statement, a true and accurate copy of which is attached hereto as **Exhibit “G.”**

81. Thus, it was never debated on the floor of either house, nor voted on. See Exh. G.

82. New York case law cautions against drawing definitive conclusions from legislative inaction on a bill, especially where there is no written record of the reasons for the inaction. *See NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 184 (2016) (“Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences”) (internal quotation omitted).

83. There is simply no way of knowing why S.4213 never proceeding beyond the committee level, or why the Legislature chose the particular bill it did. *See* Exh. G.

84. The NYCLU’s speculation that the decision *must* have reflected a general disapproval of the withholding *any* police records ignores a much more obvious conclusion—*i.e.*, that the Legislature understood there were other provisions within the existing FOIL statute, like § 87(2)(b), which would preserve an officer’s privacy interests, even in the face of a complete repeal § 50-a.

85. It is this view, not the NYCLU’s, which is consonant with the existing state of the law as described above, including both the legislative history and the *Committee*’s opinions at AO 19775 and AO 19785.

The cases cited by the NYCLU are irrelevant to the issue presented to the Court.

86. The NYCLU has cited to three cases that it argues have “rejected” the City’s position with respect to the scope and application of FOIL § 87(2)(b). *See generally* Dkt. No. 3.

87. In framing this issue for the Court, it is important to remember that the City relied specifically on FOIL § 87(2)(b) for its partial withholding, and expressly cited to AO 19775 for its legal justification. R. 18-20 (citing, *inter alia*, R. 2-4). That decision, as described above, merely held that (i) the repeal of § 50-a did not affect the personal privacy exemption under §

87(2)(b), and (i) that there was well settled case law applied that exemption to unsubstantiated complaints of employee misconduct. R. 2-4.

88. Thus, it stands to reason that if the NYCLU is correct, the three cases it cites—*Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998 (Sup. Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup. Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—*should have* rejected the analysis set forth in AO 19775 and expressly found that the repeal of § 50-a somehow created a different standard under FOIL § 87(2)(b) for police officers, as opposed to other employees.

89. However, the Court will find upon reading these cases that *none of them* accomplish either necessary tenet of the NYCLU's position. The cases simply have *nothing to do* with the analysis set forth in AO 19775, which remains presumptively valid advisory opinion from the *Committee*. See discussion of cases in accompanying Memorandum of Law.

90. Perhaps most compelling is the *Committee's* subsequent opinion AO 19785, issued on March 19, 2021.

91. There, the *Committee* was presented with the exact same three cases cited by the Petitioner here and asked whether those cases would cause the *Committee* to overrule its prior decision from July 2020 in AO 19775. See Exh. D.

92. The *Committee* concluded that the case law did not affect the *Committee's* prior interpretation and that all three decisions were “consistent” with AO 19775. See Exh. D.

93. The *Committee* then provided a detailed explanation distinguishing the three cases and identify how they actually supported the principles set forth in AO 19775. See Exh. D.

94. The Court should give deference to this second advisory opinion as well in rejecting the NYCLU's arguments. *See Kwasnik*, 262 A.D.2d at 172 (noting that the *Committee's* advisory opinions are entitled to *deference*); *Forsyth v. City of Rochester*, 185 A.D.3d 1499 (4th Dep't 2020) ("agency's interpretation of the statutes it administers generally should be upheld if not unreasonable or irrational.").

95. Thus, it is apparent that these cases have little if anything to do with the true legal issue before the Court—the validity of the analysis set forth in AO 19775.

By not taking an administrative appeal of the issue, the NYCLU did not preserve any right to challenge the application of FOIL § 87(2)(b) beyond its contention that the § 50-a repeal statute somehow altered or limited its effect to police officer records.

96. To the extent that the Verified Petition can be read to state a challenge to the *particular determination* by the SPD that the unfounded or unsubstantiated complaints of officer misconduct constitute an unwarranted invasion of personal privacy under FOIL § 87(2)(b), that issue was not preserved for Article 78 challenge because it was not raised in NYCLU's administrative appeal.

97. It is well-settled that where a petitioner has failed to raise a particular objection to a FOIL response during its administrative appeal, that issue is not preserved for judicial review under Article 78. *Police Benevolent Ass'n of New York State, Inc. v. State*, 145 A.D.3d 1391, 1394 (3d Dep't 2016).

98. Here, the NYCLU's administrative appeal only raised two issues: (a) whether the FOIL response was procedurally deficient because it did not "fully articulate the reasons for [the SPD's] denial" but merely "parrot[ed] the statutory language" in the FOIL statute; and (b) whether the statutory repeal of Civil Rights Law § 50-a mandated the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. R. 21-25.

99. Relative to the issue raised in this Petition, the NYCLU's sole basis for its Article 78 challenge, that was raised in its administrative appeal, is whether the § 50-a repeal statute mandates the requested disclosure. *See* R. 21-25.

100. Any late challenge to the SPD's application of FOIL § 87(2)(b) has been waived and may not be challenged in this Petition.

EVEN IN THE UNLIKELY EVENT THAT THE NYCLU PREVAILS, IT IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS BECAUSE RELIANCE ON ADVISORY OPINIONS FROM THE COMMITTEE ON OPEN GOVERNMENT CONSTITUTES A "REASONABLE BASIS" TO WITHHOLD RECORDS.

101. Entirely in passing, the NYCLU argues that it is entitled to an award of attorney's fees and costs, suggesting—without even a modicum of evidence—that the SPD's denial of access “was without reasonable basis.” Dkt. No. 3 at 14-15.

102. Such fee shifting would not be proper in this case.

103. To award fees, a court must determine that there was “*no* reasonable basis for denying access.” *See* N.Y. Public Officers Law § 89(4)(c)(ii) (emphasis added).

104. There can be no reasonable dispute that the SPD's good faith decision to withhold certain, limited records was predicated upon a valid and principled basis: AO 19775. *See* R. 5-7.

105. Thus, even assuming that the NYCLU “substantially prevailed” in this proceeding, the SPD nonetheless had a reasonable basis in law for withholding the material requested by the NYCLU. Accordingly, the request for attorney's fees must be denied.

WHEREFORE, Respondents respectfully request judgment granting its motion to dismiss the Verified Petition in its entirety and grant Respondents costs and such other and

further relief as the Court deems just and proper.

DATED: April 14, 2021



John G. Powers, Esq.

CERTIFICATION OF WORD COUNT

I, Mary L. D'Agostino, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the foregoing document complies with the word count limits set forth in 22 N.Y.C.R.R. § 202.8-b(a) because it contains 5,961 words.

In preparing this certification, I have relied on the word count of the word-processing system used to prepare this document.

DATED: April 14, 2021

A handwritten signature in black ink, appearing to read "Mary L. D'Agostino". The signature is written in a cursive style and is enclosed within a large, hand-drawn oval.

Mary L. D'Agostino, Esq.

Exhibit A to Powers Affirmation-
Transcript of Assembly Floor Debate on June 9, 2020
[pp. 143 - 424]

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

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INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

TUESDAY, JUNE 9, 2020

11:43 A.M.

ACTING SPEAKER AUBRY: The House will come to order.

In the absence of clergy, let us pause for a moment of silence.

(Whereupon, a moment of silence was observed.)

Visitors are invited to join the members in the Pledge of Allegiance.

(Whereupon, Acting Speaker Aubry led visitors and members in the Pledge of Allegiance.)

A quorum being present, the Clerk will read the Journal of Monday, June 8th.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, I move

NYS ASSEMBLY

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that we dispense with the further reading of the Journal of Monday, June the 8th and ask that the same stand approved.

ACTING SPEAKER AUBRY: Without objection, so ordered.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr.

Speaker. I would like to start our day off with a quote from a young lady by the name of Lucille Clifton. She is an award-winning author and poetry writer as well as an educator. She's saying to us today, *In the bigger scheme of things, the universe is not asking us to do something, the universe is asking us to be something. And that's a whole different thing.* Again, Lucille Clifton.

Mr. Speaker, I wanted to welcome all the colleagues and staff in the Chambers and those who are participating remotely. We have on our desk a main Calendar, the main Calendar. Committees have met this morning and have produced an A-Calendar. At this time, Mr. Speaker, I would like to advance that Calendar.

ACTING SPEAKER AUBRY: On Mrs. Peoples-Stokes' motion, the A-Calendar is advanced.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr.

Speaker. Our principal for today will be taking up with the remaining bills and our Police-Community Relations package. Those are Rules Report No. 63, 64 and 67. We're also going to be taking up several local bills from the main Calendar as well as from the A-Calendar.

NYS ASSEMBLY**JUNE 9, 2020**

Members should note that included in the main Calendar are about 60, 6 - 0, Calendar resolutions. These resolutions were -- have been accumulating since we were here in our routine Session in March. We expect to adopt these on the floor tomorrow in the same fashion as we would do privileged resolutions, all with one vote. Members wishing to have their -- one -- their one of the 60 resolutions separated out for a separate vote should contact my office and we'll be happy to accommodate your request. Otherwise, Mr. Speaker, all 60 of those we'll be asking you to take up on one motion on tomorrow.

I'd also like to remind colleagues and members that we will be operating under the same procedures as we did on yesterday, which I think went very well, by the way.

ACTING SPEAKER AUBRY: I think it did.

MRS. PEOPLES-STOKES: Yes. Just a reminder, those participating by Zoom should use the "raise hand" function in order to be recognized for debate purposes and/or to explain your vote. As in our previous remote Sessions, when we are on a fast roll call or Party vote, members wishing to be an exception will have to contact their Majority Leader's office or the Minority Leader's office.

With that said, Mr. Speaker, I believe we're ready to begin our work. And we're going to start today on the main Calendar. And we're going to go to page 144 and take up Calendar No. 193 by Ms. Darling, and then we're going to go to page 56 and take up Calendar No. 291 by Mr. Zebrowski. Following that we'll go to page 56 and take up Calendar No. 294 by Mr. LiPetri. Then we'll go to two

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Member Woerner bills, one of them -- both of them are on page 71, and they are Calendar No. 7 -- 474 and 478. In that order, Mr. Speaker.

Thank you very much.

ACTING SPEAKER AUBRY: Thank you very much. And I do believe you mean page number 44. We don't want to run ahead of ourselves.

The Clerk will read.

THE CLERK: Assembly No. A05061-A, Calendar No. 193, Darling. An act in relation to permitting Iglesia La Luz Del Mundo, Inc. to file an application for certain real property tax exemptions.

ACTING SPEAKER AUBRY: On a motion by Ms. Darling, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report -- Calendar No. 193. This is a fast roll call. Any members wishing to be recorded in the negative are reminded to contact the Minority and Majority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

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The bill is passed.

Page 56, Calendar No. 291, the Clerk will read.

THE CLERK: Assembly No. A07821, Calendar No. 291, Zebrowski, Jaffee. An act authorizing the Commissioner of General Services to transfer and convey certain unappropriated State land to Rockland Recovery Homes, Inc.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Calendar No. 291. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A07919, Calendar No. 294, LiPetri. An act in relation to authorizing the Good Samaritan Hospital Medical Center to file an application for a real property tax exemption.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Calendar No. 294. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the

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Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

The Clerk will read.

THE CLERK: Assembly No. A08609, Calendar No. 474, Woerner. An act to amend the Public Officers Law, in relation to qualification for holding certain offices in the City of Saratoga Springs.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Calendar No. 474. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if you could please let the record show that Mr. Epstein is a no on this one.

ACTING SPEAKER AUBRY: So noted. Thank you, Mrs. Peoples-Stokes.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

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The Clerk will read.

THE CLERK: Assembly No. A09590, Calendar No. 478, Woerner. An act to amend the Public Officers Law, in relation to expanding the waiver of the residency requirement for the city attorney in the City of Mechanicville, Saratoga County.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Calendar No 478. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mr. Epstein to explain his vote.

MR. EPSTEIN: Thank you, Mr. Speaker. I just rise to explain my vote. And I -- I do appreciate Assemblywoman Woerner's requirement that the -- that the waiving of the local responsibility on hiring for this position, but I -- I think this is a larger issue we have to grapple with in the Assembly and that really has to do with whether we do these local waivers one by one makes sense. Whether there's a system and structure in place to make sure that there's no local postings that we have available to members to know that there's local postings, and to ensure long-term that we have a system that we can all understand and make sure that it makes sense. I don't think issue by issue, neighborhood by neighborhood, job by job is a good structure anymore, and I'm voting against this because I -- I

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would love to see us come up with a better system and structure moving forward.

Thank you, Mr. Speaker. I vote in the negative.

ACTING SPEAKER AUBRY: Mr. Epstein in the negative.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if we can go to page 15 on the main Calendar, we're going to take up Rules Report No. 63. It's by Ms. Fernandez, on debate.

ACTING SPEAKER AUBRY: The Clerk will read.

THE CLERK: Assembly No. A08226-B, Rules Report No. 63, Fernandez, Heastie, Peoples-Stokes, Aubry, Reyes, Pichardo, Epstein, Taylor, Richardson, Jean-Pierre, Hyndman, Blake, O'Donnell, Perry, Hevesi, Simotas, Jaffee, Cruz, Rivera, Walker, Fall, D'Urso, Sayegh, Niou, De La Rosa, Ortiz, L. Rosenthal, Hunter, Gantt, Mosley, Bichotte, Carroll, Joyner, Glick, Lifton, Vanel, Abinanti, Arroyo, Bronson, Crespo, DenDekker, Dinowitz, Fahy, Frontus, Gottfried, Jacobson, McDonald, Nolan, Otis, Pretlow, Quart, Ramos, Seawright, Simon, Steck, Thiele, Weinstein, Weprin, Wright. An act to amend the Civil Rights Law, in relation to medical attention for persons under arrest.

ACTING SPEAKER AUBRY: An explanation is

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requested, Ms. Fernandez.

MS. FERNANDEZ: Thank you, Mr. Speaker. This bill would recognize the duty to provide attention to the medical and mental health needs of a person in custody of a police officer, peace officer or law -- other law enforcement representative or entity. The officer will have a duty to obtain assistance and treatment of such needs which are reasonable and provided in good faith under the circumstances. Any person who does not receive this attention and as a result suffers serious physical injury or death, a significant -- a significant exacerbation of an injury or condition shall have a cause of action against the officer and/or entity.

ACTING SPEAKER AUBRY: Mr. Morinello.

MR. MORINELLO: Thank you. Would the sponsor yield for a couple of questions?

ACTING SPEAKER AUBRY: Ms. Fernandez, will you yield?

MS. FERNANDEZ: Yes, I do.

ACTING SPEAKER AUBRY: The sponsor yields, Mr. Morinello.

MR. MORINELLO: Thank you very much. This is a duty to provide attention to two different aspects. One is medical and one is mental health. Am I correct?

MS. FERNANDEZ: Yes.

MR. MORINELLO: Okay. Number one, what do you envision as "other law enforcement representatives or entities"?

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MS. FERNANDEZ: A school crossing guard, mall security. Anybody that is there to protect.

MR. MORINELLO: All right. So -- so this would cover anybody that is in a position to assist any individual. And when you say school crossing guards, those are normally hired by the school districts rather than the municipalities. But they would be subject to this also, correct?

MS. FERNANDEZ: Yes. Again, anybody that has responsibility of protecting the public.

MR. MORINELLO: All right. Next, "under arrest" is very self-explanatory, but "otherwise in custody of a police officer," what is your intent dealing with that particular portion?

MS. FERNANDEZ: Different custody in situations after arrest or detained in the precinct before indictment.

MR. MORINELLO: So the way it's written it's police officer arrest, but yet you say it still covers crossing guards and anyone else who's in a position to assist others. So is that something that you're envisioning, or you intend to place in the bill in the future, or is that your interpretation?

MS. FERNANDEZ: Really anyone in custody. So...

MR. MORINELLO: Crossing guards, they just help kids across the street normally. So they wouldn't really wouldn't be involved in this, correct?

MS. FERNANDEZ: No. So, I --

MR. MORINELLO: Okay.

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MS. FERNANDEZ: I think it depends on the circumstances.

MR. MORINELLO: I'm trying to narrow it down, because what you're doing is, this is a civil liability so you're opening up individuals to expenses that may have no -- no ability to even understand that they're involved in this.

I have a couple more questions. Is there a requirement that the individual request assistance?

MS. FERNANDEZ: Not a requirement, but if they do, then the officer would be obligated to act and either find the assistance, call for the assistance, or if they're able, some are certified in CPR to provide the assistance.

MR. MORINELLO: Okay. Now, what if it is a non-visible, non-apparent physical injury and there is no request for assistance? What would happen in that situation if they don't know they have to provide it?

MS. FERNANDEZ: In reasonable good faith is what we're asking for. Somebody could --

MR. MORINELLO: Well, if -- if it's not visible and there's no request, yet they get sued in the end because there's some underlying internal injury that was not caused. So what you're saying is, this can open any police officer, or anyone acting in consort with them, to liability even if they don't know that there is something there.

MS. FERNANDEZ: Well, if there's no evidence or indication, then that's reasonable for them to not be liable. But if

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they're explaining it or showing distress and lack of concentration or slurred speech or unable to focus, that can be a reasonable reason to seek attention and help.

MR. MORINELLO: What's more concerning is the mental health needs. I think we both need to agree that in most instances it takes trained psychiatrists, psychologists and professionals to determine internal mental health needs, yet you're placing -- yet this appears to place a burden on the police when they encounter someone if there's no outward manifestations. Is that the intent of this?

MS. FERNANDEZ: It's about what is obvious to see. If the person is exasperated and acting in a manner that we can say is not of the norm, then that is a reasonable need for a good faith decision to be made to seek more help.

MR. MORINELLO: All right. But the -- the issue becomes good faith or reasonable would be decided by a court or a judge. So this here really puts them in a position to have to at least undergo the expense or the trauma of a trial and to be determined that their actions were reasonable and not unreasonable. That -- that's what this appears to do. As far as the mental health, what type of treatment do you envision?

MS. FERNANDEZ: A phone call. Officers should not be expected to perform every act under the world to -- or over the world to -- to do what we're really asking. We ask a lot of our officers. But mental health, yes, is something that should be addressed by professionals, and what they can do is make a phone call

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or a report on the radio, *Bring extra help because I can't help the situation.*

MR. MORINELLO: So in essence, then, what this does is puts a burden on the police officer to determine any hidden defects, any hidden injuries or any -- any hidden mental. And what I -- and your answer as far as reasonableness, yes, it could be determined by a court of law. But it's my understanding the way this is written, that if someone brings an allegation, they're subject to be able to bring a lawsuit on this. Am I correct?

MS. FERNANDEZ: Only if it's -- if they suffer a serious physical injury, which would be obvious to see.

MR. MORINELLO: Well, it's not always obvious. It could be an internal injury. That's the point I'm getting at. Or a mental health, a schizophrenic --

MS. FERNANDEZ: But if they're able to --

MR. MORINELLO: -- a police officer --

MS. FERNANDEZ: Sorry. If they're able to --

MR. MORINELLO: Well, that's all right. So --

MS. FERNANDEZ: -- show or speak, saying something like "I can't breathe," that is a reason to act in good faith to address that need and that concern.

MR. MORINELLO: Well, that's an outward manifestation. So I'm not talking outward manifestations. But, I appreciate your time.

On the bill.

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ACTING SPEAKER AUBRY: On the bill, Mr. Morinello.

MR. MORINELLO: Although I understand the need to protect the public at-large, this bill seems to put a burden - which would be a financial and an obligatory burden - on arresting officers for either mental illness, which is not outwardly manifested, or physical injuries which are not outwardly manifested. The ultimate result may be a non -- a -- a trial where there is no finding, but it would still subject them to it.

Because of those reasons I urge my colleagues to vote no on this bill. Thank you very much.

ACTING SPEAKER AUBRY: Thank you.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Would the sponsor yield?

ACTING SPEAKER AUBRY: Ms. Fernandez, will you yield?

MS. FERNANDEZ: I yield.

ACTING SPEAKER AUBRY: The sponsor yields.

MR. GOODELL: Thank you very much. I had some questions and I was hoping you could help clarify. This bill purports to apply personal liability to police officers because it says, *When a person is under arrest or otherwise in custody, a police officer has this duty to provide attention to the medical and mental health needs of the person and obtain assistance and treatment.* But it goes on to

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say, then, that if the person suffers any injury or an exacerbation of existing injuries, the police officer could face personal liability. Is that correct?

MS. FERNANDEZ: They would likely be indemnified.

MR. GOODELL: But this bill doesn't -- doesn't say that the entity that employs the police officer would be liable, it actually says that a person who is injured shall have a cause of action against such officer, correct?

MS. FERNANDEZ: Or entity. And existing law identifies that.

MR. GOODELL: It -- it doesn't say "or," it says "and/or entity." So it's -- a person could select to sue just the officer?

MS. FERNANDEZ: Depending on the case and the evidence that show that there might have been direct action of this officer as in neglecting them or deliberately ignoring calls for help, then yes, it could become directly on the officer.

MR. GOODELL: Now, as you know, we have a Good Samaritan law in New York State and, in essence, what the Good Samaritan Law says is that if a person stops who has no duty and offers medical care, you know, you may see somebody who is having a heart attack or is injured or otherwise needs medical care and stops, they're immune from liability. They're exempt from liability as long as their actions were not grossly negligent. Does the same standard apply to a police officer under this bill that's providing

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medical care? In other words, as long as the police officer's action were not grossly negligent, does he have the same protection that a Good Samaritan would have?

MS. FERNANDEZ: Indemnification -- the law -- all the other laws apply and nothing would change.

MR. GOODELL: Well, my question, though -- and I apologize that -- you and I did talk earlier but sometimes I hear a debate from my colleagues or questions that sparks other -- other questions and so on, and I apologize for not asking you in advance. But my question is very specific. Do the Good Samaritan exemptions from liability also apply in this situation, or alternatively, does this impose a direct affirmative duty on police officers to provide the medical care or arrange for medical care?

MS. FERNANDEZ: It would be up to a court to decide. But they are provided indemnification and all the laws apply.

MR. GOODELL: We talked a little bit about qualified immunity. Under current law, if a public official is operating within the scope of their duties -- in other words, they're not (unintelligible) but they're operating within the scope of duties, they have a qualified immunity from personal liability. Would you anticipate that this law overrides that qualified immunity for a police officer under these circumstances, or would qualified immunity still apply as a defense?

MS. FERNANDEZ: They're already indemnified under the General Municipal Law and the Public Officers Law.

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MR. GOODELL: So you envision that the indemnity provisions that might apply under the Municipal Law or perhaps under union contracts those would still apply. But of course, as you know, an indemnity provision means the judgment surrendered against the officer but then paid -- the judgment is then paid by the taxpayers. That's what indemnity means. The question, though, I have is are they immune from liability in the first instance under qualified immunity?

MS. FERNANDEZ: All the statutes apply.

MR. GOODELL: Okay. Does this obligation of a police officer to provide attention to the medical and mental health needs of a person who might be in custody apply even if the health or mental health condition is unrelated in any way to the police action?

MS. FERNANDEZ: Yes, because one wouldn't know immediately what are the underlying health things. So it is my belief that a first action would be to act upon it and seek help or provide help if you're able.

MR. GOODELL: So, as an example, if an officer receives a call or the police department receives a call about an individual who is acting in an erratic behavior - and we've seen that sometimes people who are talking loudly to themselves, they appear to be either on drugs or suffering from mental health - that the police officer would, upon responding, have an affirmative duty to seek medical care for that person?

MS. FERNANDEZ: Yes, they should call for professionals to come and help deescalate.

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MR. GOODELL: If the police make a call, they arrive on the scene, they make the call, does the making of a call for medical assistance then absolve them from liability under this bill?

MS. FERNANDEZ: If it's reasonable and in good faith -- under the circumstances, if it's reasonable and in good faith that they made an attempt to help this person in staying alive, then yes.

MR. GOODELL: Now there are many police officers who are very concerned that this imposes a duty on them to become paramedics in addition to their police activities. How would you respond to that concern? Should a municipality, in order to avoid liability, require all their police officers to be also trained as paramedics?

MS. FERNANDEZ: Reasonable and good faith under the circumstances. But one in custody of government cannot be ignored or overlooked the other way. So we're not expecting officers to do -- to be in these positions and do the most, but again, seek the assistance that you need to address the situation.

MR. GOODELL: Again, thank you very much for your comments. I appreciate them.

On the bill, sir.

ACTING SPEAKER AUBRY: On the bill.

MR. GOODELL: Under current law, our municipalities are responsible for providing appropriate medical care to anyone who is in their custody. That's the current law. And that

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custody is triggered when the individual, you know, cannot leave or is under arrest. It's not always obvious, though, that a person may need medical care. For example, the symptoms of somebody who is having a stroke can be very similar to the symptoms of somebody who's very intoxicated. They're both slurring speech, they both have trouble communicating. Their coordination is -- is not good. And sometimes it's hard to tell. This bill imposes personal liability on a police officer. If the police officer arrives on scene and doesn't, quote, "provide attention to the medical and mental health needs of the person and obtain backup medical support." So under the terms of this legislative language, the police officer is not absolved from liability if he calls for medical support. He has to provide it himself and call for backup. Now, we don't expect our police officers to be trained paramedics. That's not their role. Their role is to secure the -- the crime scene, if there is one. To respond to an active shooter. To stop, you know, widespread vandalism or -- or chaos that they might show up to. When they show up at a car accident, their immediate response is to secure the scene to make sure people aren't hurt, more people aren't hurt. That there's not a follow-up pileup. Then they do the investigation. This bill, I think, would be much more appropriate if it made it clear that police officers do not have personal liability and they have qualified immunity if they're acting in good faith. It should also be clear that the same standards that we apply to Good Samaritans apply to police. We don't expect the police to be sued personally if when responding to the scene of a crime they provide an

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appropriate medical care. And sometimes it's difficult to tell what's appropriate or not if you're not a trained medical professional. This extends the mental health conditions, as my colleague noted, and imposes personal liability if a police officer doesn't distinguish between someone who is really drunk, high on drugs, or whacked out on drugs, or is facing some other mental health issue. And often our -- we're asking our police officers to respond in very dangerous and very difficult circumstances like a violent domestic abuse situation. And so often our officers are attacked. They respond to a call, the neighbors say people are screaming. They respond, they break up what appears to be a domestic violence fight only to have the other spouse attack them. And then on top of this we impose on them the obligation to be mental health professionals, to evaluate when that -- someone is suffering from a mental health problem that needs medical treatment. Or the characteristics of an emergency room triage to determine whether or not they have to respond. I think we're losing sight of the fact that our police have a role to stop crime, to investigate crime, to arrest those who commit crime. We already have a general obligation to provide medical care and treatment. But it's not backed by the personal liability of the officer. It's the responsibility that applies to the institution. And that allocation that we currently have is the proper allocation. And telling a police officer in the State of New York that, *If you don't make the right medical call or the right mental health call in the middle of an emergency involving an active crime scene, your personal assets are at risk, your family's financial security*

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is at risk, and you better hope that the municipality will indemnify you. That's the wrong message to send.

For those reasons, I and many of my colleagues will not be supporting this bill. I do want to end, though, on a positive note. I appreciate my colleague's concern - which are shared by all of us - that our police do call for help, that we do respond quickly and appropriately in terms of seeking help for those who interact with any of our law enforcement professionals, whether it's police, fire or anyone else. We all share that goal. I applaud you for that goal and your thoughtfulness in pursuing that goal. But I don't think imposing personal liability on police officers is the right approach.

Thank you so much, sir, and thank you to my colleague.

ACTING SPEAKER AUBRY: Mr. Ramos.

MR. RAMOS: Mr. Speaker, will the sponsor -- sponsor yield for a few questions?

ACTING SPEAKER AUBRY: Ms. Fernandez, will you yield?

MS. FERNANDEZ: Yes, I do.

ACTING SPEAKER AUBRY: The sponsor yields.

MR. RAMOS: Ms. Fernandez, the way I understand it, this bill requires police officers to get medical help in an obvious situation where a person is in distress or if a person expresses some kind of a psychiatric problems that are obvious, reasonable --

MS. FERNANDEZ: Obvious.

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MR. RAMOS: -- that the police officer would be require to make a phone call, right? I -- I hear a lot of gaslighting here, making this situation so difficult. I was a police officer for 20 years, and the situation is not -- it's rarely any question as to what the situation is. According to your bill, if a police officer puts his knee on somebody's neck and the person says, *I can't breathe. Please just let me stand up. I'm not resisting*, and the police officer does not do that and does not get medical assistance for that person, he would be in violation of this, right?

MS. FERNANDEZ: Yes.

MR. RAMOS: That's pretty obvious. If a person is under arrest and says, *I'm going to kill myself*, a police officer should make a phone call.

MS. FERNANDEZ: Yes.

MR. RAMOS: This is -- I don't know how -- why we're twisting ourselves into pretzels to say that this is so -- such a burden on police officers to do what is their absolute duty. And the -- you know, I heard here, *Well, you know, the police officers, they would -- they would suffer an expense if they're sued*. But the person who is suing is also retaining attorneys. And if they want to do a frivolous suit, they're also throwing away an expense at -- at doing that, right?

MS. FERNANDEZ: Correct.

MR. RAMOS: So, nobody's asking a police officer to diagnose anybody. They're talking about what is obvious. And it's

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usually not the case of an underlying condition. It's usually the case of somebody with their head split open who gets brought to the station to be booked instead of brought to the hospital first to -- to be treated. And in a case of -- of negligence like that, there should be some liability. If there's no liability, you can't change the behavior. We're asking for a law that says if there is a medical situation, a police officer should get assistance. Plain and simple. No rocket science. Nothing complicated about this. And the officer should make a phone call on psychiatric issues. Now, I heard here about the Good Samaritan. Does this -- you know, Good Samaritans are covered, right? If somebody tries to help somebody, of course, and some -- it doesn't work out well, then they're -- they're indemnified under the -- the Good Samaritan laws. But if a police officer tries to get somebody help, they're not in violation of this.

MS. FERNANDEZ: No.

MR. RAMOS: The Good Samaritan Law has nothing -- that's a person who's trying to help somebody. This addresses a police officer who is not trying to help somebody. If a police officer has knocked over an elderly man and the elderly man is bleeding through his ears and they walk over him and don't get assistance, are they in violation of this?

MS. FERNANDEZ: Yes.

MR. RAMOS: Quite obvious. This is what we're seeing. We're not asking a police officer to give somebody a blood test to see if they have diabetes or not or -- or any kind of underlying

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condition. It's not reasonable to expect a -- a police officer to know about invisible physical conditions. And your -- this law covers that. It's -- it's quite obvious. So I believe that the gaslighting should -- should end on this. We should pass this law.

Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. RAMOS: The gaslighting on this should end.

This is not rocket science. This is not -- I think the public is intelligent enough to see what we're trying to do here. We have a -- a problem throughout the country where people are being harmed and police officers are -- are -- are dealt with with impunity. We're -- we're not talking about invisible ailments, we're talking about somebody saying, *I can't breathe. I'm going to die. Mom, I'm going to die. Mother*, and a police officer does nothing. That's what we're talking about. We've seen it. Not once, we've seen it multiple times. And that's what we've seen on video. We don't know what has happened that has not been on -- on video. And this -- this bill here covers that atrocity that we see happening throughout the country. This brings accountability, and I applaud the sponsor and I urge all my colleagues to vote yes.

ACTING SPEAKER AUBRY: Mr. Barron.

MR. BARRON: Thank you very much, Mr. Speaker.

I was going to do something that you may not have heard or seen me do since I've been up here, but I was going to unraise my hand because Assemblymember Ramos was so good. But I want to applaud

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the sponsor of this bill as well. There's a reason for this bill that some people who have another kind of reality who have, in my opinion, a Mr. Roger's Neighborhood reality. Officer Joe Bolton reality. But we have another reality that includes racism and includes serious neglect. I had a case in my district with Akai Gurley, a young man who was in the Pink Houses, and he was going to the elevator with his friend. The elevator was stopped on the floor above him, the 8th floor, he was on the 7th floor. And the officers on the 7th floor were doing a vertical patrol in public housing when they go down the stairwell to make sure nobody's doing anything on the stairwell. As soon as Officer Liang opened the stairwell, his gun was drawn, his finger was on the trigger, and the light was dim. So he turned and he shot a bullet that struck Akai Gurley, just missed his friend, and Akai Gurley ran down two or three flights and he was dying. The first thing the officer did was to call his supervisor to make sure he wasn't in trouble. And then when he eventually got down the stairs, Akai Gurley was being kind. They were trying to resuscitate him. His friend was, and she knew nothing about CPR or anything. The officer stepped over his body, and they refused to even try to give him CPR, which they're trained to do, or do anything to try to resuscitate him. And he died. I've had cases where the police arrived on the scene and someone was mentally disturbed. There was quite a few cases that I've had with them, so I dare not -- dare not try to name anybody and leave somebody out. But instead of them calling up for a psychic -- psychological backup or psychiatric back up, they went in blazing with their weapons. In one case, they

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shot off the hand of a grandmother saying that she was coming at them with a knife. There was 12 of them, and they had the -- the bulletproof jackets, they had 12-foot shields to block it, and they had a -- a restraining rod. With the Eleanor Bumpur's case, the first shot shot her hand off where she had the knife, and the second shot blew a whole in her chest and killed her. They didn't say, *She's in there, let's leave her alone. She may not want to be disturbed. Let's call somebody.* And by the way, she was behind a couple of months in her rent - some say one month, some say three - and that's why they were coming to evict her, /and her eviction notice was a shotgun blast to her chest that killed her. They didn't try to see if they could get somebody to talk to her. So this bill is a life-and-death bill. It is not one of these -- they always come up with scenarios and they come up with cases that don't exist for the most part. They just make them up to protect the police, and some of my colleagues up here do this almost reflexively.

So, this bill, I want to commend the sponsor. In the light of all that's going on, this is the least you could do. How cold can you get? This is the least you could do, and stop trying to find all of these technical things, made-up scenarios that you come up with because you don't want police officers to pay the consequences of their neglect. And in many instances they're neglecting the medical attention needed after they're the ones who inflicted the pain and the harm on the black or brown individual, which is usually the case in our neighborhoods.

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So I'm definitely going to vote yes on this. And it's just unfortunately [sic] that we have bills that really aren't, I don't think, addressing the root causes of these problems and making them pay severe penalties for killing us. At least this one says you can be held personally liable for your neglect that could lead to someone's death. I applaud the sponsor.

ACTING SPEAKER AUBRY: Mr. Kim.

MR. KIM: Thank you, Mr. Speaker. Will the sponsor yield for a question?

ACTING SPEAKER AUBRY: Ms. Fernandez, will you yield?

MS. FERNANDEZ: Absolutely.

ACTING SPEAKER AUBRY: Ms. Fernandez yields, sir.

MR. KIM: Thank you, Ms. Fernandez. If -- if this law was in place back in 2014, could the family of Eric Garner have filed a personal lawsuit against Officer Derek Chauvin?

MS. FERNANDEZ: Yes.

MR. KIM: I'm sorry, not Chauvin, Daniel Pantaleo.

MS. FERNANDEZ: Yes.

MR. KIM: Right. Okay. Thank you. And if -- if this law was in place in a place like Minnesota, could the family of George Floyd file personal lawsuits against Officer Derek Chauvin?

MS. FERNANDEZ: Yes.

MR. KIM: Okay.

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On the bill, please.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. KIM: I think this is one of the more significant bills we're taking on today and this week. You know, the Federal government is actually, as we speak, taking on the possibility of repealing qualified immunity entirely. Now, this is about accountability. And unlike the other bills, this has real consequences on how police officers conduct themselves.

So I wholeheartedly applaud the sponsor for her courage and for being brave enough to take this on and take this challenge on, and I support it and we should all support this bill one hundred percent. Thank you.

ACTING SPEAKER AUBRY: Mr. Mosley.

MR. MOSLEY: Thank you, Mr. Speaker. Would the bill sponsor avail herself to a question?

ACTING SPEAKER AUBRY: Ms. Fernandez, will you yield?

MS. FERNANDEZ: Yes, I do.

ACTING SPEAKER AUBRY: Ms. Fernandez yields.

MR. MOSLEY: Thank you, Mr. Speaker. As it was so noted by one of our colleagues who talked about the Akai Gurley shooting, would that officer, in that particular instance, would he have been held accountable, based upon your legislation, if your legislation would have been in law then?

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MS. FERNANDEZ: It would be up to the courts. I can't really give you an opinion.

MR. MOSLEY: Can you give me a scenario as to why back -- or can you explain as to why, for that case, there would not have been any culpability, or the culpability would have been based on him going to court compared to others where there would have been more culpability towards the officer?

MS. FERNANDEZ: A suit could be brought, but ultimately, it would be up to the court.

MR. MOSLEY: Okay. So in terms of the -- I'm just trying to distinguish between what happened in Minnesota and what happened then. Where is the distinction between the two?

MS. FERNANDEZ: Same answer. Different judge.

MR. MOSLEY: Okay.

On the bill, Mr. [Sic] Speaker.

ACTING SPEAKER WOERNER: On the bill.

MR. MOSLEY: Thank you, Mr. [sic] Speaker. I applaud my -- my colleague for this bill. It's long overdue. It's a bill that speaks to the fundamental responsibilities in large part that an officer is supposed to perform in terms of his duties -- his or her duty to the general public that they're sworn to serve and protect. But as my colleague said earlier, if -- you know, this bill is too late for Eleanor Bumpurs or Akai Gurley or even Eric Garner. We hope that going forward that this practice and pattern of officers neglecting the most fundamental issues that they are to address when they're

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protecting the people that they've been sworn to changes a practice where so many people known and unknown have lost their lives in the streets of our five boroughs and throughout the State of New York.

So I applaud the -- the sponsor of this bill and I applaud my colleagues for bringing up many of the points that I was going to bring up earlier. But again, I -- I vote in the affirmative. Thank you so much.

ACTING SPEAKER WOERNER: Thank you, Mr. Mosley.

Mr. Reilly.

MR. REILLY: Thank you, Madam Speaker. Will the sponsor yield for a quick question?

ACTING SPEAKER WOERNER: Does the sponsor yield?

MS. FERNANDEZ: Yes, I do.

MR. REILLY: Thank you, Ms. Fernandez.

Regarding this legislation, if an officer radios for -- to the dispatcher to have an ambulance respond or to transport a -- a person that's in custody to the hospital, which of course is their duty to do, and they should be doing it, and that's just a moral thing to do, I believe. Would that cover the reasonableness in rendering aid and doing as much as possible that they could do before the ambulance arrives or before they get medical attention at the hospital? Would this -- would that cover?

MS. FERNANDEZ: Yes. That would cover because

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they made the attempt to -- they made the attempt to bring the person to the assistance that is needed, the aid needed, and they would not be liable.

MR. REILLY: Thank you. I appreciate the clarification.

ACTING SPEAKER WOERNER: Thank you, Mr. Reilly.

Mr. Walczyk.

MR. WALCZYK: Thank you, Madam Speaker. Would the sponsor yield?

ACTING SPEAKER WOERNER: Will the sponsor yield?

MS. FERNANDEZ: Yes.

ACTING SPEAKER WOERNER: The sponsor yields.

MR. WALCZYK: When this piece of legislation talks about custody, does that include incarcerated individuals in the State of New York?

MS. FERNANDEZ: Yes.

MR. WALCZYK: So are -- are inmates who are incarcerated in New York State, are they always under the care of a corrections officer?

MS. FERNANDEZ: Probably not every minute of the day, but in general, yes, they are under the care of the officer and State or -- or city.

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MR. WALCZYK: If -- if an inmate is to purposefully hurt themselves, would you assume, under this law, that there's an underlying mental health issue with that inmate?

MS. FERNANDEZ: One could assume.

MR. WALCZYK: So wouldn't that open our corrections officers to this civil liability any time an inmate chooses to hurt themselves?

MS. FERNANDEZ: If they don't try to seek help, then yes.

MR. WALCZYK: Okay. Thank you.

ACTING SPEAKER WOERNER: Thank you, Mr. Walczyk.

Mr. Abinanti.

MR. ABINANTI: Thank you, Mr. [sic] Speaker. I'd like to commend the sponsor of this legislation and state my support. I want to concentrate on what is the most obvious and probably the most frequent circumstance, where an injured person is in the presence of, and maybe the custody of, if not in fact by being handcuffed, but in fact by being surrounded by law enforcement officials. Where you have someone who's injured and others are watching and would like to come to the assistance, they often do not because of the presence of the police officers or other law enforcement officials who are controlling the circumstance. All this legislation says is that those in charge of the situation have an obligation to make sure that anyone who is injured gets the care that

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he or she needs, because their presence is preventing others from coming to the aid of that person. No reasonable person would have rushed out into the middle of the street to aid the injured man who -- in Buffalo when there was a troop of law enforcement officials walking down the center of the street, stepping over that person. Under normal circumstances if the police officers were not there, any reasonable person on the street would have come to that man's aid. But given the circumstances, the presence of law enforcement prevented others from coming forward, in fact. This bill says that we expect law enforcement to act as human beings towards other human beings. That they will come forward and do what we expect one person to do for another person. A reasonable thing: provide some assistance.

I think this is an excellent bill. It basically says that benign neglect is no longer acceptable and that we have to train each other as human beings no matter what the circumstances are. Thank you for sponsoring the bill, and I support the bill.

ACTING SPEAKER WOERNER: Thank you, Mr. Abinanti.

Mr. Pichardo.

MR. PICHARDO: Thank you, Madam Speaker.
Would the sponsor yield for a very quick question?

ACTING SPEAKER WOERNER: Will the sponsor yield?

MS. FERNANDEZ: Yes.

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ACTING SPEAKER WOERNER: The sponsor yields.

MR. PICHARDO: Well, thank you, Assemblywoman, for -- for carrying this bill. I just had a really quick question regarding a case that happened not too long ago about a woman who gave birth on the floor of a cold county jail out in California and was crying for help and the -- the local sheriff and the folks who were supposed to monitor her. Was there an obligation from them in this -- under this -- under this legislation in certain circumstances, was there an obligation for these folks who were -- incarcerated this young individual to render aid to that individual?

MS. FERNANDEZ: Yes. These are existing duties of our law enforcement officers. Under government custody, you cannot be ignored. So, yes. This just reinstates that this is their duty.

MR. PICHARDO: So, again, from my understanding and the reading of this legislation, it has to do with a reasonable rendering of aid in certain circumstances. So the example that some of our colleagues gave before regarding the issue of custody, especially if an individual is under the custody of the State, in this particular case where there was no aid or attempt to render aid, this bill would cover that situation and basically say that there is a reasonable responsibility for folks who have individuals in their custody to render aid under these circumstances. Is that correct?

MS. FERNANDEZ: That is correct.

MR. PICHARDO: All right.

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On the bill, Madam Speaker.

ACTING SPEAKER WOERNER: On the bill.

MR. PICHARDO: Again, I want to commend my colleague for putting this legislation forward and making sure that, you know, that it's not just simply a moral obligation, but it's also a legal obligation. If a person is in your custody, it's -- the automatic assumption is that that person is in your care at that moment, and that we need to make sure that we do everything that we can reasonably. And most folks understand what that legal terminology means, which is reasonable, in order to make sure that that person is not only in -- in good health but also alive when the chain of custody changes.

So I commend my colleague for this legislation, and I support her endeavor in this. And I will be voting in the affirmative when this bill comes to a vote. Thank you, Madam Speaker.

ACTING SPEAKER WOERNER: Thank you, Mr. Pichardo.

Mr. Sayegh.

MR. SAYEGH: Thank you very much, Madam Speaker. I just wanted to also voice my, really, support for the sponsor. I had the pleasure of cosponsoring this bill, and -- and I hope that this bill would expand the importance of making sure whether individuals are in the custody of law enforcement or other departments and first responders, that individuals are given the proper care. I think we all acknowledge that law enforcement and first responders are not really trained sometimes to be medical

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professionals. But what we do expect is that the person who is either arresting someone or caring for someone's health and property that they take into consideration the circumstances. And if a person is suffering or seems to be suffering, then this policy and this bill would encourage and -- and -- and -- and make it a responsibility and an obligation to either treat the person or immediately call for expert treatment. I think this is expected. And I'm looking at this bill also as setting a norm and a standard also for individuals that are incarcerated, whether in State prisons or hopefully at some day to expand this to Federal prisons, where many inmates are not being treated or given the proper care of those with diabetes, with high blood pressure, with cardiovascular disease. Their conditions are largely ignored. There has not been an emphasis on the treatment of inmates and those in custody. And what we're learning now, even with this past pandemic and COVID-19 where Federal prison -- prison officials are leading judges to feel that this -- their facilities are safe when, in fact, we know there's no testing going on. So they can't determine whether the inmates are safe or not and whether they're getting the proper care and treatment.

So I support the bill. I support the spirit of the bill. I recognize there's situations that may arise that say sometimes may be questionable. But when you legislate, you legislate for the well-being of the majority of individuals that can benefit from this type of legislation. So I will vote in favor of this legislation, and again, urge my colleagues that this is a bill that does protect our citizens and is

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something we should support. Thank you very much.

ACTING SPEAKER WOERNER: Thank you. Mr. Sayegh.

Ms. Glick.

MS. GLICK: Thank you, Madam Speaker. I wish to point out a few things that I find somewhat troubling in the conversation. And that is that the -- we want to ensure that the police have the opportunity to do their job without concern. The flip side is, their job is to protect the public. And in two recent cases over the last five years, two individuals not involved in any violent crimes found themselves essentially killed by the police despite indicating that they couldn't breathe. This should shock the conscience of all of us. For some time, New York City has recognized that there are emotionally-disturbed people, and they have established protocols. When those protocols are not followed and an injury or death results, that is on the officers involved. I am also aware of the fact that there are instances, numerous instances, at least in New York City, where people are arrested, they're taken into custody. They indicate they have medication that they need, and that medication is never provided. That happens probably more often than we know. These are basic, basic things that we should expect, that people taken into custody who are either obviously injured, who indicate that they are in distress, that they indicate that they need certain medication -- someone could need asthma medication if they are -- have had their breathing disrupted, or even if they are upset it can trigger a -- an asthma attack and you can

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die. We had a New York City Schools chancellor who was from the midwest and foolishly waited for an ambulance instead of taking a cab to the hospital, and he died from his asthma attack. So, one might need medication and need it quickly, and not have to -- and should not be unable to obtain that because the police have decided not to respond or acknowledge that. Now, we've had individuals who have -- there was an incident many years ago in Brooklyn where an obviously emotionally-disturbed individual was surrounded. He was an Orthodox Jew. He had a small hammer that was part of some ceremonial equipment, and he was shot several times by over a dozen -- half-dozen officers who had surrounded him and contained him, but never reached out for -- for the proper assistance for somebody who was obviously disturbed and not advancing on them, but had refused and might not have understood. We also have people who have hearing disabilities, or people who have a different language and are not understanding commands in a very short period of time to drop something. And yet their lives could be lost or they could be injured because the police have not recognized or responded to that emotional distress.

Now, my colleagues on the other side of the aisle are always concerned about the taxpayers' dollars. New York City has spent literally millions of dollars every year in lawsuits brought to -- based on the fact that there have been actions undertaken by the police - and in some instances by an individual repeatedly - with excessive force. So, this is an attempt to ensure that the police render care that

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is obviously necessary either because somebody is injured or somebody is emotionally distressed. The fact that there have been some folks who because of their hearing loss, the fact that they're diabetic and when you're going into a diabetic coma you may be slurring your speech and you may appear to be drunk. The police can't discern everything, but they should be able to call for assistance when somebody is clearly not a threat to the public at-large. After all, in those instances the police are armed. And these are individuals who have committed no serious violent crime. Mr. Floyd, I believe, matched the description, matched the description of a forgery suspect. A forgery suspect. And he lost his life. That's a capital -- we -- the-- he suffered capital punishment because he matched the description of a forgery suspect.

So I applaud the sponsor. And I think that as much as when you don't want to deal with something and you call the police, yes, it's a tough job. But they also have to recognize when somebody is in distress and ensure that they have the appropriate care rendered to you. I applaud the sponsor and hope that everybody will vote in favor of this.

ACTING SPEAKER WOERNER: Thank you, Ms. Glick.

Mr. Blake.

MR. BLAKE: On the bill.

ACTING SPEAKER WOERNER: On the bill.

MR. BLAKE: First, I want to commend the sponsor

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for not just commonsense legislation, but legislation that will lead to the saving of lives. One of our colleagues said this earlier, and I think it's important. I think we're tired and done of the gaslighting that's happening here. What is more important: Your salary or our survival? What's more important: Your -- your pension or our protection for our livelihoods? We're literally having a conversation right now on if someone needs medical assistance from a law enforcement official, will you help them. What else do we need to see? We saw it with George Floyd. We saw it with Eric Garner. We -- we see it over and over and over again. And -- and when we talk about black lives matter, brown lives matter, while we say our lives matter it's not just that we have the injustice of what's happening from criminal injustice. It's the sheer brutality and inhumanity happening against us. So to be as direct, as heartfelt as I can be, vote for this bill so we can live. Vote for this bill so we can survive. I'm really tired of constantly hearing from people about, *Everyone else needs to be protected. Everyone else needs to be okay. Everyone else needs to get back home.* When do we get back home? When do we get to actually live? I haven't heard one coherent argument why you'd be voting against this. And if you weren't an officer, I would ask -- I've heard this notion about Good Samaritan and again, these things get tossed around. If someone was in need of medical attention, wouldn't you go help them? Wouldn't you pick up the phone? Wouldn't you figure out a way to help them to survive? Isn't that just commonsense? And if someone is a police officer or in law

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enforcement in any way and they're choosing in those split seconds to pick up a phone and call their supervisor to make sure they still have a job rather than you living, they shouldn't have a job in the first place.

So I encourage all my colleagues to support the sponsor on this legislation which, again, is not just commonsense, it is about survival. One more time! What is more important: Your salary or our survival? I'll absolutely be voting in the yes and I thank the sponsor for her leadership on this bill.

ACTING SPEAKER AUBRY: Ms. Wright.

MS. WRIGHT: Good afternoon. Thank you for the opportunity to speak on this bill. I applaud the sponsor for bringing this bill. It is simply obligating officers to provide or request medical attention and assistance to a person in custody who is showing distress. At bare minimum, this establishes a model of professional conduct that we should demand from someone who has a duty of care to respond to reasonable, verbal and physical cues in assessing any situation. And most importantly, this bill allows us to shift the burden of liability back where it should rest. We're going to save our taxpayer dollars and force negligent officers to bear the burden. This job -- the job of being an officer, a peace officer, is to care for and to serve the public. It is already a requirement for officers to provide care and request it where a person is obviously injured or in distress. Officers who fail to do so, fail to comply, are deliberately defying orders. We should not be protecting that behavior. Let's treat officers as the professionals we expect them to be.

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I am very proud of this legislation. I am glad to see us standing up for the community and understanding, and also honoring the work that our officers who do respond in well and good time do.

So thank you. I will be voting in the affirmative and I would like to applaud our sponsor, once again, for bringing this very important piece of legislation. Thank you.

ACTING SPEAKER AUBRY: Ms. Fernandez.

MS. FERNANDEZ: On the bill.

ACTING SPEAKER AUBRY: On the bill.

MS. FERNANDEZ: The New York State -- or just the New York Police Department -- but in similar fashion, other departments all over the State -- they pledge -- and it's in writing -- to value human life, respect the dignity of each individual, and render their services with courtesy and civility. Yet that hasn't always been the case. It wasn't the case for Eric Garner. It wasn't the case for George Floyd. And it wasn't the case for Andrew Kears, who was the inspiration for this bill. Andrew was a Bronx resident that was arrested in Schenectady in 2017. He was apprehended after running a red light and thrown into the back of a squad car, handcuffed. And that's when the timer on his life went off. For 17 minutes. And at the beginning of that 17 minutes we saw Andrew fell ill. He became short of breath. He slumped over. He couldn't keep his (unintelligible) right and he struggled to breathe. And he begged the officer over and over and over again. *Officer, I don't feel good. Officer, please, I need*

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help. Officer, please, I can't breathe. Open the window. Please, officer, I need help. He probably begged and said the word "please" 70 times, and that officer disregarded him, didn't believe him, and literally waved him off. And it's all documented on the camera in the back of the car. Anything could have been done. That officer could have acted. That officer could have turned back to say, *Are you sure?* Something in good faith to check that this human was doing okay. *I can't breathe.* He uttered that 11 times. After 17 minutes when they arrived at the precinct, Andrew was slumped over, unresponsive. They dragged him out of the car, laid him on the sidewalk and then started to check and see if he was okay. He was eventually pronounced dead right there on the sidewalk. But we know and saw that he died in the back seat of that car. But 17 minutes was all he had. "I can't breathe" were his last words. These haunting words stay with us. If the officer had done something, listened to him, could Andrew have been alive today? Unfortunately, we may not know. But his fate was decided as soon as he sat in that car. What was his crime? Running a red light. Was the disregard worth it? Was it worth his life? We have indemnification, and it exists. But in cases when the officer deliberately did not act and showed malice, that's where this law comes into effect. How often have black and brown Americans been subjected to the callous, negligent and fatal actions of the police? We've seen all the videos. "I can't breathe" has become a rallying cry. But it is also a haunting reminder of just how little law enforcements care about our minority communities, our black and

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brown communities. A fact that we're all reminded of when George Floyd died in Minneapolis. Rather, he was killed in Minneapolis. Andrew didn't have to die. Neither did Eric. Neither did George. Neither did Breonna, or neither did any other person that is on the long list that we have of those that have died in police custody (unintelligible).

Police must act reasonably. We trust them. We call for their help. Sometimes it's not enough just to make a phone call, but show that you care for this human life in your custody, in your care, in your responsibility. Especially when you were the ones who put the cuffs on them. Our law enforcement officers swore to an oath, an oath to protect this community. Their job is hard; I'll never deny that. The hours are tough, the work is grueling, and there's danger. But to actively hear someone cry for help and beg for their life, literally begging for their life and you don't give any attention or regard for what is actually happening to them, that is a blatant disregard for human life. And that is a blatant disregard for the oath that they swore upon.

This bill will require officers to provide medical attention to those in custody who show medical distress, and failure to do so, if it results in physical injury or death, they will be civilly liable. It's a good start towards accountability, and it is commonsense. We entrust these people with our lives, for protecting our communities. But such callous neglect cannot be written off by mistake or an oversight. Not anymore. We need to amend the broken

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system that allows this to happen. A system predicted upon the exploitation of black Americans cannot hope to succeed without real foundational changes. New York has always taken the wrong step when it comes to police in our lower-income communities, from stop and frisk to the three-strike rule. We are complicit or actively participating in a system that targets us. We've made strides, like yesterday. That was a great day. But there's still so much more to do. We need to reconcile the fact that New York is not the bastion of progress we tout it to be. But it can be. And yes, it will only be if we keep fighting, if we keep working to make these changes. It is work that must be done for those who have passed. The victims of malice and negligence. For Chantelle, for Genuine, for Andrew, for Ariel, for Cherish, for Justin, for Justice, Sincere and Serenity -- the nine children of Andrew Kearsse and his wife, Angie. They now have to grow up without a father, and a story that will have them in fear of the police.

I thank everybody for supporting this bill and for understanding that we need to have a sense of humanity when we are in custody or in charge of another life. And I need everyone to act. I want our police officers to act. That's why I'm calling this bill the "Andrew Kearsse Act." Because no more should somebody lose their life because somebody just -- and I say "somebody", it's a police officer. But I'm tired of seeing people die because their life just didn't matter to them. Their cries didn't matter. They were ignored. And again, we lose a member of our families.

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So I ask everybody to vote in the affirmative. I thank this Body, I thank the Speaker, Majority Leader, the Caucus Chair and every advocate, especially Angie, his widow wife, for keeping this -- this need alive and further protecting our communities, making sure that they are heard and that their needs are met.

Thank you.

ACTING SPEAKER AUBRY: On a motion by Ms. Fernandez, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 63. This is a Party vote. Any member wishing to be recorded as an exception to their Conference position is reminded to contact the Majority or Minority Leader at the number previously provided.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. The Republican Conference will be voting no. If you would like to vote yes, please contact the Minority Leader's office right away.

Thank you, sir.

ACTING SPEAKER AUBRY: Thank you.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Colleagues, this is a Party vote in the affirmative. Members choosing to vote in the

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negative should either come to the Chambers or call my office and you will be so recorded.

ACTING SPEAKER AUBRY: Thank you, Mrs. Peoples-Stokes.

(The Clerk recorded the vote.)

Mr. Ortiz to explain his vote.

MR. ORTIZ: Thank you, Mr. Speaker, for allowing me to explain my vote. First of all, I would like to thank the sponsor for this commonsense piece of legislation. It has taken so long to really to begin to do everything that looked to me from the perspective of being long over -- overdue. Creating a duty to prevent -- to provide attention to medical needs of a person by a police officer should be just something natural. It's a human being that they're dealing with. I used to oversee the Department of Corrections in the City of New York many years ago, and I remember going to the -- the medical facilities and trying to also to evaluate how the Correction Department is dealing with inmates when they come through the -- to prisons. And what kind of database, what kind of mechanism, what kind of data do they collect from these inmates that are going to be in the facility. The sponsor has spoke very clearly and eloquent about the importances of why this bill is needed. But, Mr. Speaker, the reality of life is there are still a lot of police officers out there and I hope that they can get this clear. Because Briana Ojeda, who was not an inmate, she was just -- just a person who needed assistance by a police officer by providing CPR. And the mother is calling on this police

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officer by asking him, *Can you please call somebody up? Can you please provide CPR to this person, on this little girl?* And guess what, Mr. Speaker? The police officer just walked away by saying, *No, I don't know -- I -- I cannot provide those type of services.* So this is a bill that will bring to light, and hopefully our law enforcement officers will be better prepared, Mr. Speaker, to deal with arrests to make sure they have the right data if an individual is suffering from asthma and so on, Mr. Speaker, that they will be able to take care.

Therefore, Mr. Speaker, I will be voting on the -- on the affirmative and I encourage -- encourage my colleagues to vote -- to do the same. This is a (unintelligible) commonsense legislation. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Mr. Ortiz in the affirmative.

Ms. Cruz to explain her vote.

MS. CRUZ: Thank you, Mr. Speaker. Every day in this room, for most part of the year we pass legislation to either give rights or create deterrents. The fact that we would have to create a law to incite an officer to call for help when someone is asking for it, to deter him from not failing to act, it just makes absolutely no sense in my brain. That we are not recognizing the humanity of people that when someone says, *I cannot breathe*, every single person in this room would turn around and call for help. That we would have to ask an officer to do that, I cannot understand. I will say, often we create deterrents that are criminal and sometimes we create deterrents that

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are financial.

I want to thank you, Nathalia. I want to thank the sponsor for this bill, and our colleagues. Next year we need to come back and create a criminal deterrent. Because until we start to put people in jail who fail to get help, the same people that we are entrusting our community with, we're not going to see change. I'm hoping that a couple of a million dollars in financial, how shall we say, deterrents can help. But if it doesn't, let's come back here and change that. Because when you have nine children who will never see their father because an officer, for more than almost ten minutes, ignored the pleas. And this isn't an isolated incident. We're seeing this all over the country. We're seeing this in our own backyard. And the fact that we are here having to pass a law that says, *You should get someone help or you're going to be held liable*, I cannot understand.

I'm going to vote in the affirmative because it's the right thing to do, just like it's the right thing to do to make sure we get someone to help you.

ACTING SPEAKER AUBRY: Mr. Ramos -- Ms. Cruz in the affirmative. Jumping the gun.

Mr. Ramos.

MR. RAMOS: Mr. Speaker, I am proud to be a cosponsor on this legislation. This legislation that protects the public, especially black and brown lives, that requires that police officers get medical assistance to somebody who is suffering distress. And as my colleague said, it's sad that we actually have to pass a law that requires

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police officers to get people medical attention. I was a police officer for 20 years. I swore that oath to help people, to protect lives, to save lives. Not to -- to stand around and allow other colleagues to kill people or to do it myself. And we heard here some clever attempts to establish some kind of a legislative intent that would serve -- I -- I guess to help officers who get sued. I want to clarify something. It was asked here that if a police officer calls an ambulance would that constitute getting help. And, yes, that's part of it. But if a police officer chokes somebody out and then 15 minutes later calls an ambulance, that doesn't get him off the hook. The intent of this legislation is to get somebody help at the scene in a timely manner, in a proper method. It is sad. It's a sad state of affairs where we see the devaluation of black and brown lives. Where a man's life in Staten Island was worth -- worth less than a loosie cigarette and he was killed. Where a man's life is worth less than a \$20 bill was given a death sentence and not given medical assistance. It is a sad state of affairs. And when we see these repeated incidents of abuse against people of color, there is always the excuse of, *He was resisting arrest*. They're not resisting arrest, they're resisting death.

Mr. Speaker, I proudly vote in the affirmative and I urge all my colleagues do the same.

ACTING SPEAKER AUBRY: Mr. Ramos in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, sir, to explain my vote.

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I -- I agree with my colleagues that if a police officer sees someone who needs medical attention, they should call for assistance. And that's not the issue here because that's the current law. As it turns out, as legislators, we actually vote on language. We don't just vote on concepts, we vote on language. So what's this language say? This language doesn't say an officer has the duty to provide care or call for help. That's not what the language says. The language says the officer has -- the officer has to provide care and -- and obtain assistance and treatment. Our officers overall are very conscientious. Sure, we've heard a few examples where they weren't. And our hearts goes out to the victims of any improper police behavior. We're there. And when they don't act properly, under current law there's liability. We heard the example of a person who was tossed in the back of a police car and they died on the way to the police station, and the City of Syracuse [sic] -- and the City of Syracuse [sic] paid out \$1.37 million on that claim because what happened was wrong. This bill goes beyond that. It imposes personal liability on officers. It doesn't -- it doesn't provide any exemptions for good faith like we have for -- for Samaritans. And it requires that they provide care and call for help.

Let's vote on what the law is, and if that's not what we mean, let's change the law so it reflects what we want. Thank you, sir.

ACTING SPEAKER AUBRY: Mr. Goodell in the negative.

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Mr. Crespo.

MR. CRESPO: Thank you, Mr. Speaker, to explain my vote. It is amazing to be here today and to vote on this piece of legislation. I think others have articulated. First of all, thank you to the sponsor and to the Speaker for making this and all the bills that are related to this week's package possible. I remember coming here to work in the New York State Legislature almost 17, 18 years ago, and it was in the aftermath of the Amadou Diallo shooting. And I remember the package of police community relations bill that you, Mr. Speaker, and so many of our colleagues and former colleagues championed then. And here we are, this many years later, still having to react and respond, unfortunately only having an opportunity to pass bills after a number of egregious acts have mobilized the community. And it is unconscionable that that's what it takes. It is unconscionable that the victims tend to be people who look like me and you, Mr. Speaker. It is the reason why this bill is so important. The decency of providing care. As elected officials, we get elected. Not everyone voted for us, but we represent them all. Whether you're a Democrat, Republican or any other party, whether you came out to vote or didn't vote in that election, we now make rules and decisions that impact everyone. And the same goes for officers. You're there to protect and serve. That includes the very people you may be there to hold and arrest. And providing medical care when it's asked for is the most basic human reaction that not only officers should have, but every public servant. I think this is the right thing. It's unfortunate we have

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to do this. But while we see the examples that we see, and while those examples are people like -- like myself, yourself and so many of our colleagues, they happen to be people of color, something has to give. And we're seeing a national mobilization expecting change. Today we achieve it with this bill.

I'm proud to vote in the affirmative, Mr. Speaker.

ACTING SPEAKER AUBRY: Mr. Crespo in the affirmative.

Ms. Simon.

MS. SIMON: Thank you, Mr. Speaker, to explain my vote. You know, when a police officer is sworn in they take an oath to protect and serve. To save lives, not to disregard them callously. And when a police officer is sworn in, they do not take an oath to leave their humanity at the door, although some appear to have been encouraged to do so. This bill only says that when someone is in custody, when a police officer has a duty of care they have to render that care.

I want to thank the sponsor for this legislation and I'm very proud to vote in favor. Thank you.

ACTING SPEAKER AUBRY: Ms. Simon in the affirmative.

Ms. Bichotte.

MS. BICHOTTE: Thank you, Mr. Speaker, for allowing me to explain my vote. I want to thank the -- my colleague for sponsoring this bill. I'm so extremely proud of her. This bill

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requires law enforcement to provide medical attention to people arrested or who are in custody who is expressing medical distress and are in pain. Again, we have seen many who have cried, *I can't breathe. I need help. I don't feel good. I'm in pain.* Those who were murdered and neglected and treated with malice while in custody of law enforcement officers is another form of illegal capital punishment. We've often done -- we often see this with the start of racial profiling, a bill that we just recently passed in this House, and we asked and demand accountability from police officers. My brother, Wayne Bichotte, while he was in custody, he was sick. He was sick probably before being in custody. They finally released him from jail right before my mother tried to bail him out. Later he died, in August of 2005. He was a veteran. This bill would also allow for families of the victims to sue. Very extremely important bill. We say their name, Javier Ambler, Eric Garner, George Floyd, my brother Wayne Bichotte and many more.

Thank you for this bill. In the name of my brother, I will vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Bichotte in the affirmative.

Mr. Lavine.

MR. LAVINE: Thank you, Mr. Speaker. Almost every law enforcement officer I know and have ever known has gone into that field with the best of intentions and the best of motives. This bill should not be necessary. But for the last three-and-a-half years,

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Americans of good faith have had to defend not only what is good, but what is obvious. Just two years ago, the President encouraged law enforcement officers to rough -- rough up those they had arrested. Words have meanings. This bill simply requires that authorities operate in good faith. Now, my colleague may be theoretically correct that perhaps that is the state of the current law. But if that is, indeed, the state of the current law and that -- and that is, indeed, true, then that law obviously is not working and we must obviously do better, which is what this bill is all about.

This bill is about good faith. Nothing more, nothing less. I will be voting in the affirmative. Thank you.

ACTING SPEAKER AUBRY: Mr. Lavine in the affirmative.

Ms. Fernandez.

MS. FERNANDEZ: I just want to thank this Body one more time. This was a bill I worked very closely with, close with the family, and I want to commend them again one more time because the attention for this case would not have been without his widow wife, Angie Kearse. And I just want to thank you again.

I absolutely vote in the affirmative.

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes to explain her vote.

MRS. PEOPLES-STOKES: Thank you. I just want to call one name as I cast a yes vote for this piece of legislation: India Walton. India Walton was a very young lady who got connected with

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the wrong people. I'm going to say she's actually from Rochester. Connected with the wrong people, using the wrong product and ended up incarcerated after a chase by police. If she had gotten the kind of service that she needed either from the police or once she was in the Erie County Holding Center, that beautiful aspiring young lady would still be with us. She did not get it. She is no longer with us because no one decided to care for her. That is what this legislation seeks to deal with. Now mind you, Erie County's -- the taxpayers are going to pay out a lot of money, and the City of Buffalo has paid out a lot of money for these sorts of infractions in the past and they probably will in the future. But at some point, the people who create the problem by not providing assistance should be responsible, and not the taxpayers. I think -- I mean, I know way too many officers personally that I know would never let this happen. Not because they're police officers, but because they're caring human beings and they care for humanity. They understand their job is to protect and serve. But there are just that few, and we've seen them on film and we know the results of their inaction. We would like to not see that anymore.

So I want to thank the sponsor for this legislation, thank the Speaker for bringing to the floor, and I'm grateful to my colleagues that are voting in support of it.

ACTING SPEAKER AUBRY: Are there --

Mr. Goodell.

MR. GOODELL: Thank you, sir. There are some additional votes that need to be reflected. The following Republicans

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are voting yes on this: Mr. Ra, Mr. Montesano, Mr. Reilly, Mr. Garbarino and Mr. Johns. Thank you, sir.

ACTING SPEAKER AUBRY: Thank you. So noted.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr. Speaker. If we can move to our next debate. It is on page 16, it's Rules Report No. 67 and it's sponsored by Member O'Donnell.

ACTING SPEAKER AUBRY: The Clerk will read.

THE CLERK: Assembly No. A10611, Rules Report No. 67, Committee on Rules (O'Donnell, Heastie, Peoples-Stokes, Aubry, Arroyo, Bichotte, Bronson, Burke, Carroll, Colton, Crespo, Cruz, DenDekker, Dickens, Epstein, Fernandez, Frontus, Gottfried, Hunter, Hyndman, Jacobson, Jean-Pierre, Lifton, McDonald, Nolan, Otis, Pichardo, Pretlow, Ramos, Reyes, Richardson, D. Rosenthal, Rozic, Seawright, Simon, Simotas, Steck, Taylor, Thiele, Walker, Weinstein, Wright, Ortiz. An act to amend the Civil Rights Law and the Public Officers Law, in relation to the disclosure of law enforcement disciplinary records; and to repeal Section 50-a of the Civil Rights Law relating thereto.

ACTING SPEAKER AUBRY: Mr. O'Donnell, a [sic] explanation is requested.

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MR. O'DONNELL: With pleasure. This bill - a version of which has been pending in this House for five years - has two separate, distinct components. The first component is the full repeal of Section 50-a of the Civil Rights Law, a law that was passed in 1976 that exempted a certain group of public employees from having their information disclosed.

The second provision in this bill involves amending the -- the laws regarding the Freedom of Information Law. FOIL -- because of 50-a, FOIL did not -- was not applied to those employees. And so, we have written into the FOIL statutes additional protections for those police officers so that certain information, such as their home addresses, their phone numbers, their Social Security numbers, et cetera are clearly not subject to the Freedom of Information Law.

ACTING SPEAKER AUBRY: Mr. Palumbo.

MR. PALUMBO: Thank you, Mr. Speaker. Would the sponsor yield, please, for a few questions?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure, sir.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields.

MR. PALUMBO: Thank you, Mr. O'Donnell. And now this -- the -- the law as it currently stands is a Section of 50-a that's going to be repealed.

MR. O'DONNELL: Mm-hmm.

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MR. PALUMBO: There -- could you just explain the current process in order to receive records, that there's a court order application that could ultimately be obtained to release some of that information; is that correct?

MR. O'DONNELL: It's a little bit more complicated than that. Historically, it was originally written to not include an absolute bar to getting those records. In the years since 1976 up until last year, the courts have expanded what that rule is to say it's an absolute bar for the release of any records. We are just one of three states that has such a bar, and because of the interpretation of the courts, there is no method available for people to receive those records. If one were to try to get those records, the court would be required, based on the Court of Appeals decisions, to not allow them to be disclosed.

MR. PALUMBO: Unless they could prove materiality and so forth, right, that it would be relevant and material because it -- I know they've been doing that in my county, in Suffolk County, for some time upon on application in limited circumstances as far as the relevance and material nature of the -- that was the determination to release them, in very limited fashion, I'll certainly agree with you in that regard.

MR. O'DONNELL: There are certain abilities, I know there are certain current cases in New York City where in criminal matters, criminal defense lawyers have applied to get around the rule. But other than that, it's an absolute bar for the release of that

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information.

MR. PALUMBO: Sure. And I guess there was some judicial discretion in that regard. Can we agree on that, regarding whether or not they should disclose them, and that could go either way.

MR. O'DONNELL: In only the most limited fashion, and I am unaware of any recent times when they have been released.

MR. PALUMBO: So, is that the reason why you feel that this should move now to the FOIL statute because that, of course, has significantly less restraint and it would ultimately allow everyone, including the general public, to obtain these records?

MR. O'DONNELL: As you may be aware, my original bill only repealed 50-a. In the repealing of 50-a, the people who are under 50-a are now subject to FOIL like all other public servants, and we wanted to ensure that their personal, with an "a", private information is not disclosed. That was never the intention, but we wanted to make it very clear.

MR. PALUMBO: Understood. And in this particular bill now, the items that will be disclosed, subject to the personal information being redacted, is essentially any complaint; is that accurate? It makes no distinction regarding substantiated or unsubstantiated?

MR. O'DONNELL: I can address the substantiated versus unsubstantiated question. It has been raised to me by a number of people. One of the problems with putting a word like

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"substantiated" into statute is we probably have to define it. I can assure you there's not a police department in the State of New York that wants us to define how to substantiate or not substantiate. Additionally, the lesson we should have learned from the 1976 50-a law is that when you write things with verbiage, that verbiage gets interpreted by a court. The man who led that charge, Senator Frank Padavan, who was a true public servant - sadly, he has now passed away - but before he died, said he never intended 50-a to be interpreted the way it is. And so, no, we don't distinguish between those two things in this law.

MR. PALUMBO: Understood. And you do have a definition here regarding specific types of information like technical infractions on page 3, I guess it is, line 1, Section 9, that it's a *Minor rule violation by a person employed by a law enforcement agency as defined in this section, did not -- that did not involve interactions with members of the public, persons investigative enforcement -- oh, I'm sorry, Are not a public concern and are not otherwise connected to such persons investigative, enforcement, training, supervision or reporting responsibilities*. So, regarding that section, that's really the only limitation on what the agency may determine is not disclosable?

MR. O'DONNELL: That provision required quite a bit of negotiation. Obviously, it's not my intention or anyone's intention for a violation for not having shiny shoes or something of the sort to be included in what that is. Not having shiny shoes doesn't involve their job or their interaction with the public, and I can't

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imagine anyone having a concern about the shininess of an officer's shoes. So in the end, even though it may be a technical violation of the patrol guide, that is not the kind of information that we are seeking.

MR. PALUMBO: Thank you, Mr. O'Donnell.

On the bill, please, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill.

MR. PALUMBO: Thank you, sir. Now, amidst what's going on around us nationally and internationally, I understand the need that this needs to be rushed through and the concerns of many. But what's really critical, and I think is what is of significant concern to me is the unique nature of law enforcement is not being treated as if -- as many other professions; in fact, every other profession in New York State. Their civil rights are of significant concern to me. For example, 3020-a of the Education Law renders unfounded complaints against schoolteachers confidential. Under the Public Health Law, Section 230, Office of Professional Conduct for Physicians seals and keeps, not subject to disclosure, any unfounded or unsubstantiated charges; in fact, pursuant to the Public Health Law, even administrative warnings are confidential. So, legislators, it's a misdemeanor for someone to disclose a confidential investigation that's unfounded into any one of us. City Council has similar rules. Under the Criminal Procedure Law, 160.50, 160.55, only by a court order is someone able to obtain a defendant's criminal history in the event that it's sealed or there is an -- an unfounded or otherwise -- or a

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not guilty rendering by -- by a jury.

So, this is really a distinction that's very important because when you think about it, why would we make unfounded allegations against police officers public with mob rule going on right now in our society. Some statistics that I think are certainly relevant here. In 2018, and this is just the New York City Police Department, 98 percent of cases in the Civilian Complaint Review Board were unsubstantiated. So now we might have active police officers who make a lot of arrests, as if -- looking as if they're doing something untoward because they have a lot of complaints against them. And I can trust -- and trust me, I -- I can assure you that the police officer who, for example, is writing ten tickets a month versus the police officer who's writing 210 tickets in a month, the more active police officer who is doing his or her job appropriately will have a lot more complaints. And you compare this to other states, and I know that there was some -- there is -- has been many discussion that these items are not subject to disclosure, and I'll suggest that I will disagree in that regard because it's subject to judicial discretion. And as a lawyer, something that is material and relevant is important.

So, now we're going to have a number of complaints that will be available and subject to cross-examine -- examination of that police officer that are neither relevant nor material to the case at hand, but it will create some sort of a cloud that they are -- that they are not an appropriate -- or were not fit to act in particular situations. And we have in California, they have a disclosure statute and only

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allows the disclosure of substantiated findings of an incident involving the discharge of a firearm, use of force, a record relating to an incident in which a sustained finding was made by a law enforcement agency engaged -- of an officer engaging in sexual assault involving a member of the public, any record regarding dishonesty or lying. And that's it, because that makes sense. That it's relevant to a -- a criminal or even a civil proceeding.

So when we balance these things, the probative value versus the prejudicial effect is the test in a courtroom regarding the admissibility of what's called "propensity evidence." That's all that this is now. We're going to be providing this information to show that this police officer was -- was complained of, although it is unsubstantiated, didn't happen, he's had many -- or she has had many, many complaints and, as a result, they are doing something inappropriate here or it may otherwise fit within a -- a defense.

So, the problem is this: That we don't have the ability for judges to render a decision on that particular relevance or whether or not it should even be out there. Because then again, we've got other -- other issues regarding this being public now. Since it's going to go to anyone, there's no lawful purpose necessary, that these databases may be created to simply harass in the court of public opinion a police officer. Look, I'm a son of a police officer, my father was a Suffolk County homicide detective, interactions with police and the general public are uncomfortable. When you get a speeding ticket, your heart races, you're not really thrilled about it. Sometimes you're having a

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bad day, you're late for work, you're grumbling, you're really disappointed that this police officer who was just sitting on the side of the road doing his or her job, wrote you a ticket because you were, in fact, speeding. Even if they write you another one a month later, you're really not going to like that person.

So, this is what's so unique about this. Those men and women kiss their families and put on a bulletproof vest every day. They could be in a fight any given time during the workday. We don't have those types of risks that we face. We -- they face uncomfortable situations every single day. And when you look at the statistics, again, because I have these from New York City, this is what our men and women of law enforcement have done. We don't need to paint every single law enforcement officer with the same brush. Every cop I know that I've spoken to is appalled by what happened in Minneapolis. That wasn't police conduct, that was a murder. And you no longer -- you -- you can't legislate around criminal conduct. You are no longer an officer when you engage in that type of conduct. You're a crook, you're a criminal and he will go to jail for a long time, hopefully as well as the rest of them that have been charged. But these are the people that we're talking about in New York, in our State, the people that we're legislating against right now.

In 1990, there were 2,262 murders in New York City. Last year there were 319. Rapes in 1990, 3,126; last year, 1,755. Robbery, 100,280; last year, 13,369. Burglaries, 122,055; last year, 10,778. These are the people we're talking about whose civil rights

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we are trampling on by at least not controlling this legislation to only allow substantiated claims that are relevant to a proceeding. Allowing all of it into the public is dangerous.

And so, when we couple that with what's been going on in this Legislature the past two years, eliminating cash bail, the Governor is talking about releasing prisoners over the age of 55 who are refusing to cooperate with Federal authorities declaring New York a sanctuary state, calls to defund the police, what's going on right here? This is anarchy. We need to get control of this. This is making our families and neighborhoods less safe. Let's not paint everyone with the same brush. We have confidentiality for teachers. The Childs Victim Act -- Victims Act that we passed opened up a number of lawsuits against teachers for molesting children. Are they all going to be painted with that same brush? Of course not. Of course there are bad actors. You can't legislate around criminal conduct. I'll say it again: 30 some-odd -- what was it, 33,000 police officers and millions of interactions with civilian [sic] in New York City alone. Millions of interactions, and we have but a handful that we can say there was untoward, inappropriate and criminal conduct, which is what it is.

I urge my colleagues to vote against this. This is not the right way to fix this. Obviously, as I said, we're doing this as a reactionary thing. I don't think enough stakeholders have been involved in this to make this -- get this done right. We had a problem with -- the -- the removal of cash bail was a terrible problem. There

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was some amendments and changes in this year's budget, which still create a number of problems. We need to slow down and if you want to fix this, this is not the way to do it. I vote no.

ACTING SPEAKER AUBRY: Mr. Reilly.

MR. REILLY: Thank you -- thank you, Mr. Speaker.

Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure, sir.

ACTING SPEAKER AUBRY: The sponsor yields.

MR. REILLY: Thank you, Mr. O'Donnell. I just have a couple of questions.

MR. O'DONNELL: Mm-hmm.

MR. REILLY: When the legislation, the new revised legislation was being drafted, was there any consultation with the law enforcement community, including New York City Police Department, Civilian Complaint Review Board, New York City Corporation Counsel and the Mayor's Office?

MR. O'DONNELL: The language in question that goes beyond just repeal was language that was inserted by the State Senate, and I'm unaware of who they spoke to, but I am confident, given the number of iterations we went through, that they were speaking to some of them. It is my understanding that the Mayor is in favor of full repeal. I have no idea whether or not they spoke to the Mayor.

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MR. REILLY: Okay. With -- the New York City as it pertains -- I'll specifically ask a question about -- with my experience, with the New York City Corporation Counsel, there's a fund that the City has to settle cases brought upon by complainants that are seeking remedy against the City, against the New York City Police Department naming officers. The New York City Corporation Counsel decides on which cases to settle and they don't give officers the ability to represent themselves in court, and then notify them of the settlement. Would those types of scenarios and -- and cases be allowed through this legislation?

MR. O'DONNELL: The truth is that your question is somewhat irrelevant in that the New York City Corporation Counsel's Office actually keeps a public record of every case against them involving the Police Department and what, if anything, they were settled for, including the names of the officers involved.

MR. REILLY: So those -- those officers named are -- are open to public view now?

MR. O'DONNELL: That is my understanding, yes.

MR. REILLY: Well, wouldn't you say that violates 50-a currently if that was allowed, because we're saying that no records were available? So, clearly, there are some records that are open to public view by request.

MR. O'DONNELL: There is another mechanism that is also available, the New York City Comptroller is required to, when you sue the City of New York, you have to file a Notice of Claim I

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believe within 30 days, and then there's a time that the City could try to settle those lawsuits and do so quickly. The Comptroller's Office keeps a record of all those settlements, and that includes that information, as well. 50-a was designed to prevent the police departments from giving up that information, that is why it needs to be repealed.

MR. REILLY: Okay. So during the discussion on the legislation, was there any input on unsubstantiated claims, as my colleague mentioned before?

MR. O'DONNELL: Yes, and in contrast to previous statements already made in this House about rushing, I've had this legislation for five years, and I have had hundreds and hundreds of hours of conversations about 50-a and about my belief that it needs to be repealed, and different proposals with different language to do so. At no time did any police PBA offer any suggestions other than, *No, we can't repeal it.*

MR. REILLY: Okay. Thank you.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. REILLY: So, I think part of the -- as my colleague mentioned earlier about the other protections of -- of work of public servants that have protection of unsubstantiated claims being presented, I want to put this into perspective that if you have officers that are out doing their job, maybe they're in enforcement units like narcotics enforcement, they often receive complaints from people that

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are using it as a tool against them. And I know that there are officers that violate the trust of the public, and they should be held accountable. I fully understand that. And I -- I understand that we want to make sure that those cases that are substantiated and that we know shows the bad actors, yeah, that should -- that can be released. I get that. But when we start to release information that is not proven, it is not substantiated, by putting out unsubstantiated claims, we are essentially opening up those officers to public shaming just by the mere fact that someone put in a complaint.

Just to give you some insight, an unsubstantiated complaint, according to CCRB is it couldn't be proven or disproven and it's a preponderance of the evidence, so 5149. If someone files a CCRB against a New York City Police Officer and they withdraw their complaint by not showing up, they can't get contacted, they can't proceed to go forward, that's deemed an unsubstantiated complaint, but it will still be on the officer's record. The only thing we're asking for is to be fair and balanced. I mean, just yesterday we passed legislation that made people accountable for calling 9-1-1 to create false emergency response. We're creating that with officers now if you're going to allow unsubstantiated cases to public review.

Now, if there's a basis for it in a criminal proceeding, it's there. If you look at the way we legislated in the past, and I may not have been a part of those bills when I -- I wasn't in the -- the Assembly at the time, but I think we made it -- made sure that you couldn't use criminal arrest records when they're applying for jobs.

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That's a personnel issue, right, that's hiring a job. We've -- we've made it where you can't release mugshots, right? I applaud that. Only if it has law enforcement -- a law enforcement reason. You know, these are things that we look to protect people's privacy. That's what we're looking for here. We want to make sure that it's fair and balanced.

When we -- when someone is charged with burglary and they go to trial and they have a prior conviction for burglary, you have to have a Sandoval hearing to make sure that you can use it in -- in the courtroom to charge that crime. By releasing unsubstantiated CCRB's into public review, you're -- you're creating something that's just going to paint all those officers with a broad brush. And, yes, there are bad actors, and we can hold them accountable. I think that a full repeal is really going swimming -- swinging the pendulum way too far where we're not protecting everybody's rights. I mean, that -- that's what we're trying to do, due process, the ability to have due process.

You know, under FOIL, it says that you can't release information that's going to give unfair balance or insight and create an unfair trial for someone. Well, by releasing un -- unsubstantiated CCRB's, in essence you're doing that to police officers, your correction officers, your firefighters. But just remember, in the Education Law, you don't release those unsubstantiated for not only teachers, but the other license holders that fall under the New York State Education Department. This is a basic right that public servants

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have.

Now, I'm not -- I'm not, like I said, I'm not against putting out substantiated when it's relevant. It's the problem of those false accusations, those -- those lawsuits that are frivolous that the City settles as an example because they have a slush fund, because it's cheaper to give \$5-, \$10,000 away than to defend the officers. Those are the cases that I'm worried about. I'm not worried about the ones that deserve to be off the job. If that's -- if that's the light that has to be shined on them, then that's fair. But when you start to paint them all as if -- because there's going to be no context when this is released. There's going to be no context to say, *Unsubstantiated, well, the person couldn't -- didn't want to proceed.* It's going to be in there.

So, all I ask is that we take a look at this and try and do it fair. Present it in a fair and balanced way. That's -- that's all I can ask for, and I think that's all that officers are asking for. And I think the public would get their accountability, because we deserve our accountability. Officers have to be held accountable, I agree 10,000 percent, but it's got to be fair. It's what we ask for everybody else. It's what we said about criminal justice reform, it's about fairness and that's all I ask.

So, I know you're going to probably pass this today, I understand it, I understand where you're coming from. But I just hope that you take the opportunity to think about it. Think about how you would like it if a constituent wants you to take care of something for them and you really can't do it, and you're trying, but you can't and

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they're not happy. But they blast you all over the place as being useless, horrible, you -- they make up lies saying you said something. But if it's a true thing, then, yeah, shine a light on it. That's all I ask.

So, we can make some changes to make it where unsubstantiated and we put a little accountability in it for the information that's being released, maybe we can move forward on that. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Mr. Ra.

MR. RA: Thank you, Mr. Speaker. Will Mr. O'Donnell yield?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields.

MR. RA: Thank you, good to see --

MR. O'DONNELL: Good to see you.

MR. RA: -- hope you are well. I just had really, just one quick question as you went through this. Is -- is this approach, this new piece of law that we're putting in modeled after any of the other states' statutes regarding access to police disciplinary records?

MR. O'DONNELL: I would say it's more modeled after the states that don't have a statute, which is many, including Minnesota. So with the murder of Mr. Floyd, within days the world

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knew what the disciplinary history was of his murderer because there is no law preventing that. And both the City of Minneapolis, as well as others, keep a running list of those complaints. And so, that is instantaneous information that is available there.

In this particular case, it's putting it into FOIL, and thing about FOIL is there's a process. And so, there is -- you file a FOIL complaint and there's a FOIL officer, and then the FOIL officer ignores you and then you file an appeal, and then the appeal ignores you, and then you have to go to court and a judge is going to have to decide whether or not you get your FOIL request, often so full of redactions you don't know what it means. So, the suggestion that this is sort of an open book is not really accurate as it relates to FOIL. There are limitations, there is a process and all -- frequently, one needs to go to court to access that information.

MR. RA: Okay. And then I know that there's two pieces of this in terms of that work that the, you know, would be done with redacting. There's the shell, you know, language, that -- that applies really to, you know, that personal information, and then there's also some information that says a law enforcement agency "may redact" regarding technical infractions. Can you expound about what the intent of that is?

MR. O'DONNELL: Well, the -- there's some subjectivity in that. And there's subjectivity in that into whether or not a particular technical infraction is, in fact, something that should be disclosed. So the example I gave, shiny shoes, is actually a violation

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of the patrol guide, and I would be very upset to learn that lack of shiny shoes was ever deemed a technical violation that was worthy of releasing. Could there be technical violations that are worthy of releasing? Could it be that somebody who has a very long disciplinary record outside of technical violations that they choose to release the technical ones, as well? I'm not going to tell the Police Department how to do that, and I would not want them to be limited in their attempt to give full disclosure and compliance.

MR. RA: Okay. And -- so when somebody does make that FOIL request --

MR. O'DONNELL: Yep.

MR. RA: -- you know, we -- we all know, you know, with FOIL there's some level of specificity that's required when somebody's making a FOIL request. So could, you know, presumably, somebody, if they were to say, you know, what if they're asking for something that -- that we think is technical in nature, could -- could the FOIL officer respond that, you know, *These are technical and we're redacting them*, or if they're asking for something specific, suppose they were asking about something -- I don't think they'd be asking about shiny shoes, but maybe something comparable to that that is also considered technical.

MR. O'DONNELL: So, it's subjective, the police department gets to make a determination as to whether or not it's subjective. And if you as a person seeking the information feel the police department is -- made that discussion incorrect, then you have

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the right to go to court to say, *This violation is non-technical, or you may release it and I think you should because of these other circumstances.*

MR. RA: Thank you very much.

Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, Mr. Ra.

MR. RA: Thank you, Mr. Speaker. You know, we've come back here a couple of times now since this, you know, whole situation started with -- with COVID-19 and, you know, we've all remarked many times about the unusual circumstances we found ourselves in, and I think even two weeks ago when we were here, I don't think we could have imagined where we are now. We were, you know, happy to see different regions of the State were starting to reopen, even New York City, which had the -- the height of this is now into Phase 1 and we're moving forward.

But as this was all happening, you know, something happened that really changed the conversation all over this country and, perhaps, all over the world. And we've -- we've seen protests and demonstrations, many peaceful, other times people who -- who maybe wanted to I don't think necessarily deal with the situation, but maybe were taking advantage of the situation for their own purposes to -- to destroy and -- and hurt people, and that's a shame because it distracts from an important message and an important conversation.

You know, this is a time when we've seen a lot of division despite the fact that the outrage over the killing of George

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Floyd is near universal, if not universal. I think we can all agree on that. That officer was fired and charged, should have been fired and charged swiftly; the other officers, you know, that were there have -- have been fired, they've been charged. And it's something that all of us that have seen that video, it -- it really does shake you to your core to see something like that happen. And I can only imagine, though, how it shakes you to your core if you're one of the thousands and thousands of law enforcement officials in this State who went into that career out of a sincere desire to protect their communities.

And we've all heard in our offices from -- from people saying repeal 50-a, repeal 50-a. And certainly under these circumstances, I think the easy thing to do is say, *Yes, let's -- let's do that. Here's an opportunity to, you know, throw open the door for this information.* But we've also -- I know in my office, I'm starting to hear from law enforcement officers themselves, I've started to hear from their families. And I had a couple of conversations last week with spouses of law enforcement officials, and they're terrified. They are watching their spouses go report for duty not knowing whether it was going to be -- they were going to be in the midst of a peaceful protest or they were going to be in the midst of some of the violence we've seen: Officers being hit with bricks, Molotov cocktails thrown at police vans. You know, all of the situations that we've seen in the last few weeks. You know, I know that the spouse of a law enforcement official is -- has a very difficult life because every day they don't know if something's going to happen that's going to prevent

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their husband or their wife from coming home.

And we have to remember, my colleague talked about painting with a broad brush. We have to remember we're talking about the same individuals who are there trying to keep our communities safe every day. The department that, from what I can find in my research has lost, at least in the NYPD, 43 members to the coronavirus over the last few months. That was reeling before that with a rash of suicides last year, ten suicides in 2019 of law enforcement officials, which should give you an idea of the stresses they undergo on a day-to-day basis. And we also have to realize those are the same men and women who, in one of the darkest days in the history of this country ran in when everybody else was running out. We lost 23 members of the NYPD on 9/11. We've lost ten times that many since then to 9/11-related illnesses. These are the same individuals that didn't ask, *Am I going to be safe if I report there*, either in the midst of the attack or afterwards. They're the same individuals who went in without regard for that. And many of them paid for it with their life that day and have in the days since because they -- they got sick from -- from breathing toxic air and got horrible, horrible illnesses. And one of the real shames of it is up until recently, they had to continue to fight just for families to be protected who had been so deeply impacted by that day.

So, we have a FOIL law in this State which is an important piece of allowing for public disclosure of information. Sunlight is the best disinfectant. That's -- that's a phrase we hear all

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the time, right? But 50-a, when it was passed all those years ago, was designed to recognize the unique nature of these jobs of our law enforcement officers, our correction officers, of our -- of our firefighters. That is a unique job. And it exposes you to things that many of us can't even relate to in our -- in our day-to-day lives. And because of that, this Legislature, many years ago, I don't know if there's -- maybe there's one or two that were here at the time, but decided that we needed some specific protections for the information of -- of these law enforcement officers so that they didn't just get FOILed and -- and you didn't have issues with -- I know one of the intents at the time was defense attorneys that -- that might FOIL all the disciplinary records of an individual and -- and use something in there, you know, to try to impeach their testimony at a trial or -- or, you know, perhaps otherwise embarrass an officer.

So, as we repeal this today, we are opening the door that any complaint that gets filed against an officer, substantiated or not, can get sent out to the public. If somebody wants to go on a fishing expedition and get all this information and put it out in public, they -- they'll be able to. And that is a great cause for concern for -- for myself, and I know it's a great cause for concern for -- for those law enforcement officers who go out there every other day with no other intention but to go report to duty and being there for their community. And I'm sure there are days that are routine and calm, and there are days that are anything but. And sometimes, you know, maybe under the current circumstances you have an idea of what

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you're going into when you report for duty, but other days you don't. Nobody that reported for work on 9/11 knew what they were going to deal with that morning. Nobody who, you know, reports for work like we've seen in -- several times in the last few years where -- where officers were assassinated sitting in their cars, or somebody made a false 9-1-1 call just to lure an officer to the scene so they could kill them.

So, when that phone rings or the call comes over the radio, they're not sure where -- where they're going, what they're walking into. And they hope for the best, hope that the call that's come in is a legitimate call for help with a situation, but -- but they don't really know. And we have to look at these situations through that lens, that when you're in a situation, you have to have your guard up, right? You -- you don't know what you're walking into and you have to have your guard up. We have to recognize the unique nature of this job. And there's no doubt that if somebody makes a complaint that ends up being unsubstantiated, and maybe multiple complaints that are unsubstantiated about an officer, and this goes out into the public, I don't think it's difficult to see how it could expose that officer and their family to potential danger as a result.

So, you know, we've done some good things over the last few days. I voted for -- for many bills that I think will -- will help get information out to the public, will help improve the relationship between -- between law enforcement and the community, but this one -- and this is obviously the one getting the lion's share of the

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media attention, this one is a problem for me, because I get what people are saying about wanting transparency. Transparency is important across the board. By the way, at some point maybe we can look in the mirror when it's regard to transparency, because, you know, last week we were talking about this, but we didn't even have Committee agendas 'til, you know, Sunday, so I don't think we even gave the public, you know, a chance to fully understand what we're working on.

But I ask that we all look at this through the lens of, you know, we have to have those important conversations about race. We're all outraged about George Floyd, but doing something that could potentially make a job that is already very difficult inherently dangerous, potentially more dangerous, is not the way we should be going. I'll be voting in the negative. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Giglio.

MR. GIGLIO: Am I on?

Thank you, Mr. Speaker. On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. GIGLIO: As my colleague just said, we are discouraging people from even entering the field of law enforcement if we -- if we're afraid to protect them. And as we've said often that there is more good people out there than bad. And I just wonder, you know, you wonder as -- as a human being how much hate is in people's hearts and how can we control that? Sometimes there's

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nothing we can do to control people that are bad, on either side, either the criminal or the police officer. And I think it's unfortunate that today, we have completely concentrated only on the police officers and law enforcement, including corrections. It just seems to me that we're targeting them for no real good reason besides some of the bad things that some of these people did. And I know what's going to be said, *Oh, it's only the bad apples or you can't excuse them.* You're right, hate is never excusable. Their actions are never excusable. But there is a way to go about it, and I think to try to punish police, all police for what's going on is way past that.

There's another thing I wanted to talk about today, and I'd like to just -- just say this: You know, not too long ago in our Chambers it got very contentious in there, and the word "racist" was thrown at other members because of the way they were going to vote, or the way they were arguing the bill. And during that debate, and during that contentious period, the Majority Leader spoke up at the end of it and said, *You know, at some point, people, we're going to have to have this conversation, we're going to have to make everybody uncomfortable.* Well, I was sitting there that day and I said to myself, Joe, get up and say how about now.

So, now I'm going to say it: How about now? How about we sit in our Chambers, we put a task force together and finally talk this out. It doesn't have to be over a bill. It doesn't have to be over laws, it has to be all of us sitting there together deciding what's best. I believe that our members are the best in the country. I believe

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we can come up with those answers, I truly do. This is not the way to do it half the time, one on one side, one on the other, criticizing everything somebody says if you don't agree with it? So, here's my proposal, let us get together, let us find out that hate will never be justified. Let us move forward, and as long as we have hope we can keep on trying. But this is what I'd like to do. I'd like to either get a task force and get us all in those Chambers together at one point and start talking about the issues that we've been talking about regarding these laws and everything else that's happened in New York City or the rest of New York State.

And I have a proposal. I think you should put a good-hearted person in charge of it. And my suggestion would be the Majority Leader, the one who said it, the one who has a good heart and the one I trust. That's what I believe today. Thank you.

ACTING SPEAKER AUBRY: Ms. Hyndman.

Mr. Barron.

MR. BARRON: Thank you, Mr. Speaker. I thought the prior speaker was going to put me in charge of the conversation.

(Laughter)

But let me say this: All of this demonstration that happened didn't happen because people wanted to see, in my humble opinion, watered-down legislation that is acceptable to the Governor, acceptable to the leadership in these two Bodies. I applaud the sponsor of this piece of legislation for being consistent with it over five years; however, honesty compels me to say, *Big deal, you have to*

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give up your background. And you're talking about the CCRB not substantiating? Well, don't -- why don't you finish the conversation. Every complaint and resolution from the CCRB goes to the Police Commissioner, and 95 percent of the times, the Police Commissioner gives them a -- a slap on the wrist, or nothing, they get away with it.

So this bill, we're talking about background information? The minute one of us are killed in the streets unjustifiably, the first thing that comes out is all the background information on the victims of police murder and police brutality, even though that particular incident, the person was totally innocent and unarmed and not committing a crime, but all of the background information comes out on those individuals. And people make it appear as though, *He got what he deserved because look how bad his background was.* Well, when that officer shot him, when that officer beat him down, he didn't have his background information on his chest. They dug that up later.

These demonstrations, and I've warned this country and I've warned this City, when peaceful methods for justice and systemic change are ignored or rejected, violence is inevitable. These bills will not stop the next explosion, because they're weak. A police officer, we have to deal with when they're committing the act, every one of you sitting in here, you know if a police officer comes up to you and you're innocently moving about in your neighborhood and they attack you and call you out of your name, you could care less what their background is, you want to know how do we get that one to

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jail? How do we get that one off the streets? Every time we have these things, they say they need retraining, they need cultural sensitivity, we need to have a conversation on race so that we can understand you better, so they can understand black people better, so they can understand that if you want to talk about looting, we were looted from Africa, stolen and brought here to build the economic foundation for Capitalism. You want to talk about looting? The land of the indigenous people were looted by the Founding Fathers of this sinful, racist, parasitic, predatory Capitalist nation.

Let's talk about looting. Look what you steal. You steal other countries and their diamond mines and gold mines, steal human beings, steal land and build a racist, Capitalist system for profit. And then you send your police out to protect your property and your person. So what happens? In the black community, we live in domestic colonies. Domestic colonies. Yeah, we need to talk about racism, but the system that is fatally flawed is Capitalism. Its ideology is racism, its institutional practice is racism, but the system is Capitalism.

And so, we'll talk about race as though we want to be included in this racist, Capitalist system that needs systemic change. So when people rise up -- and you know, this is about the tenth time I've worked on a package of reforms around the death of an innocent black civilian, unarmed not committing a crime. And for those of you who say, *Oh, we -- we say it's murder, that officer, we agree, cops agree that George Floyd was murdered and that -- he needs to go to --*

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you don't have to go all the way to Minnesota. Why didn't you say something about Amadou Diallo? Why didn't you say something about Sean Bell? Why didn't you say something about Eric Garner? I could spend the rest of my time making the list. You were silent, and your silence is consent. It is disingenuous for you now. You're going to talk out against this. Why? Because of the pressure the protests has put on everybody. Burning down a police center, senseless -- a station. And I have no mercy for Macy's. Looting mercies -- Macy's and Gucci, I don't think we should destroy those properties, those small businesses in our neighborhoods. That's why people are scared. For a minute there, the stock market dropped. It's going back up now, that's why they panicked. That's why we had a curfew. That's why some of you and Nancy Pelosi in Washington with the Kente cloth taking a kneel -- a knee. Hypocrisy. Goodell, the Commissioner of Football, *Oh, Colin Kaepernick, he was right, he was right; I'm sorry.* Because you're scared now because the system is in trouble all over the world.

So, when we come up with legislation, we have to come up with legislation that makes them pay consequences. This doesn't do that. I'm supporting it because my colleague worked hard on it and it need -- it needs to be done. This doesn't do that. How many times are we going to ban the chokehold? We say it over and over, this is about the tenth time I heard that, *Let's codify it. You know, it's against the policy, but let's codify it.* Couldn't even get both Houses and the Governor to agree with racial profiling, which is

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against the Constitution, and that had to be a one-House bill. And any time you have this hypocritical Governor saying, *Bring me a bill, I can't wait, I'll sign it tonight*, you know it's ineffective. You know it's not going to hurt the police. So, you go ahead and pass all this legislation -- and by the way, for the record, I supported it all. I think it's weak. I think some of the advocates wanted this bill badly. And look at that, they made this bill -- they made this bill the prized package. We got to repeal 50-a. They made this bill, the background check. Like that's going to stop them from murdering us. A background check. You want to do something? Don't have a special prosecutor. Have an independent prosecutor, not a special prosecutor in the AG's Office who's not going to prosecute police. Have an elected civilian complaint review board, like the City Council is -- is looking at now with Council Member Inez Barron, an independent, an elected complaint review board that has the power to investigate, prosecute and have binding consequences for the police. They have to go to jail. Jail. They tell me, *Oh, Charles, but they need cultural sensitivity, they need to understand the black community, the plight of black people*. Fine. If they murder us, give them 25 years to life. I will buy them a black history book to read in jail. You need consequences. And we've come up with this.

I hope I'm wrong. I never wanted to be more wrong on something in all my life. This is not going to put the flames out. These bills are not going to stop a worse uprising. You think the fires in Minneapolis and the fires in Ferguson and the fires in Baltimore

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and all over the country was something? Wait 'til you see the flames next time if we don't take a serious, serious approach to dealing with this issue. It's been with us for a long time. I've been at it for 50 years. So, pardon me if I'm not excited about a package of legislation that I've seen 50 times.

This is not the answer. I agree with Minneapolis, we need to dismantle the police department and come up with a new process, a new structure. When you hear, *Abolish the police, abolish prisons, and dismantle police*, you think it's crazy, radical stuff. But if you would listen to people that have constructive ideas on how to sell up -- set up public safety agencies that can actually keep the public safe. The police don't know if they're going to come home, the average black mother doesn't know if their black son is going to come home. And their black son, 90 percent of us, I'm not talking about any other minority element, they go out there unarmed, they've got to meet police officers that are armed to the teeth. They even have military equipment. We need to demilitarize it. They have tanks. Military equipment in police departments. This is a fascist police state. You could sit here and legislate like you did something and have your press conferences, and everybody get a little piece of a bill so it'll make them look good to their constituents and for their reelection. That's the priority sometimes around here. But the reality is when we go back to our communities, there's nothing more lethal, nothing more violent than poverty.

And look at that budget you passed in April. Nothing

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on poverty. The one before that, nothing on poverty. Since I've been up here, since I've been in the City Council, placating poverty. Oh now, now that the stuff has hit the fan and the flames are up, de Blasio found a whole lot of money to defund the police, and said even the Commissioner is with him on that. Oh, where -- where did you get that idea from? So, we got to watch out for the cooptation, co-opting the movement trying to sound like us, defund the police, de Blasio. Really? Hypocrite. The Governor, can't wait to get 50-a, hypocrite. The Leaders of this Assembly and the Leader of the Senate are working in concert and I think that is the problem. And then they come to you and of course y'all attack somebody like me, *Don't take it personal*; this is not personal, this is all political and the personal part is that my people are dying and I really don't care what you think about. But our people are dying? You all can take all of your bows for this weak legislation. But I'm telling you, it's not going to hold. Even when people were marching to get some kind of reform, they were beating the heck out of us. I know my own people around me, we went to different demonstrations, Keron Alleyne who is the Deputy District Manager in Community Board 5, he and his wife Ameria were at a demonstration to have this day come so we could do something. The police touched his wife. He ain't letting -- no black man's going to let nobody touch their wife, he went to investigate, they threw him down on the floor, punched him in his face, hit him in his ribs, and arrested he and his wife.

So, I don't have no more patience for gradual reform.

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It failed. Every time we try to gradually reform something, it has failed. We need radical, systemic change. And if there is anything called a "good cop", a good cop doesn't watch bad cops commit crimes. And if you do, then you are acting in concert with the bad cop. Just like all of those police officers that marched by that poor old man who was bleeding out of his ear that was mentioned, but what you didn't mention is that every one of those police officers should have been arrested. Not the one or two for assault, but everybody that stepped over him, everybody that looked at him and walked by, which were tens of them that did that, should be arrested for acting in concert for assault. That's not going to happen. *We're going to get their backgrounds.* And when we try to get something like their backgrounds like this, you make a big deal over that. You make that the issue. *Well, suppose it's not substantiated.* Well, even when it is substantiated, the Police Commissioner has total control over the consequences in CCRB. That's why we need an independent one, elected with power, and take the power away from the Police Commissioner.

I would be happy -- I would think you were sincere if you would embrace an independent, an independent prosecutor. If you would embrace the restructuring, the dismantling of the Police Department and coming up with a new structure and new ideas. Maybe the police shouldn't respond to mental health situations. Let some other team do that. Maybe they shouldn't come into communities where youth that they don't understand, let another

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agency do that. We have --

ACTING SPEAKER AUBRY: Thank you.

MR. BARRON: -- officers that are out of control and this legislation doesn't do it, but I'm voting in favor.

ACTING SPEAKER AUBRY: Ms. Hyndman.

And good luck.

MS. HYNDMAN: Will the sponsor yield? I have to go after that.

(Laughter)

MR. O'DONNELL: Sure, Ms. Hyndman. Go ahead.

MS. HYNDMAN: Since you already answered this, you explained why we just can't FOIL police departments, how long, just for the record, again, how many years have you had this bill?

MR. O'DONNELL: I've had this bill over five years.

MS. HYNDMAN: Over five years. Do you happen to know why or how the general public knew so much about the allegations against the officer, Derek Chauvin, in Minneapolis, Minnesota?

MR. O'DONNELL: Mr. Floyd's murderer, you mean?

MS. HYNDMAN: Yes, Mr. Floyd's murderer, yes.

MR. O'DONNELL: The State of Minnesota has no restrictions on access to that information. The City of Minneapolis actually keeps a website where they list the allegations against their police officers, and advocates in the state keep their own running list.

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So we were able to learn within days what that officer's history was.

That could not happen in New York --

MS. HYNDMAN: Okay.

MR. O'DONNELL: -- under current law.

MS. HYNDMAN: Under current law. So, once we pass this bill, we could have officers that have records as long as Mr. Chauvin in Minneapolis and still be in the police department, the probation department, the sheriff's department, or corrections?

MR. O'DONNELL: You have the ability as a citizen, as a reporter, as a lawyer to file a Freedom of Information request with the department they work for to ask them for that information. They don't give you that information, you have to file an appeal. If you don't win the appeal, you have to go to court. If you go to court and they give you a copy of -- of the document you requested, which is redacted within an inch of its life, you have a judge decide whether or not that is in compliance with FOIL.

MS. HYNDMAN: Thank you very much.

MR. O'DONNELL: You're very welcome.

MS. HYNDMAN: Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, Ms.

Hyndman.

MS. HYNDMAN: I have received approximately 600 requests to repeal 50-a. Now, as we know, it will happen, we'll vote on it today. So for the correction officers, police officers, probation officers and sheriffs, they may have records that may be

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similar already to the officer in Minneapolis, but it doesn't mean that they will be removed from the police department or any police departments. They will still continue to work for these departments throughout the State of New York. They will still be in a position to protect and serve. This just shines a light on the records that these officers may have. It doesn't remove them from office. It doesn't penalize them. It means that we, in New York State, can create a website, as the sponsor said, to look at the records of these officers when it comes up.

So as -- as my colleague [sic] said earlier, sunshine is a disinfectant. We'll be able to look at these officers and say whether or not they're being -- protecting and serving the communities. But it doesn't remove them, and I think that's what the key word is here. So if an officer decides to spit at young people on Hollis Avenue in Queens as of last week, he will be suspended but he will not be removed. Someone who is supposed to protect and serve communities that they do not respect will still be in office.

So it has taken many years for us to get to this point. And while I am going to vote yes on this bill, I think it's important to highlight that many mothers and fathers tell their children when they leave -- before they leave the house how to act and talk and walk when it comes to interacting with police officers because they're afraid their children, their brothers, their fathers, their mothers, their daughters, won't be home that evening. So while I understand that there is fear amongst officers, there's also fear amongst families, black

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families, Latino families, throughout the State of New York and throughout the country. So if officers decide that they want to disrespect communities or if they're in situations where they are over their heads, it doesn't mean you have to lash out. It's no amount of training. We're asking you to deescalate situations, not inflame situations. So -- and for Queens, for my district, where I have a police precinct that's still under Federal monitor, I want to make sure the officers -- and I know they work hard, don't get us wrong. I know how hard they work. But as these protests proliferate throughout the country is because they want to see change happen. And I want to see it happen in my lifetime. So for all of those 600 some-odd people who e-mailed my office, yes, we will be repealing 50-a. But this is just one step in a long line of legislation that has to occur in the State of New York and throughout the country to make sure that Black Lives Matter, not just in this State but across the country and throughout the world.

I will be voting in favor of this legislation. I thank the sponsor and I urge my colleagues to do the same.

ACTING SPEAKER AUBRY: Thank you, Ms. Hyndman.

Mr. Kim.

MR. KIM: Mr. Speaker, on the bill, please.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. KIM: Mr. Speaker, this is the -- the People's House. This is not the Police House. It's not the Corporate House.

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It's the People's House. And Article 50-a is not just about privacy rights for police officers, it's about what happens in a system when politically powerful forces influence the law and our policies. When Article 50-a was first passed in 1976, the law was intended to protect officers who served as witnesses for the prosecution during cross-examinations. Now after years of expensive legal fees, the lobbyists behind the police have extended the law and essentially bought their officers protection while nonviolent protesters tonight are being thrown away in jail for 24 hours with absolutely no rights. So how did we get to this point? The truth is, we did this to ourselves. In the last ten years there is a close to 50 percent increase of funding for the NYPD. The New York City Comptroller just reported out that in the last five years there's been a 22 percent funding increase and 6 percent increase of police officers. The NYPD is a \$6 billion corporation that has massive influence over our policies, and they have the ability to continue to buy their members legal protection and immunity. And it's not just the NYPD. You know, we see this pattern everywhere. During this -- during this pandemic, nursing home corporations and their shareholders secured a blanket immunity for themselves by the Governor before we even reached the peak of COVID-19. We have a duty right here, right now, to steer the People's House away from the Corporate House. You know, what we're witnessing, all the pain, all the suffering, is the net aggregate for the lack of accountability these past 40 years over corporate and special interests.

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Just recently I uncovered the sinister -- that sinister corporate executives used to grant themselves immunity before they lifted even a finger to help the most vulnerable nursing home patients. And now a week later, multiple videos are released of the dehumanization of black and brown bodies at the hands of police officers who act within the same protective immunity shields as these corporate executives. You know, we -- we are continually gaslit into a reductive story that somewhere out there evil must be controlled. That we must dominate over them so we rid ourselves of any variables that might harm us. It's a simple story to inject in order to pit ourselves against one another. In order for special interest groups and corporations to cover up their moral depravity. However, the people and the People's House are seeing through it now. You know, they know that the story is a product of systems and ideologies manipulating us to run, to turn on one another, and suppress what is true inside all of us, which is we are here to take care of one another. To help one another. That is a life well-lived.

This week the package of police account -- accountability bills, including the repealing of Article 50-a, is about us telling our people that they are right. We should be centering all of our policies to strengthen and protect the rights of our people. Of all of our people, regardless of their background or immigration status. Instead of jumping to protect the private equity firms behind nursing homes with corporate legal immunity, imagine if we actually strengthened and protected the rights of our nursing home residents.

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Instead of strengthening the rights of police officers, imagine if we protected the rights of nonviolent protesters on the ground who are getting beat up with batons every night.

With that, Mr. Speaker, I support this bill and I thank Danny O'Donnell, the sponsor, for championing this for so many years. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Mr. Ramos.

MR. RAMOS: Mr. Speaker, will the sponsor yield for a few questions?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields.

MR. RAMOS: Mr. O'Donnell, I'm certainly supportive of this bill and I appreciate the -- the dialogue that's going on here. And I would like to ask a few questions just so that we can break it down. There's a lot of aspects of this, perhaps, the -- the public doesn't understand, and it needs to -- and especially when there's efforts to cloud up the issue, I think we -- we need some clarity. The difference between unfounded cases and unsubstantiated, unfounded is something that they're claiming didn't happen. And unsubstantiated is something that might have happened, might not have happened, but they were unable to prove it either way. Am I

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correct?

MR. O'DONNELL: Yes.

MR. RAMOS: Thanks. We heard mentioned here that unsubstantiated cases are not relevant. But un -- unsubstantiated is not the same as not guilty, right?

MR. O'DONNELL: That's correct.

MR. RAMOS: It just means there wasn't sufficient proof, if it was one's word against the other, that -- that something happened.

MR. O'DONNELL: That's correct. And I'll provide a little factoid. The last two years there were 4,000 complaints at the CCRB alleging racial profiling. Do you know how many have been substantiated? Zero. Zero. Which means to me very clearly that the process, whatever that may be, is fatally flawed. Because they may not have all happened, but I absolutely refuse to believe that none of them did.

MR. RAMOS: So, we heard from our colleagues here that there's no value in unsubstantiated cases in divulging that. First of all, your bill does not mandate what we do with that information, it just says that it -- it's discoverable, that the public can see it, right?

MR. O'DONNELL: The public will have access to it through the FOIL process, subject to the limitations we have written into FOIL as it relates to police officers.

MR. RAMOS: All right. Out of 50 states, I

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understand that only three states have a -- sim -- similar to what New York has, 50-a, that protects those -- those rights. We hear about how all -- I mean how this is a bridge too far. And this is something, you know, not good. But yet most of the United States doesn't have anything like -- like 50-a. And all we're asking for is some transparency, and I agree that down the road we should either, through policy, police department policy, or through legislation, talk about the inferences that -- that are derived as a result of -- of the information. But on another pattern of questions that -- that we had here, we heard somebody say, *Why are we treating police officers with a double standard? Why is it that we can't do this with teachers?* We can't divulge their disciplinary record, but we can with police officers. Now, teachers don't have the authority to take a life. Am I correct?

MR. O'DONNELL: We do not give them guns, Mr. Ramos.

MR. RAMOS: All right. And I would submit that the he who is much has given, much is expected. 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.

Thank you, Mr. O'Donnell.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. RAMOS: You know, I appreciate the -- the discourse that we had here and the tone of my colleagues. You know, and -- and I could understand -- I could understand your perspective. I

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could understand some of you saying, *Well, you know, we have good officers* and, you know, why should they be saying, *I can step in your shoes and understand what you're saying*. I ask that you step in the shoes of a Puerto Rican man who was a police officer for 20 years and look at my perspective. This bill does not say that anybody's -- it doesn't mandate any inference from information. And the core of the problem is that throughout history, crimes against people of color have been unsubstantiated. People have been lynched, murdered and found innocent. So the fact that there's a record of unsubstantiated cases, it may or may not be relevant. But I wouldn't dismiss it, as -- as -- as some of my colleagues do, as unimportant. If an officer has 30 cases that are unsubstantiated complaints, and out of those 30 cases, 20 of them were people who didn't know each other who all said, *This officer came up to me and started harassing me, and when I wouldn't cooperate he stepped on my toes and when I tried to push him away he arrested me for assaulting a police officer*. Twenty unsubstantiated cases. Now they're unsubstantiated, but isn't it relevant that there is a pattern here? Isn't there some value to weed out an officer who might have a problem? Who might be a problem and might be a risk to the public? Now, I do agree that we can have inferences just from things that we see at face value. You know, and I've heard people say, *Yeah, if an officer gets a lot of complaints from African-Americans then he should be called into question*. This legislation doesn't do anything about that. Those are policies that police departments must -- must take. But I understand. If an officer works in a minority

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neighborhood, he's going to generate more complaints. And I do understand that when police contact the public, in many cases it's not a very happy situation. A difficult situation. A police officer is getting there in the middle of a family fight, in the middle of an assault, in the middle of a conflict. He's questioning somebody about something. It's not a very pleasurable situation. And sometimes it generates complaints. And not all complaints are true, and not all are substantiated cases, meaning that an officer is innocent. But there is value. There is value in looking at the total picture. And so if a person works in a community primarily of African-Americans and generates more complaints, that, in its face value, doesn't mean anything because the predominant race in that particular -- but -- but patterns of what happens are relevant. Or if a person works in a predominantly white neighborhood and the only complaints they get are from African-Americans, that might tell us something. The point is that this raw data is relevant and it's important and it goes towards trying to create a situation where we can help people of color in this dire situation that we are in in this country where people are being killed and police officers are getting off in the courts. Being found guilty, being found unsubstantiated, and we're giving the public some tools with which to have justice. But we don't obligate anybody to form any conclusions based on this raw data. The fact that we would want to hide this -- is -- is troubling. The fact that we wouldn't want to divulge this is troubling. And it -- it's so important to our community and to our whole country that these things be looked at.

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We want to bring back integrity to policing. I want to be able to hold my head up high as having been a 20-year police officer, with pride that people will look at me and say, *You were part of a noble profession*. I don't want them to see the images of people being abused. Of arrogance. Of speaking to people with disrespect. And if police officers know that their records are going to be public, then perhaps we will be controlling human behavior. Perhaps they will treat people with courtesy. Perhaps they will not inflame a situation unnecessarily. And that is the aim here, to change what we are seeing. And in the end, I say to my brother officers, sister -- brother and sister police officers, *Your enemy is not the communities of color who are crying out for justice. Your enemy are these bad officers who take it too far. And you -- most of you are good officers. But the minute you decide to defend them, the minute you decide to cover it up, the minute you decide to do nothing, you become complicit. It's those officers that are causing you the problem where the whole world -- I know you feel that the whole world is coming down on you, but the problem is coming from the people at your side.* What we're doing now and we need to do -- I agree with my colleague Mr. Barron that we need to do more. And this legislation, although good, should not be the flagship of police reform. We need to do so much more and make police officers mandated reporters. We need to go to the scene of these incidents and make sure that negative investigations are not carried out and that investigations aren't tainted. And that we constantly see police officers who are murdering people and we see it on videotape

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and they get off in court, and we wonder why. And he goes to the scene of the crime and how it's handed -- handled. And I would like to see more legislation to that effect.

But I support this legislation as one element of what we need to do in this country. To my brother and sister police officers, it's time for us all to reflect, and realize that the situation has become a runaway train. What we saw in Buffalo where we see now a whole group of police officers - I think it was about 50 officers - who now decided to resign from their position because they object to officers getting in trouble for having knocked down an elderly man and practically fractured his skull, bleeding from his ear. Think about it. In what profession can you decide, *I'm not going to be -- work here in this unit anymore*. They didn't resign from their job, they resigned from the unit. How can police -- you work where we tell you to work. How can -- this is a runaway train, where this can happen and they say, *Well, we don't like that he got in trouble so we're not doing this anymore*. They're permitted to do this? Please, my colleagues, we need to open our eyes. I understand your perspective. Policing is an honorable profession. We need fairness. We shouldn't blame police officers for certain things. And there are unfounded complaints against police officers. But transparency is what helps all. Transparency, I would submit, is what protects police officers. Cameras will protect me as a police officer if I'm falsely accused. This transparency in the record -- if you don't have a pattern of doing the same bad thing, you have nothing to worry about.

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So I -- I -- I proudly vote for this legislation. I commend the sponsor. I'm proud to cosponsor it as well. I urge all my colleagues to please vote yes on 50-a. Thank you.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Johns.

MR. JOHNS: Yes, Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. JOHNS: Mr. Speaker, look, I -- I plan on voting for this legislation, but I just want to give a little bit of background. This bill, 50-a, is better than it was, not as good as it could be. And that's not just my words. That's the words coming from Mike Mazzeo and the Rochester Police Union. This union is called the Locust Club. Mike Mazzeo is the head of it. But, Mr. Speaker, for years, before this incident ever happened in Minneapolis, for years they were talking about reform, and reforming 50-a was one of the things that they were talking about. And I think what perplexes them is the fact that here's a police union that actually wants to reform 50-a, and they were never invited to the table, to even have a seat at the table to even talk about it. And I know that they care about openness and transparency. The police force in Rochester does a great job. You'd never have a Minneapolis incident in Rochester. But at the same time -- and I know that our Rochester Mayor, Lovely Warren, Police Chief La'Ron Singletary, they want openness and transparency. It helps them do their work. Getting rid of a few bad apples will make the rest of the police force look good.

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So I do want to make everybody here understand that there are stakeholders in this, and when you rush a bill through bill drafting and it's out in two days, you can make some mistakes. We've seen it with bail reform, and a year later we had to come back and fix some of those mistakes. So I'm hopeful that we will get everybody to the table to be able to talk about what we talk down here as chapter amendments. For the folks back home, a chapter amendment just means that you wrote the book but maybe we need to add another chapter. And I think that maybe in this particular piece of legislation we should add some stuff to it to make it better.

I've been talking about real reform since before I got elected. And I'm in the 80 percent of Americans in the middle that want to do things better. And I think 80 percent of the Americans and the people in my district think like me, and we don't want extremes. We get one extreme saying one thing, and then we get another extreme that says let's defund the police departments. No one wants to defund or get rid of the Rochester Police force. I've lived in Webster all my life. We've got a Webster Police Department. The four towns that I represent, three out of the four have police departments: Webster, where I live; Fairport and East Rochester. No one wants to defund -- defund or get rid of those police departments. We would wind up going back to the Old West. You've seen with some of the disturbances recently, gun sales are up. They're through the roof. Women, more than ever before, are going out and buying weapons. They're buying shotguns, keeping them at home because

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they're afraid somebody might come into the house. If you defund and get rid of the police force, you're going to get the Wild West times a hundred. It's not going to be a good thing. So extreme -- extremism on the left or the right isn't a good thing. I'm supporting this bill, even though I believe that we need to do some chapter amendments to make it better.

Thank you so much, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Epstein.

MR. EPSTEIN: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. EPSTEIN: Thank you. I -- I really want to applaud the sponsor, the Caucus and all my colleagues for moving this bill forward. This is a historic moment for the State of New York. This is an opportunity that doesn't come all the time. And it comes in the course of tragedy that we've seen all over our -- our City and our State. And let's be clear. This is about people in our communities where in my neighborhood a month ago, a real lovely human being named Donni Wright, just on the street corner of 9th street and Avenue D, he saw some of his friends being questioned about -- from the police around social distancing enforcement. Donni just came into the intersection. He was assaulted by Officer Garcia. We saw on videotape, many of us, what Officer Garcia did to Donni. You know, it was violent. It was aggressive. Here today, the history of Officer

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Garcia remains unknown. This bill creates protections for survivors of police violence, for their complaints, for their witnesses and their families who've been brutalized. And Donni was brutalized. This will help him and his family. The claim that the -- the police union has is that -- that we'll give out specific information, phone numbers, e-mails, so people will go to those police officer's homes. That is specifically outlined in the bill that we cannot do this. There's also additional protections beyond 50-a statute and FOIL that protect these officers.

This bill changes lives. This bill will require the law enforcement community to stand up and say, *For the officers who aren't doing the right thing, we will get that information out there to the public.* To the officers like Officer Garcia that we found out there were six other incidences, at least that we know of, where the City of New York spend hundreds of thousands of dollars, and to this day Officer Garcia remains on the force. It's being paid by our taxpayer dollars today, even though one of my constituents was brutalized.

So I appreciate my colleagues saying we don't want to go too far. I would argue that this bill doesn't go far enough. We can't hide from the truth. We can't, as our colleague Sayegh said, mob rule in our society. This is not mob rule in our society. This is our community talking about social and economic justice. I've gotten thousands and thousands of e-mails from my constituents, phone calls non-stop, saying they understand the value of repealing 50-a. They understand that people are hiding information. And to the allegation

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that all these cases are -- are 98 percent unsubstantiated, then there's nothing to hide from. I know. I've been a victim of -- of police assault, and my case was, quote, unsubstantiated. But I know the experience. And I'm a white man with privilege, and they used their power and privilege against me. I can't imagine what the experience is for my black and Latino friends and colleagues who I hear time and time again, their experiences around on police stop and frisks and assaults. Here, with 50-a, we say we will get the information out. We'll make it harder for the department to hide information. We'll make it harder to stop this information from going out. We'll make it harder that officers can hide behind this blue wall of silence. That's why. That's why repealing 50-a is necessary. It is one of the most secretive laws in the country for hiding police misconduct. We need the sunshine of our laws to make this come out. Will this law subject police to greater disclosure? Yes. Do we think this is a good thing? Absolutely. That's exactly what we need to do. That's exactly what we intend to do. This will provide more transparency to the families of people like Donni Wright and Eric Garner who, maybe, with their suffering get a little more justice. And maybe officers who've engaged in this pattern and practice of abuse will be disclosed. And maybe we can get them off the force because they have set a bad reputation not just for our City and our State, but for our people in law enforcement. They are not sending the right message. They are not communicating our values. And they are not standing up for racial, social and economic justice, which I know my colleagues firmly believe in. This

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repeal goes a long way in advancing those beliefs.

Again, I want to thank our sponsor, I want to thank our leadership and our Speaker for moving this forward. I thank our Caucus for pushing so hard on this agenda. I encourage all my colleagues to vote in support of this historic legislation. Thank you, Mr. Speaker.

ACTING SPEAKER BLAKE: Thank you, Mr. Epstein.

Mr. Manktelow.

MR. MANKTELOW: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER BLAKE: On the bill.

MR. MANKTELOW: On the bill. Today we're talking about lives. We're talking about lives of individuals. Today here on this floor in the Assembly we're debating Bill No. 10611, also known as the 50-a bill. Why are we here today? Because the loss of life. The many tragic deaths that I've heard all day long, all day yesterday, on the floor, from my office. The death of Mr. Floyd. We are now looking at multiple pieces of legislation on the Assembly floor because of these deaths, tragic as it is. Absolutely. Lives matter. Why? Because as we've heard from many other Assemblymembers today, Black Lives Matter. And I want to say that one more time. Absolutely, Black Lives Matter. Because of the COVID-19 that we're going through here in New York State, we have lost so many lives. So, so many lives. And as we all know, COVID-19 doesn't care what

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color we are, what part of the State we're from. It comes in and attacks. And some of those lives that we lost are dear to my heart. Some of those lives that are residents of the nursing homes that are in our communities back home. Approximately 6,000 lives we have lost in the nursing homes. Six thousand lives. Do I know the makeup of those lives? Absolutely not. I'm sure there's white folks there, Puerto Ricans, Hispanics, blacks. I don't know the makeup of those. But this is what I do know. Each and every one of those lives, no matter where they come from in this State, absolutely matters. As we -- as we look at the pieces of legislation, making sure we take care of the people that we represent. There was a directive that came down on March 25, 2020. It came down from the Governor's office as well as the State Department of Health, directing our nursing homes to readmit residents of that nursing home if they have the COVID or they have symptoms of the COVID. Those lives matter. A few weeks ago on this floor, our Ranker from the Health Committee offered up a piece of legislation, an amendment, to bring to the floor to have those loss of lives investigated and who was responsible. It was very unfortunate; we couldn't even get that -- that amendment to the floor. Six thousand lives. Again, 6,000 lives. Each and every one of those lives matter.

We're here today because we've heard all along, Black Lives Matter. And I'll say it again. Absolutely, Black Lives Matter. Last night we were briefed on two of the upcoming bills that we may take a look at. The first bill, Bill No. 1601-C, establishes the

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Office of Special Investigation to investigate and prosecute a police or peace officer in certain circumstances. The next bill, 10002-B, creates the Law Enforcement Misconduct Investigative Office. Here are two bills. Where's the third bill? If we're really here about people, taking care of our people and that lives truly matter, where is the third bill? Where is the bill that establishes the Office of Special Investigation for nursing home deaths related to the COVID-19? Each and every one of those lives matter. If we're going to hold our police officers at such high standards as we should, absolutely, men and women of integrity. I'm so proud for the men and women that serve in my district. I have the utmost respect for each and every one of those individuals and what they have to go through each and every single day. But at the same time, these lives matter. At the same time, if we're going to hold our police officers to this level, why on earth are we not holding the Governor and the Department of Health at the same level? Why do those 6,000 lives not matter? Why is there not a piece of legislation here protecting those 6,000 lives, wondering what happened to those individuals? Yes, they deserve to have that looked at. And today I just ask and say that all of these lives absolutely do matter. And absolutely, Black Lives Matter. Those from minority communities. These lives all matter. So as we move forward I ask, let's work on pieces of legislation on this floor together to look at each and every one of those lives. And again, it's my privilege to sit here and speak about those lives and to say here, yes. Every life matters. Every black life matters, every life of any minority matters.

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So I applaud what we're doing in the Assembly this week, looking at those things and looking at those lives. So again, thank you for the time, Mr. Speaker, and all these lives matter.

ACTING SPEAKER BLAKE: Thank you.

Mr. Dilan.

MR. DILAN: Thank you, Mr. Speaker. Will the sponsor yield for one brief question?

ACTING SPEAKER BLAKE: Will the sponsor yield?

MR. O'DONNELL: With pleasure.

ACTING SPEAKER BLAKE: The sponsor yields.

MR. DILAN: First, Mr. O'Donnell, I want to thank you for being a champion on this issue for so many years, even before it became politically popular. But my question is specifically on language, and I just want to make sure that I'm not interpreting it wrong.

MR. O'DONNELL: Mm-hmm.

MR. DILAN: We discussed this in one of the Caucus subcommittees, and I'm still concerned about it so I want to get an answer from you. It's on page 2, first paragraph, Section 9. It's the Section B that says "... not of public concern." I'm assuming that it would be the police department that would decide if a matter is not of public concern or not. And I just want to know why this section -- I think I know why it was in the bill, but I think -- wouldn't it be better served in not having this section in the bill?

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MR. O'DONNELL: It is some of the language that I found most troubling when trying to draft it. However, there are things that really aren't of a public concern about an officer's conduct. If it doesn't involve interaction with other people. The example I previously gave, which was non-shiny shoes. And so, it is included there to provide additional layers of protection, and with the certainty that if it's invoked or lied upon, an individual has the ability to go to court and say it was improperly used.

MR. DILAN: Okay. So I guess, then, if the NYPD or any other police department broadly determined that something that is of significance but from their perspective decided it was not of public concern, that can be addressed in court?

MR. O'DONNELL: Absolutely. If they were to redact or not provide something and that was their justification, that -- that would have to be argued in court to determine whether or not the FOIL law was being misconstrued by the department.

MR. DILAN: Okay. Thank you, Mr. O'Donnell. Thank you for your years of work on this issue.

On the bill, Mr. Speaker.

ACTING SPEAKER BLAKE: On the bill.

MR. DILAN: First I want to say, my compliments to the Speaker and to the Caucus and to every member of this Body for, one, bringing the bills to the floor, and two, having a genuine discussion from all perspectives on the bill. Our people are looking for a systemic change. Real systemic change so that we know the

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value of our lives are equal under the law enforcement purview. And we've heard a lot of discussion about the bad apples. We've heard a lot of consensus about the bad apples, and we've heard consensus about what happened in Minnesota being wrong from just about every member in this Body. And from every -- even from the Police Commissioner in New York City, which I thought in my life I would never hear a police commissioner say something like that. So I view that as progress, but not enough. Not enough. In this political climate, we should be taking further steps to ensure that when our people have their constitutional rights trampled, their State laws being violated, that we don't have a system - and I'm not talking about individual officers, I'm talking about departments, I'm talking about prosecutors - that they don't have a system that is going to shield this wrongdoing. That is all our people want. That's all we want. That is all. Nothing more, nothing less. And I really hope we take more steps to ensure that basic premise because I have friends who are in Federal law enforcement. The first thing they tell me in -- in casual gatherings, we discussed this stuff, you know, at barbecues at -- at my house and they say very simply, *You know, when we're hired, we're told don't violate someone's constitutional rights because the Justice Department will come down on you.* Why aren't we doing the same thing here? When you violate a person's constitutional rights in this State, when you violate criminal laws that protect people in this State, whether you are a police officer or not, you should be prosecuted to the highest extent of that law. You shouldn't get a special law because

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you are a police officer. That -- that's all we want. And you say "bad apples" -- and when I say to -- to -- to the good cops out there who don't say nothing, like my colleague Phil Ramos said, this is what puts you at risk. This is exactly what puts you at risk. We need not only a revolution in the streets -- that's not what we want. We're not for anarchy. We need a revolution of our minds, of the way we think about this. We need to let officers know that if you are a mandatory reporter, which is something that I believe should be in this, that you're not the rat. You're not the whistleblower. You're doing things that will keep other good cops safe. You know, I've had good cops die. Like Rafael Ramos, an example of a good cop, my constituent. You know, he died needlessly. You know, and it's always the innocent that paid the crimes for the bad apples. So when you have a culture that doesn't give up your bad apples in fear of being quote, unquote, "the rat" or the whistleblower, that's the mindset that we need to change. And that's what will protect good cops, in my mind. Having laws in situations that treat people fairly will protect everybody. Like in that same discussion we talked about how heartwarming it was to see people of all races gather for change via a peaceful protest. But when those protests turn violent and my local commanding officer was hit with a brick in the face -- you know, I remember talking with some people in my yard and they were saying, Well, yeah, the protests are good, but just think about it, Dilan. If it were a crowd of largely black and brown people and they threw a brick at a police officer, would anybody leave there not arrested?

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What would they do to that crowd? Now, I'm not saying that that should be condoned. What I'm saying is it should be treated the same in every circumstance. You know, throwing a brick or any projectile at a police officer is wrong, period. But so is violating someone's rights and blatantly murdering them on the street. And without video think that you're going to get away with it because the, quote, unquote, "system" is going to protect you, that's wrong. And this is the systemic change that we are all looking for. It's the reason why I've stayed in this Body. It's the reason why I'm here. And I believe in Speaker Heastie's leadership. He said it very early on in his Speakership, so I know that he means it. A message to just everyone. We watched bail reform. We watched it happen. We were happy about it. And some people may say it was a mistake. We could have a disagreement on that. But I know everything good that we gain out of this package has the potential to be revisited. Just like bail. So let's talk about real progress and let's talk about being strong for our people out there who are expecting, like I said in Conference, the pen to be mightier than the sword. That's our job. That is our job.

So I think this is a good -- a good first step. But I agree with -- with Charles Barron in one respect. Why is this bill -- which I'm going to vote for, by the way -- why is this bill the priority of this package? Yes, it'll help a little bit. And I certainly understand why because I served in the City Council's Public Safety Committee. We've done constant oversight of NYPD attorneys, and during my, you know, 12 years of experience conducting oversight, NYPD's

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lawyers have a tremendous amount of things that they do not believe are of public concern, which is why I'm concerned about that language in this bill. But I do trust the work of my colleague. I know he is a -- a very good attorney, a great attorney, in fact, and that his heart's in the right place.

And I want to say one last thing as I wrap up. I remember being on the City Council, being the -- actually the -- the deciding vote on -- being the veto-proof vote on stop and frisk in the City when it was passed, and I remember being the deciding vote on the Inspector General bill when it was passed and there was a lot of pressure on me. And I couldn't understand why they would come to me to vote with them when the two precincts I serve have the highest stops and frisks in the whole City. Like, I didn't understand that at all. But I remember telling them I couldn't give them my vote, and then I had to watch it come full circle this year when, you know, Mike Bloomberg ran for president and just simply could not shake this issue. Now, I'm not specifically going after Bloomberg and what he did and the way he did it, I'm just citing history. Bloomberg paid the political price for being on the wrong side of this issue. So the message to us is we do not need to water down these bills because those who hide behind this issue, it doesn't go away. Sooner or later you will pay the political price from the people for being on the wrong side of this issue.

So, with that, you know, I -- I certainly hope that this is not the end. I hope we go for the systemic change that our people

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demand and -- and hope for. Brother Barron mentioned a -- a legislative item that -- that I'm currently drafting about how the PR machines of police departments - not individual police officers, but the departments - bringing up every derogatory item that comes up when there's a high-profile officer-involved shooting or arrest. But meanwhile, if an officer does something, the department that he works for, by contract, can't even talk to him for 48 hours. How is that balanced? How is that balanced? So even in the case of George Floyd, you know, they talked about the fact that he had coronavirus. Really? Did the family give you medical authorization to release the fact that he had coronavirus? I sure hope so. But why is that part of the discussion? Because it's setting up the system to give potential justification as to the reason why he couldn't breathe. Are you serious? We all saw why he couldn't breathe. But if there was no video, trust me, that would have been part of the justification. And the fact that he wasn't properly charged in the first place is another systemic change that we're looking for. That happened here, right? That happened here in the case of -- of Eric Garner. It happened to Eric Garner. Those cops weren't properly charged by the DA's offices. These are the systemic change that our people want, and I hope we all are here in a bipartisan manner to make sure that they have it.

Thank you, Mr. Speaker. I intend to vote yes.

ACTING SPEAKER BLAKE: Thank you.

Ms. Cruz.

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MS. CRUZ: Thank you, Mr. Speaker. Will the sponsor yield for some quick questions?

ACTING SPEAKER BLAKE: Will the sponsor yield?

MR. O'DONNELL: With pleasure.

ACTING SPEAKER BLAKE: The sponsor yields.

MS. CRUZ: Thank you, Mr. O'Donnell. And thank you for your fight that brings us here today. Can you provide a quick definition for a technical infraction?

MR. O'DONNELL: We don't really have one. So it is vague. It is left somewhat vague on purpose in order to allow it to be interpreted and to allow the individual to challenge that interpretation.

MS. CRUZ: And the technical --

MR. O'DONNELL: But there is wording, if you would like me to read it.

MS. CRUZ: My apologies.

MR. O'DONNELL: Okay. A technical infraction means a minor rule violation by a person employed by a law enforcement agency as defined by this section as a police officer, peace officer or firefighter or firefighter/paramedic solely related to the enforcement of administrative department rules that, a, do not involve interactions with members of the public; b, are not of public concern; and c, are not otherwise connected to such person's investigative, enforcement, training, supervision or reporting --

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reporting responsibilities.

MS. CRUZ: Could a failure to maintain or comply with rules related to filing reports be considered a minor infraction?

MR. O'DONNELL: No.

MS. CRUZ: Could a failure to properly affix or display a badge be considered a minor infraction?

MR. O'DONNELL: Absolutely not.

MS. CRUZ: And as you stated before - my apologies - can it include allegations of retaliation against whistleblowers?

MR. O'DONNELL: No.

MS. CRUZ: Can it include physical and verbal fights between officers?

MR. O'DONNELL: No.

MS. CRUZ: And as you stated earlier, we don't really care if they fail to shine your shoes, but we would want to know, for example, if they purposely covered their badge number or their name.

MR. O'DONNELL: Well, if they were to have covered their badge or their name, that would've involved interacting with the public and, therefore, it would be required to be included.

MS. CRUZ: And so this bill ensures that what are actually minor infractions will not be disclosed, correct?

MR. O'DONNELL: Correct.

MS. CRUZ: Thank you.

Mr. Speaker, on the bill.

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ACTING SPEAKER AUBRY: On the bill, Ms.

Cruz.

MS. CRUZ: I rise today as a proud cosponsor of bill A.10661, and in support of a full and unequivocal repeal of Civil Rights Law 50-a. I want to thank the sponsor, the Speaker, the Caucus, especially the advocates and their families who are so truly the victims here, and who for decades have cried out for justice.

Mr. Speaker, I am an attorney by trade. As an attorney, I have a license to practice law. In exchange for the privilege of practicing law, I am subject to a character and fitness screening, as well as my obligation and my duty to follow the rules of professional conduct set forth by the State of New York. Judiciary Law Section 90.1 requires that before admitting a person to the Bar of the State of New York, the Appellate Division of the Supreme Court must be satisfied that he or she possesses the character and general fitness requisite for an attorney and counsellor-at-law. Unless otherwise ordered by the Appellate Division, no person may be admitted to practice without having received a certificate of proper committee, attesting that it has carefully investigated the character and fitness of the applicant and that he or she is -- has good character and is fit to practice. Should an attorney be disciplined, whether by admonition, censure, suspension or disbarment, all of this information is made available to the public and published in the Law Journal, where much, if not all of the information that is critical to practicing law is contained, printed and issued daily. Additionally, should an

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attorney be disciplined, that attorney has the affirmative duty to inform each and every single one of our clients of this disciplinary action. Multiple other licensed professionals - teachers, nurses, doctors and even funeral directors are subject to public disclosure of their disciplinary complaints. It should be noted, like all of these professions listed here, I, as an attorney, cannot carry a gun and I'm not trained to utilize deadly force when necessary. Yet my conduct, mainly my bad conduct, is public record. Civil Rights Law 50-a prevents the public from receiving critical information about the police officers that serve our communities. Officers entrusted with an immense amount of power. In recent years, 50-a has been invoked -- invoked to remove NYPD's disciplinary summaries, including CCRB prosecutions that had been previously publicly available. And I want to reiterate that. They had been previously publicly available.

(Unintelligible) a public (unintelligible) to (unintelligible) an officer's disciplinary history and to refuse to answer community members' and reporters' many calls to identify officers who have committed acts of brutality. Members of over-policed communities like mine are in turn left without recourse to understand whether police or other oversight of accountability systems have made any efforts to eradicate systems of abuse. This results in mistrust. And so when people say the police cannot police themselves, they're not lying. This is what we mean. Judge Willett from Texas compared the increasing secrecy to kudzu, a nearly uncontrollable creeping vine that blocks access to sunlight. Slowly strangling fields and forests in its wake could create an

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environmental devastation by outcompeting other species for resources, mainly light, imperative for survival, and acts to block their access by growing over and shading them with their leaves. Native plants, as a result, die. Similar to the death of these native plants, our communities are dying. They're being asphyxiated by the injustices perpetuated in our society. And while we do not always have the power to legislate away systematic oppression, today we do.

In Detroit Free Press v. Ashcroft, Supreme Court stated that a major purpose of the First Amendment is to protect the free discussion of governmental affairs. Public access helps inform the public of the affairs of government. That is why many of you can see us from home today. Direct knowledge of how their government is operated enhances the public's ability to affirm and protest government's efforts. When the government selectively chooses what information it allows the public to see, it can become a powerful tool for dissection. In the 8 minutes and 46 seconds that Derek Chauvin's knee pressed into George Floyd's neck, in the 8 minutes and 46 seconds that Mr. Floyd took his final breaths and they were pushed out of his chest by the weight of Mr. Chauvin's knee, crushing his neck and crushing his life. Robbing him of the -- of the vibrancy of his life and mortality. People of color around this City have felt that. We felt the compression tighten around our necks, and something finally broke. The residual frustration and anger resulting from centuries of systematic oppression and police brutality drove hundreds of us, thousands of us, to protest around our City. I was immediately

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reminded of Mr. Eric Garner, whose death six years ago remains so raw and so painful that most of the people of color in our City cannot drive the image of him laying in the pavement, begging for his life. And that image was leaked. Not released because of the overreaching secrecy of 50-a, but leaked. That Officer Pantaleo, the officer administering the deadly chokehold, had seven disciplinary complaints and 14 allegations against him. This is not to say that all cops are bad. But they are charged with the responsibility of representing the best of us, and not the worst. And we not only rely on them to be judicious and tempered in their conduct, but we demand it. Similarly, as members of our community we are entitled to know when officers have acted badly in order to ensure that our system of law, the same system that police have sworn to uphold, can identify and bring justice to those who have committed these atrocities against our communities.

This is absolute necessity. Transparency in government. As has been identified by the advocates and attorneys, transparency in government can have a community therapeutic value that provides an outlet for our communities' concerns, hostility and emotions. The structural role that acts and serves by exposing the public to information necessary for self-government (unintelligible) is very important. The benefit of public access is the role that government and transparency plays is our -- in our constitutional system. For decades police advocates have argued that 50-a is meant to protect the privacy of officers and their families. And today we saw

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colleagues across the aisle bring up painful memories of officers lost during 9/11, officers who have killed themselves and other ways in which they have died over the last years. These are disingenuous and manipulative tactics. This gaslighting has got to stop. Because one has nothing to do with the other. We deserve transparency.

It should be noted that New York and Delaware are the only two states left with this archaic law. And theirs is not nearly as expansive as ours is, and that's going to change today. The best role that we can serve as elected officials is not only to write and pass legislation, but to ensure that there's oversight, transparency and accountability. And that we, as guardians, the keepers, the protectors of our neighborhoods, that we begin the therapeutic healing process in our communities. How? With legislation that demands transparency. How? With financial capital dedicated not -- not a -- not to a \$1 billion police state, but to programs that enrich the lives of our constituents, irrespective of wealth, race, religion or their background. How? By bringing a message home that we love you, that we care about you and that we're going to prove this by investing in you. In your housing, in your healthcare, in your education and reentry programs. As soon as this law goes into effect, we take that first step in providing this to our communities by opening the doors to government and allowing New Yorkers to finally demand that their police departments provide them with the transparency that they deserve.

And because of that I will be voting in the

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affirmative. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Ms. Glick.

MS. GLICK: Thank you, Mr. Speaker. First of all, I want to congratulate and thank my friend Danny O'Donnell for pursuing this for so long. And I'm very pleased to hear all of my colleagues talk about how they agree that the murder of Mr. Floyd was horrific. Now of course we wouldn't have known about this as a murder without the videotape. So I want to thank the young woman who risked being roughed up herself by taking that video.

Now, we may think, and I -- I -- I agree, that most officers act appropriately. And the percentage of the force that is, in fact, the minority of officers who violate the rights of the public, I won't put a percentage on that. Let's just say that it's a small amount. But there is a culture of silence in the police department. And it is reminiscent of the denizens of organized crime who also had a code of silence. When a few cops step up to complain about another officer's inappropriate actions, they're called a rat. They are ostracized. I'm going to do a little history here, because remember Serpico? It became a cause célèbre. He raised the issue of corruption in the police department, and he was almost killed for his -- for his trouble. I remember Patrick Dorismond. This was a young man who was a security guard. And an undercover police officer who may not have appropriately identified himself got into a scuffle with Mr. Dorismond, who ultimately died as a result of that encounter. And I

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remember Mayor Giuliani saying -- as was referenced to one of the things one of my colleagues said about how the victim is denigrated -- Mayor Giuliani said at the time, *Well, he's no altar boy*. And of course it was demonstrated that he had, in fact, been an altar boy. He had two children - I believe it was two children - and they went without a father for the rest of their lives. One of my colleagues made -- raised the issue that the -- and -- and I've written to the Police Department going back to Ray Kelly -- or maybe it was Bratton 1 -- raising the issue of police officers who have cases against them that wind up costing people not only their lives or injuries, but the taxpayer dollars. And they say, *Well, you know, the Corporation Counsel sells a lot of cases because they view them as a nuisance*. And of course that happens with the MTA and uneven sidewalks for DOT. But this is someone with a gun. And this is someone who has the ability to remove your liberty from you. So it's very different. And I am reminded that this isn't anything new. Yes, we have people in the streets raising their voices, perhaps much more dramatically than anything we have seen because it is worldwide. Because across the world, people are recognizing that people of color, indigenous people, have not been treated fairly. In the '60s after another set of disruptions - I will refer to them as uprisings; the President will call them riots - there was a Presidential commission started, the Kerner Commission. And I'm just going to read just a little bit from a report on the Kerner Commission because I think it is instructive to us today.

Pent-up frustrations boiled over in many poor

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African-American neighborhoods during the mid- to late-60s, setting off riots that rampaged out of control from block to block. Burning and battering and ransacking property, raging crowds created chaos, et cetera, etc cetera. Many Americans blamed the riots on outside agitators or young black men, they may have represented the largest and most visible group of rioters. But, in 1968, the Kerner Commission turned those assumptions upside-down, declaring white racism—not black anger—turned the key that unlocked urban American turmoil. Bad policing practices, a flawed justice system, unscrupulous consumer credit practices, poor or inadequate housing, high unemployment, voter suppression, and other culturally embedded forms of racial discrimination all converged to propel violent upheaval on the streets. And as black unrest arose, inadequately trained police officers and National Guard troops entered affected neighborhoods, often worsening the violence. This presidential-appointed panel reported white society is deeply implicated in - at the time the terminology was "ghetto". White institutions created it, white institutions maintain it, and white society condones it. That was in 1968.

This very, very minor bill which will unmask the disciplinary records of police officers is just one piece of what we need to do to change, to change the direction of our country. Now, in 1968 we did not have nearly as many people of color in legislative bodies. We are seeing the people ask for change, demand change, and we must change. It is our obligation to redress the grievances that

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people rightfully and righteously ask of us. I believe that we must and will see change come, one way or another. So we should get on board. We should stop making excuses. And probably spending more money than we should in one place and take some of those resources and put them where they are needed. So I don't see it as eliminate the police, but I see it as an appropriate reallocation of resources to ensure that we finally, finally do the right thing.

Words echo in my head, *How long? Too long.* Let's do it now. I'm happy to vote in favor.

ACTING SPEAKER AUBRY: Thank you.

Mr. Vanel.

MR. VANEL: Thank you, Mr. Speaker. First, I'd like to thank the sponsor for carrying this bill for five years and for making sure to -- to help push justice with respect to this in his career. Mr. Speaker, in case you didn't know, I'm a black man. And I was born a black man and I'll die a black man. And an esteemed poet from the South penned some words that sounded like this: *Say it loud, I'm black and I'm proud.* Now, being black, many people have come and asked me questions recently in the past couple of years. Like, they ask, *Why did Colin Kaepernick, your fraternity brother, take a knee four years ago?* They ask, *Why do demonstrators demonstrate?* But more fundamentally, they ask me as a black man, *What am I asking for? What do I want?*

And, you know, that's a tough question. It's a difficult question. You know, it's complicated. I get confused

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sometimes to, you know, address, you know, what -- what do we want? I don't know if I have the proper education to explain the nuances of the societal ills, but if I try to answer the question, I might just simply close my eyes and just imagine. I'd imagine if I was to live in a New York where I was able to walk to Central Park and be able to bird watch without my skin color being used as a weapon against me. I continue to imagine, imagine I was able to go for a run in my neighborhood without the fear of someone trying to hunt me down and kill me. I continue to imagine, imagine being able to watch a basketball game and at halftime, being able to go to the store to buy candy and be able to come back home without being killed. What do I want? I want to feel safe just like you. Like your sons, like your brothers, like your uncles, like your friends. I just want to feel safe.

To the people of the 33rd Assembly District, to the people out there across the City, across the State protesting, to the good cops, which are the majority, we see you. We're here fighting for you. This bill is one of the bills in this package that is a -- would help change what? This will help change to make sure that good [sic] cops can't hide. That's what it is. Too often in New York State we don't know what the records are. We want to make sure that good [sic] cops can't hide -- I'm sorry, the bad cops can't hide. This bill matters. I'm proud of these packages of bills. But will these bills change everything overnight? No. There's much work to do. But I'm proud to be able to stand here and try to help make -- improve the situation in New York State.

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Martin Luther King once said that the arc of the moral universe is long, but it bends towards justice. And today with this bill, and with the packages of bills that we're doing, we're trying to bend the arc of moral justice, the arc of morality in New York State towards justice. And, Mr. Speaker, I'm voting yes for the bill.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Carroll.

MR. CARROLL: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. CARROLL: Transparency is essential for a free society to exist. Transparency is essential in our police departments and those who are vested to protect and serve us because how, as a civil society, can we monitor them, can we look over them without having access to those records. That's what this bill is about. It's about transparency. It won't fix all the ills of racism, but what it will do is start to bring sunlight into the structures of the police departments around our State. And, of course, structures and institutions have a way about changing people. All of them do. And we are all affected by them. And the structural and institutional racism that affects all of us, myself included, needs rooting out, needs sunlight. We're all guilty. What this bill does is try to shine a little bit more light so that we can do a better job at reforming ourselves and at making a more just and perfect society. It won't fix everything. We will be here again, but this bill and the package of bills I think helps

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shine a bright light on the original ills of our society, ills that we are all responsible for and all guilty for and, again, myself included. So, I hope and urge my colleagues to vote in favor of this commonsense transparency and sunlight that we so desperately need. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

Mr. Fitzpatrick.

MR. FITZPATRICK: Thank you. Thank you, Mr. Speaker. I want to thank everyone for their passionate eloquence today, it's been a very interesting debate. But I have to say, what troubles me is I remember after the Ferguson, Missouri incident, watching the news and seeing a banner of Black Lives Matter, and the marchers yelling and screaming, *What do we want? Dead cops. When do we want them? Now.* And I didn't hear any denunciation of that kind of language from anybody. No one on MSNBC, no one on CNN, no politicians on the left side of the political spectrum. It was ignored. And it was very unfortunate to see these -- these incidents, Garner, Brown, Floyd, but no one is feeling sorry for the Dorn family, nor for the gentleman in Oakland who was murdered.

The problem I have with this bill is that allowing unsubstantiated claims to be made available is not only unfair, it plays into the hands of those forces of anarchy that want to not just defund and disband, but want to destroy the police departments of this country. There was a demonstration in my town just on Sunday and another one planned for tonight with some of the most vile and

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vitriolic language to burn Smithtown down, F the police, all of that stuff. I just want to say that the men and women in blue, the men and women in the fire service and the men and women in the corrections department, I support you, I stand with you, and like all of you, I condemn what happened to these people, Mr. Floyd and others, that's not you, those are the bad apples and they're getting the justice that they deserve. But I rise in opposition to this bill because this is not the answer. We are feeding red meat to the mob who wants to go after the police department rather than work with them.

Nerves are raw right now, everybody's upset. A lot of people are angry on both sides. We can work through this. I live by one simple rule: I treat people the way I want to be treated. And if we all did that, we wouldn't have these problems. I have friends of all sizes, shapes, colors, et cetera, because I treat people the way I want to be treated. That's all we have to do. But by providing a form of transparency in terms of being able to get unsubstantiated claims added to this -- to this record or -- or be -- to be visible, when other interest groups, you know, are protected. There's a fundamental unfairness here. I do not support this. I am voting no on this bill. And to the members of law enforcement and the fire department and the corrections department, thank you for what you do. I appreciate everything that you do for us, for all of us. Like you, I condemn the bad apples, but what -- what's happening here today to you is wrong and I will be voting no. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.

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Ms. Woerner.

MS. WOERNER: Thank you, Mr. Speaker. Will the sponsor yield for a couple of questions?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure, Ms. Woerner.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields.

MS. WOERNER: Thank you. Mr. O'Donnell, as I read the FOIL Law, I read that, "An agency can deny access to records or portions of records that, if disclosed, would endanger the life or safety of any person." In that definition, would "any person" include a law enforcement officer?

MR. O'DONNELL: Absolutely.

MS. WOERNER: Thank you. So, then, would I be correct in concluding that if an agency determined that releasing the unfounded complaints about an officer would put her or his safety at risk, that agency could deny access to those portions of the records?

MR. O'DONNELL: Subject to judicial review if someone wanted to challenge said determination.

MS. WOERNER: Thank you very much.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, Ms. Woerner.

MS. WOERNER: We're here this week to establish a

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framework of law in which a cultural shift towards a more just and equal society can finally emerge. As I reviewed the package of bills this week, I approached them with the lens of will this build goodwill and better friendships for all, and will they be fair to all concerns? I have to say on this bill, I received nearly 700 constituent communications in support of this bill. And I also consulted with law enforcement to understand what their concerns might be.

After reviewing the original bill language that as Mr. O'Donnell says he has been working on for five years, the compromised language that sits before us and the body of law related to the Freedom of Information Law, I am satisfied that the existing framework of FOIL and the new language that has been added to it protects the private, personal information, as well as unfounded, unsubstantiated claims and satisfies those concerns. And it highlights the fine work that good officers do while ripping away the shield from those who abuse their power.

Now, there will be some who say that by supporting this measure that provides for transparency and accountability, I am turning my back on law enforcement, so let me be clear: Nothing could be further from the truth. Over the six years that I have served in office, I have met with dozens, hundreds of local sheriff's deputies, city and village police officers, En Con officers, park police and forest rangers, and I know them to be honorable, just, kind and committed to protecting the communities they grew up in, raise their families in and have sworn to protect. I think about the sheriff's deputy who travels

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hundreds of miles in Washington County alone at night responding to domestic violence calls or chasing down drug traffickers who would poison our communities. I think about the sergeant in Stillwater who 13 years ago started a program to collect old cellphones for victims of domestic violence to assure that they have a lifeline in their moment of need. I think about the officer in Hudson Falls who ran into a burning building to save the lives of two members in his community. I think about the young officer who stood with me at a drug take-back to take -- to get prescription pills that have wreaked havoc in our rural communities off the streets.

These men and women are the very best of our community and their everyday acts of heroism humble me; in fact, I would put their records up against those of any other police force because I know that they are sterling examples of how community policing should be done. Our officers got into this job to protect their communities, not to protect bad cops. This bill is about transparency and accountability, and this is the best way to ensure that the reputations of the upstanding officers that I know are not tarnished by those who would abuse their power. Thank you, Mr. Sponsor -- Mr. Speaker, I'm pleased to support this bill.

ACTING SPEAKER AUBRY: Thank you, Ms.

Woerner.

Mrs. Gunther.

MRS. GUNTHER: Thank you, Mr. Speaker. And this is really a very emotional day for me. I am the granddaughter of a

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New York City Police Officer. I'm the daughter of a New York City Police Officer. I'm also the aunt of a New York City Police Officer. My cousins also were in the NYPD. And I can remember as a young child when I was living in 161st Street in the Bronx that as we walked to St. Angela Merici School, my mother would say to me, *If anything goes wrong* -- there was always a cop on the street, and my mom would direct us to go to the cop because that was a safe place to go.

So today, you know, the only thing that I feel about -- I feel very emotional. I know there are so many good police officers all across New York State. But just like any other profession -- I'm a nurse, if I do something wrong, if I steal a medication, it goes on my record. In many professions, that does happen. And often, we can't get another job. If we're drug-addicted and we go to rehab, it still remains on my record and my license.

So today, I'm asking that any unsubstantiated please be removed. I can live with that. But other than that, we want our children to feel that we can run to that police officer and to feel safe, that they're there to protect us, and most of them do. And to me, it's a blessing to have a police officer on the street and the sheriff's department, and that our children should feel safe no matter what color, religion, they should feel safe. My family is very eclectic. I have a Latino grandchild. I have a Latino daughter-in-law. We -- I have a Majorcan. We speak Spanish. We speak English. We are eclectic, and that's what the United States is all about. And we are brothers and sisters and we are here to protect each one. And, you

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know what? We stand with our police officers and we stand for those who are dis -- disproportionately feeling unsafe in the United States today. God bless America and let's move forward. Thank you. And I vote --

ACTING SPEAKER AUBRY: Not yet.

Mr. Taylor.

MR. TAYLOR: Thank you, Mr. Speaker. Will the sponsor yield?

MR. O'DONNELL: With pleasure.

MR. TAYLOR: Thank you. Question --

MR. O'DONNELL: Mr. Taylor, I can't actually hear you.

MR. TAYLOR: You can't hear me.

ACTING SPEAKER AUBRY: You're having some problem with your audio, Mr. Taylor.

MR. TAYLOR: Is that better?

ACTING SPEAKER AUBRY: Not -- keep trying.

MR. TAYLOR: One two, check one. Mic check, one two. Better? I'm working here.

ACTING SPEAKER AUBRY: Keep --

MR. TAYLOR: Hopefully that's better.

ACTING SPEAKER AUBRY: Raise the voice. You need your preacher's voice.

MR. O'DONNELL: As they say on Broadway, *Sing out, Louise*. Okay?

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(Laughter)

MR. TAYLOR: Okay. Well, thank you, Mr.

Speaker. I appreciate this -- this opportunity and I thank the sponsor for yielding -- yielding. You said this bill was introduced, it was five years ago. In your research in doing this bill, presenting this, have you run across any opportunities where any states -- I think there are three of us left that have this 50-a, have you encountered anywhere where officers were harmed as a result of information that was published?

MR. O'DONNELL: I'm unaware of any. Certainly in Minnesota, which has no such restrictions, I'm unaware of anyone ever being harmed because that information is available.

MR. TAYLOR: Thank you.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. TAYLOR: Thank you. I -- I want to follow one of my colleagues. I am a black man, and what I find -- and I don't want to be -- no. Let me start here. I don't want to be apologetic for what I'm thinking and how I'm feeling. When I'm with my son, who is 24, I hug him like a little kid because I'm always concerned when will I see him again. He travels, he's a -- a Penn State graduate and I shouldn't have that concern. And I remember being in school with my colleagues working on my divinity, and all my colleagues and their cohort were all white. And they couldn't imagine that I had to tell my son how to drive, what to do when stopped by a police officer. There are a lot of wonderful cops out there. But I think someone mentioned

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earlier about this as being overreaching or unbearing, you need to be in a black man's position when he's driving and stopped by a police officer in any town in U.S.A. America. The question is, *What did I do wrong -- you automatic -- this is me. What did I do wrong, I know I wasn't speeding. Well, what is this going to be? What is this encounter going to be and am I going to make it home tonight?* Those are real conversations.

And I think when we look at the history, this bill goes back to 1970-something, I think about Clifford Glover, ten years old that was shot. I think about Michael Stewart. I think about Eleanor Bumpurs, who was mentioned. And so, there's a litany of cases that have happened in our lifetime, in my lifetime and it -- it has not always been pleasant. Now, that's not to -- to say all police officers are bad. That's not what this legislation is about. This is about rooting out those that will allow others to do things. So when you look at the man that was knocked down in Buffalo, they marched over this guy. There's no way you can tell me that no one had compassion enough to stop and say, *Let me help this individual regardless of what's going on around us, we need to do that.* And if you have the mindset that it's okay with you, and he appeared to be white, imagine what happens in a black community at night and you're black and they're white. It could be a lot uglier than that.

So, I think on the nature of what we're talking about here, it's not cops are bad generally. There are some bad cops out there and we want to make sure that if you're going to do that, then

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you're going to be held accountable to the highest degree. I am a retire -- I'm not retired, but I am a former military police officer, so I understand what it means to deescalate, what it is to be courteous even when you're spat on, cursed at and called everything but a child of God, you have a responsibility. And we need to make sure that if you're going to take that job, if you're going to take that pledge, then you need to be responsible and held to the highest high. And I don't think that this conversation, and it's gone on for hours, about we're turning our backs on cops. We're doing -- this is the furthest thing in the world. And if you are that woman and that man that is a good cop, and there are a lot of you out there, I work with you in my district, I work with you in other places, you already know, I don't have to -- I don't have to qualify that. But I think we're wrong to believe that in the perfect world, everything is -- is -- is well. I think more conversation could be had. But not for a moment, not for one moment are we of the mindset that this bill is going to eradicate racism that's in America, that it's going to fix the black platform. We need to look at the education, the housing and employment and how we are going from uneducated schools straight to prison. When we start to fix those things collectively, and we can go in those rooms and Kumbaya and do it, but there are lot of things that need to be done and this bill is just one step in that direction.

I understand. I've got a lot of friends that are cops, and I -- I get that. But this is not an attack on cops. And I want to dispel that. This is a -- a -- a [sic] incident, it's an opportunity to stop

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bad behavior, bad behavior and looking the other way. We want to know, if you're in our neighborhoods, we want to know. And if you're there and you're doing the right thing, we'll stand with you all day long. But if you're wrong, we're coming at you. And that's how it should be if we're talking about doing this across the board.

Thank you, Mr. Speaker, and thank you for the sponsor that allows me -- that yield. I will be voting in the affirmative on this bill. Thank you.

ACTING SPEAKER AUBRY: Thank you, Mr. Taylor.

Ms. Darling.

MS. DARLING: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, ma'am.

MS. DARLING: I was told from childhood that the system was broken. I would think about how the Founding Fathers of this country came together to draft the rules, conversations about freedom and the absence of religious persecution. I would think about the irony that these men who spoke and wrote of freedom were on stolen land being served tea by slaves. The irony that these men who spoke and wrote of freedom were on stolen land being served tea by slaves. The story just did not add up.

I had an epiphany this year. These men were able to have the vision of freedom in the presence of slaves because the men determined that people of African descent were not men. They were

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not even considered human. People of African descent were characterized as beasts, dark devils, savages, disgusting creatures who needed their guidance. And this is America. The system is not broken. The current system in America was built deliberately. What we have here is exactly what the Founding Fathers intended.

I am of African descent. I've had to learn about and experience the plight of my beautiful people. My beautiful people who struggle every day to attain the American Dream, the American Dream that seems out of reach for the very people who built America. But America has offered us all the nightmares we can manage. We have nightmares of slavery. We have nightmares of the Reconstructive era. We have nightmares of the Civil Rights Movement. We have nightmares of the war on drugs. We have nightmares of dismal neighborhoods. We have nightmares of being brutally murdered by law enforcement.

Most recently, we have the nightmare of George Floyd's murder. This was a clear example of how some people in the system view people of African descent, like we are nothing. Like we are worthless. To watch a man be murdered in the street by someone hired to protect and serve, I and millions of others will live with that nightmare forever. The tragic and disgusting murder of George Floyd is a time for pause, a time for reassessment and a time to determine what we need to do to prevent any more of these tragic and disgusting events.

This tragic and disgusting event is not the time to

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condemn all law enforcement. I am in full support and gratitude to my brothers and sisters in blue who are professional and humane. For the other ones, this legislation will allow for the much-needed transparency so police departments can better determine who deserves to wear a shield and who should never be shielded. The system needs a massive rebuild, and this legislation places us one step closer to an America where I, nor any person of African descent, is viewed or treated like we are worthless.

I would like to thank the sponsor of the bill and I'm voting in the affirmative. Thank you.

ACTING SPEAKER AUBRY: Thank you.

Ms. Richardson.

MS. RICHARDSON: Mr. Speaker, I rise today full of pride. I'm so proud of the New York State Legislature right now because we have arrived at a moment so long overdue for New Yorkers around this great State. As we stand here today, speaking on repealing 50-a, the section of the Civil Rights Law that was covering the misdealings of police officers and peace officers and alike, which amounted to a lot of pain through the brutality and mistreatment [sic] afflicted on people who just simply didn't deserve it.

Before I get all emotional, I just want to look back at the sponsor of this bill, Mr. O'Donnell, a man not of my same gender, a man not even of my same race. But because he's not prejudiced, he was able to see me and to see men that look like me. And you would think - and I'm speaking more to my viewership who is at home - you

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would think it is an African-American person that has this bill, but it's not. And so, I think it's important to note that, that this is a Body that is full of color through our ethnicity. We are a Body full of color in the way that we think and that it takes really a coalition to change the narrative of a system that is broken and that has disenfranchised communities for a very long time.

Now, Mr. Speaker, I've got to be honest now because you know that's all I know how to do. There are a lot of people, Mr. Speaker, who are very upset that the New York State Legislature is passing this legislation today, and they want to try to make this legislation about something that it is not. We are not looking into anyone's personal business. We don't want your Social Security, we don't want your telephone number, we don't want your home address. But you know what we do want? We want that if you take an oath to protect and serve, that you don't become an abuser. We want that if you take an oath to protect and serve, that you uphold yourself to the highest level of accountability.

Far too often, Mr. Speaker, in communities - particularly in communities of color - that has not been the case. Police brutality has ran rampant. Most notably, there was just a police officer that my colleague, I'm sure, will speak about, was found on camera pushing down a protester essentially causing her a concussion and then when you look back at the record, this police officer is notorious in the community for causing harm and, you know, abuse to communities of color. Now 50-a is going to allow us to -- with the

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repeal of 50-a, we are now going to be able to see those records, track the patterns and course correct when necessary. So, when we spoke to our communities and said that we were going to be relentless in the pursuit of justice, Mr. Speaker, I don't know if they thought that we were joking, but we are here in this moment and we are going to do that, because justice, transparency, clarity and reassurance is what New Yorkers deserve.

And, quite frankly, Mr. Speaker, we also have to talk about the other side of this. Anyone who is opposing this piece of legislation, the question we submit to you today is what do you have to hide? What do you have to hide? Doctors' records of performance, nurses' records of performance, even us as legislators, records of performance are public. So is my address, unfortunately. Right? So, I don't have anything to hide. What do you have to hide? So, don't make this about Blue Lives Matter. Don't -- don't -- don't do that. Don't do that. Because that's a -- it's a -- it's a miscarriage in terms of the truth, and our people deserve for the transparency that they seek to be delivered to them in a righteous way.

And so I just want to end by saying, Mr. Speaker, because I don't need to speak here for a whole lot of hours because my colleagues are eloquent in the way that they are laying out the case here today, and I am very confident that we will get to an affirmative vote, but now is the time. Our communities are crying out. People have taken to the streets to -- to seek -- to seek the justice. Too many men and women have lost their lives to law enforcement individuals

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who have had long history of records of abuse prior to it becoming a death situation, causing pain in our -- in our community. And so, I just want to say thank you to all of my colleagues who are a rainbow coalition of what New York looks like. I do stand here to affirm to you today that Black Lives Matter. But the truth is, Mr. Speaker, all lives do matter, it's just black lives, we have to put a focus on right now because of what's going on in this country. But you're not going to divide us. We will continue. We will continue to keep our eyes on you and we are going to ensure that the right thing is done by our constituencies. And so with that, Mr. Speaker, I vote in the affirmative.

ACTING SPEAKER AUBRY: Thank you.

Ms. Dickens.

MS. DICKENS: Thank you, Mr. Speaker. Will the sponsor of the bill yield?

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure, my colleague. Go right ahead.

MS. DICKENS: Thank you so much. Thank you. As my colleague had asked something very similar, but on the -- the repeal of 50-a, it's the records of the officers, but certain information is redacted, is that correct, on the personal life of the police officers or the peace officers and their families, and if -- if I am correct in saying and asking you that if that is the correct -- if it is so, can you tell us

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what will be redacted and what is included in the bill?

MR. O'DONNELL: This involves Section 2 (b), the amendment to the Public Officers Law Section 89. They shall redact the following information: Medical history of a person employed, which is necessary because I believe ADA Federal law prohibits that anyway, the home addresses, personal telephone numbers, the personal cell phone numbers, personal e-mail addresses from a person employed by a law enforcement agency or a family member of such person, or a complainant or such person named in a law enforcement disciplinary record, except where required pursuant to Article 14 of the Civil Service Law, and Social Security Numbers or the use -- any employee's use of an Employee Assistance Programs, mental health services or substance abuse assistance.

MS. DICKENS: Thank you. Then that means that's really -- what's really included in this bill, the repeal of 50-a, is the disciplinary records of peace officers; is that correct?

MR. O'DONNELL: By repealing 50-a, we allow for that, and the -- the FOIL Law is amended to permit the police department to do so in accordance with FOIL.

MS. DICKENS: Thank you. Thank you, Mr. O'Donnell.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, Ms. Dickens.

MS. DICKENS: Forty years ago and, unfortunately,

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it's still very relevant today in 2020, as part of a speech Martin Luther King said, *I think America must see that riots do not develop out of thin air. Certain conditions continue to exist in our society which must be condemned as vigorously as we condemn riots. But in the final analysis, a riot is the language of the unheard. And what is it that America has failed to hear? It has failed to hear the plight of the black poor that has worsened. It has failed to hear the promises of freedom and justice have not been met. It has failed to hear that large segments of society are more concerned about tranquility and the status quo than about justice, equality and humanity. So, in a real sense, our nation's summer of riots are caused by our nation's winters of delay. And as long as America postpones justice who stand in the position of having these recurrences of violence over and over again, social justice and progress are the absolute guarantors of riot prevention. As one of my constituents writes, It is not a movement, it is a lifestyle.*

Yes, this bill, the repeal of 50-a, is about life, my colleagues. It's about life. It's not about anti-police for we all recognize that most officers of the law that have been sworn to protect and serve are, indeed, doing just that, protecting and serving. But unfortunately, it is the few that we today refer as to as bad apples that has infected the barrel and has brought up and used 50-a to further increase and enlarge that wall of blue science [sic] that -- that has permeated the history of -- of police in this country. Most officers of the law, law enforcement, would never fear the repeal of 50-a, for it is

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about the -- the disciplinary records that this is seeking. I feel strongly, though, that mental and medical records that entail the taking of medicines that are known to impact on cognitive ability and show the mental state of a person carrying a gun should be included. But alas, it is not.

And yes, I personally have been stopped, not so long ago, by a police officer in my district who stopped me and when -- and he had his hand on his gun and when I asked him why was I stopped -- and I was frightened, I was frightened for my life and I kept my hands up on the steering wheel so he could see them, and why was I stopped, and he said because you were talking on the cell phone. And it was only after I showed him that my cell phone was in my pocketbook, that my car had a phone in the -- the car itself where I did not have to use my hands to use it, did he then just turn without saying anything, just handed me back my license, because I did not state, and my license had not been changed, that I was an elected in that community. I was just a black woman. And he just turned and walked away from me as if he had been in the right and he was forced to admit, and he wouldn't admit when he was first forced to just walk away from me.

So, I commend the bill's sponsor. I commend Assemblyman Danny O'Donnell for standing up for what is right. We talk about that we treat others as we would like to be treated ourselves. If this were the case, if this was what was being done, then this bill would not have to be an asterisk. That policy would not have

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to be changed, that we would not have to legislate laws to protect people. If I'm arrested, my full background is exposed not only in courts, but in the public media. If that is the case -- and that's before I'm pronounced guilty. And you're supposed to be innocent until proven guilty. So, yes, I do commend you, Assemblyman Danny O'Donnell. And, yes, you're not ethnically like me, you're white and I'm black. You're a man, and I'm a woman, but, yet, you have recognized that there is a true inequity existing here across America and we're starting with an embryo here in the State of New York to make the necessary changes to not eradicate the system, because that's not what this is going to do. What this does is to try to equalize the bar in a court of law so that just like my history is open to the public when I am before the court, so should a police officer's.

So, I commend for you for having the strength to -- to bring this legislation forth, to fight for the repeal of 50-a. I -- I thank you, Assemblymember O'Donnell. I thank you, my colleagues. I thank you, Mr. Speaker, and I vote in the affirmative.

ACTING SPEAKER AUBRY: Thank you.

Mr. Mosley.

MR. MOSLEY: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. MOSLEY: First and foremost -- thank you, Mr. Speaker. First and foremost, I'd like to thank the bill sponsor for his internal fortitude, his courage and resiliency over these past five years

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to carry this bill when it wasn't the most popular thing and, when nobody was looking, still championing its cause and its eventual passage today.

Before I get into my comments, I just want to be clear that the intent of this bill shall, one, allow for law enforcement agencies to continue to cooperate with oversight agencies and provide them with the access to all information that is relevant to their oversight duties. It would also allow for oversight agencies to release findings and recommendations in disciplinary investigations and proceedings, subject to existing FOIL protections. These things don't change. As soon as this law goes into effect, though, New Yorkers from across the State will be able to demand and get from their police departments who are these officers who are currently employed who have a history of misconduct. This bill will allow for New Yorkers to finally find out officers who are currently in their streets, in their precincts who have racked up years worth of complaints for excessive force or illegal stops, or any other type of misconduct.

And last, but certainly not least, this intent of this bill will make it possible to find out whether police departments have ignored repeated patterns of complaints about officers. Police departments won't be able to hide that they knew about and ignored excessive complaints -- excessive force complaints of a particular police officer.

That's what the intent of this bill will talk about, but now, the substance of my conversation. Why do we have to wait?

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There's no need for a commission, there's no need for an auxiliary group or organization that tells us what we already know, that the outcome of when we don't do this is a George Floyd. The outcome for when we don't do this is an Eric Garner. The outcome of when we don't do this is countless other individuals who didn't have -- have someone record it or -- or videotape their encounters who have lost their lives or lost their dignity, who have been disrespected in front of their families and friends and community. I know one of my colleagues so noted, and I know that he didn't mean it in jest, he talked about, you know, transparency and the committee agendas and -- but the far greater agenda that we need to be talking about is the agenda of my life as a black man. The agenda of my life and my children's lives, and whether or not we will make it home safely, whether they're in my presence or not. This bill is about accountability, transparency and how performance is related to them. My grandfather who raised me as his own was a decent man, Private First Class Marine, he was a moral man with a moral compass. But he didn't leave that moral compass and that level of decency and humanity at the door. He took it with him to his beat. He took it with him when he went to the precinct. He took it with him when he was encountering those he was told and instructed to serve and protect each and every day that he walked the streets of Brooklyn, New York.

So, this is about power given back to the people. This is about not making sure that the status quo has a foot on our necks that should be tolerated. So, I thank the sponsor because

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ultimately we know that no one bill is a silver bullet, that this collection of bills are not a collection of silver bullets that will resolve all issues and concerns that we may have, but they are -- they're a -- a -- a -- they're pointing us in the right direction. This malignant tumor of police brutality has to be carved out, and I think that this bill, the repeal of 50-a, is one of those scalpels that will do a tremendous job in removing that malignant tumor so that police officers have a level of decency and accountability to the men, women and children they have sworn to protect. And I'll be proud to vote in the affirmative, Mr. Speaker. Thank you so much.

ACTING SPEAKER AUBRY: Thank you, Mr.

Mosley.

Ms. Wright.

MS. WRIGHT: Will the sponsor yield?

MR. O'DONNELL: With pleasure --

ACTING SPEAKER AUBRY: Mr. O'Donnell, will you yield?

MR. O'DONNELL: With pleasure, Ms. Wright.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields again.

MS. WRIGHT: Thank you very much. I am, like many of my constituents, I am not that familiar with the Public Officers Law and the Civil Rights Law and all of the laws that are governing our police officers, so I'm always learning this a little more as we do our work. I'm going to ask you to walk me through exactly

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what it is that we are going to allow to be exposed, what we are going to -- and what we're going to be shielding and/or what's going to be outside the scope. So, would an officer's employment records of indiscretions inside the police -- the -- would -- inside the office, inside the command station, would they be captured under this rule?

MR. O'DONNELL: If they involve a disciplinary record, yes, they would.

MS. WRIGHT: And if it were just listed as bad performance, not disciplinary record, would there be a way for us to actually capture the work or the misdeeds or the record of that interaction?

MR. O'DONNELL: Certainly, if that discipline involved interacting with the public or in performance of their duties, yes, it would.

MS. WRIGHT: Okay. So are we able through this law, not through the FOIL, just through this law, able to do anything other than address interactions with the public in the performance of their duty as an officer in that -- under the auspices of them being a representative of the police force?

MR. O'DONNELL: Well, it would involve any instances of allegations of misconduct that leads to an investigation, a report, an exhibit, a hearing, all of those things, certainly it would, including, I would suggest, internal affairs investigations, which those are conducted when they believe an officer is committing a crime.

MS. WRIGHT: Okay. So if I made a complaint

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against -- if I were a police officer and I made a complaint against another officer, do you think that that might be picked up in this -- under these rules?

MR. O'DONNELL: It could be, but under the fact pattern as presented by Ms. Woerner, it could very well be shielded if that is the case.

MS. WRIGHT: Okay. Thank you very much --

MR. O'DONNELL: And that would be in the discretion of the police department.

MS. WRIGHT: Thank you. On the bill, please.

ACTING SPEAKER AUBRY: On the bill, Ms. Wright.

MS. WRIGHT: I don't think I've ever received as much mail as I have regarding the passage of 50-a. Thank you to our sponsor for bringing this bill forward, to our Speaker for ushering us through this moment and assuring that we take advantage of this opportunity to enact legislative changes. This discussion of 50-a is a learning opportunity. While initially created to protect officers from perceived abuse during cross-examinations, this law has been broadly interpreted and its meaning expanded to effectively prohibit the production or use of any record that contains any information that could conceivably be used to evaluate the work performance of an officer.

This broad interpretation has resulted in perverse outcomes. This broad interpretation has allowed an -- allowed

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officers after officer, in case after case to hinder proper investigations and to frustrate the justice. So I'm very happy to be here today as we make it clear that the employment records of police officers and peace officers are discoverable, and that law enforcement agencies shall comply with requests for law enforcement disciplinary records by producing employment records as defined in these sections and limited only by the stated exclusions which shall be narrowly defined and interpreted.

Today, we are trying to reconcile a hard truth, those whom we have trusted to dispense justice and mercy have retreated from their stations and hid in shadows of brutality, abuse and manipulation. But today, this bill will expose systemic shortcomings and correct our laws so that it is clear, disciplinary records include a myriad of other employment records and they are subject to review and disclosure when there is an investigation into an officer's job performance. My community, like others, all over this State, has responded in this moment with a shrilling outcry that should send chills down all of our spines. The people demand accountability and transparency from those who have sworn to protect and serve our communities. The repeal of 50-a is one part of establishing a system that reports to the people, affords oversight and review. The -- the repeal of 50-a is one step towards restoring the trust between community, police and our Judiciary. I vote in the affirmative.

ACTING SPEAKER AUBRY: Thank you.

Mr. Blake.

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MR. BLAKE: On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. BLAKE: Mr. Speaker, colleagues, allow me first to ask that we take a moment of silence for those that have been lost and called home way too early, as we're here right now as George Floyd will be laid to rest in Houston.

(Whereupon, a moment of silence was observed.)

We pause and, first, we acknowledge and thank the sponsor for his incredible work and standing up for justice, and using his breath to speak out for those who don't have a chance to speak out themselves. Allow me to commend our colleagues for doing the right thing here and saying enough is enough in what has happened in this journey. We come at this hour right now hurting. We are socially distant because of a virus that has been attacking our physical systems, but we're also unable to breathe because of a virus of criminal injustice.

We're not supposed to be here today, colleagues. The Session was going, according to plan in 2020, we would have departed by now, but we're here because we have to breathe life back into our homes and our communities, and we have to breathe life back into the black and Latino people who are sick and tired of injustice. There are too many names we have lost over the years. Too many times we have been here. But we're here because there's power in the name. David in the Bible, usually when they refer to him, you spoke of David and Goliath and, often, they would speak of how would you

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defeat this giant, this one that is impossible to be taken down. That's what many of us feel often about the criminal injustice system and police brutality. When you think about our police departments, many have their origins of slave patrols. Or you think about the NYPD and its creation in 1845, we understand that we watched a modern day lynching of George Floyd. It was this generation's Emmett Till moment; blatant brutality once again against a black man.

That mindset of supremacy and brutality and militarized police force has occurred over and over again: Eric Garner, Ramarley Graham, Tamir Rice, Trayvon Martin, Kalief Browder, Andrew Kearsse, Anthony Baez, Abner Louima, Amadou Diallo, Breonna Taylor, Ahmaud Arbery and George Floyd. Today we bring justice. Today we say that Black Lives Matter. It's continued in this journey where we understand that policies matter. We decided to pause, but not stop speaking out. We are tired as black people being told to wait. And when I say black, I don't just mean African-American, I mean African-American, African, Latino, Caribbean, all of us of African descent. We couldn't breathe due to coronavirus, and we can't breathe because of police brutality. Your silence has become violence. So breathe, and be the premise that we can still live.

Life has not been easy in these past two weeks. For many of us, it's been a reminder of what we've experienced for years. In the Bronx, we had a march on Grand Concourse, or maybe you saw it in Minneapolis, or LA to London. Maybe it was in Brooklyn where

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you saw cop cars being driven into people and then being told, *You didn't see that*. Last week on Brook Avenue in the Bronx, we literally had a war zone where I watched as people were beaten in the streets in 2020. See, help me to understand how we continue to be a society that spends millions of dollars to lock up people, but we can't find money for summer youth programs. Why did I use my breath earlier this year to vote against the Budget and why is it tied to now? Because I couldn't, with any right mind, say to our community that we've endured brutality over and over again, but, yet, everything is fine right now. But however, in that spirit of David, we use this vote today to take down the Goliath of institutionalized racism, the Goliath of police brutality, the Goliath of a prison industrial complex, the Goliath that went from slavery to Jim Crow to slave patrols to a police force, the Goliath of 50-a. We take back our breath on this day.

Why am I speaking out in this manner? Because it reminds me that as a person of faith that even our Savior was one who experienced criminal injustice. See, you have to realize that the Pontius Pilate listened to the crowd instead of doing the right thing. I'm asking you not to listen to the PBA, but listen to the people. Don't stop marching, because your marching has allowed to us to get to this day. Don't stop moving, don't stop prodding, don't stop preparing. You allowed us to get here right now to repeal 50-a. Lives for justice. And I'm not speaking in some theoretical sense. See, Mr. Speaker and colleagues, the simple verse of Psalm 150:6 said it simply, "Let everything that has breath praise the Lord." It's impossible for me to

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phrase if I can't breathe. It's impossible for the instruments to have that ability of harmony without breath. It's impossible for the strings and the cymbals to do what they can without breath within them. And when you put your knee on our neck or you stop and you have an illegal chokehold, all you're doing is denying us what's happening. There's a pandemic of poverty, a pandemic of privilege, a pandemic of hope, disparity, a pandemic of economic injustice that came before this moment of repealing 50-a. Coronavirus tried to take us out, but we get to be here right now to say we breathe justice once again.

I'm not here just speaking as if this is new to me. I've endured police brutality twice in my life. In 1999, I was told that they heard that I was yelling at a cop, despite the car being 400 feet away going in the opposite direction. In 2016, while as an elected official trying to deescalate a situation, I was tossed against the gate and they only let go of me because they recognized me; however, my name and my title should not lead to a level of justice that someone else cannot get. Now, this is just a spiritual defibrillator to give us breath once again. Raise the Age, breathe life. Discovery, breathe life. Speedy trial, breathe life. Bail reform, breathe life. Ending racial profiling, breathe life. Providing medical assistance, breathing life. But repealing 50-a, we breathe life and justice.

Think about this: Too often we're hearing about just the hashtag of #BlackLivesMatter, but we're not asking ourselves, why do we say it? Because over and over again, you look at my blackness as if something's wrong with me. Over and over again, you make it

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seem like I'm a criminal, I'm a thug, like I'm not smart enough, that I don't deserve to live. And what we do today is bring justice. Justice means you should build schools and not jails. Justice means you've got to stop brutalizing our black and Latino men and women. Justice means that I am tired of crying. I'm tired of us dying. I don't need any more hearings. I don't need task force or commissions. Racism is clear. It is obvious, it is palpable, it is real. I'm tired of my mother being afraid about me walking outside, and all the other black mothers that are wondering right now how exactly will we survive. Before you do these things, stop talking to me about the other side. I'm not here for an All Lives Matter conversation. I'm here because you keep going after black people. You literally lynched us on a screen and then you're surprised about why we're upset.

So don't stop now. Don't stop now. George Floyd, Eric Garner, Breonna Taylor, Sandra Bland, Andrew Kearsse, Kalief Browder, on and on and on and on, say their names for justice. I don't need you to shield your badge number if you are believing you're doing the right thing. Yes, there are officers who are doing the right thing, I acknowledge that; however, if I would have done exactly the same thing, I'd be in jail right now. And all we're saying is we want to live. I am tired of having this pain. It's that understanding that we follow in the tradition of our Native American brothers and sisters who had their opportunities taken from them. It's the understanding that too often within public housing you tell us to socially distance, but you also can't breathe there, as well. We just want to live. We

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just want to breathe.

So, maybe this might be my last time standing before you, but as someone who has almost died twice in my life, when I was born with a heart murmur and they didn't know if I would make it, or when I fell asleep at a wheel in 2001. The only reason I'm still here is because God watched over me. What is the purpose of us being elected officials, in particular, elected officials in 2020, if we will be silent as people are being lynched in front of our eyes. Our ancestors can smile down on today, because we finally did something that had been waiting for too long. Not only will I vote yes and vote with pride, I vote yes because "Let everything that has breath praise the Lord." Thank you.

ACTING SPEAKER AUBRY: Thank you.

Mr. Colton.

MR. COLTON: (Unintelligible) an emotion-filled debate. But it has been a debate where people have listened to each other, and I think that's something that's very important. This legislation, I do not see as being anti-police or pro-police. I think what we must judge every piece of legislation by is whether or not it promotes transparency, which is very important in healing the distrust and the mistrust that has existed for decades and centuries. Whether or not it is specific in terms of a fair specification of the characteristics of the -- the conduct or the requirements that we are imposing upon people in New York, and whether or not it will permit the fair and effective law enforcement and public safety of all the people of New

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York. When we come to emotional issues, we need to remember that every controversy involves people and families. The family of George Floyd was absolutely devastated by a horrific murder, taking away from them a father, a brother, a son. And that's something that they will remember for, really, the rest of their lives. And so, it is something that is going to generate a lot of emotion and anguish and feeling. And that's only normal. I remember in my district, the -- one of my constituents was the family of Wenjian Liu, who together with Detective Rafael Ramos, was murdered also. And I've seen day after day, year after year, the anguish that continues in the parents of Wenjian Liu, in the wife of Wenjian Liu. They experienced also this terrible devastating loss from a horrific murder. Sitting in a police car, not doing anything to anybody, and being executed because they were police officers. Both of these officers were also people of color. But the key here is the devastating impact it has on their family and on society. And so when we look at legislation like this, we have to be very careful not to talk about the anger of it or concentrate on just negative. We must be positive in what we can do to undo the future course of events like this. Prevent events like this from happening. And that's the criteria I use in deciding on my vote on each piece of legislation. Most of the pieces of legislation in this bill meet that criteria. There are a few that do not, and I will vote no on those. But this particular piece of legislation, I believe, discloses the disciplinary record of police officers. Protects the personal information so that police officers will not be endangered by the information being

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exposed or -- or released. The only concern I do have about this legislation is that it also discloses what may be unfounded allegations that someone could make against a good police officer, and that will be disclosed, I believe, or could be disclosed. It may not be. There may be ways that, you know, this -- this will go through a FOIL procedure and the courts will have interpretations. But it would be a negative thing if a good police officer's character and reputation were unfairly manipulated by simply making unfounded allegations which would then have to be released as part of the disclosure of his record. I would much prefer to see that there be some kind of a due process hearing of allegations before they came out. But I believe that because of the history of what has gone on, because of the circumstances, because of the distrust that has existed between communities and police, I think that it is the right thing to do. It is the transparent thing to do. And I think it will promote better law enforcement to permit 50-a to be repealed, and that a new procedure be substituted in order to be able to disclose disciplinary proceedings that may be brought against a police officer.

Therefore, I am going to vote in the affirmative on this piece of legislation. But we have to be very careful that it does not become a climate of anti-police behavior where people manipulate the records of police officers by including in them, inserting in them, unfounded allegations. Because if that happens, it will definitely pervert the intentions that we have, and it would certainly present a lot of problems that we would have to come back and adjust to make sure

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that it does not interfere with effective law enforcement and attracting good police officers to be part of our police force. I very strongly support the police. I believe most police officers are good police officers. But I must condemn - as universally people have done - bad police officers. Police officers who -- who did the thing that was done to George Floyd. That police officer and the one standing around that police officer clearly were wrong, and that's one of the reasons why we were able to get as far as we have in this particular package of bills. Because universally, people of all races, of all genders, of all ethnicities recognize that what that police officer did was wrong and we must do something to make sure that does not continue to happen in the future. So this package and this bill, I believe, complies with the criteria that I have to make sure that it is transparent, that it is clear and specific in terms of what it requires, and that it will promote the effective law enforcement and public safety that is so crucial if our society is to get back on track and to be the kind of America that the promise of America has that we really haven't achieved yet in -- in its full meaning. But we have to keep moving towards it. And so I am not pessimistic. I am optimistic. And I believe that we can and will do better, and I believe that as long as we stay together and not become simply anti-police or anti-anyone, because hate is the enemy of all good. Hatred and bias are the enemies. When it is directed against any one group or any one person, it is directed against all of us and it promotes basically bad things, not good things. So hopefully this will be a step in the right direction, and hopefully that as a result

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of this, we will have a better relationship between the police and the community, a better relationship between all of us, and that together we will work to make this a much better and stronger and more transparent State.

Thank you, Mr. Speaker.

ACTING SPEAKER MCDONALD: Mr. Garbarino.

MR. GARBARINO: Thank you, Mr. Speaker. Will the sponsor yield for a couple of questions?

ACTING SPEAKER MCDONALD: Will the sponsor yield?

MR. O'DONNELL: With pleasure.

ACTING SPEAKER MCDONALD: The sponsor yields.

MR. GARBARINO: Thank you. Thanks, Danny. I have a couple of questions, and maybe I missed it during this long debate. You might've already answered some of them. So, if I -- if I did, I'm sorry. But can you please go over why - I don't know if you did address it - why unsubstantiated or unfounded complaints are being a part of this legislation, they're being released under this?

MR. O'DONNELL: Well, there's a variety of explanations. One, is the history of 50-a, which is if you define something in a -- in a way that allows the court to interpret what that means, you're opening the door to allowing the interpretation to be ever expanded. B, because I didn't want to take it upon us to tell local police departments what process or procedures they should use to

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substantiate or not. I think that would be a very difficult thing to do correctly. And lastly, because I believe that if an -- an investigation turned out to determine that an allegation is untrue, when that is turned over the report will say this has turned out to be untrue. And so because of all those reasons, I chose not to try to do that in this legislation.

MR. GARBARINO: Well, I mean there's -- there's a difference between -- according to the police I spoke to there's a difference between untrue or -- and unsubstantiated. Specifically, one of the officers told me that if something is found to be -- if there's a complaint and -- and their investigation determines it to be true, okay, then it's substantiated. If there's a complaint but then there's -- after further investigation either the -- the claimant doesn't want to -- doesn't want to pursue it or there's no -- there's no further proof that it happened but there's -- there's not enough to say it didn't happen, it's unsubstantiated or unfound -- it's unsubstantiated. And then if it's proven, then it goes in the file as an -- an exoneration. So there's three different things that are kept in the -- in the file, at least that my police officers do. So my question is, with the way this is currently written if something -- say there's a complaint against a police officer that says, you know, *He was -- he pushed me into the -- the squad car too -- squad car too hard, I hit my head.*

MR. O'DONNELL: Okay.

MR. GARBARINO: But then it doesn't go any further than that. That's still an unsubstantiated complaint that would

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be released under this -- under this legislation.

MR. O'DONNELL: Well, it could be. The two things I would say to you is I hear where you're coming from, but if there were ten of them in the same month against the same officer, their inability to substantiate may not be a reflection of whether or not they occurred. And I earlier mentioned to someone that in all complaints that the CCRB has investigated concerning racial profiling, zero percent have been substantiated. So I'm not entirely clear what their processes or procedures are, but it defies logic that no complaints about racial profiling in the City of New York actually happened.

MR. GARBARINO: Okay. But I -- I -- I spoke to some of the City police officers, but I'm -- I'm speaking -- specifically I got most of my information from some of the officers out in Suffolk County, and they -- no, they don't have the -- the Civilian Review Board -- Complaint Review Board. They -- they have -- they do it internally through Internal Affairs. So, but the question is you now have these complaints, Internal Affairs has reviewed it. It might not be ten in -- ten in a month. It might -- what if it's two over ten years or ten over 20 years? It's -- you know, why release these -- why release these unsubstantiated complaints? You know, I -- I -- I get your point of ten in a -- ten in a week or ten in a month. I -- I get, you know, that hypothetical, but there's -- there's the others on the other end. Two in 20 years.

MR. O'DONNELL: Mm-hmm.

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MR. GARBARINO: Why release the ones that can't be substantiated?

MR. O'DONNELL: In my experience, albeit somewhat limited, with FOIL requests, FOIL requests are regularly denied and then they are appealed and then they don't turn anything over. There's nothing in this legislation that's going to fundamentally change that FOIL process. And so if, in fact, a police department determined or chose not to turn it over, the remedy is with the court to find whether or not that was an appropriate thing for them to do. Again, if you're saying unsubstantiated, we would have to write a definition of substantiated, which I think would be very difficult to do and very unhappy for any department who was required to follow it.

MR. GARBARINO: So, my -- so the follow-up question to that is -- so now if -- can the police station now -- or the -- the police have declined the FOIL request saying it's this is an un -- we think this was unsubstantiated so then you have to now then go to -- you appeal that decision. If they deny it again it goes to court. Can the judge then say, you know, *We don't want to release this*. Do we give -- do we give the judge the power, under this legislation, to not release unsubstantiated complaints or is it all or nothing?

MR. O'DONNELL: Our legislation -- my legislation does not change the power dynamic in that sense. And so, yes, a judge can make a determination that it was inappropriate to turn over that information.

MR. GARBARINO: Okay. Could you see a -- a

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problem here, and I -- I -- I know defense attorneys. I'm an attorney, you're an attorney and I imagine you know some, too. I know defense attorneys that have told their clients that once they're arrested, the first thing to do is make a complaint against the police officer. Say something -- you know, just get something in the file. Is that a concern now that all these false complaints that as a -- as a mechanism for an attorney -- the client doesn't know, he might just -- most people are going to do whatever -- I wish most people would do what I tell my clients. But most people are going to do what their -- their clients say. So in other words, they just make a complaint against the -- the police officer. Do you think there'll be a growth in this -- in those --

MR. O'DONNELL: I -- I wouldn't dream of disparaging you or your colleagues. I was a full-time public defender in Brooklyn from 1987 to 1995. At no time did I ever, in representing some very serious criminals, recommended any of my clients follow that process. I never did that. Now, did some of them possibly do it on their own? I can't comment because I don't know. But no, I never attempted to create dirt on an arresting officer as a mechanism for trial.

MR. GARBARINO: Thank you. Now, we just talked about the FOIL requests. Who can file a FOIL under this? Is it anybody?

MR. O'DONNELL: Well, pretty much anyone. FOIL requests are generally filed by lawyers seeking information, the press seeking information. But anyone has the power to file one, yes.

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MR. GARBARINO: So somebody can go and just FOIL every -- every police officer's personnel file in a certain precinct if they want to?

MR. O'DONNELL: Well, I suppose they could. Anybody who has any experience in that realm would tell someone not to do it unless they want to wait for 17 years to get all the information. So they've changed. They need to be as narrow as possible if you want to get them answered at all, or answered in a timely fashion.

MR. GARBARINO: So -- and I'm -- and I'm specific -- specifically talking about -- you know, I think 20 years ago there was a case, Court of Appeals case, The Daily Gazette v. Schenectady County.

MR. O'DONNELL: It was mentioned earlier, yes.

MR. GARBARINO: It was?

MR. O'DONNELL: Yes.

MR. GARBARINO: Okay. Now, that case, it was -- so that case said -- the Court of Appeals specifically said the newspaper couldn't have access to this information because of 50-a. Now we're getting rid of 50-a. The newspaper could now get access, they could FOIL that information. That would be allowed under this law, right?

MR. O'DONNELL: They would be allowed to ask for it, and subject to the provisions we're passing today, they maybe will get them or won't get them based on what the limitations are

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we're putting in them.

MR. GARBARINO: Okay.

MR. O'DONNELL: I don't recall the specific information they sought in that piece of litigation.

MR. GARBARINO: It was personnel files because -- it was a group of police officers that were out on a bachelor party and they got into an altercation with another group of people --

MR. O'DONNELL: Correct, which --

MR. GARBARINO: -- and they were looking for personnel files.

MR. O'DONNELL: -- makes you -- makes you wonder why the non-work-related misbehavior of public employees was not something that would be turned over. But yes, 50-a, that's what they hung their hat on, and it would -- this would allow them subject to the limitations we're passing today.

MR. GARBARINO: Another item that I -- a local police officer brought up with me was in the past they've had -- they've had false accusations filed against them. You know, they've -- they've actually questioned attorneys, *Can we sue? Can we sue this person for making this false accusation against me?* They were advised in the past, *No, you can't because there's no public harm to you. You know, there's -- it's -- it's in your file, yes. But there's -- there's no public harm. You're not -- you're not being harmed in any way publicly. It's -- you're not being disparaged publicly.* Now that these false -- potential false complaints are being released under this

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or that can be released under this, would this now open up the ability for law officers, police officers to -- to sue these people who make these false complaints?

MR. O'DONNELL: I don't care for the use of "open up" in your question, but I know of no legal basis why somebody who was harmed by that would not be able to seek legal redress.

MR. GARBARINO: Okay. Thank you. And -- and the last question I have is really, what's -- what is the remedy you're searching for here? To -- to release these files, what -- what is the -- not the purpose, but with this information being released, what's -- what's the remedy? What are you -- what are you -- what are you looking for?

MR. O'DONNELL: I'm trying to bring the State of New York to be relatively consistent with the rest of the country and not be an outlier by the way we -- with which we prohibit information about a concern group of public employees being available to the press, to the lawyers and to the media. And if, in fact -- you know, other people earlier today have questioned about use at trial. As if in a criminal defense case - which is all I really know - if you attempted to use that information that was unsubstantiated or untrue or whatever in -- in a trial, you'd be shut down by the judges I appeared in front of in Brooklyn, no less, quicker than you can possibly imagine. So you both need a good faith basis and you need something else to -- to be able to use that information. Obviously, that would vary on a case-by-case basis in the sense that if a defendant is accused of

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assaulting a police officer and in that assault he gets beaten up and then there are ten previous cases where this officer assaulted other arrestees, that would clearly be relevant to the question at hand in front of a criminal jury. It would also be relevant in a civil action against the police department. And so the idea you could just bring it up willy-nilly and not connect it to the facts is not the way things worked when I was there.

MR. GARBARINO: But my -- my question is though now I can go to a precinct now and FOIL somebody's police -- police record whether or not there was -- there was an assault, whether or not there's an underlying action, so --

MR. O'DONNELL: And I'm fairly certain you don't work -- walk into a precinct and file a complaint. I think you file a complaint --

MR. GARBARINO: Well, I --

MR. O'DONNELL: -- through a Department, and the department has a FOIL officer and the FOIL officer will then deal with the FOIL complaints as they come in.

MR. GARBARINO: But what -- what I'm saying is I get -- I -- I want this -- I want this information on this specific officer. I have -- there's -- there's no -- he didn't do anything to me, I just want to know what he's got in his file. I find out that over 20 years he's got ten complaints. What -- what's the purpose of me having that information? What is -- what is --

MR. O'DONNELL: What you're getting to the heart

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of is when something is so tangential and to other things -- and does FOIL permit that. We don't change the fundamental rules of FOIL. We just provide protections for these officers in terms of their medical history, whether or not they got drug treatment, whether or not their Social Security number -- all those things we provide an additional layer of protection. FOIL does have other protections. I am not familiar with all of them.

MR. GARBARINO: 50-a set up protections and -- which is -- which has been said in The Daily Gazette v. Schenectady. You know, people were not entitled unless they were specifically allowed in the bill. We're now getting rid of 50-a, which gets rid of those protections. FOIL does not have -- you know, I can go to the -- I can go to a town and FOIL anybody's building record and they'll give it to me. There's no -- this is now -- I believe based on the rules of FOIL, anybody can go now and FOIL a -- a record because it falls under FOIL. It doesn't have that 50-a protection. You can -- you can FOIL that personnel record and there doesn't have to be any connection. It's -- it's allowed under FOIL.

MR. O'DONNELL: Yeah, but that is currently the law for every other employee. We're not creating a specific negative thing for police officers. If you chose to, you could FOIL a State agency and ask them for certain kinds of information and they were going to give it to you.

ACTING SPEAKER MCDONALD: Mr. Garbarino, your time has expired. Thank you.

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Ms. Walker.

MS. WALKER: Thank you, Mr. Speaker. Will the sponsor rise for --

MR. O'DONNELL: Ms. Walker, with pleasure.

MS. WALKER: Thank you. So the concept of 50-a has existed on the books in the State of New York for a number of years. Can you -- I'm sure you know this because I believe I heard you mention it earlier. Can you let us know when this 50-a was added to our New York State laws?

MR. O'DONNELL: In 1976, Ms. Walker.

MS. WALKER: In 1976. And during this time, are you aware of any occurrences where information regarding past disciplinary occurrences were reported by a FOIL request or otherwise to the public?

MR. O'DONNELL: You mean were they released to the public?

MS. WALKER: Were they released?

MR. O'DONNELL: No, I'm not.

MS. WALKER: Thank you. Thank you, Mr. O'Donnell.

On the bill, Mr. Speaker.

ACTING SPEAKER MCDONALD: On the bill.

MS. WALKER: According to some of the records that I've been able to locate, 50-a initially got on the books, as Mr. O'Donnell pointed out, in the year 1976. However, over the course of

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many years, when the documents were required or requested to be released, the NYPD in particular released such documentation. It wasn't until the year 2016 under Commissioner Bratton where when a FOIL request for the records of Pantaleo with respect to the Eric Garner case were requested that all of a sudden now the NYPD determined, *Hold on, 50-a is in place. We are not allowed to release these records.* In fact, the New York Civil Liberties Union took that decision to court. And notwithstanding decades of information being released with respect to the disciplinary records of police officers, the courts decided that they were going to legislate from the bench and determine that not only were these particular personnel records forbidden to be released, but also laid out a number of other records that should be released, including body camera footage. In June of 2018, Police Commissioner James O'Neill appointed an independent panel to conduct a review of the internal disciplinary system of the NYPD, and there were a number of findings in this report. One of such findings states that, *The current law keeps the public in the dark about police discipline, it breeds mistrust and it reduces accountability. Public confidence is vital to the Department's mission and should -- and -- and a shrouded disciplinary process undermines that confidence. In addition to that, it also teaches that there are a number of circumstances, according to the patrol guide, where other police officers not may, but must, must, in many instances require -- it requires members of the service to report certain types of misconduct including corruption, unnecessary use of force, abuse of authority,*

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misuse of a firearm, false statements, and failure to properly perform patrol or other assignments. Failure to report such offenses is itself a disciplinary violation. And so I say today that we are talking also about the fact that we need to release the records of police officers who we consider to be bad apples. But this also allows for an opportunity for those individuals who allow these bad apples to -- to hide behind a color of blue silence to be exposed as well. So not only must the reports be allowed to be released of the officer who have engaged in a reign of terror on communities, but if you are the police officer who sits back and allows this to happen, you will be exposed as well. One of the premises that we've seen take place -- of course we know about the travesty of George Floyd and the modern-day lynching that took place in that situation. And before I jump to the point where I wanted to call this a lynching, I took a look at an article that was written in the *Baltimore Sun*. And apparently there was a Maryland Lynching Truth and Reconciliation Committee that established a working definition for what constitutes a racial terror lynching. And it reads: *The unlawful killing of an African-American by white mob violence, often with the apparent complicity of state and local officials, intended to incite racial terror and subservience to white supremacy.* It went on to say that, *The flagrant disregard for black lives is a tragic but undeniable symptom of the pervasive racism that persons -- that poisons our institutions and it weakens our community and demeans civility itself.* So again, we saw the lynching which occurred with George Floyd and the history of lynchings

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throughout our society. One of the things that came out was the fact that the officer who committed this infraction, this injustice, this crime, had a history of personnel and disciplinary encounters. So I submit to you that whenever we get to this point where this type of egregious occurrences occur, that they are not isolated incidences. In fact, there are situations where there were signals that something is about to happen that will shock the conscience of this nation if someone had just known or been able to hear of the fact that this bad apple was allowed to remain on the police force in the face of 17 other infractions.

I just had an experience like that within our community where there was a police officer, Officer D'Andraia, who exhibited a reign of terror locally within our communities. And we kept saying to a number of folk like, *You can file a complaint through CCRB. You don't have to get this complaint through other officers. You can file this complaint in many different situations.* And we kept saying this guy has been punching, beating, shoving regular every day people in our communities for far too long. We even took these complaints up the ladder to the Police Commissioner, to the Mayor. And they were ignored. It was not until this particular police officer shoved violently a young protestor to the ground, causing her to have seizures and a concussion that, *Eureka, he's a bad apple and he should be brought through a disciplinary process.* In fact, in addition to him being brought through that process, today he had to turn himself in to the New York -- to the Brooklyn District Attorney's

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Office and is or will be arrested for a crime. When he pushed this young lady it was for no lawful law enforcement objective. It was purely him acting out on his biases. Biases, you say? Well, what makes you think that he had biases? Well, we did some Google searching since we couldn't get any personnel records. What did we find? That in Suffolk County this very same police officer was pulled over in a traffic stop. And during this traffic stop, in the Judge's decision we learned that he had the emblem of the Confederate flag on the back of his pickup truck. Huh. You think that this individual with this Confederate flag and the dirty and nasty -- nasty history that it brings to most African-Americans would be allowed to be in a community that is predominantly African-American to exhibit through his actions the very type of racist ideologies through force that we've seen historically in our nation.

So today, if we had had the opportunity to have this information, we could have stopped him in his tracks before he ultimately wound up causing someone's seizure on the ground. But thankfully what we knew was exposed for the entire world to see, and now he's being made an example of to say that any time that you try to utilize this type of brute force in our communities, you will be held accountable for it, and now you will be exposed to it.

One of the other things that we also learned was that the Bronx District Attorney, Darcel Clark, as well as the Brooklyn District Attorney, Eric Gonzalez, just recently last year received a FOIL request in order to release the names of police officers who had

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credibility issues with respect to their prosecutorial offices. Those names were released. And so I want to honor them for having the foresight and the courage to stand up in the face of adversity and allow for those individuals to be exposed. One of the things that we are having conversations about is the fact that when these names are exposed, it allows for a level of community and police relations to exist. There's also this huge call to defund police departments. That people are taking, you know, taking it away to say that we're saying let's get rid of police departments. No. But in fact, in New York City the MTA Police at one point in time was not under the NYPD, and if they were under a different level of jurisdiction, that perhaps they wouldn't have been covered by the -- by this thing 50-a, where we're seeing that there was another reign of terror that had been exhibited in our train stations where people were being harassed by police officers, where there was an uprising of the community to say that the MTA Police has to stop. In addition to that, New York City School Safety used to be a division that was under the Department of Education but then it became under the NYPD, and we started to see and have conversations about a school-to-prison pipeline where it didn't have to be theo -- theo -- theoretical, but it was happening each and every day in a child's academic experience because now the NYPD was within their schools. So one of the things that perhaps folk are saying is to take those resources and take those particular police jurisdictions and put them back where they belong. Put the MTA Police back to the MTA. Put School Safety back to the Department of Education so that

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our young people are allowed to grow in an environment that does not -- that does not criminalize them. And also to put people who are just going about their everyday businesses within the MTA to be able to go to work in peace.

One of the things that we've also noticed was that just recently, within the years 2018, there were -- 2017, there were 817 cases of investigations for profiling filed against police officers throughout the NYPD, 378 in the year 2018. And so we know that these occurrences are still taking place. We recognize that they are still racially-motivated, and we appreciate that at this point in time with the passage of 50-a that now these individuals will be brought to justice and exposed.

I will be voting in the affirmative and I encourage my colleagues to do the same.

ACTING SPEAKER AUBRY: Mr. Sayegh.

MR. SAYEGH: Thank you very much, Mr. Speaker. And I'd like to thank the sponsor and the Speaker for initiating not only this bill, but a whole battery of bills and legislation that really truly addresses what I've always fought for, and that is equity. Equity in education. Equity in worker's rights, immigrants rights, women's rights. And this is an issue and a concern that has really caused tremendous harm and injustice to many of us. And even though we look at the Minneapolis incident, that is only one of a long pattern of instances and circumstances that really caused our nation, our entire communities across from coast to coast and even on the global level,

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this heightened concern for addressing inequity. And -- and although many may -- may be concerned about the level of protests, I'm an advocate of speaking out. I'm an advocate of protests. If you have an issue, a concern, address it. We teach our kids even at the very elementary levels of education that in order to promote change, you really need to speak up and you need to address what the issues and concerns are of the day. And today I've listened and all of us have heard this passionate debate on 50-a, and I believe very strongly that the debate is necessary. That change is necessary. Today I would be voting in favor of change, although I may have some reservations as far as unsubstantiated evidence and information. I really believe that as time goes on, any time you promote change it's -- it may be difficult, but change is a vehicle that allows us to move forward, allows us to modify, if necessary. This Body of Legislature has taken on some very important issues the last couple of years, at least during my tenure on the Assembly. We've taken on many issues. And recently, criminal justice reform. We took on bail reform. And we recognized when we made major changes to bail reform, we reached out to law enforcement. We reached out to individuals and specialists that get involved with bail reform, and we made modifications. You know, and this is the way change takes place.

So as I look at 50-a, I recognize the need for transparency and I recognize the injustice that has been caused to many families and individuals over the years. But I also recognize that it's not fair and it's not proper to pin any injustice on a whole

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profession. And I, myself, have dealt for many years with law enforcement officials, especially in the City of Yonkers in Westchester County, and I can attest to the tremendous efforts that law enforcement individuals have taken to improve community relations. To work with children in school. To really volunteer, especially during the last pandemic with distributing food to food pantries and really try to do what is required of a police officer. Not just safety and security, but to really be involved with the community at-large. As an educator for many years, I've witnessed law enforcement officials come into our buildings and improve relationships with students and law enforcement officials. I've witnessed this last two years, especially in the City of Yonkers, when our football program was having a serious problem, first responders, police officers and fire department representatives took on a role to be mentors and helped tremendously with financing sports and developed two major teams. One was the Yonkers Force, and one was Yonkers Pride. And it tremendously improved the football program, the sports program. And the reason I say that is because, you know, I look at other professions; education, for example, that I've been involved for nearly 40 years. I had the support of labor and rank-and-file teachers when we worked to take out ineffective teachers that did not address the needs of our children. I am aware, as an attorney, when we deal with healthcare and medical malpractice how doctors joined in and healthcare professionals in making sure that healthcare professionals that committed medical malpractice were taken and held accountable

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for their actions. And in law enforcement, I understand throughout the debate we speak about some bad apples, but we tend to show, in my opinion, more emotion against the profession, which is, in my opinion, wrong. And I feel that our work with law enforcement is necessary. Our collaboration, our cooperation is necessary. To hear many of us speak about defunding and unfunding law enforcement really is ridiculous. You know, I look at law enforcement in America and I, being a student of international affairs for many years, recognize law enforcement in other parts of the country where you can't protest and you can't take to the streets and you can't criticize governments. And punishment is much more severe than what we've seen. Now having said that, does that justify any injustice or any -- any extensive use of force? No. And this is why our effort should be geared on working with law enforcement officials to make sure that hiring practices are such that whoever we hire in law enforcement should be reflective of the communities they serve, which means let's hire more police officers and first responders that are of minority groups and ethnic groups. Because this is not a black-and-white issue. This is the disenfranchised. This is communities of color. This is ethnic communities, immigrant communities that are feeling the same harm and the same burdens. I've reached out to law enforcement officials, and they've been more than willing to accept a responsibility to put more effort into making sure that the police academies and the training that takes place for law enforcement officials includes a greater amount of time and hours in the areas of multiculturalism,

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diversity, sensitivity training, policing skills and strategy. And I say policing -- I've witnessed and was involved in a protest in Yonkers that included over 1,000 individuals. And because of policing strategies - in my opinion, effective policing strategies - there was not one arrest made that entire day. And that's a tribute to the skills that officers are trained to do and had.

So when I support a bill like 50-a, I do so because we all recognize the need for important change. And we understand that this is a system that needs to be modified, needs to be corrected, and we need to handle it in a way where we do it through collaboration. We don't do it through making sure at the end of the day there's winners and losers and pointing fingers. We need to recognize our nation needs a strong law enforcement body to continue, but to talk about unfunding is ridiculous. I look at other foreign countries, and when I hear last week a Russian foreign minister criticized the way we in America deal with protestors, it's really not only unsensible, but it's really derogatory. It's derogatory to our Democracy, to our principles. Do we have wrongdoings? We sure do. In every field. Do we need to address them? We sure do. Do we do it by finger-pointing and putting down each other and fighting each other? That's not the way to do it. You know, I've always believed in -- in mediation. I believe in conflict resolution and arbitration. And we're no different. We're debating important issues. Our goal at this point is to pass 50-a to move on, to bring in law enforcement, first responders, and to work out a process that puts those that violate their pledge of duty, you

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know, and hold -- hold them accountable. And many of us forget, three weeks ago, four weeks ago, I remember most of us were going and celebrating healthcare workers, going around blowing our horns at hospitals, and then we went on an entire program of celebrating our heroes; enforcement officers, police officers, first responders, EMS, fire department officials. And we forget too quick who was once a month ago our heroes, we can't look at them as our enemies and nemeses.

So I preach and I recommend that not only do we pass 50-a, but we continue to look at methods and processes to get rid of systemized, derogatory and degrading policies and procedures that have impacted each and every one of us, especially in urban America. As an Arab-American, I witnessed firsthand, especially after 9/11, you know, the amount of tremendous negative impact that I faced and many in my community have faced because of the negative media and stereotyping. And this goes on, of course, in communities of color and immigrant communities. So, yes, we need to address our concerns. We need to put forth methodologies. We need to make sure that we do it with collaboration, and in this case with law enforcement officials, with first responders, to treat them with respect. To bring them on board to recognize that change is necessary, and we cannot have murders and tragedies like each and every one of us have witnessed in America, to continue to see this and witness it.

So thank you, Mr. Speaker, and I would be voting in the affirmative.

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ACTING SPEAKER AUBRY: Mr. Lavine.

MR. LAVINE: Thank you, Mr. Speaker. These are days filled with tragedy, grief and despair. We must do our best to change that. We have had bad days like this before. I have been thinking of April the 4th, 1968, when New York's Senator, Federal Senator, Robert F. Kennedy - whose hometown was my hometown of Glen Cove - was speaking to a group of black Americans in Indianapolis when he first learned that Dr. King had been murdered. His heartfelt words resonate as much today as they did with Americans, myself included, on that day of seeming hopelessness. *My favorite poet, Kennedy said, was Aeschylus, who long ago wrote, In our sleep pain which cannot forget falls drop by drop upon the heart until, in our own despair, against our will, comes wisdom through the awful grace of God.* But wisdom that has come from our grief is the same today as when RFK said it. And these are his words: *What we need in the United States is not division. What we need in the United States is not hatred. What we need in the United States is not violence or lawlessness, but love and wisdom and compassion toward one another, and a feeling of justice towards those who still suffer within our country, whether they be white or they be black.* There's another piece of wisdom for us here. We must all stand together for a more perfect union. Our battle - and this has been expressed by colleagues on both sides of the aisle - our battle is for justice, and each and every one of us - black, white, brown, Christian, Jew, Muslim, Sheikh, Atheist, and those of us who are in law enforcement and those of us

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who are not in law enforcement - must all be in this together. The great disparities in justice that confront our nation today will not be remedied by any of the bills that address law enforcement that we will pass here in these days. I, for one, fear that we deceive ourselves believing otherwise. The police cannot be the scapegoats for the injustices of our society. Our battle must be for justice, for housing, for healthcare, for education. Our battle is also to make sure that each of us become anti-racists. These were Bobby Kennedy's words on April the 4th, 1968, and sadly, we would lose him only two months later. In his words, *Let us dedicate ourselves to what Aeschylus wrote so long ago, to tame the savageness of man and make gentle the life of this world. Let us dedicate ourselves, he went on, to that and say a prayer for our country and for our people.* Yes, today, let us say a prayer for our country and for our people.

I will vote in the affirmative, and I want to thank Assemblymember O'Donnell and Speaker Heastie. Finally, let's remember Bobby Kennedy and let's tell it like it is. *Let us stand together. If we don't, our nation will fall apart.* Thank you.

ACTING SPEAKER AUBRY: Thank you.

Ms. Joyner.

MS. JOYNER: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill.

MS. JOYNER: I would like to commend the leaders of both Houses and the Caucus for advancing these pieces of

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legislation. In the words of Sam Cooke, it's been a long, long time coming. But change is going to come. The world can't wait for perfect. But do we look at the end of the Jim Crowe laws and the Civil Rights Movement as a failure because it didn't end racism? No. Today we are seeing transparency matters. Accountability matters. Participation matters. And many of these bills have lingered around for years, but the political will -- the will of the Majority said no longer will we wait. So I encourage everyone, keep the same energy on this issue and all of the issues that will continue to uplift our communities. Martin Luther King said, *Darkness cannot drive out darkness. Only light can do that. Hate cannot drive out hate. Only love can do that.* So we are not eliminating racism today, but we are saying to our communities, *Your voice matters.*

So I'm looking forward to voting in the affirmative for this piece of legislation and those that will follow. Thank you.

ACTING SPEAKER AUBRY: Thank you.

Ms. Bichotte.

MS. BICHOTTE: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. O'Donnell, you've been asked to yield.

MR. O'DONNELL: With pleasure.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields.

MS. BICHOTTE: Thank you. Mr. O'Donnell, it says

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that -- in this bill on Section 2, line 9, the definition of technical infraction means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, firefighter or fire -- or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that do not involve interactions with members of the public, are not of public concern, and are not otherwise connected to such person's investigative, enforcement, training, supervision or reporting responsibilities. So as we're talking about redacting records pertaining to technical infractions, does that include internal administrative procedure (unintelligible) supervisions, like a supervisor giving the subordinate orders and how to perform their duties? And -- and -- and -- and let me just expand a little bit just so you know where I'm coming from. In New York City there were 12 black and brown police officers who sued NYPD for fighting against an illegal quota system which was literally racially targeting specifically minority communities. These are things that obviously were found unconstitutional by the court. This was ordered internally. This was an order by supervisors which are internal practices not dealing with the public, right, but eventually have an impact interacting with the public. So again, my question is in that sense, does this include these type of management and supervision, and would they -- and would they be considered unsubstantiated if there will be someone to evaluate the situation?

MR. O'DONNELL: So, Ms. Bichotte, that was a very

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long question. I want to make sure I understand it correctly.

Obviously, if what you're saying is somebody internally ordered a police officer to do or not do something that ended up with those officers interacting with the public, then it would not be viewed as a minor violation. Because of paragraph -- excuse me, not paragraph -- because of line -- line a. So a technical infraction cannot be an interaction that ends up involving with interaction with members of the public. So if someone ordered officers to or to not do something that ended up with interactions with the public, they would not be considered technical.

MS. BICHOTTE: Good to know that. Next question is, you had mentioned about racial profiling complaints and they were found un -- unsubstantiated. Is that true?

MR. O'DONNELL: I'm sorry, you're going to have to repeat that. I what?

MS. BICHOTTE: Racial profiling complaints. You mentioned that they were found unsubstantiated. Is that true?

MR. O'DONNELL: I have been told as a factoid that the CCRB has found zero percent of their complaints about racial profiling to be substantiated, which suggests to me that their processes for substantiation are both flawed and inaccurate.

MS. BICHOTTE: Okay. You had answered my next question. So, why do you believe that it was flawed and inaccurate? Why? Why do you think?

MR. O'DONNELL: Because I don't believe there's

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any way for -- for thousands of complaints to result in zero percent substantiation. Some day, some time, must have been. So if you can't -- if you never find any case that's substantiated, you're either looking the wrong way, asking the wrong questions or applying the wrong standard.

MS. BICHOTTE: Okay. So, Mr. O'Donnell, you know that this House had recently passed a racial profiling bill, correct?

MR. O'DONNELL: That's correct. And I was very proud before you arrived to be a cosponsor with my dear friend Mr. Wright who used to carry that bill, and I would help him debate that bill here on the floor.

MS. BICHOTTE: Thank you. And thank you for being a cosponsor. And in that bill, the basis of the bill, obviously, was -- is to collect data on every stop, question and frisk. Now, just so you know, Mr. O'Donnell, this bill was only passed here in the House, okay? The -- the bill -- the companion bill was not passed in the Senate. They had a different version that didn't collect data. So my question to collecting data, do you think if in the event that we passed the same bill, the companion bill, 4615-A and S.1137-A, and that it would require for police officers to fill out a form and the Division of Criminal Justice Services collect that data, okay, do you think that would help these complaints that come through to be substantiated? Do you think so?

MR. O'DONNELL: Not only do I think so, I'm fairly

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certain -- and I've been corrected, it's the NYPD that investigates racial profiling, not the CCRB. I got my letters confused, I apologize.

MS. BICHOTTE: Okay. Thank you about that. So the question is, also, so, you know, we were told that, you know, we could not do both bills. You know, it was either 50-a or racial profiling. And I guess there was some confusion. Maybe they thought 50-a would take the place of racial profiling. I don't know. Why -- why do you think so? Why do you think there were police unions who didn't want us to have both the repeal of 50-a and to pass a racial profiling bill with data collection?

MR. O'DONNELL: It seems like you're asking me to explain racism in America, and I'm going to choose not to do that and to defer to someone who probably has more experience about that than I do.

MS. BICHOTTE: I think -- I think one of the things is that every bill that we're passing is not enough on its own, okay? And we're here today, this week, to pass a comprehensive set of bills, and I -- I believe that if we are data collecting from the police officers and we are data collecting and exposing disciplinary actions with 50-a, with the repeal of 50-A, I think it would give more evidence of the reality of what's happening, okay?

MR. O'DONNELL: Absolutely. And that's the way it's done in other states. And it seems to me that repealing 50-a is the first step to get the data necessary that we need to do the other work we need to do.

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MS. BICHOTTE: Good. I just want you to -- I have another question in terms of FOIL.

MR. O'DONNELL: Okay.

MS. BICHOTTE: The Buffalo -- the Buffalo Police Department has been under scrutiny for their culture of misconduct, okay? And I don't know if you know, but the New York Civil Liberties Union had filed a lawsuit against the Buffalo Police Department after they refused to fulfill the FOIL request. And, you know, it was on -- information on policing, stop and frisk, temporary detention, surveillance, technologies, things of that nature. How a stun gun is being used, Taser weapons. What they found is that after a few months, almost a year, the Department only provided one-fourth of the 39 categories of -- of records requested. Under this bill, if NYCLU were to request data, would the -- this bill have any impact on getting that data that they've been fighting for for so many years?

MR. O'DONNELL: This bill will provide a mechanism to prevent entities or the PBA to claim that any of the information in that data is not able to be turned over. Once again, in reference to an earlier question, if you ask for way too much data, you're going to end up waiting a hell of a lot longer to get it. It seems to me that what -- with today's repeal of 50-a, the FOIL process will be further scrutinized to ensure that the data that we are trying to make sure is available to the lawyers, to the public, to the press actually becomes available.

MS. BICHOTTE: Thank you, Mr. O'Donnell. I

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appreciate it.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, ma'am.

MS. BICHOTTE: First, I want to thank my colleague - and I'm going to say his name, Mr. O'Donnell - for -- for being bold. For being bold, for introducing this bill and -- and fighting for this for all the years and -- and being on the front line of police reform. This bill disclosure of law enforcement disciplinary records, it repeals the Section 50-a of the Civil Rights Law which was a law that was put in place since 1976. The bill would repeal that section, but it would still protect personal records of the law enforcement, not putting the officer's safety at risk. And as I mentioned, while I fully support the repeal of the 50-a as a standalone bill, it doesn't go far enough. It's a bold bill, but it -- it needs to go a little bit because of the concerns of the internal practices. Now, I was very happy to hear from Mr. O'Donnell that anything that can lead to the interaction with civilians would not be under the meaning of a technical infraction. Okay? So I'm -- I'm very, very happy to hear that. Now, we all know about the NYPD 12, the 12 black and brown officers who sued NYPD because they were being forced to racially target communities of color, to over-police and to fill a quota. Cops in New York City merits for a very long time was based on how many black and Latino people would be issued a warrant, which led to the disproportionate of black and brown men, in particular, in Rikers and prison for alleged low-level crimes, many of who -- who've been innocent. With police

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policies like Broken Window, which place like Ferguson where -- where like Ferguson adapted, where Michael Brown's death started the whole Black Lives movement. That's been an issue for a very long time. Now let's think about this for a minute. The documentary called *Crime + Punishment* won an Emmy by the way, where (unintelligible) whistleblowers swarm in because they thought that they (unintelligible). And when you hear the recording of these supervisors and their racist comments and their racist orders to racially profile and target minority communities very, very disappointing and very disturbing, which is why I'm happy that, under this bill, they will not be covered under the technical infractions. Okay? And I'm also happy that whistleblowers will be protected, and that they don't have to file a lawsuit to be protected. And these cops, that's what they did. They had to file a lawsuit and they were protected. Furthermore, when we're having all of these complaints from civilians, I'm happy to know that there are different means of determining if they're substantiated. I'm happy to know that unsubstantiated will be also open to the public. I believe we can all agree that we have a problem with the method in which law enforcement is being executed in minority communities. Whether we are all -- whether we all want verbally admitted or not. We must bring an end to the loss of lives. The mental anguish, the physical dysfunction and the broken families. George Floyd's death, through excessive neck compression, did not have to happen. Eric Garner's death, through strangulation, did not have to happen. Aaron Bailey's

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death from bullets from -- following a traffic stop did not have to happen. And it goes on. We need comprehensive police reform to correct the long and deep-rooted bad relationships between minority communities and the police force.

ACTING SPEAKER AUBRY: Ms. Bichotte, your time is up.

Ms. Simon.

MS. SIMON: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, ma'am.

MS. SIMON: I'm old enough to remember the 1970s and the movement for open government. In 1974 New York passed this Freedom of Information Law - or FOIL as we call it - and expanded it in 1977 to, I quote, *achieve the greatest magnitude of openness in government without sacrificing personal and privileged information, and to help instill in the citizens of the State greater trust and confidence in the governmental institutions which are playing an increasingly important role in our daily lives*. But in 1976 we also passed Civil Rights Law 50-a to prevent the so-called harassment by criminal defense attorneys who sought to impeach police officers' testimony with unsubstantiated prior bad acts. And therein lies the issue. 50-a was turned on its head and used to shield officers from accountability for substantiated bad acts, and that is why I've proudly cosponsored this bill since 2016. 50-a was never intended to block disclosure of police misconduct from the public, but that is what has

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happened again and again and again. The public was largely unaware of 50-a until Eric Garner was killed at the hands of an NYPD officer, and we all saw how it both shielded the officer from public accountability and impeded racial justice. The public saw how the Garner family's efforts to obtain Officer Pantaleo's disciplinary records through FOIL were denied, citing 50-a. The public saw that the NYPD seemed to prioritize the protection of police misconduct. The misconduct that we all saw on video over the public and further dividing communities of color from the police who swore an oath to protect and serve them.

Today, I am proud that we will right this terrible wrong and let the sunshine in. For as Justice Brandeis has told us, *Sunlight is the best disinfectant*. I want to thank Speaker Heastie and Majority Leader Peoples-Stokes for their unfailing leadership and commitment to justice. I want to commend the sponsor of this bill for his zealous advocacy for the repeal of 50-a. And I want to thank most especially the families and friends of victims of police misconduct, the advocates and my colleagues of color who have fought so hard to repeal 50-a for so long. I also want to highlight the work of the New York State Open -- Committee on Open Government, who have been bringing to light the issue of surrounding 50-a for many years. And, yes, I even want to thank the more than 6,000 people who e-mailed me and tweeted at me and called my office since the murder of George Floyd, demanding the repeal of 50-a.

This week, I have been voting with my colleagues for

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justice. On this repeal of 50-a, I will again cast my vote for justice and I will vote in the affirmative. Thank you.

ACTING SPEAKER AUBRY: Thank you.

Mr. Lentol.

MR. LENTOL: Thank you very much, Mr. Speaker.

First of all, I want to thank Mr. O'Donnell for, once again, leading us down a path to get some equality in our system. I don't want to be repetitive with what's already been said, but I know in my own heart that the horrific killing of George Floyd is a reminder to me and everyone else that racism and inequality continue to exist in our society. And, once again, it's blown open the doors of frustration that we saw explode into the streets for a number of days now. Protesters have been out there raising their voice for change and reform. And that's why we're here. The people got ahead of us, like they always do. And they've actually moved on, as a matter of fact. They're already past 50-a. But we're working through the emotions that they have worked through themselves and it's important that we acknowledged and heard their pleas for change.

You know, the virtue of good government has always been to promote transparency and accountability, as so many have already said. And that is exactly what we're doing here today by the repeal of 50-a. And that will help restore the public trust in law enforcement, I believe. And we have real momentum now by enacting this. Maybe it doesn't go far enough, as some have suggested, but we can do more. And we have to follow the people,

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like we always do, and see what they say about change, and listen to the people and get it done. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, Mr.

Lentol.

Ms. Davila.

MS. DAVILA: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, Ms.

Davila.

MS. DAVILA: I've been listening to all of my colleagues today, and every and each of one had so many great points. But the bottom line is that this bill, it doesn't go far enough. People want us to pass it, the sponsor of this bill is magnificent; thank you. But I want to say that this is the only thing that we have at the moment. Right now, we have to bring some type of solace and peace into our communities. We need to bring hope. And with that said, that's why we're all here. We're going to pay -- pass legislation that is going to bring hope. Systematic problems are going to be systematic, and we have to continue to chip on that blue wall. We have to continue. It's not perfect, but it's what we have right now.

And I want to also commend the Caucus members for -- for being so present in that, getting all of the bills that were passed, and we have so much more to go. But I'm going to be voting in the affirmative because I want to bring some type of peace to those mothers that have lost their children to -- to all of this violence that is

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completely unnecessary. No one is above the law, only God Himself.

And with that said, I will be voting in the affirmative.

ACTING SPEAKER AUBRY: Thank you.

Ms. Seawright.

MS. SEAWRIGHT: Thank you, Mr. Speaker. Like most New Yorkers and most Americans, I'm deeply distressed by the shocking television images of violence in major cities across the country, including here in New York State. A couple of days ago, I joined the protesters marching up York Avenue in front of our community office here in Yorkville. New York State currently has the most restrictive law in the country regarding transparency. I want to thank the Speaker and commend the bill sponsor, Chairman Danny O'Donnell, for fighting year after year after year to get this legislation passed.

And I have a -- a question for the bill's sponsor.

Given the culture on college campuses, what impact do you think that the repeal of 50-a will have with university police on our campuses around the State?

ACTING SPEAKER AUBRY: That is a question for you, Mr. O'Donnell.

MR. O'DONNELL: Thank you, Ms. Seawright, it's lovely to see you. I believe that they're covered -- they would be covered under the new FOIL statute.

MS. SEAWRIGHT: Okay. Thank you. These are terrible tragedies on a long list --

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MR. O'DONNELL: Yes.

MS. SEAWRIGHT: -- and a long history of the people that have died, and I believe that repealing Section 50-a will go in a long way in ensuring justice is served for the victims of police misconduct in New York. And, again, I thank you, Chairman O'Donnell, for sponsoring this important piece of legislation.

ACTING SPEAKER AUBRY: Thank you.

Mr. Abinanti.

MR. ABINANTI: Thank you, Mr. Speaker. Today we face a dual crisis, a pandemic and an epidemic, a worldwide health crisis and a nationwide moral crisis. The health crisis is the result of a failure of nations to prepare for what we have known for years was coming. The moral crisis is the result of our nation's failure to confront the racial injustice that has plagued our country from its very beginning. Both are devastating our brothers and sisters in our minority communities. At the same time, both are intensely impacting all of our communities. The response to the COVID crisis was to shelter and socially distance. Remarkably, the response to the moral crisis has been to bring people together, to have them unite.

In my district, the 92nd District, there have been eight rallies stating very clearly that Black Lives Matter. Eight rallies in the 92nd Assembly District. Black and white, rich and poor, young and old. And it was heartening to see so many young people out on the street standing and yelling and saying, *It's time for change*. And interestingly, they all targeted 50-a as -- as the symbol of the need to

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change a system that has empowered police misconduct.

So, I'm speaking now on this bill, the repeal of 50-a, but this is an important measure, but it's also a symbol for all of the legislation that we've been working on, some of which we passed yesterday and some of which we're passing today. I have found that I have received more e-mails, somewhere in the neighborhood of 1,500 e-mails calling for the repeal of 50-a. We've received telephone calls, people stop me at the rallies. As I said, 50-a has become the symbol of what needs to be done.

But I support this legislation not only because of my district, but because it's the right thing to do. It provides a shield for information like only two other states have done, way too much of a shield. And I can't figure out the rationale for the shield. All I've heard during the debate was it protects law enforcement officials from possible ridicule. On the other hand, Mr. Speaker, what I see is that it facilitates secrecy, it facilitates bad decisions on personnel matters and it prevents real scrutiny by the public of personnel decisions.

This is not only about New York City. We have communities of all sizes and police departments of all sizes, and those communities have a right to know what their local officials are doing, how they're evaluating their law enforcement. They have a right to look over the shoulders of their local officials and see who they're disciplining, who they're keeping on their police departments, who they're letting walk down the street with a badge and a gun. And when we do away with 50-a, they will be able to continue that scrutiny

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day after day and make sure that their local officials are making the right decisions. And those bad decisions, unfortunately, as we have heard over and over again have had severe impacts. As I've said before, they're devastating our brethren of color.

This disclosure that we're talking about here is only one piece, but it's a very important piece. We're talking here, Mr. Speaker, not just about bad cops. Some cops just don't have the temperament to carry a gun and a badge and go confront a protest, or to stop people on the street and maintain their cool. Some just don't deal with those circumstances the way they should. And so, it's not just about substantiating complaints, it's about a history. And those who are watching carefully will see a pattern emerge, and that's where the local law enforcement officials have to look over the shoulders of their other law enforcement officials and make the right decisions. Those who misuse their power, Mr. Speaker, have not only hurt those upon whom they wreak violence, but have also betrayed those who appointed them, their communities, and they've betrayed their fellow officers. So this package was long-needed. It's unfortunate that we needed a series of tragedies to spur us to action.

In 19 --1963, Martin Luther King spoke of his dream to erase the divisions between black and white people. But in 1968, his vision changed. He saw his dream was not possible unless he confronted two dual threats: White supremacy and economic inequality. One of my colleagues a moment ago referred to a speech by Robert F. Kennedy, also in 1968, and I'd like to refer to that speech

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as well, because Kennedy spoke of social injustice as a kind of violence. He termed it, *A slower, but just as destructive type of violence. The violence of indifference, inaction and slow decay. A slow destruction of a child by hunger. Schools without books and homes without heat.* And just the other day, Barack Obama, President Barack Obama, noted that we have to remember that for millions of Americans, being treated differently on account of race is madly normal, whether dealing with the health care system or the criminal justice system, or just jogging down the street.

And so, we've seen police violence erupt again. We've seen police misuse the power and the weapons that we have given them to protect us. But, Mr. Speaker, police violence is only the latest reminder that the seeds of hate are spreading like weeds, growing in the minds of the weak, the ignorant and the desperate. And they're being fed, they are being fed now by a man in Washington who wreaks political and economic harvest by cultivating division, anger and hate. A man who now controls the most powerful machine in the world, the United States Government. And from the White House, he spews hate and encourage hate -- encourages hatred.

Now, I cannot speak from personal experience about the hurt caused by the twin evils of which Martin Luther King spoke. But I can speak about the America that I want to live in, where I want my kids and my grandchildren to grow up, where hatred is not a dominant emotion and poverty is not a permanent condition passed on from one generation to another. And so, what I have said at the rallies

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that I've gone to is that we have to remember what the Greek philosopher Plato said 2,500 years ago when he said, *The price of apathy towards public affairs is to be ruled by evil men.* And so, we need to encourage all of our citizens not to be satisfied with what we do here in the Legislature, but to educate, to motivate and activate people of goodwill everywhere, and that's the vast majority of our country, but to bring them together to recognize the danger that hate poses to our way of life, and to promote hope, respect and cooperation. As Michelle Obama recently said, *If we want to hope to -- if we want to -- If we ever hope to move past racism, it's up to all of us, black, white, everyone, to look, to do some self-examination and listen to those whose lives are different from our own.*

So, Mr. Speaker, we've got to go out and make sure everyone understands that we stand together for American values, social and economic fairness for all, and we need all of our governments at all levels to send the message that acts of hatred, whether committed by police officers or whoever, are unacceptable. And this package, I believe, will motivate and facilitate governments all across New York State to move forward, to examine what it is they're doing, what their police officers and other officials are doing, and to do the right thing. We cannot say that All Lives Matter if we don't say that Black Lives Matter.

So, Mr. Speaker, I think we can move forward. I think this Legislature is leading the way, but we can only move forward if we move forward together. Together, we have hope.

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Together, we will not fail. I want to end by commending the sponsor and the -- the Leaders of the Legislature for putting these bills before us and for pushing for passage. I think we're going the right way. We're not going to solve all of the problems, but we're taking some big steps and we're sending a message that hate, whether it's by someone with a badge and a gun, or someone else on the street who decides to shoot up a church or go into a synagogue is not acceptable, and it's particularly not acceptable when the person is acting on behalf of the community with a badge and a gun.

Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Ms. Niou.

MS. NIOU: Thank you, Mr. Speaker. I was wondering if our amazing sponsor of the bill would be willing to answer a couple of questions for me.

MR. O'DONNELL: Of course, yes.

ACTING SPEAKER AUBRY: Mr. O'Donnell yields, Ms. Niou.

MS. NIOU: Mr. O'Donnell, thank you so much for taking the time. I know you must be very tired standing there today. I just wanted to say, again, thank you, but I wanted to ask a couple of questions that some folks may have already asked and, also, I know that you have been answering, but I just wanted to clarify. And the other speaker before me had just spoken about this, but how many other states have this special protection for their officers and their law

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enforcement?

MR. O'DONNELL: There are currently only three: The State of New York, the State of Delaware and the State of California, which requires an asterisk. California used to have a bill just like ours. In 2018 the Legislature attempted to modify it, which has been an utter failure, and that is why I didn't attempt to modify, I went for full repeal.

MS. NIOU: And so bringing that up, you've -- you've sponsored this bill for five years now. Why did you sponsor this bill in the first place?

MR. O'DONNELL: At a hearing I attended, the Governor's Committee on Open Government came and said, *If you want transparency then you must repeal 50-a*. Additionally, some of this is known, I did not have an easy or happy childhood and the pain -- when people experience pain resonates with me. And so, the mothers of the people who have died at the hands of the police who attended such hearings literally broke my heart. And so, it was clear to me that it required -- transparency required repeal, and humanity and decency required it, too, that's why I did it.

MS. NIOU: Thank you for sharing that with me and with all of us. I -- I also wanted to ask, you know, because you're -- you're talking about transparency and you're talking about needing that to make change. But this bill, it doesn't change any disciplinary procedures, right? It doesn't -- or make it so that there's any -- any more likely for any officer to suffer any other consequences that are

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different, right?

MR. O'DONNELL: This bill merely repeals 50-a and sets up the structures so that FOIL can be used for police officers. It does not change their ability to be fired, it doesn't change their union contract, it doesn't do any of those things. Although, I would be shocked if having access to all this information doesn't end up leading to some changes in those areas, as well.

MS. NIOU: Thank you so much. I really appreciate all of what you -- what you just said because I think that you're right. I think that, you know, that transparency is such an important first step because it might be the thing that leads to all of the things that -- that are -- it would bring more visibility, I think, to a lot of the things that are wrong that are happening. Do you believe that, I guess, that this -- that this piece of legislation is long overdue?

MR. O'DONNELL: (Laughter) Yes. I think since 1976, this law has been abused and misinterpreted over and over again, and I think it's long overdue for it to be repealed. And I'm very proud that the word "repeal" is in the statute, because it was very important to me.

MS. NIOU: Thank you for sharing that.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, Ms.
Niou.

MS. NIOU: I believe that we are long overdue for police reform in this country and that New York State should take the

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lead. Incident after incident of police brutality, murder and institutional racism has eroded the trust between law enforcement and communities of color. Having the repeal of 50-a will -- will bring transparency for folks and -- but I also believe that nothing short of systemic reform can really begin rebuilding that trust. We don't have a broken system and we don't have a system that is needing fixing or patching, because our system is working exactly the way that it is designed, and it is designed in a way that is racist. It is designed racist. And -- and only reforming all of our systems can we actually have real change.

And you know, I am the only Asian-American woman in the entire New York State Legislature. And -- and we also feel this aching pain in our communities, and we need to stand up in solidarity with our black and brown communities because -- because as other speakers have said, silence is violence. And so, we need to make sure that we are -- we are speaking up. We have, as a country, a justified rage at the racist violence that has taken the lives of so many people, the lives of George Floyd, Breonna Taylor, Ahmaud Arbery, Eric Garner, Trayvon Martin and so many others. The horror at this ongoing violence and hurt has caused trauma for so many people for so long that it has become normal.

And I think that, you know, we don't have all the answers here today, and we also know that we have to do things better and we're asking for solidarity. We're asking for action and we've -- we've, you know, we've -- we've fought for those things, but I think

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that what we need to do is we also need to make sure that we have an ability to make sure that we are acknowledging what's right in front of us. And it's that, you know, and I'm going to take the words from my friend, Christine, and I'm going to say that, you know, right now this piece of legislation is a step forward. It gives us eyes, but it doesn't give us teeth.

And so, I think that it's really important that we are also keeping in mind Martin Luther King's words, right, that, you know, we could take the first step in faith, we don't have to see the whole staircase. And I think that, you know, we can move forward, we can take these first steps in faith and I think that, you know, it does give us the tools to be able to look to see what are those systemic things that are consistently, you know, hurting all of us. And we need to make sure that we acknowledge that as we make these changes, that we ask those questions of who we want to be as a country, who we want to be as a State and, you know, is this the future that we want for our generations to come? Because we have to do the essential work right now to dismantle racism, to dismantle a deeply-rooted system of institutional racism that deprives people of color of equal rights. And we have to say it out loud that as black Americans are fighting for all of us, we have to fight for them.

You know, we, as a legislative Body, have to recognize that our rights, or liberties, our freedom are all tied together and -- and it's time for our legislative Body to stand in front of and for black and brown bodies. So, thank you so much, Mr. Speaker.

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ACTING SPEAKER AUBRY: Thank you.

Ms. De La Rosa.

MS. DE LA ROSA: Thank you, Mr. Speaker. I want to -- on the bill, please.

ACTING SPEAKER AUBRY: On the bill, ma'am.

MS. DE LA ROSA: Well today, as we already heard, George Floyd's family is laying him to rest. And today, a daughter is saying goodbye to her father, whom she declared to the world has changed the world, all because a police officer viewed his life as disposable.

Violence has been inflicted on our communities consistently. Racial disparity and discrimination and violence cannot continue to be the only constant for people of color. People have taken to the streets across this nation, because the streets do belong to the people. They are tired and rightfully angry. I say, let them march if it will move us towards change and if it will move us towards justice. We need everyone to understand that the experiences of people of color at the hands of law enforcement in America, what those experiences are. If you have not had that experience, a negative experience, then realize that you stand in privilege. But do not minimize the experience of those that have suffered, of those that have felt the pain of discrimination and racism.

Repealing 50-a today will begin to deliver justice for all of the black and brown mothers who have lost their children on the streets of America. For those black and -- and brown mothers who

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have seen their children die due to the sin of racism. Today, I look forward to voting in the affirmative when the time comes, and I -- but I also implore us to look at this as just one stop on the road to justice. We must also look at the treatment of those individuals who are incarcerated and bring compassion and dignity for the lives of those who languish behind prison walls. Today, I also reclaim justice for those lives who have been lost in custody. We uplift their names in this moment, as well. We uplift the names of Kalief Browder, Layleen Polanco, Leonard Carter, Benjamin Small, Valerie Gaiter and James [sic] Floyd. For them, we must continue to do the work of bringing justice for our communities.

I also want to thank the Speaker for his leadership in this moment, his uncompromising leadership and his uncompromising commitment to justice. I also want to thank the sponsor of this legislation, who I personally know to be a man who believes in equality, a man who has fought his entire career to make sure that the voices of those that have been marginalized come to the forefront. I feel proud to stand in this Chamber today as his colleague. And I -- and I hope that as we see everything that is happening in our communities, we take this moment of tragedy as a -- also as a moment of education of mobilization so that change can continue to come for our communities. The ugly legacy of racism in America cannot be the legacy that we leave for our children tomorrow. Thank you.

ACTING SPEAKER AUBRY: Thank you.

On a motion by Mr. O'Donnell, the Senate bill is

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before the House. The Senate bill is advanced. Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 67. This is a Party vote. Any member wishing to be recorded as an exception to the Conference position is reminded to contact the Majority or Minority Leader at the number previously provided.

Mr. Goodell.

MR. GOODELL: Thank you, sir. This is a Party vote. The Republican Conference is in the negative on this particular bill. Those Republicans who would like to vote yes are encouraged to contact the Minority Leader's Office right away. Thank you, sir.

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, this will be a Party vote in the affirmative. And, likewise, should a member decide that they'd like to vote in the negative, they can contact the office, we'll be happy to record their vote.

ACTING SPEAKER AUBRY: Thank you both.

(The Clerk recorded the vote.)

Mrs. Peoples-Stokes to explain her vote.

MRS. PEOPLES-STOKES: Thank you, Mr. Speaker, for the opportunity to briefly explain my vote. I want to commend the sponsor here, and I certainly want to commend the Speaker for allowing this to get to the floor. But I want to commend the sponsor because he and I were in the same room when the Office

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of Open Governments came in more than once to Government Ops Committee and said that this legislation needed to be repealed. It was the only piece that did not provide for FOILs across the State in a fair and equitable manner. And so, I appreciate that he took that information and put it into legislation and finally, we're in a position where we can have it on the floor and get it approved.

The thing that distresses me most about this whole debate that I've been listening to all day is people keep talking about this is some -- this is against somebody. This is not against anybody. This is for some people. This is for many mothers, grandmothers and parents who, quite honestly, look like me. It's for them. It's not against anyone. And, clearly, transparency is one of the most important core values that we have when you have a relationship between the community and public servants. Commitment to transparency is something that we hear on a regular basis from the good government people and from the public. How can we allow anybody that earns a public dollar as a public servant, much like we are, to not be transparent in how they perform their work, to not be transparent and accountable in how they perform their work on the public dollars that taxpayers pay for. We have to do this, Mr. Speaker.

So, again, I want to commend all of my colleagues for all the great words that were said today, but let's just keep in mind that we can't legislate morality, but we can tell people who we hire as the public that they have to be transparent about the way they do their job.

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ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes
in the affirmative.

Mr. O'Donnell.

MR. O'DONNELL: What a day. It's been a very long day and it's allowed me to do a lot of reflection about how it is that we are here and how it is that I came to think and believe what I think and believe. I grew up in a segregated community. There were no people of color where I lived. People of color who are like Mr. Ramos were sent to Brentwood, where he lives. People of -- people who were black were sent to Central Islip. And at 17 years of age, I went to college in Washington, D.C., in a majority black city, and my education began. Many friends, many, many friends, were guests at my wedding after all these years, have taught me a lot about what their life was like that was different than the life that I had had. It wasn't such a happy life I had, but I -- it was a life of privilege, I came to be aware.

I went to law school back in New York and Eleanor Bumpurs was murdered while I was a law student. And it took my breath away, how could this be happening here and now? When I came -- became a public defender in Brooklyn during the crack years from '87 to '95, I spent a great many hours reading and trying to get -- figure out police reports and police information. And the stories I can tell, the stories that could go in a book about the information that was withheld, the lies that were told, the misrepresentations. I once had a police officer admit to perjury while testifying. And when I would tell

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my friends that, they would say, *Well, was he arrested?* No, he was not. He was not arrested.

In the end, we have to fight for justice. You have to acknowledge your own privilege. If you don't acknowledge your own privilege, you're never going to come around the bend. So let me start with thanks. Thank you to my Speaker, Mr. Carl Heastie. Thank you to my Majority Leader, Mrs. Peoples-Stokes, for allowing me the opportunity to do this. Thank you to the staff: Mr. Suggs, who sat in silence for the last eight hours, Lou Ann Ciccone, Kathleen O'Keefe, who allowed me to pester them for five weeks. Thank you to the members of the Caucuses - Ms. Wright, Ms. Davila, Mr. Kim - who all stood with me when I made this case. It's not lost on me that you got yourself a fat gay Irish guy fighting against [sic] this -- this bill, but I believe in it with all of my heart.

And let me be very clear to members of the other side: There is not a bone of hatred in my body towards anyone. This was not written out of hate, that's not what this is. It is an attempt to level the playing field. It is an attempt to get information into the public. And I know enough to know if you don't include "unsubstantiated claims", as have been discussed, that information will be filed away by the NYPD as it -- as if it never existed.

So, we take one step forward today on transparency, we allow people some degree of peace. And to the mother of Eric Garner, whose heart was broken, who still doesn't know as much information as the family of Mr. Floyd, may I just say that justice

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denied -- justice delayed is justice denied. Perhaps this is a minor, minor step forward. I'm honored today to be a member of this Body and I'm honored for all the yes votes on that board. Thank you very much.

ACTING SPEAKER AUBRY: Mr. O'Donnell in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Today, we have heard many eloquent speakers on both sides of the aisle, including my colleague, the sponsor. And for those thoughtful comments, I am indeed grateful. I'm extraordinarily thankful that in my Assembly District, the protests have also been attended by the police chiefs and the county sheriffs. And the message has been two-fold: The message has been racism is inappropriate; what happened was horrific; we should stand up in solidarity, in opposition of that. But the message was also one of respect and thoughtfulness. And for that, I am deeply thankful.

I'm mindful that all of us are children of God. And if we're God's children, then each of us is entitled to that respect because we're all part of the same family. And I'm painfully aware that in the last few years, 50-a has been abused, as was pointed out by one of my colleagues, and expanded well beyond how it had been interpreted for the 40 previous years. And so, here we are today to make statutory changes. And one of the most difficult and challenging things we have as a Legislature, especially when we have a very contentious and

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emotional issue and we all feel so strongly about the need to stand up against racism, is to act in a thoughtful, careful and balanced way.

Unfortunately, this bill, in my opinion, goes too far. We need to reform 50-a, I agree. But what we're doing is we're allowing claims that were determined to be false, or untrue, or malicious, or unfounded to be -- to be available in the public, and we're doing nothing to protect the good reputation of our officers for unfounded claims. And so I hope as we move forward that we look for a way to protect our officers against false, malicious, abusive claims while still ensuring transparency and openness in government. Thank you so much, sir.

ACTING SPEAKER AUBRY: Mr. -- Mr. Goodell in the negative.

Mr. Ortiz.

MR. ORTIZ: Thank you, Mr. Speaker, for allowing me to explain my vote. I have heard so much about the debate here today from one side to the other and this is -- this bill main objective, Mr. Speaker, is to give accountability. To give accountability on those unscrupulous police officer who doesn't follow the rule. Plain and simple. We all can tell our stories, and I will tell you my story as an elected official. I have been stopped by police officer and I have been stopped by police officer not only one day, but he called three other cops while they stopped me to search my car, for whatever reason, and they don't have no warrants. I asked them what is the reason behind. My son has been stopped many times. My daughter

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has been stopped, as well. So we know how intimidating it can be by being stopped by a police officer, by being talking to a police officer and trying to ask questions to a police officer that at some time, they developed some kind of attitude behavior that they -- that we don't have the right to ask questions. And when you follow up that police officer and look into the past of that police officer, it's very difficult to figure out if that police officer really have some kind of disciplinary action that happened to this police officer.

What I will tell you that I did follow one police officer and I find out that this police officer had disciplinary actions. Not only had disciplinary action, was taking away from my precinct and sent into another precinct in some place else. That's not a way to move our police officer from one precinct to another. What need to be done, Mr. Speaker, is that we need to go to the culture of the problem. The culture of the problem is how our police officer have been trained, how that cancer has been developed and we want to stop that cancer and it's stopping now.

And I finish with this, Mr. Speaker, what we need to -- what we need in our country is to teach our children the lawful diversity and unity and humanity. That's what we need to do, and that's what we need to do to move forward. Thank you, Mr. Speaker, and I will be voting in the affirmative.

ACTING SPEAKER AUBRY: Mr. Ortiz in the affirmative.

Mr. Pichardo.

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MR. PICHARDO: Thank you, Mr. Speaker, for allowing me to explain my vote. It's good back to be -- it's good to be back in the Chamber. And, again, I want to thank my colleague, as well as the leadership in this House both the Lead -- the Majority Leader and the Speaker, but let's get back down to -- to brass tacks here.

So, the broad interpretation of 50-a in the Civil Rights Law basically created a publicly-funded agency that is not accountable to the public. It is not sound policy to expect members of the public to trust an agency that has no accountability and transparency to them. Again, let me remind my colleagues here in this Chamber that days after Mr. Floyd was murdered in front of our eyes, the Hennepin County Medical Examiner ruled that his death was a combination of cardiac arrest and several drugs in his system, without making any mention that the fact that he died through asphyxiation through pressure on the back and his neck. And the -- fortunately and -- well, unfortunately and fortunately, we had video evidence to the contrary and what our government institutions, particularly Minneapolis, were asking us to do is not to believe our lying eyes. It took two separate independent exams to basically prove the fact of what we saw in that tape, in that disgusting tape where that man's life was snuffed out.

So, when we ask our agencies both here in the Legislature, as well as in law enforcement, to earn our trust as a community, how do the public -- and how do we expect the public to

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believe in these instances when there are government agencies who are primed to lie and to basically ask us to deceive. With that, Mr. Speaker, I vote in the affirmative. Thank you.

ACTING SPEAKER AUBRY: Thank you so much.

Mr. Pichardo is in the affirmative.

Mr. Buchwald.

MR. BUCHWALD: Thank you very much, Mr.

Speaker. I rise in support of this legislation and, in particular, to thank its sponsor. The process of repealing 50-a is too long in coming, but it has been a legislative process that he's been ably leading for the last five years. I was, you know, proud in 2016 when Mr. O'Donnell's attempt to reform 50-a got a vote in the Governmental Operations Committee, and I believe our now Majority Leader was Chair of that Committee at the time, and so I want to thank her, as well, for her leadership. But, ultimately, in 2016, though maybe many of us in the Assembly were willing to have that conversation, the simple fact was the other House, the State Senate, was not willing to have that conversation. And, certainly, those who were not recognizing the need to make changes to 50-a were not engaged in the conversation.

So we are where we are today, and where we are today is a compelling need to repeal this law. We are -- have to make sure that those who have lost their lives as a result of, in particular, police misconduct, know that they have not lost their lives in vain. And so, we, as legislators, have a special responsibility to ensure that we do everything we can to make sure that we are being responsive.

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And though I'm proud to march with others and attend vigils, I'm even more proud to stand up today as a member of the State Assembly in support of this legislation.

So, I sincerely hope that we don't let this be the last step we take, that it's just the first step on a path towards combatting institutional racism in our government and in our society. But today, I proudly vote yes for this legislation. Thank you so much, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you. Mr. Buchwald in the affirmative.

Mr. DenDekker.

MR. DENDEKKER: Thank you, Mr. Speaker, for allowing me to explain my vote. I want to thank the sponsor of this bill, and I -- I also want to thank my Speaker and the rest of my colleagues. I think it's so important that this representative type government has listened to the people that are fed up and have had it and want change. And we are here to do some of that change here this week and the repeal of 50-a is a first step. And I'm just so proud that this government and the way New York State is operating as a responsive legislative Body listening to the people that it represents. So, I will be voting in the affirmative.

ACTING SPEAKER AUBRY: Mr. DenDekker in the affirmative.

Mr. LiPetri.

MR. LIPETRI: Thank you, Mr. Speaker. I rise to

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explain my vote. Prior to becoming a State Legislator, I worked for the New York City Corp Counsel where I defended the NYPD, FDNY and correction officers. During a multitude of depositions, oftentimes I would invoke 50-a. The purpose of 50-a is to prohibit and prevent harassment, intimidation and embarrassment. It protects against fishing expeditions of disclosure of unverified and unsubstantiated information. In essence, it prohibits the dissemination of false claims, false claims of which now this Legislative Majority wishes to weaponize against our law enforcement, first responders and correction officers.

Frankly, at this time now, you have opened the flood gates to frivolous requests. I saw it time and time again; in fact, just 50 years ago, the purpose of 50-a was to prevent the use of these bad faith probing that now will occur. Mark my words, Mr. Speaker, you're going to see databases now form where we're going to have all these government groups that -- excuse me, these groups that despise police will now create these databases of all this personnel information, many of which is false, many of which is unsubstantiated, but nevertheless will be disclosed. Mistakes will be made, addresses, personal information will, in essence, and inevitably be disclosed, and those on social media will publish. Threats have already been issued over the years against our police officers, and now those threats will turn to action because they have that information available to them.

It's so sad, Mr. Speaker, we saw just a few weeks ago

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our law enforcement, first responders praised as heroes during this pandemic and, yet, now we're seeing the -- the winds change during these difficult times. In essence, Mr. Speaker, we can't keep furthering division. Whether your skin is black or your uniform is blue, people should not feel targeted in this country. That, we can agree upon; however, Mr. Speaker, this legislation only makes our finest, New York's finest, more vulnerable to attacks. For those reasons, I vote in the negative.

ACTING SPEAKER AUBRY: Mr. LiPetri in the negative.

Mr. Barron.

MR. BARRON: Thank you, Mr. Speaker. We mentioned the CCRB and unsubstan -- unsubstantiated complaints a lot. Do you know what the CCRB is? Thirteen members, five appointed by the Mayor that pathetically is an apologist for the police, three are appointed by the Commissioner, that's eight of the 13, and then five are appointed by the City Council. When a complaint comes in, they set up a panel of three, one from the Mayor, and one from his pal, the Commissioner, and one from the City Council.

So, they have to substantiate a complaint. So if you have two police supporters that have to substantiate a complaint, two-to-one substantiates it, two-to-one makes it unsubstantiated. So, they lied on a lot of these complaints. That's why it's good to keep it all in. And then after they substantiate a complaint, guess who it goes to who has the authority to determine their punishment? The

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Commissioner.

This is a false. This is why I support this bill, as weak as I think it is in terms of the larger issue. We've been thanking a lot of people, Speakers, sponsors of bills and all of that, individuals, but the real heroes and heroes are the protesters. And, unfortunately, if the violence didn't happen, this bill of five years would not be passed today, and neither would the package. Many of these bills have been around for years. We protested peacefully to get some of these bills passed. Nothing. The minute stuff starts burning, people start rising up in larger numbers, then people start waxing militantly and eloquently like I've never seen them wax before. And incredible how a whole package of bills are now being passed.

These aren't sufficient --

ACTING SPEAKER AUBRY: Mr. Barron --

MR. BARRON: -- but I do want to thank the protesters. I want to thank them --

ACTING SPEAKER AUBRY: And how do you vote, sir?

MR. BARRON: And I vote yes.

ACTING SPEAKER AUBRY: Mr. Barron in the affirmative.

Mr. Ramos.

MR. RAMOS: Thank you, Mr. Speaker. I thank the Speaker for advancing this bill on the floor. Today has been an historic day. We passed 50-a and it's been a very -- very emotional

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day, emotional for many reasons. Being a person who has lived both worlds, Hispanic man who has been subjected to the inequities in -- in this country towards people of color, and living through the police world. Mixed emotions over what is transpiring. It's been an emotional day because I've seen some movement from my colleagues here, which I -- I got to say I appreciate. There are a few who talk about weaponize -- weaponizing against police. But for the most part, I've seen some movement, and I want to say that I -- that I appreciate that.

It is a day of also anguish. As my colleague mentioned, when we see the same playbook over and over again that after George Floyd was killed, an autopsy tries to somehow insult our intelligence and say that he had a medical problem, as if he would have died anyway had the police not shown up. Can you think of anything so ridiculous? The people in this country, when they decide that is -- enough is enough, the people of color in the history of this country, change has come about. We've seen that through the '60s and after Martin Luther King was killed, people rose up and the powers that be felt it. They felt it. Presidents threw their hands up. Objectors threw their hands up and said, *Okay, let's start some Civil Rights reform.* We are at that watershed moment right now.

To the protesters, don't start -- stop marching. This is not the end. And don't be fooled and don't accept a false prize in 50-a. This is not the end. This is the beginning. It's good legislation, but we need to do much more. To my police colleagues - I'll end with this -

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to my police colleagues, I know what might follow. And a loud, sucking noise of political action money going to the people to fight against our movement. I ask you to please --

ACTING SPEAKER AUBRY: Mr. Ramos.

MR. RAMOS: -- think about sitting with the advocates and coming to some change --

ACTING SPEAKER AUBRY: Mr. Ramos, how do you vote?

MR. RAMOS: -- with the -- thank you.

ACTING SPEAKER AUBRY: How do you vote?

MR. RAMOS: I vote in the affirmative.

Ms. Simotas.

MS. SIMOTAS: Thank you.

ACTING SPEAKER AUBRY: Ms. Fahy.

Oh, Ms. Simotas.

MS. SIMOTAS: Thank you, Mr. Speaker, for allowing me to explain my vote. We are living in very perilous times. We are grappling with the health pandemic, an unsound economy, and protests taking place across the nation, where everyday Americans are demonstrating that they are fed up with the criminal behaviors of those who have taken an oath to protect them.

In response to these protests, we have witnessed video after video that documents the reprehensible behavior that some in uniform have exhibited. It has been absolutely devastating to witness some of the police -- of the brutal police interactions that have

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occurred with protesters, and the officers involved must be held accountable for their actions.

The law that we are repealing today, Section 50-a of the Civil Rights Law, hides police misconduct and the disciplinary action that follows as a consequence. As the sponsor of the bill so eloquently stated, this type of law only exists in only three states because 47 other states believe in transparency and, ultimately, accountability. During this debate we have heard a lot about the FOIL law and the ability for the public to use it to attain access to the records of police officers. We heard that passing this bill would lead to fishing expeditions and an encroachment into police officers' personal information. The truth is what we are -- is that we are -- that with repealing this law today, all we are doing is preventing the shielding, the shielding of disciplinary records, which only enables abuses of power. We are choosing to protect the survivors, the loved ones and the witnesses instead of protecting the wrongdoers.

It is time that we end the policies of secrecy that undermine public safety and foster mistrust between our communities and law enforcement. I am so proud that we finally have an opportunity to vote on this bill, and I would like to thank the sponsor for his immense focus, determination and unwavering dedication, and I proudly vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Simotas in the affirmative.

Ms. Fahy.

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MS. FAHY: Thank you, Mr. Speaker. I rise, as well, to explain my vote, and I'll be voting in the affirmative today and I want to start by saying this is truly an historic day, it's not a joyous one, but it's an historic day. And I want to commend the Speaker and I want to commend the sponsor on -- on many levels, but also for their perseverance.

We've heard a lot, we've been through a lot, we've talked about that is this the moment for change? And I am proud to be a part of New York where I think we are seizing the moment for a change. And I'd like to think on this day, when George Floyd is being buried today, that he will not have died in vain. This is about transparency, it is about accountability, and I do believe - and I've listened to a lot of the debate - while there have been a number of concerns raised about unsubstantiated reports being made available, I do think there are protections in and if there aren't enough, we will come back. But I do think that we've made the appropriate changes.

This is about correcting abuses and I think all of us still have a tremendous respect for authority. We want that shield to shine. This is about the few among our law enforcement office -- among law enforcement that have brought down the reputation of the many. And I have tremendous, tremendous respect for our law enforcement, and I want to regain that throughout this country. We've had bipartisan support on so many bills these last couple of days, and it's been very impressive. We've had a lot of emotional whiplash these last few months between the COVID virus and now a lot of time to

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reflect on the virus of racism in this country. And I think this is just the beginning of trying to make some change. There is more to do. I want to see us professionalize the ranks more, I want to see us elevate, we've got to change the culture. But I think today is about beginning that healing.

And, again, I vote in the affirmative. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, Ms. Fahy. Ms. Fahy in the affirmative.

Mr. Rodriguez.

MR. RODRIGUEZ: Thank you, Mr. Speaker, for the opportunity to explain my vote. And I want to thank the Speaker for allowing this important piece of legislation to -- to move ahead. I also recognize the good work of the sponsor who has, once again, taken on a unique challenge to equality in an effort to make our systems and our society a little bit fairer.

I think one of the concerns that we have begun to address with 50-a is that there's almost a complete lack of transparency and public accountability around law enforcement discipline, and this law takes the steps towards beginning to make the necessary changes. You know, currently, police are allowed to conceal nearly all police records from public view with -- which exempt officers from the transparency standards that are applied to other public officials. And this is something that has to change.

And it's not -- you know, as a Puerto Rican father of

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two with a seven-year-old son, where we have begun to have the conversation that many people of color have with young men about what the interactions of law enforcement should look like and why, you know, they may have a propensity to be stopped or -- or approached with more frequency than other people and why the institutional viewpoint and lens looks at people of color in -- in a particular way. And having those hard conversations reminds us that there's still a significant amount of work that needs to be done.

And this one piece of legislation is not going to change people's viewpoints on -- on people of color, and it's not going to change the way that the system addresses injustice. But this is an important step to make sure that those people who hold the power are worthy of -- of -- of those badges, worthy of that responsibility, and it gives a little bit of transparency in an effort to identify those folks who are not worthy and -- and have abused that responsibility. So it's an important piece of legislation. It is time for us to make that change and, as a result, I'll be voting yes and support the legislation.

ACTING SPEAKER AUBRY: Mr. Rodriguez in the affirmative.

Mr. McDonald.

MR. MCDONALD: Thank you, Mr. Speaker. I rise to support not only the repeal of Section 50-a today, but as well as many other components of the criminal justice package that we have passed and we will be passing over the next day or so. As a former Mayor and Public Safety Commissioner for over 13 years, I am very

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familiar with the protections of 50-a, as I dealt with police discipline issues and public complaints more times than I care for. The system is in need for a change. And I believe the changes we are making today will provide greater transparency to the public and to help repair community and police relations where they are tarnished.

In the past few weeks I have received several hundred e-mails and phone calls on this legislation, and I dare say 99.9 percent is in support. Those few who did not offer support were those in law enforcement or their family members who worried about their private information. It is important to note that there are protections in place to protect their private lives and information of those in law enforcement and their families. And I thank the sponsor for those protections and this legislation. Many of those in law enforcement have been supportive, knowing what I have known for years after hiring over 25 law officers myself. It is the actions of a few that spoil it for the many who day in and day out protect our communities. I am appreciative of those in law enforcement who have reached out and who do their job with the utmost respect for the community. At the same time, we need to be mindful that the repeal of 50-a alone will not stop all the issues, especially when it comes to systemic racism. We do not need to defund law enforcement, but we need to enhance community policing.

And therefore, Mr. Speaker, I support this legislation.

ACTING SPEAKER AUBRY: Mr. McDonald in the affirmative.

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Ms. Bichotte.

MS. BICHOTTE: Thank you, Mr. Speaker, for allowing me to explain my vote. I want to thank my colleague, Danny O'Donnell, for being bold and introducing the repeal of 50-a and fighting for this for five years. Repealing 50-a and revealing the activities of law enforcement officers in a more transparent manner will help to shine a light on those who act with comfort in the dark. George Floyd's death through excessive neck compression did not have to happen. Eric Garner's death through strangulation did not have to happen. Aaron Bailey's death from bullets following a traffic stop did not have to happen. And it goes on. We need comprehensive police reform to correct the long and deep-rooted bad relationships between minority communities and police force. The repeal of 50-a is not about punishing the police force. It is about identifying those few bad law enforcement officers. It's about transparency and accountability. I have a good relationship with the precincts in my district, the chiefs, the Commissioner. And, like, many other organizations: The Haitian-American Law Enforcement Fraternal Officers, HALEFO; Grand Council of Guardians and Latino Officers; GOAL, Gay Officers Action League New York. However, continued excessive brutality prevents these types of relationships that could also be present with the community members. This repeal of 50-a must be part of a comprehensive package of bills like banning racial profiling; needed -- needing to end the institutional racism causing many black and brown civilians, people, family members, fathers, mothers and

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children to pay their -- pay -- pay with their lives. I call on the name of my Haitian brother Abner Louima who was racially profiled, beaten and sodomized. Unlike many, he is alive to see this bill become law. And hopefully one day he will see the banning of racial profiling with data collection also become law.

I am a Haitian-American, and I witnessed the protests and the participation in the march -- in the march -- in the marches. I see the Haitian flag wave high. Many can tell you it is the flag of revolution. Today --

(Buzzer sounding)

ACTING SPEAKER AUBRY: Ms. Bichotte.

MS. BICHOTTE: I will vote in the affirmative.

Thank you.

ACTING SPEAKER AUBRY: Ms. Bichotte in the affirmative.

Ms. Linda Rosenthal.

MS. ROSENTHAL: Thank you. Thank you, Mr. Speaker, to explain my vote. Today George Floyd was laid to rest while his family and friends celebrated his life and mourned his loss. At the same time, the country grapples with how to reverse generations of systemic racism that has been institutionalized over time and reinforced by officialdom, silence and inaction. Mr. Floyd's murder not even the most recent in the seemingly never-ending stream of killings of innocent black people at the hands of police has captured the nation. Mr. Floyd's life and death serve as a painful reminder that

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the stain of racism is not a mess of vestige of a bloody past, but is a dangerous reality today for women and men of color in every state in the nation. Repealing 50-a will help to shine the bright light of accountability on the police force. Doing so will ensure that bad cops are held accountable for their actions and will change a culture of secrecy and invincibility that has permeated the force and enabled many police officers to act brutally and with impunity. And it might help restore the trust between the community and some officers that has been broken with every act of senseless and excessive force.

I am so proud to be part of the Legislature as we vote to pass this bill. The New York Legislature, the Caucus, the Speaker, the sponsors and everyone who participated in getting us to this day.

On the last day of 11th grade, George Floyd was asked what he wanted to do with his life, and he answered, *I want to touch the world*. Well, Mr. Floyd, you should not have had to die to live out your childhood dream, and I hope you can sleep peacefully knowing your death has touched each and every one of us deeply and permanently, and I proudly vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Rosenthal in the affirmative.

Ms. Reyes to explain her vote.

Two minutes, please.

MS. REYES: Thank you, Mr. Speaker. Very briefly to explain my vote. As a mom of two young brown boys being raised in the Bronx, I am proud to support this piece of legislation and all of

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the pieces of legislation of police reform we have taken up the past days and -- and -- and tomorrow to come. I want to commend the -- the sponsor and the Speaker. And I want to dedicate my vote to all the families that have lost loved ones to police brutality. To all those mothers who have had to bury their children too soon. This is a step in the right direction. We still have a lot of work to do, and I encourage all those out there taking to the streets to keep fighting.

Thank you. I'll be voting in the affirmative.

ACTING SPEAKER AUBRY: Ms. Reyes in the affirmative.

Mr. Perry to explain his vote.

Two minutes, please.

MR. PERRY: Okay. Do I -- wait, wait, wait, wait --

ACTING SPEAKER AUBRY: Don't wait, you can speak.

MR. PERRY: Thank you. I was checking if I was unmuted. Thank you, Mr. Speaker. This bill was passed into law on the third try. The first two times, Governor Hugh Carey vetoed the bill. He said it was too broad. Senator Carol Bellamy warned us that it was a very, very bad bill and that we should have rejected it. I wasn't in the Legislature, neither any of us, I hope, at that time. But this bill certainly grew into a big mountain that I stood in front of every New Yorker who was fighting for some justice and to get past the silent blue wall. Today we have prevailed. But we can't go praising ourselves too much because the fight has already begun to

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make sure that this bill, what we intend it to do, will be diminished as much as they can. So we have to continue to fight. We have to be aware that there's so much more to be done. This is a drop in the bucket. Whatever drop will help to fill that bucket of justice, that bucket of freedom and the ability to express ourselves and the ability to use and enjoy the environs of this great State without being worried for ourselves, our children, about police brutality and police misconduct.

Mr. Speaker, thank you for the opportunity to explain my vote, and I proudly vote in the affirmative.

ACTING SPEAKER AUBRY: Mr. --

MR. PERRY: -- and certainly commend the -- the -- the -- my colleagues who pass this bill.

ACTING SPEAKER AUBRY: Mr. Perry in the affirmative.

Mr. Reilly.

MR. REILLY: Thank you, Mr. Speaker, to explain my vote. You know, we heard that New York is one of only three states that had this protection for police officers. In reality, that's not accurate. The three states did have specific for police officers, but the other states have it for all their public employees. As a matter of fact, there's 23 states that require it all to be confidential. There's 15 states that have limited availability, and it goes on to only put out records of substantiated serious conduct. And the other states, 12 of them, have access, full access to public records, but it still only allows

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substantiated. Unsubstantiated are not allowed. So that's one of the reasons why I think that this bill just goes a little too far, and we need to make sure -- I know we heard that -- many saying that it doesn't go far enough, but I think to give it -- you know, we talk about due process. Having unsubstantiated in there does not allow due process for the officers as well that did nothing wrong. So -- and that -- if you want to look it up, that's on project.wnyc.org, that information.

So I will be voting in the negative.

ACTING SPEAKER AUBRY: Mr. Reilly in the negative.

Ms. Walker.

MS. WALKER: Thank you, Mr. Speaker, for allowing me to explain my vote. There are folk who feel as if this bill has some right to privacy infringements. And one of the things that we understand is that New York State has a compelling State interest to protect its citizenry, which a right to privacy claim cannot meet muster. What are some of those compelling State interests? To protect its citizenry from the chokehold. From using a flashlight as a club. From using a gun as a club. Handcuffs too tight. Non-lethal restraining device and pepper spray. These are some of the categories of complaints and are located and lodged with the CCRB. And so I also want to say that this is not about the police. This bill and this package of bills are about police officers killing black people. Point blank. Good cops hate bad cops just as much as we do. And we're saying today that for all of those bad cops who are out there who have

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been conducting themselves in a pervasively racist manner, that you're going to be exposed and you're going to be found out. And so that when you think of committing a civil rights infraction against any person in the State of New York that your records will be released and you will no longer be able to hide behind a veil or a blue wall of silence.

I proudly vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Walker in the affirmative.

Ms. Fernandez.

MS. FERNANDEZ: Thank you, Mr. Speaker, for allowing me to explain my vote. One thing that I know for sure between every single person in this Body and in this State and probably in this country is that we do not want, we do not like bad cops. And this bill give us the opportunity to find those bad cops and to hold them accountable for their actions. And I think that's absolutely fair. And for our duty, even as public servants, as law enforcement, we have to protect the public at all cost.

So I vote in the affirmative of this because accountability is everything, and we need to make sure that that doesn't move. So thank you.

ACTING SPEAKER AUBRY: Ms. Fernandez in the affirmative.

Mr. Garbarino.

MR. GARBARINO: Thank you, Mr. Speaker, to

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explain my vote. Derek Chauvin is a murderer and he'll pay for what he did. But as the sponsor said before, this is already the law in Minneapolis and it didn't stop the death of George Floyd. I don't understand the remedy that is being sought here. This legislation is going to release unsubstantiated, unfounded complaints against law enforcement officers. These are complaints that haven't been proven to be true, but they're going to be released and they're going to tarnish an officer's name. In the Senate and the Assembly here in this House, we -- we have an Ethics Committee that oversees complaints that are against us. Those are only released when they are substantiated. The -- the Ethics Committee, they -- they-- they hear the files and they hear complaints. Those aren't released. We don't -- we don't release complaints against us when they're unsubstantiated. They're only -- they're only released when they're substantiated. Education Law says that unfounded complaints against teachers are expunged from their record. I don't know what we're doing here today by allowing unsubstantiated complaints to be released. I don't know who this -- who this helps. It's going to put targets on the backs of police officers. I know a lot of police officers. I know a lot of firemen. I know a lot of correctional officers. They don't have an evil or racist bone in their body. But this will unfairly put targets on their backs, and for that reason I cannot support it and I'm voting in the negative.

ACTING SPEAKER AUBRY: Mr. Garbarino in the negative.

Ms. Nolan to explain her vote.

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MS. NOLAN: Thank you, Mr. Speaker and my colleagues. I want to really thank our Speaker Carl Heastie and Majority Leader Peoples-Stokes and all of my colleagues in the Caucus, Tremaine Wright, for doing such a wonderful package that was so important to be done and respond to people quickly and handling it well. I want to also acknowledge the incredible insight, legal mind and tremendous speaking ability and dedication of my dear friend Danny O'Donnell, who led the debate with such distinction today. Just as I explain my vote would like to point out that it is a journey, as Danny said, to understand issues within the community and within the black community, which I have been privileged to represent for many years. I want this vote to be in memory of Richard Luke, a young man, my very first year in office, who died in police custody and his mother never really got an explanation, was never able to get any information. She had actually called the police because he was not feeling well and it just cascaded into a very, very tragic situation. I'll never forget that. I want to also say I -- I -- how important it was -- and I want to add my voice to so many of my colleagues who said this is not about all people in law enforcement. I come from a law enforcement family. My district office chief's brother died in service to this City as a NYPD detective after 9/11 as a -- a first responder, and their service and their honor, their honorable service can never be forgotten and must always be cherished. But here we have a situation of a terrible tragedy, and it's important for us in the Legislature to move forward with new laws that will address

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these things so that we can show people we are moving to a new social justice and racial justice in our State.

So thank you, Mr. O'Donnell, thank you, Mr. Speaker, thank you all my colleagues. I vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Nolan in the affirmative.

Ms. Griffin.

MS. GRIFFIN: Thank you, Mr. Speaker. Thank you for the opportunity to explain my vote. Over the past two days I supported and voted in favor of every reform measure in this important package of bills. In passing them, we seek to halt the systematic racism that has been a poison allowed to flourish unabated for far too long. I don't believe that legislation alone can change the hearts and minds of people. I believe the bill before me now won't accomplish our shared mission of preventing police brutality and misconduct. I don't believe simply making personal records public while including unsubstantiated claims will bring about the accountability and transparency we seek. It's not enough, and falls short of what is truly needed to eradicate inequality and racism in our justice system and really true reform.

While I do fully support the other initiatives in our package and look forward to initiating more ways we can make proactive and effective change through collaboration with all stakeholders, I am voting in the negative on this one. Thank you for giving me the opportunity.

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ACTING SPEAKER AUBRY: Ms. Griffin in the negative.

Mr. Goodell.

MR. GOODELL: Thank you, sir. Please ensure that Mr. Ashby is noted as a yes vote on this legislation. Thank you, sir.

ACTING SPEAKER AUBRY: So noted.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Thank you, Mr. Speaker. If you could please record our colleagues Mr. Santabarbara, Ms. Buttenschon and Mr. Jones in the negative.

ACTING SPEAKER AUBRY: So noted. Thank you, Mrs. Peoples-Stokes.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

My colleagues, before we proceed to the consideration of the next bill, it is only right and proper that we pause for a moment of silence in the memory of George Floyd, who was murdered last week and was laid to rest today during our work here in this Chamber.

Let us rise.

(Whereupon, a moment of silence was observed.)

Thank you, my colleagues.

MRS. PEOPLES-STOKES: Mr. Speaker.

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes.

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MRS. PEOPLES-STOKES: If we can continue our work, we're going to go to Rules Report No. 64 and it's on page 16 by Ms. Walker.

ACTING SPEAKER AUBRY: The Clerk will read.

THE CLERK: Assembly No. A08674-A, Rules Report No. 64, Walker, Heastie, Peoples-Stokes, Aubry, Richardson, Rodriguez, Blake Mosley, Ortiz, Frontus, Magnarelli, Arroyo, Bichotte, Bronson, Carroll, Crespo, Cruz, DenDekker, Epstein, Fall Fernandez, Gottfried, Hunter, Hyndman, Jacobson, Jaffee, Lifton, McDonald, Nolan, Otis, Pichardo, Pretlow, Ramos, Reyes, D. Rosenthal, L. Rosenthal, Seawright, Simon, Steck, Taylor, Thiele, Weinstein, Wright. An act to amend the Executive Law, in relation to the use of body-worn cameras by New York State Police officers.

ACTING SPEAKER AUBRY: On a motion by Ms. Walker, the Senate bill is before the House. The Senate bill is advanced.

An explanation is requested, Ms. Walker.

MS. WALKER: Thank you, Mr. Speaker. A.8674 [sic] is a bill that will create within the State -- New York State Police a body-worn camera program which would aim to increase accountability and evidence for law enforcement and the residents of the State by providing body-worn cameras to all New York State Police officers while on patrol. This bill would also provide provisions on when a body camera must be used and the exceptions, the preservation of body camera footage, and the maintenance of the

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body camera.

ACTING SPEAKER AUBRY: Mr. Goodell.

MR. GOODELL: Thank you, sir. Would the sponsor yield?

ACTING SPEAKER AUBRY: Ms. Walker, will you yield?

MS. WALKER: Yes.

ACTING SPEAKER AUBRY: The sponsor yields.

MR. GOODELL: Thank you, Ms. Walker. I note that your bill calls for this legislation to be effective April 1st next year. Why did you select April 1st next year?

MS. WALKER: So, there is a cost associated with providing body-worn cameras to the New York State Police Department. And the next opportunity for us to be able to budget for that is in the '20-'21 budget negotiations. And so we've extended its effective date until that -- until that time.

MR. GOODELL: Do you have an estimate of what that cost might be?

MS. WALKER: Not at the moment.

MR. GOODELL: Do you envision that this would be an additional appropriation for the State Police next budget year, or would you anticipate that -- that they would have to find that money within their own budget?

MS. WALKER: I think that's a conversation that we can discuss considering whatever those circumstances are. We know

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that we are in extraordinary times and it's hard to foresee what may be the case at that time.

MR. GOODELL: As you might understand and appreciate, there's a lot of concern, particularly among the State Police, that we might fund the cameras by laying off State Troopers. And if it's a choice between laying off State Troopers and having fewer Troopers but having cameras, that's a much different discussion than if we keep the State Troopers intact in terms of their manpower and provide them with additional cameras.

MS. WALKER: That's a conversation that we can have at that time, Mr. Goodell.

MR. GOODELL: I see. This bill requires the State Police Department to keep this data, obviously. But doesn't have any time frame on it. And there's a concern that's been raised that the amount of data that we would be saving is -- is pretty massive. I -- I no longer have my stepson on my phone plan, so the number of gigabytes I need has gone down since we don't stream. But video takes a lot of data. Can you give us some sense of what you anticipate in terms of recordkeeping requirements?

MS. WALKER: So, Mr. Goodell, the State archivist will have to work with any State agency which will be working with the body cameras - in this case, the New York State Police - to work out a record retention schedule. But I will suggest that normal record retention rules will apply.

MR. GOODELL: Thank you very much, Ms.

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Walker. Thank you, sir.

ACTING SPEAKER AUBRY: Thank you, Mr.

Goodell.

Read the last section.

THE CLERK: This act shall take effect April 1st.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 64. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Ms. Walker to explain her vote.

MS. WALKER: Thank you, Mr. Speaker. It's an honor and a privilege today to explain my vote. It is well-settled that body-worn cameras not only protect the individual who is being arrested, anyone who is in the area, but it also protects the police officer. So there are a number of individuals who are concerned about 50-a releasing of records where they're unsubstantiated. Well, body-worn cameras are a tool that may be able to be used in order to make sure that the truth of whatever the circumstances is will come to light.

So it is my honor and my privilege today to sponsor this piece of legislation, and really to state that while we all recognize that we are not weeding out racism and we cannot legislate morality, but we will also acknowledge that in these extreme times that I am proud that we are moving from agitation to legislation, and I proudly

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vote in the affirmative.

ACTING SPEAKER AUBRY: Ms. Walker in the affirmative.

Mr. Epstein to explain his vote.

MR. EPSTEIN: Thank you, Mr. Speaker. I rise to explain my vote. We talked about transparency and truth. And what cameras do is let us all see what's happening. It can't be your story or my story, it is the truth through the camera's lens. And that's what we learned from George Floyd last week, the truth of his execution on the streets. Body cameras will help us get to the answers we need.

I applaud the sponsor of this bill. I'll be voting in the affirmative and I encourage all my colleagues to do the same. In the name of social justice, we need to be with this, support this and ensure this is a critical piece of legislation. Thank you.

ACTING SPEAKER AUBRY: Mr. Epstein in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Please note that Mr. Fitzpatrick will be voting no on this bill. Thank you, sir.

ACTING SPEAKER AUBRY: So noted. Thank you.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

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MRS. PEOPLES-STOKES: Mr. Speaker, I want to thank my colleagues for the long and arduous work we have been doing so far today. But we do have a little bit more work to do. It's going to be on consent. It's going to be from our A-Calendar which we moved forward earlier. It's mostly local bills, Mr. Speaker, and we're going to start at Rules Report No. 69 and just go straight through as far as we can go. So members should really pay attention. If there's something that comes up that you would not be interested in voting on in a fast roll call, you should make sure you call our office, my office and/or Mr. -- the Minority Leader's office. So again, we're going to start at Rules Report No. 69 which is on page 3 on consent, Mr. Speaker.

ACTING SPEAKER AUBRY: Certainly, Mrs. Peoples-Stokes. We will try to move in expeditious speed.

The Clerk will read.

THE CLERK: Assembly No. A06979-A, Rules Report No. 69, Sec. An act to authorize Jaime Laczko to elect to participate in the optional 25-year retirement plan for forest rangers in the service of the Department of Environmental Conservation.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 69. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

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(The Clerk recorded the vote.)

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. I -- I wanted to remind my colleagues that we want to move quite quickly through these local bills. We had a couple of colleagues that voted no in committee. We intend to stay on a local bill only for a minute or two before we close the roll. So now is a good time to set down your coffee and pay close attention, grab your cell phone, make sure your -- your speed dial is set because we want to speed through these. And if you have any concerns, you need to act quickly.

Thank you so much, sir, for that announcement.

ACTING SPEAKER AUBRY: Absolutely, Mr. Goodell.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A07888-B, Rules Report No. 70, Byrne. An act in relation to designating a portion of the State highway system as the "Putnam County Workers Memorial Bridge."

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 70. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the

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Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08295-A, Rules

Report No. 71, Salka. An act relating to the miscalculation of benefits paid to Katherine Sweeney.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 71. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08353, Rules Report No. 72, Fitzpatrick. An act to amend the Highway Law, in relation to the limitation on certain highway expenses in the Town of Smithtown, Suffolk County.

ACTING SPEAKER AUBRY: Home Rule is at the desk.

Read the last section.

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THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 72. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08555, Rules Report No. 73, Mosley. An act authorizing the Commissioner of General Services to sell certain land to TCH Holdings, LLC; and providing for the repeal of such provisions upon expiration thereof.

ACTING SPEAKER AUBRY: On a motion by Mr. Mosley, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 73. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mr. -- Mrs. --

MRS. PEOPLES-STOKES: Mr. Speaker, if you

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could please record Mike Miller as a no on this one.

ACTING SPEAKER AUBRY: Thank you, Mrs.

Peoples-Stokes. So noted.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08643, Rules Report No. 74, Fitzpatrick. An act to authorize the Town of Smithtown to extend the boundaries of the St. James Fire District to include the Village of Head of the Harbor.

ACTING SPEAKER AUBRY: On a motion by Mr. Fitzpatrick, the Senate bill is before the House. The Senate bill is advanced. Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 74. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08666-A, Rules Report No. 75, Lifton. An act to amend the Environmental

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Conservation Law, in relation to authorizing hunting big game by rifle in the County of Tompkins; and providing for the repeal of such provisions upon expiration thereof.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 75. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

MRS. PEOPLES-STOKES: Mr. Speaker, if we could please record members --

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: If we could please record members Glick, Weinstein and Barron in the negative.

ACTING SPEAKER AUBRY: So noted. Thank you.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08695-A, Rules Report No. 76, Crouch. An act to amend the Village Law, in relation to exempting the Village of Port Dickinson Fire Department from the requirement that the percentage of non-resident fire department members not exceed 45 percent of the membership.

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ACTING SPEAKER AUBRY: On a motion by Mr. Crouch, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 76. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

ACTING SPEAKER DENDEKKER: Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08771, Rules Report No. 77, Sec. An act to amend the Executive Law, in relation to designating Brant Lake as an inland waterway for the purposes of waterfront revitalization.

ACTING SPEAKER DENDEKKER: On a motion -- on a motion by Mr. Stec, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 77. This is a fast roll call. Any

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member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08787-A, Rules Report No. 78, Byrnes. An act granting retroactive membership in the New York State and Local Employees' Retirement system to Shawn Covey -- Coveny.

ACTING SPEAKER DENDEKKER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 78. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08818, Rules Report No. 79, Byrnes. An act to amend the Highway Law, in relation to designating a portion of the State highway system as the "Savannah Marie Williams Memorial Highway."

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ACTING SPEAKER DENDEKKER: On a motion by Mr. [sic] Byrnes, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 79. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08827, Rules Report No. 80, Jones. An act to amend the Executive Law, in relation to designating St. Regis River as an inland waterway for the purposes of waterfront revitalization.

ACTING SPEAKER DENDEKKER: On a motion by Mr. Jones, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 80. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact

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the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08896, Rules Report No. 81, Stern. An act in relation to legalizing, validating, ratifying and confirming a transportation contract of the Cold Spring Harbor Central School District.

ACTING SPEAKER DENDEKKER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 81. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08898, Rules Report No. 82, Stern. An act to legalize, validate, ratify and confirm the actions of the Huntington Union Free School District notwithstanding the failure to timely file final building cost reports with the Education Department.

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ACTING SPEAKER DENDEKKER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 82. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08917, Rules Report No. 83, Finch. An act to amend the Navigation Law, in relation to allowing the Village and Town of Skaneateles in the County of Onondaga to regulate the construction and location of certain boathouses, moorings and docks.

ACTING SPEAKER DENDEKKER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 83. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

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(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A08926, Rules Report No. 84, Goodell. An act to legalize, validate, ratify and confirm the actions of the Panama Central School District notwithstanding the failure to timely file final building cost reports with the Education Department.

ACTING SPEAKER DENDEKKER: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 84. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09052, Rules Report No. 85, Blankenbush. An act to authorize the Towns of Lorraine and Worth in Jefferson County to elect a single town justice to preside in the town courts of such towns.

ACTING SPEAKER DENDEKKER: On a motion by Mr. Blankenbush, the Senate bill is before the House and the Senate bill is advanced.

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Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 85. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09145, Rules Report No. 86, McDonald. An act in relation to authorizing the assessor of the City of Albany to accept from the Koinonia Primary Care, Inc. an application for exemption from real property taxes.

ACTING SPEAKER DENDEKKER: On a motion by Mr. McDonald, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 86. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

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(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09595, Rules Report No. 87, Pheffer Amato. An act to amend the Environmental Conservation Law, in relation to the filling of borrow pits in Jamaica Bay; and to amend Chapter 288 of the Laws of 2014 amending the Environmental Conservation Law relating to the filling of borrow pits in Jamaica Bay, in relation to making the provisions of such chapter permanent.

ACTING SPEAKER DENDEKKER: On a motion by Ms. Pheffer Amato, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 87. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09614, Rules Report No. 88, Garbarino. An act in relation to creating the Davis Park Fire Department Benevolent Association.

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ACTING SPEAKER DENDEKKER: On a motion by Mr. Garbarino, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER DENDEKKER: The Clerk will record the vote on Rules Report No. 88. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

ACTING SPEAKER AUBRY: Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09663, Rules Report No. 89, Ryan. An act to authorize William J. Cooley to receive certain service credit under Section 384-d of the Retirement and Social Security Law.

ACTING SPEAKER AUBRY: Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 89. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the

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Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09682, Rules Report No. 90, Burke. An act to authorize Patrick Humiston to receive certain service credit under Section 384-d of the Retirement and Social Security Law.

ACTING SPEAKER AUBRY: Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 90. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09738, Rules Report No. 91, Hunter. An act to amend the Tax Law, in relation to imposing an additional 2 percent occupancy tax in the County of Onondaga.

ACTING SPEAKER AUBRY: Home Rule message

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is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 91. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mr. Goodell to explain his vote.

MR. GOODELL: Thank you, Mr. Speaker. I will be voting in favor of this local bill, but I would note that it does impose an additional 2 percent occupancy tax on Onondaga County. For those who are concerned about tax increases, please note this, although an occupancy tax is one of the best taxes that you can have that doesn't tax your local residents, but those who are visiting.

For that reason I will be voting in favor of this.

Thank you, sir.

ACTING SPEAKER AUBRY: Mr. Goodell in the affirmative.

(Pause)

Mr. Goodell.

MR. GOODELL: Thank you, sir. The following Republican members would like to have their vote recorded in the negative: That would include Mr. Palumbo, Mr. DiPietro, Mr. Manktelow -- I'm sorry, I apologize. Not Mr. Manktelow, Mr.

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Montesano. I was trying to get all the "Os" in at one time. Mr. Friend, Mr. Schmitt, Mr. Byrne, Mr. DeStefano and Ms. Malliotakis.

ACTING SPEAKER AUBRY: So noted, sir.

MR. GOODELL: Thank you, sir.

ACTING SPEAKER AUBRY: Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if you could please record my colleagues in the negative: Members Buttenschon, Burke, Barrett, Stern, Gunther, McMahon, Mike Miller, Wallace, Griffin, Santabarbara and Barnwell.

ACTING SPEAKER AUBRY: So noted, ma'am.

MRS. PEOPLES-STOKES: Thank you.

ACTING SPEAKER AUBRY: Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09744, Rules Report No. 92, Santabarbara. An act to amend the Public Officers Law, in relation to qualifications for holding the office of Corporation Counsel in the City of Amsterdam.

ACTING SPEAKER AUBRY: On a motion by Mr. Santabarbara, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record

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the vote on Rules Report No. 92. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if you could please note Mr. Epstein in the negative. Epstein in the negative.

ACTING SPEAKER AUBRY: So noted.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09795, Rules Report No. 93, Giglio. An act to amend the Town Law and the Public Officers Law, in relation to authorizing the town justice of the Town of Angelica, County of Allegany, to be a nonresident of such town.

ACTING SPEAKER AUBRY: On a motion by Mr. Giglio, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 93. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

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Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09802-A, Rules Report No. 94, Jaffee. An act relating to validating -- to validating certain acts by the Pearl River Union Free School District relating to final building cost reports required to be filed with the State Education Department.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 94. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09810, Rules Report No. 95, Lupardo. An act to authorize the Town of Union in the County of Broome to convey to New York State Electric & Gas, an easement through land located in the town's West Endicott Park to be used to convey an existing overhead electrical transmission line and anchoring facilities.

ACTING SPEAKER AUBRY: On a motion by Ms.

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Lupardo, the Senate bill is before the House. The Senate bill is advanced. Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 95.

(The Clerk recorded the vote.)

This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

Are there any other votes? Hold on.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, could you please record colleagues Glick, Barnwell, Barron and Walker in the negative on this one?

ACTING SPEAKER AUBRY: So noted, Mrs. Peoples-Stokes.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09814, Rules Report No. 96, LiPetri. An act in relation to authorizing the Good Samaritan Hospital Medical Center to file an -- an application for a real property tax exemption.

ACTING SPEAKER AUBRY: On a motion by Mr.

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LiPetri, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 96. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09816, Rules Report No. 97, Lifton. An act to amend the Tax Law, in relation to the imposition of an occupancy tax in the City of Cortland; and providing for the repeal of such provisions upon the expiration thereof.

ACTING SPEAKER AUBRY: Home Rule -- Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 97. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

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Mr. Goodell to explain his vote.

MR. GOODELL: Thank you, sir. As with a previous bill, this does impose a new occupancy tax in the City of Cortland. It's a local Home Rule request, and I will be supporting it. But I did want to note to my colleagues this is a new occupancy tax for the City of Cortland. So if you're planning to visit there, put a few extra dollars in your wallet. Thank you, sir.

ACTING SPEAKER AUBRY: Certainly. Mr. Goodell in the affirmative.

Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker. Please record the following Republican members in the negative: Mr. Montesano, Mr. Schmitt, Mr. Tague, Mr. Palumbo, Mr. Ra, Ms. Malliotakis, Mr. DiPietro, Mr. Fitzpatrick, Mr. Friend, Mr. Byrne and Mr. DeStefano.

Thank you, sir.

ACTING SPEAKER AUBRY: So noted.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if you could please record the Majority colleagues in the negative on this one: Mr. Burke, Mrs. Barrett, Mr. Stern, Ms. McMahon, Mr. Mike Miller, Ms. Wallace, Mr. Barnwell, Mr. Ramos, Ms. Griffin, Ms. Buttenschon, Mr. Santabarbara, Mr. Cusick, Mr. Barron and Ms. Fahy.

ACTING SPEAKER AUBRY: So noted.

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Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09826, Rules Report No. 98, Lifton. An act relating to the dissolution of the Village of Groton Industrial Development Agency and the disposition of the assets thereof.

ACTING SPEAKER AUBRY: On a motion by Ms. Lifton, the Senate bill is before the House. The Senate bill is advanced. Home Rule message is at the desk.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 98. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09884, Rules Report No. 99, Goodell. An act to authorize the Towns of Mina and French Creek in Chautauqua County to elect a single town justice to preside in the town courts of such towns.

ACTING SPEAKER AUBRY: On a motion by Mr.

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Goodell, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 99. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09905-A, Rules Report No. 100, Hawley, Norris. An act to amend the Public Officers Law, in relation to the qualifications for holding the office of assistant district attorney in the County of Orleans.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote.

(The Clerk recorded the vote.)

This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

MRS. PEOPLES-STOKES: Mr. Speaker, could you

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record Mr. Epstein in the negative on this one?

ACTING SPEAKER AUBRY: Mr. Epstein in the negative. Duly noted --

MRS. PEOPLES-STOKES: Thank you.

ACTING SPEAKER AUBRY: -- Madam Majority Leader.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09922, Rules Report No. 101, Stirpe. An act in relation to authorizing the Liverpool Central School District to receive State aid for certain approved capital-funded projects.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 101. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09936-A, Rules Report No. 102, Crouch. An act to amend the Highway Law, in

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relation to designating a portion of the State highway system as the "Colchester Veterans Memorial Bridge."

ACTING SPEAKER AUBRY: On a motion by Mr. Crouch, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 102. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09937-A, Rules Report No. 103, Woerner. An act to amend the Public Officers Law, in relation to qualifications for holding certain offices in the Village of South Glens Falls.

ACTING SPEAKER AUBRY: On a motion by Ms. Woerner, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record

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the vote on Rules Report No. 103. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09951, Rules Report No. 104, Barclay. An act relating to legalizing, validating, ratifying and confirming a transportation contract of the Fulton City School District.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: The Clerk will record the vote on Rules Report No. 104. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

THE CLERK: Assembly No. A09952-B, Rules Report No. 105, McDonald, Fahy, Steck, D'Urso, Thiele, Dickens, Darling, Epstein, Jacobson, Glick, Galef, Simon, Cahill, Lentol, Gottfried, Schmitt, DeStefano. An act prohibiting the incineration of

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aqueous film-forming foam containing perfluoroalkyl and polyfluoroalkyl substances in certain cities.

ACTING SPEAKER AUBRY: On a motion by Mr. McDonald, the Senate bill is before the House. The Senate bill is advanced.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER AUBRY: This is a fast roll call. Any member wishing -- oh.

The Clerk will record the vote on Rules Report No. 105. This is a fast roll call. Any member wishing to be recorded in the negative is reminded to contact the Majority or Minority Leader at the number previously provided.

(The Clerk recorded the vote.)

Mr. McDonald, tell me something.

First you have to spell that word.

(Laughter)

MR. MCDONALD: Well, thank you, Mr. Speaker. And I rise to, first of all, thank you, to thank Chairman Englebright, Lou Ann Ciccone and the team for recognizing this important legislation. This legislation prohibits the burning or incineration of perfluoroalkyl and polyfluoroalkyl substances, otherwise known as firefighter foam, but we'll call it AFFF to make it a little bit easier on the ears this evening. As you know, these substances, known as PFOS and PFASs, have had some detrimental health impacts here in our

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Capital Region and Hoosick Falls. And it became -- brought to my attention by the Mayor of my hometown of Cohoes that an organization was burning this back in February of this past year. Immediately we put this legislation in -- in effect, and the bottom line is this: There's uncertainty both at the EPA and the DEC on whether this can truly be incinerated without having a negative impact on public health. And, therefore, this legislation strikes to prohibit that incineration until science can prove otherwise.

So, I want to thank you for your support, for expediting this legislation. And as you might ask, I am supporting this bill. Thank you.

ACTING SPEAKER AUBRY: Mr. McDonald in the affirmative.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, do you have any housekeeping or resolutions to take up?

ACTING SPEAKER AUBRY: None that we can find, Mrs. Peoples-Stokes.

(Laughter)

MRS. PEOPLES-STOKES: Well, Mr. Speaker, now I want to commend my colleagues on both sides of the aisle for having a very deliberate but good conversation today and passing some good

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legislation. And I also want to remind people that we do have one more day in Session. So we're going to start in the morning with a Ways and Means Committee at 9:00. Immediately following that we will be doing Rules at 9:30, and then a 10:00 a.m. Session, Mr. Speaker. A 10:00 a.m. Session will allow us to move out a little earlier in the day.

So with that, I want to move that the Assembly stand adjourned until 10:00 a.m. Wednesday morning, June the 10th, tomorrow being a Session day.

ACTING SPEAKER AUBRY: The Assembly Session is over.

(Whereupon, at 9:12 p.m., the House stood adjourned until Wednesday, June 10th at 10:00 a.m., that being a Session day.)

**Exhibit B to Powers Affirmation-
Law 2020, Chapter 96, effective June 12, 2020
[pp. 425 - 427]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

INDEX NO. 002602/2021

NYSCEF NO. LEGIS 963(2020), 2020 Sess. Law News of N.Y. Ch. 96 (S. 8496) (McKINNEY'S)

RECEIVED NYSCEF: 04/14/2021

2020 Sess. Law News of N.Y. **Ch. 96** (S. 8496) (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

243rd LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .

Vetoed are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

CHAPTER 96

S. 8496

Approved and effective June 12, 2020

AN ACT to amend the civil rights law and the public officers law, in relation to the disclosure of law enforcement disciplinary records; and to repeal section 50-a of the civil rights law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

<< NY CIV RTS § 50-a >>

Section 1. Section 50-a of the civil rights law is REPEALED.

<< NY PUB OFF § 86 >>

§ 2. Section 86 of the public officers law is amended by adding four new subdivisions 6, 7, 8 and 9 to read as follows:

6. "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.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a

local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

§ 3. Section 87 of the public officers law is amended by adding two new subdivisions 4-a and 4-b to read as follows:

<< NY PUB OFF § 87 >>

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

§ 4. Section 89 of the public officers law is amended by adding two new subdivisions 2-b and 2-c to read as follows:

<< NY PUB OFF § 89 >>

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

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INDEX NO. 002602/2021

NYSCEF NO. LEGIS 963(2020), 2020 Sess. Law News of N.Y. Ch. 96 (S. 8496) (McKINNEY'S)

RECEIVED NYSCEF: 04/14/2021

2-c. For records that constitute “law enforcement disciplinary records” as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

§ 5. This act shall take effect immediately.

End of Document

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**Exhibit C to Powers Affirmation-
State of New York Department of State Committee on Open Government, dated
July 27, 2020
[pp. 428 - 430]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM
4/14/2021
 NYSCEF DOC. NO. 31

The Committee on Open Government

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021



**State of New York
Department of State
Committee on Open Government**

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FOIL AO 19775

By electronic mail only

July 27, 2020

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear:

I am writing in response to your request for an advisory opinion regarding the obligations of the City of Syracuse (the "City") under the Freedom of Information Law (FOIL) in connection with requests for law enforcement disciplinary records, specifically relating to unsubstantiated and unfounded complaints against a police officer. In your inquiry, you note that Public Officers Law § 86(6)(a) defines "law enforcement disciplinary records" to include "complaints, allegations, and charges against an employee." You ask whether "an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome." I note that yours is the first, but not the only, inquiry we have received in recent weeks asking this question.

As you know, until very recently, personnel records of police officers, corrections officers, and paid firefighters that were used to evaluate performance toward continued employment were specifically exempted from disclosure by state statute: Civil Rights Law § 50-a and, because of this, Public Officers Law § 87(2)(a). On June 12, 2020, however, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending FOIL to add certain provisions relating to law enforcement disciplinary records. Where prior to June 12, 2020, access to personnel records of a police officer was governed by § 50-a and the resulting FOIL exemption pursuant to § 87(a)(2), ending the FOIL analysis immediately, access is now governed by FOIL alone.

As a general matter, FOIL is based upon a presumption of access. All records of an agency are available except to the extent that records or portions thereof fall within one or more grounds for exemption appearing in § 87(2)(a) through (q) of the Law. Section 87(2)(b) of FOIL, a provision which until June 12, 2020, had not been applied to law enforcement disciplinary records because of Civil Rights Law § 50-a, permits an agency to withhold records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" As you note in your inquiry, the Committee on Open Government has frequently addressed issues relating to rights of access to disciplinary records of public employees pursuant to this subsection of the FOIL.

In [FOIL Advisory Opinion 17195](#), staff of the Committee opined that a record of an unsubstantiated or unfounded complaint may be withheld under FOIL where the agency determines such complaint would constitute an unwarranted invasion of personal privacy:

The exception of significance is § 87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of one's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [W]hen allegations or charges of

misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld based on considerations of privacy.

Committee staff have issued similar opinions in [FOIL AO 19771](#), [FOIL AO 16764](#), [FOIL AO 12802](#), [FOIL AO 12722](#), [FOIL AO 11747](#), [FOIL AO 9463](#), and [FOIL AO 7602](#). In sum, Committee staff have long advised that where an agency determines that a record of an unsubstantiated or unfounded complaint would, if disclosed (even in a redacted form (see, e.g., [FOIL AO 19771](#))), constitute an unwarranted invasion of personal privacy, such record need not be disclosed.

The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in § 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent. Moreover, while no court has yet issued an opinion formally answering the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, at least two have recently temporarily enjoined the disclosure of such complaints pending a final determination. [\[1\]](#)

In further support of this interpretation, there is a suggestion in the new FOIL provisions that some law enforcement disciplinary records, which the legislature calls "technical infractions" (FOIL § 89(2-c)), enjoy *greater* (rather than less) protection than such infractions contained in the disciplinary records of other government employees. In other words, while there is some express language in the statute to render certain records of law enforcement agency employees *less* available than those of other government employees, there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees.

Accordingly, it is our opinion, in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose "unsubstantiated and unfounded complaints against an officer" where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2)(a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy.

[1] See <https://gothamist.com/news/federal-judge-blocks-release-nypd-misconduct-records-orders-nyclu-keep-records-secret> (U.S. District Court for the Southern District of New York) and https://buffalonews.com/news/local/crime-and-courts/city-of-buffalo-blocked-from-releasing-portions-of-police-disciplinary-records/article_2acfc25c-cde6-11ea-8d7f-3b130bc09a73.html (New York State Supreme Court).

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay
Executive Director

SVB/ko

FOIL-AO-f19775
19775

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^{4/14/2021}
NYSCEF DOC. NO. 31

The Committee on Open Government

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

**Exhibit D to Powers Affirmation-
State of New York Department of State Committee on Open Government,
dated March 19, 2021
[pp. 431 - 432]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM
4/14/2021
NYSCEF DOC. NO. 32

The Committee on Open Government

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021



**State of New York
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FOIL AO 19785

By Electronic Mail Only

March 19, 2021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. :

You have asked whether the Committee has changed its [opinion](#) on the legal standard now applicable to records of unsubstantiated or pending complaints of misconduct made against law enforcement officers in light of three recent court decisions finding on the facts presented to those courts that Freedom of Information Law ("FOIL") disclosure was permitted or required. The short answer is no; all three of the court decisions you mention are consistent with our [opinion](#) issued in 2020 concerning the release by law enforcement agencies of unsubstantiated or pending complaints of misconduct by law enforcement agency employees.

The Supreme Court decisions each reiterate that, in 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. Moreover, in the decisions you reference, each court makes findings of fact that are specific to the records before it and is careful to identify that each such determination of FOIL accessibility by other agencies looking at other records will be similarly fact-specific. *See, e.g., Buffalo Police Benevolent Association v. Brown*, 134 N.Y.S.3d 150, 155-56 (Supr. Ct. Erie Co. 2020) ("Finally, it should be noted that the court's rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including § 87(2)(b)."); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 N.Y. Slip Op. 34346(U) (Supr. Ct. Schenectady Co. Dec. 29, 2020) ("Finally, notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to Patrolman Pommer and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits."). This is precisely what we advised in 2020 before courts had opined.

With respect to the Second Circuit decision, we do not read it as a mandate to agencies to release all unsubstantiated complaints without a review for rights of access under FOIL. Rather, it is a ruling, on a union request to enjoin an agency from proactive disclosure of an entire category of records, that an agency, such as the New York City Police Department, *may affirmatively determine to release and cannot be enjoined from releasing* such records if it concludes either that no FOIL exemptions apply to them or that it will waive such exemptions now that the legal restriction preventing their release has been repealed. *See Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021). Specifically, the ruling of the court related to an injunction that it ultimately denied: the court was asked to enjoin the NYPD from releasing such records in its portal and found that the petitioner unions failed to establish success on merits of several arguments in favor of withholding them as a category of records. The Court did not make a ruling on a specific record or make a ruling that no law enforcement agency could make a different determination on its own records. The basic FOIL principles continue to apply to these records, and therefore an agency that does not wish to proactively disclose the entire category of records (or waive exemptions that may apply) may still review such records and make determinations as to rights of access. *See, e.g., id.* at *3 (the court continues to "recognize those specific FOIL exemptions that are designed to protect against unwarranted invasions of personal privacy or endangering a person's safety"). Again, this is precisely what we advised in 2020 before courts had opined.

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4/14/2021
NYSCEF DOC. NO. 32

The Committee on Open Government

RECEIVED NYSCEF: 04/14/2021

Please do not hesitate to contact us if you have further questions. Thank you.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

SVB/fhs

FOIL-AO-f19785
19785

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Exhibit E to Powers Affirmation-
Legislative Memorandum relating to Ch. 96
[pp. 433 - 434]

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

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NYSCEF NO. LEGIS MEMO 96 (2020), 2020 Sess. Law News of N.Y. Legis. Memo Ch....

RECEIVED NYSCEF: 04/14/2021

2020 Sess. Law News of N.Y. Legis. Memo **Ch. 96** (McKINNEY'S)

McKINNEY'S 2020 SESSION LAW NEWS OF NEW YORK

Legislative Memorandum relating to **Ch. 96**
Memorandum in Support, New York State Senate

<Text of Law, see **ch. 96**>

BILL NUMBER: S8496

SPONSOR: BAILEY

TITLE OF BILL:

An act to amend the civil rights law and the public officers law, in relation to the disclosure of law enforcement disciplinary records; and to repeal section 50-a of the civil rights law relating thereto

PURPOSE:

To repeal Civil Rights Law § 50-a.

SUMMARY OF PROVISIONS:

Section 1 repeals Civil Rights Law § 50-a.

Section 2 defines law enforcement agency (including police agencies and departments, sheriffs departments, the Department of Corrections and Community Supervision, local corrections and probation departments, fire departments, and forces of individuals employed as firefighters or firefighter/paramedics), law enforcement disciplinary proceeding, law enforcement disciplinary records, and technical infraction.

Section 3 requires a law enforcement agency responding to a request for law enforcement disciplinary records to redact specific categories of personal information from the record before disclosing the record, and allows the agency to redact portions of the record that only contain minor, technical infractions that do not involve interactions with the public, are not of public concern, and are not connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities.

Section 4 provides the specific types of personal information that must be redacted from a law enforcement agency's response to a request for disciplinary records.

Section 5 provides the effective date.

JUSTIFICATION:

Section 50-a of the New York State Civil Rights Law creates a special right of privacy for the "personnel records used to evaluate performance toward continued employment or promotion" of police officers, correction officers, and firefighters/paramedics employed by the State or political subdivisions, as well as those of peace officers working for the Department of Corrections and Community Supervision or local probation departments.

This exemption was adopted in 1976 by the Legislature in order to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions. However, current law, as narrowly interpreted by the Court of Appeals, prevents access to both the records of the disciplinary proceedings themselves and the recommendations or outcomes of those proceedings.

According to the 2014 annual report by the State Committee on Open Government to the Governor and the State Legislature, “this narrow exemption has 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.”

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. The State Committee on Open Government has stated that § 50-a “creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred.” FOIL’s public policy goals, which are to make government agencies and their employees accountable to the public, are thus undermined. 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.

FOIL already provides that agencies may redact or withhold information whose disclosure would constitute an unwarranted invasion of privacy. Recent changes to the Civil Service Law have created additional, nondiscretionary protections against the release of certain sensitive information such as contact information. Furthermore, this bill adds additional safeguards in the FOIL statute. Finally, courts have the ability to protect against improper cross-examination and determine if police records are admissible in a trial, without the denial of public access to information regarding police activity created by § 50-a. The broad prohibition on disclosure created by § 50-a is therefore unnecessary, and can be repealed as contrary to public policy.

Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct.

LEGISLATIVE HISTORY:

New Bill

FISCAL IMPLICATIONS:

TBD

LOCAL FISCAL IMPLICATIONS:

TBD

EFFECTIVE DATE:

Immediately

**Exhibit F to Powers Affirmation-
2019 New York Senate Bill No. 4213 Text, dated March 4, 2019
[pp. 435 - 437]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

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NYSCEF 2019 New York Senate Bill No. 4213, New York Two..., 2019 New York...

RECEIVED NYSCEF: 04/14/2021

2019 New York Senate Bill No. 4213, New York Two Hundred Forty-Second Legislative Session

NEW YORK BILL TEXT

TITLE: Relates to personnel records of certain law enforcement officers and other public employees.

VERSION: Introduced

March 04, 2019

Parker, Kevin S.

 [Image 1 within document in PDF format.](#)

SUMMARY: PARKER Amd i50-a, Civ Rts L Relates to personnel records of certain law enforcement officers and other public employees; authorizes the disclosure of personnel records under certain circumstances.

TEXT:

STATE OF NEW YORK _____

4213

2019-2020 Regular Sessions

IN SENATE

March 4, 2019 _____

Introduced by Sen. PARKER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil rights law, in relation to personnel records of certain law enforcement officers and other public employees

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. [Section 50-a of the civil rights law](#), as amended by chapter 778 of the laws of 1981, the section heading as amended by chapter 757 of the laws of 1986 and subdivision 1 as amended by chapter 516 of the laws of 2014, is amended to read as follows:

§ 50-a. Personnel records of police officers, firefighters and correction officers. 1. All **Except as provided for in subdivisions five and six of this section, all** personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law and such personnel records under the control of a sheriff's department or a department of correction of individuals employed as correction officers and such personnel records under the control of a paid fire department or force of individuals employed as firefighters or firefighter/paramedics and such personnel records under the control of the department of corrections and community supervision for individuals defined as peace officers pursuant to subdivisions twenty-three and twenty-three-a of section 2.10 of the criminal procedure law and such personnel records under the control of a probation department for individuals defined as peace officers pursuant to subdivision twenty-four of section 2.10 of the criminal procedure law shall be considered confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer or peace officer within the department of corrections and community supervision or probation department except as may be mandated by lawful court order **as provided in subdivisions two and three of this section.**

2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.

3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting.

4. As used in this section, the following terms shall have the following meanings:

a. "covered employee" means any individual whose personnel records are subject to subdivision one of this section.

b. "employing agency" means an agency that employs a covered employee.

c. "recommending agency" means any government agency or body that is not authorized to impose discipline on a covered employee, but is authorized to make recommendations related to imposing discipline on a covered employee.

d. "public disciplinary records" means any of the following personnel records of a covered employee, when used in or created as a result of any administrative disciplinary process, whether initiated by civilian complaint or otherwise:

(1) the complaints, allegations, and charges;

(2) the name of the covered employee complained of or charged;

(3) the final disposition of any complaints, allegations, and charges against a covered employee, and the final discipline imposed or the fact that no discipline was imposed;

(4) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(5) the final written opinion or memorandum supporting the final disposition and final discipline imposed and containing an employing agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee; and

(6) the final written memorandum containing the complete factual findings, analysis, and recommendations regarding disposition, discipline, or any other aspect of the administrative disciplinary process, made by a recommending agency.

e. "administrative disciplinary process" means a process that includes any of the following:

(1) the formal service of charges and specifications against a covered employee; or

(2) a recommendation of charges and specifications by a recommending agency; or

(3) regardless of whether charges and specifications are served or recommended, either a recommendation by a recommending agency or acceptance by a covered employee of any punishment, not including retraining or education, provided that the administrative disciplinary process results from a use of force, entry or search of premises, or strip search.

The administrative disciplinary process shall be deemed to encompass all parts of such process, including any that may precede the steps specified in subparagraphs one, two and three of this paragraph, including but not limited to, the filing

of a civilian complaint. The administrative disciplinary process shall be deemed concluded when a final disposition has been issued by the agency, body, or official authorized to impose discipline on the covered employee, or when the covered employee retires, resigns, or is otherwise separated from the employment of the agency, whichever is sooner.

5. Public disciplinary records shall be subject to subdivisions one, two and three of this section only until the conclusion of the administrative disciplinary process. After the conclusion of the administrative disciplinary process, such public disciplinary records shall not be subject to subdivisions one, two and three of this section, and instead shall be subject to subdivision seven of this section. After the conclusion of the administrative disciplinary process, an agency may publicly disclose such public disciplinary records unless such disclosure is prohibited by law, and may not deny a request for such public disciplinary records made under article six of the public officers law on the basis of this section or on the basis of paragraph (g) of subdivision two of section eighty-seven of the public officers law.

6. Notwithstanding subdivision one of this section, any recommending agency may disclose the following information to the complainant or alleged victim of any act by a covered employee giving rise to a complaint: a. the covered employee's name; b. the recommendations regarding disposition and discipline made by any recommending agency; and c. the final disposition and disciplinary action taken, if any, by the employing agency. To the extent information disclosed pursuant to this subdivision is not a public disciplinary record, such information shall be considered confidential in accordance with subdivision one of this section.

7. After the conclusion of an administrative disciplinary process, public disciplinary records may not be used in litigation except as may be mandated by court order. Prior to issuing any such order, the court shall conduct an in camera review of such records and give all interested parties, including the subject of such public disciplinary records, notice and an opportunity to be heard. If, after such hearing and review, the court determines that any of such records are relevant and material to the action before it and that their probative value outweighs their prejudicial effect in such action, then it shall permit the use in such action of only those records as to which such a finding was made. The use of such records in litigation shall remain subject to any other applicable provision of law governing such use.

8. The provisions of this section shall not apply to any district attorney or his assistants, the attorney general or his deputies or assistants, a county attorney or his deputies or assistants, a corporation counsel or his deputies or assistants, a town attorney or his deputies or assistants, a village attorney or his deputies or assistants, a grand jury, or any agency of government which requires the records described in subdivision one of this section, in the furtherance of their official functions.

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

Exhibit G to Powers Affirmation-
Bill Tracking re: 2019 New York State Bill No. 4213

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:33 PM

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NYSCEF DOC BILN Tracking for 2019 New York Senate Bill No. 4213, New York Two...

RECEIVED NYSCEF: 04/14/2021

Bill Tracking (1)

2019 New York Senate Bill No. 4213 New York Two Hundred Forty-Third Legislative Session

NEW YORK BILL TRACKING

TITLE: Relates to personnel records of certain law enforcement officers and other public employees.

AUTHOR: Parker, Kevin S.

SUMMARY: PARKER Amd i50-a, Civ Rts L Relates to personnel records of certain law enforcement officers and other public employees; authorizes the disclosure of personnel records under certain circumstances.

STATUS:

03/04/2019 (S) INTRODUCED AND REFERRED TO COMMITTEE ON SENATE CODES

01/08/2020 (S) FAILED TO ADVANCE

01/08/2020 (S) REFERRED TO SENATE CODES

2019 NY S.B. 4213 (NS)

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**Respondents' Verified Answer to Article 78 Petition with Counterstatement
of Material Facts and Objections in Points of Law, dated April 14, 2021
[pp. 439 - 458]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:34 PM

NYSCEF DOC. NO. 36

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

**VERIFIED ANSWER TO
ARTICLE 78 PETITION
with
COUNTERSTATEMENT OF
MATERIAL FACTS
and
OBJECTIONS IN
POINT OF LAW**

Index No. 002602/2021
Hon. Gerard J. Neri

Respondents City of Syracuse and the Syracuse Police Department (collectively, “Respondents”) answer the Verified Petition of Petitioner New York Civil Liberties Union (the “NYCLU”), as follows:

PRELIMINARY STATEMENT

1. Over the last several years, the City of Syracuse (the “City”) and the Syracuse Police Department (the “Department”) have been at the forefront of the police reform movement by implementing cutting-edge, systemic policy and practice reforms, becoming a state leader in progressive policing. In contrast, the NYCLU’s underlying Freedom of Information Law¹ (“FOIL”) request—and this Article 78 challenge—*do not* implicate meaningful police reform issues. Rather, the NYCLU’s FOIL request served on the City effectively contains 60 individual requests so expansively broad in scope that they potentially encompass *every personnel and training document* created by the Department over a period of 20 years.

2. The NYCLU’s overbroad FOIL request represents an excessive waste of City

¹ N.Y. Public Officers Law § 84, *et seq.*

resources—and taxpayer funds—potentially requiring the commitment of multiple full-time City employees over a period of multiple years *just to respond to this one FOIL request*. It is self-evident that the resources to be expended in response to this expansive request would be better used toward direct services for City citizens.

3. Nonetheless, the City and the Department have taken their responsibilities under FOIL seriously and diligently. The present proceeding fails to mention that the NYCLU's FOIL request seeks *20 years* of police officer personnel files and disciplinary records. This appeal relates to only a small subset of those files—disciplinary records related to misconduct complaints that were ultimately found to be unsubstantiated, unfounded, or those for which a decision has not yet been reached. These records are of no evidentiary value to the goals the NYCLU has represented underlie its massive FOIL request and, when disclosed, have the potential to be unfairly prejudicial and needlessly invasive of the privacy interests of public employees.² *See generally* Dkt. No. 1. As set forth below, it well settled that *existing* FOIL exceptions protect *other types* of public employees from the disclosure of such records.

4. The NYCLU's untenable position in this action is that the repeal of New York Civil Rights Law § 50-a in June of 2020 *somehow* altered FOIL's personal privacy exemption such that police officers would be treated *differently*—indeed less favorably—than the same law treats other public employees. This is simply not the case. The repeal of § 50-a certainly does not indicate such an intent nor contain any provisions that would accomplish such a purpose. The case law cited by the NYCLU's supporting papers does not support its position and in many cases the holdings are miscited or exaggerated. Similarly, the NYCLU's citation to the legislative history is selective, one-sided, and ultimately misleading.

² Indeed, a mere allegation of misconduct, without substantiation, is evidence of nothing. But mere allegations have been used to unfairly smear public employees throughout history.

5. Rather, even a cursory review of the plain language of § 50-a reveals the inescapable and logical conclusion that while the statute had previously provided police records *an additional layer* of protection, the repeal of the statute merely removed that additional layer of protection—placing police officers on the same footing as any other public employees. There is no authority—nor has the NYCLU cited any—that police officers must now be treated less favorably than other public employees under FOIL.

6. Notwithstanding this logical conclusion to be drawn from the § 50-a repeal statute itself, the City took good faith measures during the summer of 2020 to request an official opinion from New York State’s *Committee on Open Government* as to whether the repeal of § 50-a required the City to produce unsubstantiated or unfounded disciplinary files in response to FOIL requests.

7. The *Committee* was expressly created by the New York State Legislature to (1) “furnish to any agency advisory guidelines, opinions or other appropriate information regarding” FOIL; and (2) “furnish to any person advisory opinions or other appropriate information regarding” FOIL. *See* N.Y. Pub. Off. Law § 89. Thus, the City requested an advisory opinion from the very state agency created by the Legislature to answer questions about the interpretation of FOIL.

8. In response to the City’s inquiry, on July 27, 2020, the *Committee* issued a formal advisory opinion AO 19775 in response to the City’s question, which observed that where an agency weighs the interest of disclosure against the unwarranted invasion into personal privacy and finds that the latter outweighs the public interest in disclosure, “*records of unsubstantiated and unfounded complaints*” are properly withheld under the FOIL exception found at § 87(2)(b). Thus, the *Committee* expressly found that this interpretation *applied equally to police officer employee records*, and was unaffected by the recent repeal of § 50-a.

9. It appears to be the NYCLU's position that the *Committee*—an entity that was created for the express purpose of interpreting the FOIL statute—is wrong in their interpretation. In a similarly questionable position, they also argue that the City—who relied on the *Committee's* advisory opinion—lacked a reasonable basis for taking its current position. The NYCLU provides no principled support for these arguments.

10. At bottom, the Department's limited carve out of records under § 87(2)(b) of FOIL is not "affected by an error of law"; rather it is soundly premised on the plain language of the FOIL statute and is fully supported by administrative guidance provided by the New York State agency created to interpret FOIL. As a result, the NYCLU's Petition should be dismissed for lack of merit and failure to state a claim.

RESPONSE TO THE PETITIONER'S ALLEGATIONS

11. With respect to the allegations in Paragraph 1 of the Petition, Respondents **ADMIT** only that the NYCLU served a FOIL request on the Department on September 15, 2020, which is attached to the Petition as Exhibit A and that the Department acknowledged receipt of that FOIL request, which is attached to the Petition as Exhibit B. *See* R. 8-17. The remainder of Paragraph 1 contains self-serving, exaggerated, and incorrect characterizations of the referenced documents—as well as the governing statutory schemes at issue—and on that basis, Respondents **DENY** all remaining allegations contained in Paragraph 1 on the Petition.

12. With respect to the allegations in Paragraph 2, Respondents **ADMIT** such allegations.

13. With respect to the allegations in Paragraph 3, Respondents **DENY** the characterization that the NYCLU's request for officer disciplinary records was "categorically denied" or that Respondent's partial denial of the FOIL request was "unlawful." Respondents

ADMIT that Respondents agreed to produce finally adjudicated and substantiated complaints between 2014 and 2020, which is annexed to the Petition as Exhibit C. *See* R. 18-20. Respondents further **AVER** that the November 17, 2020 letter from Corporation Counsel Kristen E. Smith to Attorney Michael Lacovara, which denied access to unfounded, unsubstantiated, and open complaints must be reviewed in its entirety to determine its proper context and meaning. *See* R. 18-20.

14. With respect to the allegations in Paragraph 4, Respondents **DENY** such allegations.

15. With respect to the allegations in Paragraph 5, Respondents **ADMIT** that by commencing this specific proceeding, the NYCLU “seeks to compel the SPD to respond to the FOIL Request,” but Respondents **DENY** that the NYCLU is entitled to such relief. Respondents further **DENY** all remaining allegations contained in Paragraph 5.

16. With respect to the allegations in Paragraph 6, Respondents **DENY** such allegations.

17. With respect to the allegations in Paragraph 7, Respondents **ADMIT** that it received a November 30, 2020 correspondence from counsel for the NYCLU, which is annexed to the Petition as Exhibit D.

18. With respect to the allegations in Paragraph 8, Respondents **ADMIT** and **AVER** that the letter, which reflected an intent to appeal in the future, did not require a response.

19. With respect to the allegations in Paragraph 9, Respondents **ADMIT** such allegation.

20. With respect to the allegations in Paragraph 10, Respondents **ADMIT** and **AVER** that the December 22, 2020 letter by Corporation Counsel Smith must be reviewed in its entirety

to determine its proper context and meaning. *See* R. 26-31.

21. With respect to the allegations in Paragraph 11, Respondents **ADMIT** that Petitioner commenced this special proceeding purportedly “to require Respondents to produce records responsive to its request for all law enforcement disciplinary records, including any unsubstantiated complaints,” but **DENY** that the NYCLU is entitled to such relief.

22. With respect to the allegations in Paragraph 12, Respondents **ADMIT** that Petitioner purports to seek “an award of attorneys’ fees and costs” in this special proceeding, but Respondents **DENY** that the NYCLU is entitled to such relief. Respondents further **DENY** the allegation that they failed to adhere to FOIL and **AVER** that they met all of their FOIL obligations.

VENUE

23. With respect to the allegations in Paragraph 13, Respondents **AVER** that Paragraph 13 contains a legal conclusion relative to the venue of this special proceeding and to which no response is required.

PARTIES

24. With respect to the allegations in Paragraph 14, Respondents **DENY KNOWLEDGE OR INFORMATION** sufficient to form a belief regarding the allegations in Paragraph 14 and on that basis, Respondents **DENY** such allegations.

25. With respect to the allegations in Paragraph 15, Respondents **ADMIT** such allegations. *See* N.Y. Public Officers Law § 86(3).

26. With respect to the allegations in Paragraph 16, Respondents **ADMIT** such allegations. *See* N.Y. Public Officers Law § 86(3).

FACTUAL BACKGROUND

27. With respect to the allegations in Paragraph 17, Respondents **DENY** Petitioner’s

self-serving, exaggerated, and incorrect characterizations regarding § 50-a and on that basis, Respondents **DENY** such allegations. Respondents **AVER** that § 50-a speaks for itself and must be reviewed in its entirety to determine its proper context and meaning.

28. With respect to the allegations in Paragraph 18, Respondents **DENY** Petitioner's self-serving, exaggerated, and incorrect characterizations regarding § 50-a and on that basis, Respondents **DENY** such allegations. Respondents **AVER** that § 50-a—as well as the legislative history leading to its enactment—speaks for itself and must be reviewed in its entirety to determine its proper context and meaning.

29. With respect to the allegations in Paragraph 19, Respondents **ADMIT** such allegations, but **AVER** that the repeal of New York Civil Rights Law § 50-a did not impact FOIL in such a way that police officers would be treated *differently* than FOIL treats any other public employee.

30. With respect to the allegations in Paragraph 20, Respondents **ADMIT** such allegations, but **AVER** that the repeal of New York Civil Rights Law § 50-a did not impact FOIL in such a way that police officers would be treated *differently* than FOIL treats any other public employee.

31. With respect to the allegations in Paragraph 21, Respondents **ADMIT** only that unsubstantiated complaints were discussed during the Assembly floor debate, but **DENIES** the NYCLU's cherry-picked representation of the debate, and on that basis Respondents **DENY** all remaining allegations contained in Paragraph 21 on the Petition.

32. With respect to the allegations in Paragraph 22, Respondents **DENY** such allegations.

33. With respect to the allegations in Paragraph 23, Respondents **ADMIT** that they

have withheld unsubstantiated, unfounded, and open complaints and **AVER** that such withholding fully complied with Respondents' FOIL obligation. Respondents **DENY** all remaining, unaddressed allegations in Paragraph 23.

34. With respect to the allegations in Paragraph 24, Respondents **ADMIT** such allegations.

35. With respect to the allegations in Paragraph 25, Respondents **ADMIT** such allegations.

36. With respect to the allegations in Paragraph 26, Respondents **ADMIT** such allegations.

37. With respect to the allegations in Paragraph 27, Respondents **ADMIT** such allegations.

38. With respect to the allegations in Paragraph 28, Respondents **ADMIT** such allegations.

39. With respect to the allegations in Paragraph 29, Respondents **ADMIT** such allegations and Respondents **AVER** that the decision "to produce disciplinary records related only to 'substantiated' complaints" struck the appropriate balance of both complying with FOIL obligations and protecting the personal privacy of employees.

40. With respect to the allegations in Paragraph 30, Respondents **ADMIT** such allegations and **AVERS** that the *Committee* adhered to the July 27, 2020 Advisory Opinion as recently as March 19, 2021. *See* Comm. On Open Gov't FOIL AO 19785; *see also* R. 32-33.

41. With respect to the allegations in Paragraph 31, Respondents **ADMIT** such allegations.

42. With respect to the allegations in Paragraph 32, Respondents **ADMIT** such

allegations. *See* R. [[H4348922](#)].

43. With respect to the allegations in Paragraph 33, Respondents **ADMIT** such allegations. *See* R. 21-25.

44. With respect to the allegations in Paragraph 34, Respondents **ADMIT** such allegations and **AVER** that the *Committee* was notified of purportedly “recent and relevant authority in New York,” and that entity adhered to its July 27, 2020 Advisory Opinion, concluding that “all three of the court decisions you mention are consistent with our opinion issued in 2020 concerning the release by law enforcement agencies of unsubstantiated or pending complaints of misconduct by law enforcement agency employees.” Comm. On Open Gov’t FOIL AO 19785; *see also* R. 32-33.

45. With respect to the allegations in Paragraph 35, Respondents **ADMIT** such allegations, but **AVER** that the NYCLU is not entitled to the relief that it seeks in this special proceeding.

46. With respect to the allegations in Paragraph 36, Respondents **ADMIT** such allegations.

CAUSE OF ACTION UNDER ARTICLE 78

47. With respect to the allegations in Paragraph 37, Respondents repeat and reallege each and every response set forth in the preceding paragraphs as if those responses are fully set forth herein.

48. With respect to the allegations in Paragraph 38, Respondents **ADMIT** such allegations.

49. With respect to the allegations in Paragraph 39, Respondents **DENY** such allegations.

50. With respect to the allegations in Paragraph 40, Respondents **ADMIT** such allegations and **AVER** that “a statutory or other valid basis to withhold materials” existed with respect to Respondents’ decision to withhold unsubstantiated complaints. Respondents further **AVER** that they fully complied with their obligations arising under FOIL.

51. With respect to the allegations in Paragraph 41, Respondents **DENY** such allegations.

52. With respect to the allegations in Paragraph 42, Respondents **ADMIT** such allegations.

53. With respect to the allegations in Paragraph 43, Respondents [complete].

54. With respect to the allegations in Paragraph 44, Respondents **ADMIT** such allegations.

COUNTERSTATEMENT OF THE PERTINENT AND MATERIAL FACTS

Pursuant to CPLR § 7804(d), Respondents set forth the following pertinent and material facts in support of Respondents’ decision to deny access to open, unsubstantiated, and unfounded complaints of misconduct. Unless otherwise indicated, all citations are to the Certified Record, which is submitted herewith in accordance with the requirements of CPLR § 7804(d) & (e).

1. Beginning in mid-2020, the City had a legitimate question concerning the scope and interpretation of FOIL relative to whether requests for the disclosure of certain types of police officer personnel records constitute an unwarranted invasion into personal privacy such that they would be exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(b).

2. Specifically, the City sought to determine—in light of the June 2020 repeal of New York Civil Rights Law § 50-a—whether it was obligated under FOIL to disclose disciplinary records of police officers relative to unsubstantiated, unfounded, or pending complaints.

3. To address this question concerning the scope and interpretation of FOIL, on July 13, 2020, the City submitted a formal request for an advisory opinion to the New York State *Committee on Open Government* and asked whether “an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome.” R. 1.

4. The *Committee* was created by the New York State Legislature for the express purpose of, among other things (1) “furnish[ing] to any agency advisory guidelines, opinions or other appropriate information regarding” FOIL; and (2) “furnish[ing] to any person advisory opinions or other appropriate information regarding” FOIL. *See* N.Y. Pub. Off. Law § 89.

5. Advisory opinions issued by the *Committee* are given deference by courts with respect to determining the scope and interpretation of FOIL. *See Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep’t 1999).

6. On July 27, 2020, the *Committee* issued a formal advisory opinion AO 19775, which is published on the State of New York’s website at <https://docs.dos.ny.gov/coog/ftext/fl19775.html>. *See also* R. 2-4.

7. The *Committee*—the State’s designated advisory body on the scope and interpretation of the FOIL statute—held that “[t]he new provisions of FOIL [included in the statute repealing § 50-a] *did not make changes* to provisions concerning personal privacy as defined in § 87(2)(b).” *See* R. 2-4.

8. Thus, the *Committee* observed that, just as the law provided for *prior* to the repeal of Civil Rights Law § 50-a, where an agency weighs the interest of disclosure against the unwarranted invasion into personal privacy and finds that the latter outweighs the public interest

in disclosure, “*records unsubstantiated and unfounded complaints*” are properly withheld under § 87(2)(b) *after* the repeal of Civil Rights Law § 50-a. *See* R. 2-4 (emphasis added).

9. The *Committee* expressly found that this interpretation applied equally to police officer employee records, notwithstanding the recent repeal of Civil Rights Law § 50-a, which had no effect on that principle. *See* R. 2-4.

10. The City relied in good faith on the formal advisory opinion issued by the *Committee* regarding this matter relative to FOIL requests submitted by various parties requesting disciplinary records concerning specific police officers, and such reliance was appropriate given the statutory mandate of the *Committee* as provided by N.Y. Pub. Off. Law § 89.

11. On or about September 15, 2020, the NYCLU served a FOIL request on the Department containing eight, single-spaced pages of particularized document requests, with over 60 individual requests. *See* R. 8-15.

12. The FOIL requests were expansively broad—covering nearly every topic of police activity over the same *20 year span*—necessarily implicating a massive investment of time, manpower, and resources in response. *See* R. 8-15.

13. For example, the first such request—which was representative of the breadth of the remainder of the requests—demanded “all law enforcement disciplinary records collected by the SPD” for an over 500 officer police force over the span of 20 years. *See* R. 8.

14. Following a meet-and-confer, on November 17, 2020, through the Office of Corporation Counsel, the Department responded to the FOIL request, outlining a schedule for the rolling production of materials collected in response to the request. *See* R. 18-20.

15. With respect to the request for “law enforcement disciplinary records” the response carved out of the Department’s production those records related to unsubstantiated, unfounded, or

pending complaints against SPD officers. *See* R. 18-20.

16. With respect to the NYCLU's FOIL request for "all law enforcement disciplinary records," the Department indicated that while it would disclose responsive police personnel records, its response would not include records concerning unfounded, unsubstantiated, or pending accusations under the exemption set forth at Public Officer's Law § 87(b)(2) (the FOIL personal privacy exemption). *See* R. 18-19. The response cited to Public Officers Law § 87(2)(b) and the *Committee's* July 27, 2020 advisory opinion. *See* R. 18-19 (citing R. 2-4).

17. The NYCLU then appealed that determination on December 10, 2020. *See* R. 21-25.

18. The NYCLU's appeal raised only two narrow issues arising from the Department's FOIL response: (A) whether the FOIL response was procedurally deficient because it did not "fully articulate the reasons for [the Department's] denial" but merely "parrot[ed] the statutory language" in the FOIL statute; and (B) whether the statutory repeal of § 50-a *mandated* the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. *See* R. 21-25.

19. On December 22, 2020, relying on *Committee's* advisory opinion AO 19775, which provided express authority for its position, the Department denied the appeal, providing detailed explanation for rejecting each of the grounds advanced. *See* R. 26-31.

20. Respondents, cognizant of their responsibility to both comply with FOIL and to protect the personal privacy of its employees, relied in good faith on an advisory opinion from the government agency formed with the specific purpose of providing guidance on the interpretation of the FOIL statute.

21. As a result, there is no dispute that the Department had a reasonable basis for its

determination, which was unaffected by any error of law.

22. On March 19, 2021, the *Committee on Open Government* issued a second Advisory Opinion AO 19785 addressing the issue raised in the Petition. *See* R. 32-33.

23. In that Advisory Opinion, the *Committee* was presented with the exact same authority cited in the present Petition—specifically *Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998 (Sup. Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup. Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—and was asked to revise its original conclusions provided to the City of Syracuse in AO 19775 in July 2020. *See* R. 32-33.

24. The *Committee*, however, indicated that the cited authority did *not* change its conclusions. The *Committee* observed that the prior advisory opinion that a municipality could lawfully withhold law enforcement disciplinary records regarding unfounded or unsubstantiated complaints was based on well-settled FOIL precedent. *See* R. 32-33.

25. It is respectfully submitted that the Court should reach the same finding as the *Committee*.

OBJECTIONS IN POINT OF LAW

I. THE PETITION FAILS TO STATE A CLAIM BECAUSE THE DEPARTMENT'S PARTIAL DENIAL OF THE NYCLU FOIL REQUEST WAS NOT AFFECTED BY ANY ERROR OF LAW.

26. Petitioner challenges the Department's withholding of limited police disciplinary records, *i.e.*, those relating to unfounded, unsubstantiated, and open complaints of police misconduct, for which it represented it was relying on the FOIL exemption found at § 87(2)(b). *See* R. 18-20.

27. New York Public Officers Law § 87(2)(b) exempts from disclosure under FOIL certain personnel records of public employees that would constitute a “unwarranted invasion of personal privacy.”

28. The case law interpreting this particular FOIL exemption illustrates that it is properly invoked to withhold disclosure of public employee records where a public employee’s disciplinary charges were never filed, or if filed, were unproven or resulted in no disciplinary action.

29. The stated basis for the Petitioner’s Article 78 challenge is that the statute repealing New York Civil Rights Law § 50-a (the “§ 50-a repeal statute”) mandates the disclosure of *all* disciplinary records under FOIL regardless of whether they are substantiated.

30. Petitioner has not and cannot show how the text or plain meaning of the § 50-a repeal statute: (a) changes or limits the applicability of FOIL § 87(2)(b); or (b) holds that police officers are treated differently than other public employees under FOIL § 87(2)(b). *See generally* Dkt. Nos 1, 3.

31. None of the case law cited by Petitioner opines that § 50-a repeal statute: (a) changes or limits the applicability of FOIL § 87(2)(b); or (b) holds that police officers are treated differently than other public employees under FOIL § 87(2)(b).

32. Accordingly, the Department’s reliance on the FOIL’s personal privacy exemption at § 87(2)(b) to withhold police disciplinary records relating to unfounded, unsubstantiated, and open complaints of police misconduct was consistent with established legal precedent as confirmed by the *Committee on Open Government’s* Opinion found at AO 19775.

33. The Department’s response was therefore unaffected by any error of law and the Petition fails to state a claim.

II. PETITIONER HAS WAIVED ANY CHALLENGE NOT RAISED IN ITS ADMINISTRATIVE FOIL APPEAL

34. To the extent that the Petition can be read to state a challenge to the particular determination by the SPD that the unfounded or unsubstantiated complaints of officer misconduct constitute an unwarranted invasion of personal privacy under FOIL § 87(2)(b), without regard to the § 50-a repeal statute, that issue was not raised in NYCLU's administrative appeal. *See* R. 21-25.

35. It is well-settled that where a petitioner has failed to raise a particular objection to a FOIL response during its administrative appeal, that issue is not preserved for judicial review under Article 78. *Police Benevolent Ass'n of New York State, Inc. v. State*, 145 A.D.3d 1391, 1394 (3d Dep't 2016).

36. The NYCLU's administrative appeal only raised two issues: (a) whether the FOIL response was procedurally deficient because it did not "fully articulate the reasons for [the Department's] denial" but merely "parrot[ed] the statutory language" in the FOIL statute; and (b) whether the statutory repeal of Civil Rights Law § 50-a mandated the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. R. 21-25.

37. Relative to the issue raised in this Petition, the NYCLU's sole basis for its Article 78 challenge, that was raised in its administrative appeal, is whether the § 50-a repeal statute mandates the requested disclosure. *See* R. 21-25.

38. All other issues and arguments raised in the Petition beyond this issue have not been preserved for judicial review and are not before the Court.

III. BECAUSE RESPONDENTS HAD A REASONABLE BASIS IN LAW FOR ITS FOIL RESPONSE, THERE IS NO BASIS TO AWARD ATTORNEY'S FEES.

40. The NYCLU argues that it is entitled to an award of attorney's fees and costs

because the Department's denial of access was allegedly "without reasonable basis." Dkt. No. 3 at 14-15.

41. In relevant part, New York's Public Officers Law § 89(4)(c)(ii) provides that a court "*shall*" award attorney's fees when two circumstances are present:

- a. the entity challenging denial of access "has substantially prevailed" *and*
- b. "the court finds that the agency had no reasonable basis for denying access."

42. The NYCLU has not shown that the Department lacked a reasonable basis to withhold the limited subset of records challenged in the Petition.

43. Indeed, the Department relied in good faith on the opinion of the advisory opinion, which is directly on point to the issues raised by this proceeding. *See* R. 18-20 (citing R. 2-4).

44. In relevant part, the *Committee* stated in that opinion that:

The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in § 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy less protection than the disciplinary records of other government employees, we do not impute such an intent.

R. 2-4.

45. Upon receiving the FOIL request from the NYCLU, the Department acted in good faith reliance on Advisory Opinion 19775 to deny access to open, unsubstantiated, and unfounded complaints as being shielded by Public Officers Law § 87(2)(b). *See* R. 18-20 (citing R. 2-4).

46. The Department's good faith determination to withhold a limited subset of records, which had a reasonable basis in law, prohibits any recovery by Petitioner of attorney's fees and costs.

47. As a result, even assuming that the NYCLU “substantially prevailed” in this proceeding on the merits, the Department nonetheless had a reasonable basis in law for withholding the materials in its original FOIL response. Accordingly, it is respectfully submitted that the Court should deny the NYCLU’s request for attorney’s fees and costs in its entirety.

WHEREFORE, Respondents respectfully request judgment granting its motion to dismiss the Verified Petition in its entirety and grant Respondents costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,

HANCOCK ESTABROOK, LLP



By: _____

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 Mary L. D’Agostino, Esq.
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**OFFICE OF THE CORPORATION COUNSEL
 FOR THE CITY OF SYRACUSE**

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NYSCEF DOC. NO. 36

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

*Attorneys for Respondents City of Syracuse and the
Syracuse Police Department*

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

Kristen E. Smith, being duly sworn, deposes and says that she is the Corporation Counsel for the City of Syracuse, one of the Respondents named in the within proceeding, has read the foregoing Verified Answer to Article 78 Petition and Counterstatement of Material Facts and Objections in Point of Law and knows the contents thereof, and that it is true to her knowledge, except as to the matters herein stated to be alleged on information and belief, and as to those matters she believes it to be true.



KRISTEN E. SMITH

Sworn to before me this
14 day of April 2021.



NOTARY PUBLIC

Mary L. D'Agostino
Notary Public, State of New York
No. 02DA6296865
Qualified in Onondaga County
Commission Exp. 02/10/20 22

Annexed to Verified Answer-
(i) Certified Record
[pp. 459 - 460]

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:34 PM

NYSCEF DOC. NO. 37

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

Index No. 002602/2021
Hon. Gerard J. Neri

CERTIFIED RECORD

Dated: April 14, 2021
Syracuse, New York



John G. Powers, Esq.
Hancock Estabrook, LLP
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202
Telephone: (315) 565-4500
jpowers@hancocklaw.com

**Annexed to Verified Answer-
(iii) Certification of Documents
[pp. 460 - 461]**

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NYSCEF DOC. NO. 37

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondent,

In a Proceeding Pursuant to CPLR Article 78.

Index No. 002602/2021
Hon. Gerard J. Neri

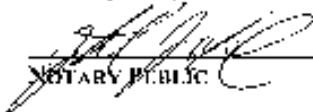
KRISTEN E. SMITH, being duly sworn, hereby deposes and says as follows:

1. I am the Corporation Counsel for the City of Syracuse and a designee for the City of Syracuse Police Department for purposes of New York's Freedom of Information Law ("FOIL"). See Public Officers Law § 84 *et seq.*
2. As a result, I am fully familiar with Petitioner's FOIL request, as well Respondents' decision to deny access to the unfounded, unsubstantiated, and open complaints, which is the limited issue in this proceeding.
3. I certify that the enclosed documents are true and correct copies of the documents that constitute the record of proceedings.

DATE: April 14, 2021


KRISTEN E. SMITH

Sworn to before me this
14th day of April 2021.


NOTARY PUBLIC

KRUPA JONATHAN J
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01KR6406981
Qualified in Onondaga County
Commission Expires April 27, 2024

**Annexed to Verified Answer-
(ii) Inventory of Certified Record**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:34 PM

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RECEIVED NYSCEF: 04/14/2021

INVENTORY OF CERTIFIED RECORD

Record Date	Description	Record Identification No.
July 13, 2020	Letter from City of Syracuse Assistant Corporation Counsel Sarah A. Lafen to Executive Director Shoshanah Bewlay requesting an advisory opinion from the New York State Committee on Open Government.	R1
July 27, 2020	Letter from Executive Director Bewlay providing an advisory opinion in response to the inquiry of Assistant Corporation Counsel Lafen.	R2-R4
July 27, 2020	Advisory Opinion 19775.	R5-R7
September 15, 2020	FOIL request by Michael Lacovara, on behalf of the New York Civil Liberties Union, to the City of Syracuse Police Department.	R8-R15
September 23, 2020	Letter from Assistant Corporation Counsel Lafen to Attorney Lacovara acknowledging receipt of the NYCLU's FOIL request.	R16-R17
November 17, 2020	Letter from Corporation Counsel Kristen E. Smith on behalf of the City of Syracuse Police Department to Attorney Lacovara, <i>inter alia</i> , denying access to unfounded, unsubstantiated, and open complaints.	R18-R20
December 10, 2020	Letter from Attorney Lacovara appealing, in part, the November 17, 2020 decision of Corporation Counsel Smith.	R21-R25
December 22, 2020	Letter from Corporation Counsel Smith on behalf of the City of Syracuse Police Department denying Attorney Lacovara's appeal.	R26-R31
March 19, 2021	Advisory Opinion 19785.	R32-R33

**Annexed to Verified Answer-
(iv) Letter from City of Syracuse Assistant Corporation Counsel
Sarah A. Lafen to Shoshanah Bewlay, dated July 13, 2020**

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NYSCEF DOC. NO. 37

RECEIVED NYSCEF: 04/14/2021



**DEPARTMENT OF LAW
OFFICE OF THE CORPORATION COUNSEL
CITY OF SYRACUSE, MAYOR BEN WALSH**

July 13, 2020

Kristen E. Smith
Corporation Counsel

NYS Committee on Open Government
Ms. Shoshanah Bewlay
Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, New York 12231

Joseph W. Barry III
First Assistant
Corporation Counsel

Christina F. DeJoseph
Senior Assistant
Corporation Counsel

Ms. Bewlay,

Lee R. Terry
Senior Assistant
Corporation Counsel

I am writing to request an advisory opinion from the Committee on Open Government regarding the application of the new "law enforcement disciplinary records" definition within the Freedom of Information Law.

Catherine E. Carnrike
Meghan E. Ryan
Amanda R. Harrington
John C. Black Jr.
Kathryn M. Ryan
Ramona L. Rabeler
Todd M. Long
Sarah A. Lafen
Sophie West
Sarah M. Knickerbocker
Danielle B. Pires
Finney Raju
Patrick R. Blood
Amelia McLean-Robertson
Patrick J. Parkinson

Under Public Officers Law §86(6)(a), law enforcement disciplinary records are defined to include, *inter alia*, "complaints, allegations, and charges against an employee." When read within the full context of Public Officers Law, it is not clear whether this would mandate the disclosure of all "complaints, allegations, and charges," regardless of the outcome of that proceeding. We are aware that in other public employment contexts, the Committee on Open Government has opined that unsubstantiated complaints need not be released. See FOIL-AO-12005 (March 21, 2000) (advising that "records involving unsubstantiated allegations may be withheld, but that final determinations reflective findings of misconduct must be disclosed"). Therefore, we are seeking guidance as to whether a similar analysis applies, such that an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome.

Thank you in advance for your analysis on this issue.

**Department of Law
Office of Corp. Counsel**
233 E. Washington St.
City Hall, Room 300
Syracuse, N.Y. 13202

Very Truly Yours,

Sarah A. Lafen

Sarah A. Lafen, Esq.
Assistant Corporation Counsel

Office 315 448-8400
Fax 315 448-8381
Email law@syr.gov.net

www.syr.gov.net

**Annexed to Verified Answer-
(v) Letter from Shoshanah Bewlay to City of Assistant Corporation
Counsel Sarah A. Lafen, dated July 27, 2020
[pp. 463 - 465]**

FILED: ONONDAGA COUNTY CLERK 04/14/2021 11:34 PM

NYSCEF DOC. NO. 37

COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
TELEPHONE: (518) 474-2518
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INDEX NO. 002602/2021

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ROANN M. DESTITO
PETER D. GRIMM
M. JEAN HILL
KATHY HOCHUL
HADLEY HARRIGAN
ROBERT MUJICA, JR.
ROSSANA ROSADO
DAVID A. SCHULZ
STEPHEN B. WATERS

CHAIRPERSON
FRANKLIN H. STONE

EXECUTIVE DIRECTOR
SHOSHANAH BEWLAY

By electronic mail only

July 27, 2020

Sarah A. Lafen, Esq.
City of Syracuse
SLafen@syrqov.net

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Ms. Lafen,

I am writing in response to your request for an advisory opinion regarding the obligations of the City of Syracuse (the "City") under the Freedom of Information Law (FOIL) in connection with requests for law enforcement disciplinary records, specifically relating to unsubstantiated and unfounded complaints against a police officer. In your inquiry, you note that Public Officers Law § 86(6)(a) defines "law enforcement disciplinary records" to include "complaints, allegations, and charges against an employee." You ask whether "an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome." I note that yours is the first, but not the only, inquiry we have received in recent weeks asking this question.

As you know, until very recently, personnel records of police officers, corrections officers, and paid firefighters that were used to evaluate performance toward continued employment were specifically exempted from disclosure by state statute: Civil Rights Law § 50-a and, because of this, Public Officers Law § 87(2)(a). On June 12, 2020, however, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending FOIL to add certain provisions relating to law enforcement disciplinary records. Where prior to June 12, 2020, access to personnel records of a police officer was governed by § 50-a and the resulting FOIL exemption pursuant to § 87(a)(2), ending the FOIL analysis immediately, access is now governed by FOIL alone.

As a general matter, FOIL is based upon a presumption of access. All records of an agency are available except to the extent that records or portions thereof fall within one or more grounds for exemption appearing in § 87(2)(a) through (q) of the Law. Section 87(2)(b) of FOIL, a provision which until June 12, 2020, had not been applied to law enforcement disciplinary records because of Civil Rights Law § 50-a, permits an agency to withhold records or portions of records which "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" As you note in your inquiry, the Committee on Open Government has frequently addressed issues relating to rights of access to disciplinary records of public employees pursuant to this subsection of the FOIL.

In [FOIL Advisory Opinion 17195](#), staff of the Committee opined that a record of an unsubstantiated or unfounded complaint may be withheld under FOIL where the agency determines such complaint would constitute an unwarranted invasion of personal privacy:

The exception of significance is § 87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute “an unwarranted invasion of personal privacy.” Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of one’s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy Conversely, to the extent that records are irrelevant to the performance of one’s official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [W]hen allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., [Herald Company v. School District of City of Syracuse](#), 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld based on considerations of privacy.

Committee staff have issued similar opinions in [FOIL AO 19771](#), [FOIL AO 16764](#), [FOIL AO 12802](#), [FOIL AO 12722](#), [FOIL AO 11747](#), [FOIL AO 9463](#), and [FOIL AO 7602](#). In sum, Committee staff have long advised that where an agency determines that a record of an unsubstantiated or unfounded complaint would, if disclosed (even in a redacted form (see, e.g., [FOIL AO 19771](#))), constitute an unwarranted invasion of personal privacy, such record need not be disclosed.

The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in § 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent. Moreover, while no court has yet issued an opinion formally answering the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, at least two have recently temporarily enjoined the disclosure of such complaints pending a final determination.¹

In further support of this interpretation, there is a suggestion in the new FOIL provisions that *some* law enforcement disciplinary records, which the legislature calls “technical infractions” (FOIL § 89(2-c)), enjoy *greater* (rather than less) protection than such infractions contained in the disciplinary records of other government employees. In other words, while there is some express language in the statute to render certain records of law enforcement agency employees *less* available than those of other government employees, there is nothing in the statute to suggest that the legislature intended that any of the records

¹ See <https://gothamist.com/news/federal-judge-blocks-release-nypd-misconduct-records-orders-nyclu-keep-records-secret> (U.S. District Court for the Southern District of New York) and https://buffalonews.com/news/local/crime-and-courts/city-of-buffalo-blocked-from-releasing-portions-of-police-disciplinary-records/article_2acfc25c-cde6-11ea-8d7f-3b130bc09a73.html (New York State Supreme Court).

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Sarah Lafen
July 27, 2020
Page 3 of 3

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of law enforcement agency employees be *more* available than the records of other government employees.

Accordingly, it is our opinion, in the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose “unsubstantiated and unfounded complaints against an officer” where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2)(a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay
Executive Director

SVB/ko

**Annexed to Verified Answer-
(vi) Advisory Opinion 19775, dated July 27, 2020
(Reproduced herein at pages 428 to 430)**

**Annexed to Verified Answer-
(vii) FOIL Request to Syracuse Police Department, dated September 15, 2020
(Reproduced herein at pages 69 to 76)**

**Annexed to Verified Answer-
(viii) Response Letter from Office of the Corporation Counsel
for the City of Syracuse to Michael Lacovara re: FOIL Request, dated
September 23, 2020
(Reproduced herein at pages 77 to 78)**

**Annexed to Verified Answer-
(ix) Letter from Office of the Corporation Counsel for the
City of Syracuse to Michael Lacovara, dated November 17, 2020
(Reproduced herein at pages 79 to 81)**

**Annexed to Verified Answer-
(xi) Administrative Appeal of Syracuse Police Department's
Partial Denial, dated December 10, 2020
(Reproduced herein at pages 84 to 88)**

**Annexed to Verified Answer-
(xii) Letter from Office of the Corporation Counsel for the
City of Syracuse to Michael Lacovara, dated December 22, 2020
(Reproduced herein at pages 89 to 94)**

**Annexed to Verified Answer-
(xiii) Advisory Opinion 19785, dated March 19, 2021
[pp. 467 - 468]**

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3/30/2021
 NYSCEF DOC. NO. 37

The Committee on Open Government

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/14/2021



**State of New York
Department of State
Committee on Open Government**

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FOIL AO 19785

By Electronic Mail Only

March 19, 2021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. :

You have asked whether the Committee has changed its [opinion](#) on the legal standard now applicable to records of unsubstantiated or pending complaints of misconduct made against law enforcement officers in light of three recent court decisions finding on the facts presented to those courts that Freedom of Information Law ("FOIL") disclosure was permitted or required. The short answer is no; all three of the court decisions you mention are consistent with our [opinion](#) issued in 2020 concerning the release by law enforcement agencies of unsubstantiated or pending complaints of misconduct by law enforcement agency employees.

The Supreme Court decisions each reiterate that, in 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. Moreover, in the decisions you reference, each court makes findings of fact that are specific to the records before it and is careful to identify that each determination of FOIL accessibility by other agencies looking at other records will be similarly fact-specific. *See, e.g., Buffalo Police Benevolent Association v. Brown*, 134 N.Y.S.3d 150, 155-56 (Supr. Ct. Erie Co. 2020) ("Finally, it should be noted that the court's rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including § 87(2)(b)."); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 N.Y. Slip Op. 34346(U) (Supr. Ct. Schenectady Co. Dec. 29, 2020) ("Finally, notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to Patrolman Pommer and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits."). This is precisely what we advised in 2020 before courts had opined.

With respect to the Second Circuit decision, we do not read it as a mandate to agencies to release all unsubstantiated complaints without a review for rights of access under FOIL. Rather, it is a ruling, on a union request to enjoin an agency from proactive disclosure of an entire category of records, that an agency, such as the New York City Police Department, *may affirmatively determine to release and cannot be enjoined from releasing* such records if it concludes either that no FOIL exemptions apply to them or that it will waive such exemptions now that the legal restriction preventing their release has been repealed. *See Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021). Specifically, the ruling of the court related to an injunction that it ultimately denied: the court was asked to enjoin the NYPD from releasing such records in its portal and found that the petitioner unions failed to establish success on merits of several arguments in favor of withholding them as a category of records. The Court did not make a ruling on a specific record or make a ruling that no law enforcement agency could make a different determination on its own records. The basic FOIL principles continue to apply to these records, and therefore an agency that does not wish to proactively disclose the entire category of records (or waive exemptions that may apply) may still review such records and make determinations as to rights of access. *See, e.g., id.* at *3 (the court continues to "recognize those specific FOIL exemptions that are designed to protect against unwarranted invasions of personal privacy or endangering a person's safety"). Again, this is precisely what we advised in 2020 before courts had opined.

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The Committee on Open Government

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Please do not hesitate to contact us if you have further questions. Thank you.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

SVB/fhs

FOIL-AO-f19785
19785

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Respondents' Memorandum of Law in Opposition to Verified Petition
and in Support of Motion to Dismiss, dated April 14, 2021

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

<p>In the Matter of the Petition of</p> <p>NEW YORK CIVIL LIBERTIES UNION,</p> <p style="text-align: center;"><i>Petitioner,</i></p> <p style="text-align: center;">-vs-</p> <p>CITY OF SYRACUSE and SYRACUSE POLICE DEPARTMENT,</p> <p style="text-align: center;"><i>Respondents.</i></p> <p>In a Proceeding Pursuant to CPLR Article 78.</p>

Index No. 002602/2021
Hon. Gerard J. Neri

**MEMORANDUM OF LAW IN OPPOSITION TO THE
VERIFIED PETITION AND IN SUPPORT OF THE MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The NYCLU's¹ Article 78 challenge to the City of Syracuse Police Department's² FOIL response is premised on a single proposition—that the repeal Civil Rights Law § 50-a in June of 2020 *somehow* altered FOIL such that police officers would be treated *less favorably* than other public employees with respect to the application of the FOIL exemption found at § 87(2)(b)(the “personal privacy exemption”). Specifically, even though it is well-settled that § 87(2)(b) allows public employers to withhold records related to unsubstantiated complaints of misconduct relative to *other types of public employees*, the NYCLU takes the position that the personal privacy exemption does not apply the same way to unsubstantiated complaints *against police officers*. According to the NYCLU, the sole authority for the application of this lesser protection under FOIL is the repeal of Civil Rights Law § 50-a.

This position is wrong, and palpably so. It is true that for the last 45 years, Civil Rights Law § 50-a has provided *extra protection* against the disclosure police records, independent of any applicable FOIL exemptions. And no one seriously disputes that § 50-a's repeal removed that layer of extra protection—rendering police employment records the same as like records for any other public employee.

But what the repeal of § 50-a *did not do*—and the NYCLU points to no statutory language supporting such a proposition—is to alter FOIL in a way that provides police officer records *less protection* than similar records of other public employees. In fact, the language repealing § 50-a does not address the personal privacy exemption *at all*, let alone change or limit its applicability.

¹ As used herein, Petitioner New York City Civil Liberties Union will be referred to as the “NYCLU.”

² As used herein, Respondent City of Syracuse shall be referred to as the “City” and Respondent Syracuse Police Department shall be referred to as the “SPD.”

Hence, with repeal of § 50-a, the disclosure of police officer records is now subject only to the well-settled law under FOIL exemptions themselves. Under that pre-existing law, police officers are treated no different under the FOIL exemptions than other public employees—and the well-settled, pre-existing authority under FOIL for withholding public employee records related to unsubstantiated complaints of misconduct under FOIL § 87(2)(b) now applies to *all* public employees, including police officers.

This conclusion is hardly controversial. In fact, this was the precise holding of the New York State Department of State's *Committee on Open Government* in its advisory opinion issued at AO 19775 on July 27, 2020. R. 2-4, R. 5-7. The *Committee* is the very public agency formed by the New York State Legislature for the purpose of advising public agencies like the SPD on the appropriate interpretation of the FOIL statute. AO 19775 is on point and requires rejection of the NYCLU's position. R. 5-7.

Still, the NYCLU argues that two trial level decisions from other state courts, and a federal appellate decision, requires rejection of the unavoidable conclusion that must be derived from the plain meaning of the § 50-a repeal statute and otherwise reject the clear opinion contained in the *Committee's* AO 19775. Dkt.No. 3. For the reasons set forth below, the NYCLU's cited authority does not address the precise issue raised in this case, and thus is largely irrelevant. Not one of the three cited cases holds that the § 50-a repeal statute somehow enacted a change on FOIL that provides police officers less protection than other public employees. Not one of the three cited cases holds that FOIL § 87(2)(b) was somehow limited by the § 50-a repeal statute. Not one of the cases holds that the § 50-a repeal statute intended to place police officers in a less protected status under FOIL than other public employees.

To this end, the Court need look no further than a more recent *Committee* opinion—AO 19785—issued on March 19, 2021 for confirmation. R. 32-33. In that decision, the *Committee* was presented with the *exact same authority* cited by the NYCLU in the present Petition—specifically *Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998 (Sup.Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup.Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—and asked the *Committee* to revise its original conclusions set forth in AO 19775. R. 32-33. However, the *Committee* found that the case law cited here by the NYCLU *did not* change its conclusions set forth in AO 19775 that a municipality could lawfully withhold law enforcement disciplinary records regarding unfounded or unsubstantiated complaints based on well-settled FOIL precedent. R. 32-33.

Thus, the NYLCU’s position is unsustainable and may be rejected as legally incorrect. The SPD’s position is supported by the plain language of the § 50-a repeal statute and two *Committee* opinions, each which address the exact issue before the Court. R. 5-7, 32-33. Thus, the SPD’s FOIL position cannot be said to be affected by errors of law and the Petition should be dismissed on the merits pursuant to CPLR § 409(b).

RELEVANT FACTUAL BACKGROUND

Beginning in mid-2020, the City sought an advisory opinion concerning the scope and interpretation of FOIL relative to whether requests for the disclosure of certain types of police officer personnel records would constitute an unwarranted invasion into personal privacy such that they would be exempt from disclosure under N.Y. Public Officers Law § 87(2)(b). R.1. Specifically, the City sought to determine—in light of the June 2020 repeal of New York Civil Rights Law § 50-a—whether the SPD was obligated under FOIL to disclose disciplinary records

of police officers relative to unsubstantiated, unfounded, or pending complaints. R.1.

In order to answer this question about the scope and interpretation of FOIL, on July 13, 2020, the City submitted a formal request for an advisory opinion to the New York State *Committee* posing the question of whether “an employer of a law enforcement employee could lawfully withhold unsubstantiated and unfounded complaints against an officer, or if the employer is obligated to disclose all complaints against an employee regardless of outcome.” R.1. The request noted the existence of prior legal authority with respect to *other types of public employees* that opined that “records of unsubstantiated allegations may be withheld” where there were no “findings of misconduct.” R.1. The request posed the question of whether law enforcement employees were treated similarly to other types of public employees relative to the interpretation of this FOIL exemption, *i.e.*, could a public employer “lawfully withhold unsubstantiated and unfounded complaints against [a police] officer, or [is] the employer [] obligated to disclose all complaints against an employee regardless of outcome?” R.1.

The *Committee* was the appropriate state agency to field this question because it was expressly created by the New York State Legislature to (1) “furnish to any agency advisory guidelines, opinions or other appropriate information regarding” FOIL; and (2) “furnish to any person advisory opinions or other appropriate information regarding” FOIL. *See* N.Y. Pub. Off. Law § 89. Thus, the *Committee* is the relevant agency tasked by the Legislature to interpret the scope of the FOIL statute. As a result, opinions on the meaning and interpretation of the FOIL statute by the *Committee* are given deference by courts. *Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep’t 1999).

On July 27, 2020, the *Committee* issued a response to the City’s request—formal advisory opinion AO 19775. R. 2-7. The advisory opinion interpreted the FOIL statute in light of the recent

repeal of Civil Rights Law § 50-a, and addressed the precise question at issue in the present Article 78 proceeding—*i.e.*, did the repeal of § 50-a require records concerning unsubstantiated complaints against police officers to be disclosed notwithstanding the applicability of other FOIL exemptions that would have otherwise applied. First, in the decision, the *Committee* held that “[t]he new provisions of FOIL [included in the statute repealing § 50-a] *did not make changes* to provisions concerning personal privacy as defined in § 87(2)(b).” R. 2-4 (emphasis added). The *Committee* observed that, just as FOIL had permitted prior to the repeal of Civil Rights Law § 50-a, where an agency weighs the interest of disclosure against the unwarranted invasion into personal privacy and finds that the latter outweighs the public interest in disclosure, “*records unsubstantiated and unfounded complaints*” against police officers are properly withheld under § 87(2)(b). *Id.*

Thus, the *Committee* expressly found that this interpretation *applied equally* to police officer employee records as it would to other public employees, and that the recent repeal of § 50-a had no effect on that particular application of § 87(2)(b). R. 2-4. Following the issue of the *Committee*’s Opinion, the SPD relied in good faith on that decision in responding to FOIL requests submitted by various parties requesting disciplinary records concerning specific police officers, and such reliance was appropriate given the statutory mandate of the *Committee* to opine on the scope of FOIL as set forth in N.Y. Pub. Off. Law § 89.

On or about September 15, 2020, the NYCLU served a FOIL request on the SPD containing eight single-spaced pages of particularized document requests, with over 60 individual requests. R. 8-15. The NYCLU’s FOIL requests were expansively broad—covering nearly every topic of police activity over the same 20-year span—necessarily implicating a massive investment of time, manpower, and resources in response. R. 8-15. For example, the first such request—which was

representative of the breadth of the remainder of the requests—demanded “all law enforcement disciplinary records collected by the SPD” for an over 500 officer police force over the span of 20 years. R. 8-9.

On November 17, 2020, through the Office of Corporation Counsel, the SPD served a timely response to the FOIL request, outlining a schedule for the rolling production of materials collected in response to the request. R.18-20. With respect to the request for “law enforcement disciplinary records” the response carved out of the SPD’s production those records related to unsubstantiated, unfounded, or pending complaints against SPD officers. *Id.* Specifically, with respect to the NYCLU’s FOIL request for “all law enforcement disciplinary records” possessed by the SPD for a 20-year period, the SPD indicated that while it *would* disclose responsive police personnel records, its response would *not* include records concerning unfounded, unsubstantiated, or pending accusations under the personal privacy exemption set forth at Public Officer’s Law § 87(2)(b). *Id.* The response expressly cited to Public Officers Law § 87(2)(b) and the *Committee’s* July 27, 2020 advisory opinion AO 19775. *Id.* (citing, *inter alia*, R. 5-7).

The NYCLU then appealed that determination on December 10, 2020. R. 21-25. The appeal raised only two narrow issues arising from the SPD’s FOIL response: (a) whether the FOIL response was procedurally deficient because it did not “fully articulate the reasons for [the SPD’s] denial” but merely “parrot[ed] the statutory language” in the FOIL statute; and (b) whether the statutory repeal of Civil Rights Law § 50-a mandated the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. *Id.*

On December 22, 2020, relying on AO 19775, which provided express authority for its position, the SPD denied the NYCLU’s Appeal providing detailed explanation for rejecting each of the grounds advanced. R. 26-31. The SPD, cognizant of its responsibility to both comply with

FOIL and to protect the personal privacy of its employees, relied in good faith on an advisory opinion from the government agency formed with the specific purpose of providing guidance on the interpretation of the FOIL statute. *Id.* Thus, the SPD relied upon a reasonable basis for its determination, which was unaffected by any error of law. *See id.* (citing R. 2-4).

Even more recently, on March 19, 2021, the *Committee* issued a second opinion applicable to this proceeding—Advisory Opinion AO 19785. *See* R. 32-33. In that decision, the *Committee* was presented with the exact same authority cited in the present Petition—specifically *Buffalo Police Benevolent Association v. Brown*, 69 Misc. 3d 998 (Sup.Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup.Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—and expressly asked to revisit its original conclusions provided to the City of Syracuse in AO 19775. R. 32-33.

The *Committee* indicated that the same authority cited by the NYCLU in the present petition *did not* change its conclusions set forth in AO 19775 that a municipality could lawfully withhold law enforcement disciplinary records regarding unfounded or unsubstantiated complaints based on the exemption set forth at Public Officer’s Law § 87(2)(b) and well-settled FOIL precedent. *See* R. 32-33.

STANDARD OF REVIEW

Although Petitioner does not set forth the standard of review that applies to this special proceeding, an Article 78 challenge to an agency’s FOIL denial is evaluated under CPLR 7803(3), and specifically as to whether the agency’s decision is “affected by an error of law.” *See Matter of Spring & County of Monroe*, 141 A.D.3d 1151 (4th Dep’t 2016). Under this standard, “judicial

review of an administrative determination is limited to the grounds invoked by the agency.” *Save Am. ’s Clocks, Inc. v. City of New York*, 33 N.Y.3d 198, 209 (2019).

ARGUMENT

POINT I

THE PARTIAL DENIAL OF THE NYCLU’S FOIL REQUEST WAS NOT AFFECTED BY ERROR OF LAW AND SHOULD NOT BE DISTURBED.

From a legal perspective, the NYCLU’s sole legal challenge to the SPD’s FOIL response is based on its contention that the § 50-a repeal statute mandates the disclosure under FOIL of police disciplinary records related to unsubstantiated complaints, *without regard to the application of existing FOIL exemptions*. See Dkt.Nos. 1,3. While the NYCLU argues that “text” of the statute *requires* the disclosure of *all* disciplinary records, it never points to the portion of the statute containing this requirement. Undertaking no legal analysis of the statutory text, the NYCLU instead relies on stray comments from the floor of the Assembly by certain state legislators regarding their own individual subjective opinions about the effect of the law, many of which are taken out of context. *See id.* In addition, the NYCLU purports to support its position by citing to three different, non-authoritative, case decisions, none of which address the issue before this Court or contain holdings supporting the remarkable result advocated here.

An appropriate legal review begins first with determining whether an existing FOIL exemption supports the SPD’s position. Once that is established, the follow-on legal question—which is defined by the NYCLU’s FOIL appeal—merely becomes whether the text of the § 50-a repeal statute somehow altered or limited the application of that existing exemption under FOIL. We address these issues below.

A. The personal privacy exemption applies to unsubstantiated allegations of public employee misconduct.

The first step in an appropriate consideration of the legal issue before the Court is determining whether any of the existing FOIL exemptions would allow a public agency to exempt employee disciplinary records relating to unsubstantiated or unproven misconduct. This is a step that the NYCLU ignores in its analysis. *See* Dkt.Nos. 1-3.

FOIL exempts from agency disclosure certain personnel records of public employees that would constitute a “unwarranted invasion of personal privacy.” Pub. Off. Law § 87(2)(b). The case law interpreting this FOIL exemption illustrates that it is properly invoked to withhold disclosure of public employee records where a public employee’s disciplinary charges were never filed, or if filed, were unproven or resulted in no disciplinary action. *Western Suffolk Bd. of Co-op. Educ. Servs. v. Bay Shore Union*, 250 A.D.2d 772, 773 (2d Dep’t 1998)(employee disciplinary records “which recite unproven disciplinary charges” are appropriately withheld); *LaRocca v. Bd. Of Educ.*, 220 A.D. 424, 427 (2d Dept 1995)(exempting records “which contains references to charges which were denied”); *see also Santomero v. Board of Educ.*, 2009 WL 6860644, *2 (Sup.Ct. Westchester County 2009)(noting that unproven charges “are exempt from production pursuant to FOIL as their disclosure would constitute an unwarranted invasion of privacy as defined by Public Officers Law §87(2)(b)”; *Herald Company v. School District of City of Syracuse*, 430 N.Y.S.2d 460 (Sup.Ct. Onondaga County 1980)(pending charges regarding “unproved allegation before the hearing panel” are appropriately withheld).

It was this exemption—the personal privacy exemption in § 87(2)(b)—that the SPD relied upon when it indicated that it would withhold a subset of the NYCLU’s requested police disciplinary files—*i.e.*, those related to charges or complaints that were ultimately found to be unsubstantiated or unfounded, or those for which a decision had not yet been reached. *See* R.18-

20 (citing Pub. Off. Law § 87(2)(b)). The above case law validates the SPD's position regarding application of § 87(2)(b) to justify the withholding of this subset of public employee records.

The *Committee* has likewise recognized the clear applicability of this personal privacy exemption to this very category of disciplinary files in AO 19775. *See* R. 2-4. In considering this *exact issue*, the *Committee* quoted a prior advisory opinion with approval, stating:

when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may...be withheld [under § 87(2)(b)], for disclosure would result in an unwarranted invasion of personal privacy.

See AO 19775; *see also* R. 2-4. And, importantly, the type of employee records being considered by the *Committee* in AO 19775 were *police employee records*. Thus, it would appear the SPD's position in this regard was supported by well settled case law and an advisory opinion, on point, by *Committee*.

The NYCLU does not challenge the applicability of the personal privacy exemption or the cited case law in general (which was cited in the SPD's FOIL appeal determination). None of the case law cited by the NYCLU disputes or undermines the existence or applicability of this body of authority. Thus, it is apparent that the SPD relied on a well-settled legally established exemption for its withholding of the category of records challenged in this proceeding.

B. The repeal of Civil Rights Law § 50-a did not change the applicability of FOIL's personal privacy exemption.

The next question to be considered by the Court in light of the NYCLU's argument is whether the repeal of Civil Rights Law § 50-a in 2020 (a) altered the pre-existing case law interpreting the FOIL exemption under § 87(2)(b); *or* (b) somehow rendered § 87(2)(b) inapplicable to police officers as a class of public employees. Indeed, as described above and in light of the case law discussed immediately above, the practical application of the NYCLU's

untenable argument is that the repeal of § 50-a means that police officers are to be treated *less favorably* under FOIL than other public employees.

1. The NYCLU points to no part of the § 50-a repeal statute altering or limiting § 87(2)(b).

First, if the Legislature intended such a remarkable result—*i.e.*, enacting a *lower* standard of protection under FOIL for police officer employment records—then the statute would have expressly stated so. It does not. The NYCLU does not cite to any text of the statute that would: (a) affect the applicability of FOIL’s personal privacy exemption at all; nor (b) exempt police officer records from the applicability of § 87(2)(b). Rather, well-settled law holds that absent actual express support in a statute for different treatment for different classes of persons, an interpretation providing for such disparate treatment is invalid and constitutes a “manifest injustice.” *Prego v. City of New York*, 147 A.D.2d 165, 173 (2d Dep’t 1989)(“If there are two possible interpretations of a statute, the court should adopt that which will produce equal results[, and a] construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination.”)(*quoting* McKinney’s Statutes §147).

2. The text of the § 50-a repeal statute does not alter or limit § 87(2)(b).

To be sure, the “clearest indicator of legislative intent is the statutory text” and “the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.” *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998).

Nowhere in “§ 50-a repeal statute: (1) is § 87(2)(b)’s personal privacy exemption mentioned at all, let alone changed or limited; (2) does the Legislature indicate that police agencies may not rely on § 87(2)(b) in response to FOIL requests; or (3) does the Legislature indicate that police officer records are to be treated less favorably under FOIL than other public employee

employment records. *See Powers Aff.*, Exh. B. The text and plain language of this law *controls* its interpretation, which does not support the NYCLU’s argument. *See id.*

In fact, the § 50-a repeal statute *does* alter *other aspects* of FOIL. *See Powers Aff.*, Exh. B. It adds new definitions to FOIL at Public Officers Law § 86. *See id.* The law also adds two new sections to Public Officers Law § 89—requiring redaction of certain parts of law enforcement records. *See id.* The law even goes so far as to change other parts of Public Officers Law § 87—also allowing for redaction of law enforcement disciplinary records. *See id.* What the law does not do, is change the applicability and scope of the personal privacy exemption. Where the Legislature had the ability to change any aspect of FOIL as part of the § 50-a repeal statute, and in fact did change *other* parts of FOIL unrelated to the personal privacy exemption, but chose not to change the personal privacy exemption—there is simply no basis to conclude that § 87(2)(b) has somehow been impliedly changed. *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995)(“courts are not to legislate under the guise of interpretation” and “the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended”)

3. The Committee has opined that the § 50-a repeal statute did *not* change the personal privacy exemption.

In AO 19775, the *Committee* opined that the “new provisions of FOIL [found in the § 50-a repeal statute] *did not make changes to provisions concerning personal privacy* as defined in § 87(2)(b).” *See Powers Aff.*, Exh. C (emphasis added). The *Committee* added that “absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent.” *See id.* The *Committee*’s legal analysis is correct in this regard and is consistent with New

York rules of statutory interpretation. *See id.* Nor has the NYCLU given the Court any reason to depart from AO 19775. *See* Dkt.Nos. 1, 3.

4. The legislative history of the § 50-a repeal statute does not support the NYCLU's argument.

As set forth above, there is no reason to examine the legislative history of a statute absent some lack of clarity in the statute itself. Here, there is no limitation contained within the § 50-a repeal statute that either *expressly* or *impliedly* limits the application of the § 87(2)(b) relative to law enforcement disciplinary records. *See Powers Aff.*, Exh. B. Thus, there is no need to look to the legislative history—as it is black letter law a court may not alter the effect of the plain language of the statute under the guise of interpretation. *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 (2019)(“Absent ambiguity the courts may not resort to rules of construction to alter the scope and application of a statute because no such rule gives the court discretion to declare the intent of the law when the words are unequivocal”).

But even if the Court *were* to look to the legislative history here, it is entirely consonant with the SPD's FOIL analysis, and *Committee's* two advisory opinions: AO 19775 and AO 19785. *See* R. 5-7, 32-33. The Legislative Memorandum in support of the § 50-a repeal statute *expressly* states that that the fact that FOIL already contained provisions allowing an agency to “withhold information whose disclosure would constitute *an unwarranted invasion of privacy*” is one of the reasons why the Legislature felt that the “broad prohibition on disclosure created by § 50-a [was] unnecessary.” *See Powers Aff.*, Exh. E. In other words, according to the Legislative Memorandum published with the statute's passage, because law enforcement records would be entitled to protection under the existing FOIL exemptions, like the personal privacy exemption, additional protection under § 50-a was unnecessary. *See id.* Thus, Legislative Memorandum directly

contradicts the NYCLU's position in this action, as well as its purported account of the legislative history. *See id.*

In its brief, the NYCLU does cite to a statement made on the floor of the Assembly by Assemblymember O'Donnell, where, according to the NYCLU, he stated "that the bill did not distinguish between substantiated and unsubstantiated records." Dkt.No. 3 at 10. Based on the text of the statute, even if true, this statement has no bearing on the issue before the Court and is entirely beside the point. Simply put, the statute did not have to differentiate between substantiated and unsubstantiated records because its purpose was to remove the *extra protection* against disclosure provided by § 50-a. That is in fact what it did, leaving in place (as confirmed by the Legislative Memo) those already existing protections under FOIL, including "information whose disclosure would constitute *an unwarranted invasion of privacy*." *See Powers Aff.*, Exh. E. The NYCLU's citation to these stray comments in no way supports its position that the § 50-a repeal statute somehow limits the application of the personal privacy exemption contained in § 87(2)(b).

Moreover, it "is established law...that the statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes." *Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916). To this end, the Supreme Court has noted that reliance on such statements by individual legislators is a patently unreliable way to interpret a statute:

it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; *the result being that the only proper way to construe a legislative act is from the language used in the act....*

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318-19 (1897)(emphasis added).

The New York Court of Appeals has also rejected the NYCLU's approach for the same reasons:

It has long been established that, since such statements [during a legislative debate] tend to show the thinking of a few legislators rather than the intent of [the legislature] as a whole, *they are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body.*

People v. Newman, 32 N.Y.2d 379, 390 n.7 (1973)(internal quotations and citations omitted); *see also People v. Arana*, 32 A.D.3d 305, 307 (1st Dep’t 2006)(the “text of the statute...controls over statements made by individual legislators during debates.”).

The mischief that can be achieved in a statutory interpretation argument like the one made by the NYCLU is revealed in *other* statements of legislators during the floor debate, whose statements the NYCLU has failed to provide the Court. The same individual, Assemblymember O’Donnell, completely undermines the NYCLU’s position by opining that after the repeal of § 50-a police officers would be treated the same as *any other public employee*:

- O’Donnell: “In the repealing of 50-a, the people who are under 50-a are now subject to FOIL *like all other public servants.*” *See Powers Aff*, Exh. A at 60 (emphasis added).
- O’Donnell: “There’s nothing in this legislation that’s going to fundamentally change that FOIL process. *Id.* at 170.
- O’Donnell: “Yeah, but that is currently the law for every other employee. *We’re not creating a specific negative thing for police officers.*” *Id.* at 176 (emphasis added).
- O’Donnell: “This bill merely repeals 50-a and sets up the structures so that FOIL can be used for police officers.” *Id.* at 211.

In addition, the following colloquy occurred between two assemblymembers during the floor debate:

MR. GARBARINO: So, my -- so the follow-up question to that is -- so now if -- can the police station now -- or the --the police have declined the FOIL request saying it's this is an un --we think this was unsubstantiated so then you have to now then go to-- you appeal that decision. If they deny it again it goes to court. Can the judge then say, you know, *We don't want to release this. Do we give -- do we give the judge the power, under this legislation, to not release unsubstantiated complaints or is it all or nothing?*

MR. O'DONNELL: Our legislation -- my legislation does not change the power dynamic in that sense. *And so, yes, a judge can make a determination that it was inappropriate to turn over that information.*

See id. at 170 (emphasis added). It should be clear from these exchanges that even if the Court is inclined to consider the stray comments of legislators about their opinion of what the statute means—a highly suspect proposition under New York law—the actual commentary paints a much different picture than that represented by the NYCLU in their papers.

Similarly misleading is the argument on page 9 of the NYCLU's brief that the Legislature considered and rejected a prior version of the § 50-a repeal statute that included express protections against the disclosure of records of unsubstantiated police discipline. *See* Dkt.No. 3 at 10. The referenced bill—S.2413—is attached as **Exhibit “F”** to the Powers Affirmation. First, review of the bill reveals that it is not a prior version of the § 50-a repeal statute at all, rather the bill had a completely different purpose—to amend § 50-a. *See* Powers Aff., Exh. F. Nowhere are the terms “substantiated” or “unsubstantiated” even mentioned. *See id.* Nor does the bill address the protections otherwise afforded under the FOIL statute, or in particular FOIL § 87(2)(b). *See id.* After reading the bill itself, the NYCLU's argument that by rejecting S.4213, “the legislature rejected Respondents' position” is hard to understand. Dkt.No. 3 at 10.

But even assuming *arguendo* that the text of the referenced bill *actually supported* the NYCLU's argument, its conclusion would still not be appropriate. *See* Powers Aff., Exh. F.

S.4213 never left committee; it was never debated on the floor of either house, nor voted on. *See Powers Aff., Exh. G.* New York case law expressly cautions against drawing definitive conclusions from legislative inaction on a bill—*especially where there is no written record of the reasons for the inaction.* *See NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 184 (2016)(“Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences”)(internal quotation omitted). There is simply no way of knowing why S.4213 never proceeding beyond the committee level, or why the Legislature chose the particular bill it did. The NYCLU’s speculation that the decision *must* have reflected a general disapproval of the withholding *any* police records ignores a much more obvious conclusion—*i.e.*, that the Legislature understood there were other provisions within the existing FOIL statute, like § 87(2)(b), which would preserve officer’s privacy interests, even in the face of a complete repeal § 50-a. And it is this view, not the NYCLU’s, which is consonant with the existing state of the law as described above, including both the legislative history and the *Committee on Open Government* opinions at AO 19775 and AO 19785.

5. The cases cited in the NYCLU brief are irrelevant to the issue before the Court.

The NYCLU has cited to three cases that it argues have “rejected” the SPD’s position with respect to the scope and application of FOIL § 87(2)(b). In framing this issue for the Court, it is important to remember that the SPD relied specifically on the personal privacy exemption contained in § 87(2)(b) for its partial withholding, and expressly cited to AO 19775 for its legal justification. *See R.18-20* (citing, *inter alia*, R. 2-4). That advisory opinions, as described above, merely held that (i) the repeal of § 50-a did not affect the personal privacy exemption under § 87(2)(b), *and* (i) that there was well settled case law applied that exemption to unsubstantiated complaints of employee misconduct. *See R. 2-4.*

Thus, it stands to reason that if the NYCLU is correct, the three cases it cites—*Buffalo Police Benevolent Association v. Brown*, 69 Misc.3d 998 (Sup.Ct., Erie County 2020); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 WL 7978093 (Sup.Ct., Schenectady County, Dec. 29, 2020); and *Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021)—*should have* rejected the analysis set forth in AO 19775 and expressly found that the repeal of § 50-a somehow created a different standard under FOIL § 87(2)(b) for police officers, as opposed to other employees. However, the Court will find upon reading these cases that *none of them* accomplish either necessary tenet of the NYCLU’s position. They simply have *nothing to do* with the analysis set forth in AO 19775, which remains presumptively valid.

Perhaps most compelling is the *Committee*’s subsequent opinion, issued on March 19, 2021. R. 32-33. In AO 19785, the *Committee* was presented with the exact same caselaw and asked whether those cases would cause the *Committee* to overrule its prior decision from July 2020 in AO 19775. *See id.* The *Committee* was unimpressed and underwhelmed by these cases (just as this Court should be too) finding that the case law did not affect the *Committee*’s prior interpretation and that all three decisions were “consistent” with AO 19775. The *Committee* provided a detailed explanation distinguishing the three cases and identifying how they actually supported the principles set forth in AO 19775. *See* R. 32-33. The Court should give deference to AO 19785, as well in rejecting the NYCLU’s arguments. *See Kwasnik*, 262 A.D.2d at 172 (observing that the *Committee*’s advisory opinions are entitled to *deference*); *Forsyth v. City of Rochester*, 185 A.D.3d 1499 (4th Dep’t 2020)(“agency’s interpretation of the statutes it administers generally should be upheld if not unreasonable or irrational.”).

Buffalo Police Benevolent Association involved a decision on an Article 75 and 78 Petition brought by a police union alleging that the City of Buffalo's intended release of police disciplinary records alleging, *inter alia*, unsubstantiated and pending allegations would violate the collective bargaining agreement ("CBA") between the unions and the city and would otherwise violate due process and equal protection rights. *Buffalo Police Benevolent Ass'n, Inc.*, 69 Misc. 3d at 1000. The court's decision—that the petitioner could not show a likelihood of success on the merits that the repeal of § 50-a "violate[s] due process, equal protection or any other provision of the Federal and State Constitutions"—has no relevance to matter before this Court. *Id.* at 1004. The court did not interpret FOIL § 87(2)(b) and expressly left open the question of "what FOIL officers might do or could do in the future." The decision in no way undermines the analysis set forth in AO 19775.

Schenectady Police Benevolent Association involved an Article 78 action brought against the City of Schenectady to prevent it from disclosing particular documents associated with a Patrolman Pommer. *Schenectady Police Benev. Ass'n v. City of Schenectady*, 2020 WL 7978093 at *2. The particular documents at issue were a counseling notice relative to a domestic call, a "Notice of Potential Charges" related to another incident, for which he was disciplined but the discipline was subsequently resolved via a settlement agreement. *Id.* Acknowledging the repeal of § 50-a, the court evaluated the documents under the regular FOIL exemptions. The court expressly acknowledged that "*POL §87(2)(b)*, which provides an exemption for records which 'if disclosed, would constitute an unwarranted invasion of personal privacy,' *was not changed*" by the § 50-a repeal. *Id.* at *4.(emphasis added). As it related to the FOIL exemptions, the court found that the settlement agreement which related to *substantiated* misconduct and the counseling notice did not constitute an unwarranted invasion of Officer Pommer's privacy. The court was very

careful in limiting its decision to just the matter in front of it, stating that its ruling should be “narrowly confined to the particular FOIL requests outstanding” and that “[a]ny broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits.” *Id.* at *6. The decision did *not* hold that police officer records were treated differently or less favorably under FOIL § 87(2)(b) than other public employees. Nor did the decision hold that all police disciplinary files are disclosable under FOIL, without regard to its exemptions. The decision in no way undermined or contradicted the analysis set forth in AO 19775.

Uniformed Fire Officers Association involved a federal action by a police union seeking to prevent the City of New York from proactively publishing police disciplinary files. *Uniformed Fire Officers Ass'n*, 2021 WL 561505 at *1. The appeal was of the partial denial of a preliminary injunction in aid of arbitration. The federal appellate court’s decision was largely based on constitutional grounds and neither the decision nor the underlying lawsuit purported to define the scope of FOIL obligations in the wake of the repeal of § 50-a. *See id.* at *2-3. The decision did not address the issue of whether police disciplinary records were subject to FOIL § 87(2)(b) and in no way undermined or contradicted the analysis contained within AO 19775.

Thus, it is apparent that these cases have little if anything to do with the true legal issue before the Court—the validity of the analysis set forth in AO 19775.

6. The NYCLU’s public policy argument is not germane to the issues before the Court and is exaggerated or inconsistent with the actual law.

The NYCLU also offers a public policy argument in support of its position, positing that the SPD’s reliance on an existing FOIL exemption will completely frustrate the Legislature’s intention of ensuring transparency regarding records of police officer misconduct. *See* Dkt.No. 3

at 11-12. The NUCLU insinuates, without *any* evidence, that police departments do not resolve individual complaints fairly on their merits but rotely find them to be unsubstantiated as part of an apparent conspiracy to shield officer misconduct from the public.

This slippery-slope argument is overstated and inaccurate and advances no concrete policy relying instead on conjecture and surmise. First, the interests of public accountability and transparency relative to officer misconduct are also served on a case-by-case basis through the federal and state court discovery processes, which allow for judicial oversight over the task of balancing of miniscule probative value of unsubstantiated or unfounded allegations with the prejudicial harm to the disclosing party of making baseless allegations public. Second, the NYCLU grossly overstates the value of unsubstantiated or unfounded complaints to the public's right to transparency police officer accountability. There are a myriad of reasons of why a suspect or arrested party might falsely allege police misconduct in the course of a valid arrest, including to avoid responsibility for his or her conduct. Such false complaints are, in fact, routine. Thus, it is the merit to a particular complaint, *not the complaint itself*, that is, and must be, the instrument of accountability. Stated differently, allegations alone are evidence of nothing. Case law bears this out. *See, e.g., Sealey v. Fishkin*, Dkt.No. 96 CV 6303, 1998 WL 1021470, at *3 (E.D.N.Y. Dec. 2, 1998)(unsubstantiated allegations of misconduct do not prove City's deliberate indifference); *Marcel v. City of New York*, No. 88-CV-7017, 1990 WL 47689 at *8-9 (S.D.N.Y. Apr. 11, 1990)(unsubstantiated CCRB complaints do not support claim of municipal failure to train); *Law v. Cullen*, 613 F. Supp. 259, 262-63 (S.D.N.Y.1985)("In the absence of any substantiated charges of abuse, there is no basis for plaintiff's claim that Officer Cullen had a 'propensity' to use excessive force"). Being denied 20 years of unsubstantiated or unfounded complaints, which are of little or no evidentiary value, does not pose a material setback to the

NYCLU in its quest to hold the SPD accountable for some yet undetermined shortcoming. Thus, the NYCLU's appeal to policy concerns does not provide adequate or compelling justification to override the above-cited law establishing that the SPD's FOIL response validly invoked the personal privacy exemption contained within FOIL. Nor is there any basis to conclude that proper application of § 87(2)(b) in this instance would somehow frustrate the intent of a legislature who expressly recognized that the repeal of § 50-a left the FOIL exemptions intact.

7. By not taking an administrative appeal of the issue, the NYCLU did not preserve any right to challenge the application of FOIL § 87(2)(b) beyond its contention that the § 50-a repeal statute somehow altered or limited its effect to police officer records.

To the extent that the Verified Petition could be read to state a challenge to the particular determination by the SPD that unfounded or unsubstantiated complaints of police officer misconduct constitute an unwarranted invasion of personal privacy under FOIL § 87(2)(b) that issue was not preserved for Article 78 challenge because it was not raised in NYCLU's administrative appeal. *See* R. 21-25; *see generally* Dkt.No. 1.

It is well-settled that where a petitioner fails to raise a particular contention during the administrative process, including during any administrative appeal, then the issue is not preserved for judicial review under Article 78. *See Ayuso v. Graham*, 177 A.D.3d 1389, 1390 (4th Dep't 2019)(citing cases); *Cappello v. Coughlin*, 178 A.D.2d 1026, 1027 (4th Dep't 1991)("Petitioner failed to raise the other issues addressed in his brief either at the hearing or upon administrative appeal and, thus, has failed to preserve them for review"); *Police Benevolent Ass'n of New York State, Inc. v. State*, 145 A.D.3d 1391, 1394 (3d Dep't 2016)("By failing to raise on administrative appeal its argument that respondent...improperly denied its requests for additional categories of documents, petitioner failed to preserve the issue for our review").

Here, the administrative appeal only raised two issues: (a) whether the SPD's response was deficient because it did not "fully articulate the reasons for [the Department's] denial" but merely "parrot[ed] the statutory language" in the FOIL statute; and (b) whether the repeal of § 50-a mandated the disclosure of all police disciplinary records regardless of the existence of other applicable FOIL exemptions. R. 21-25. Relative to the issue raised in this Petition, the NYCLU's sole basis for its challenge, that was raised in its administrative appeal, is whether the § 50-a repeal statute mandates the requested disclosure. *See* Dkt.No. 1. Any late challenge to the SPD's application of FOIL § 87(2)(b), apart from its argument regarding the effect of the § 50-a repeal statute, has been waived and may not be challenged now. *See* R. 21-25.

POINT II

THE NYCLU IS NOT ENTITLED TO A FEE-SHIFTING AWARD BECAUSE SPD'S RELIANCE ON AN ADVISORY OPINION CONSTITUTED A "REASONABLE BASIS" TO WITHHOLD CERTAIN RECORDS.

Entirely in passing, the NYCLU argues that it is entitled to an award of attorney's fees and costs, suggesting—without even a modicum of evidence—that the SPD's denial of access "was without reasonable basis." Dkt.No. 3 at 14-15. Such fee shifting would not be proper in this case. Even in the unlikely event that the NYCLU substantially prevails, the NYCLU has not shown that the SPD lacked a reasonable basis to withhold records—a necessary prerequisite to a fee-shifting award under the Public Officers Law. Indeed, there can be no reasonable dispute that the SPD's good faith decision to withhold certain, limited records was predicated upon a valid and principled basis: Advisory Opinion 19775. *See* R. 2-4.

In 2017, the Public Officers Law was amended to provide that a court "shall" award attorney's fees when two circumstances are present: (1) the entity challenging denial of access

“has substantially prevailed” and (2) “the court finds that the agency had no reasonable basis for denying access.” Public Officers Law § 89(4)(c)(ii); see L.2017, c. 453, § 1. Simply prevailing in a proceeding is not enough; a court must also conclude that there was “no reasonable basis for denying access.” See *id.* (emphasis added). A pertinent consideration with respect to whether an agency’s denial was *reasonable* “is whether the agency reasonably claimed the records were exempt from disclosure under Public Officers Law § 87 (2),...even if the records are ultimately deemed not to be exempt.” *New York State Defs. Ass’n v. New York State Police*, 87 A.D.3d 193, 195 (3d Dep’t 2011).

For example, in *Fichera v. New York State Dep’t of Env’t Conservation*, 159 A.D.3d 1493 (4th Dep’t 2018), the Fourth Department concluded that fee-shifting was not warranted. See *id.* at 1498. The Court recognized that when there is “no evidence that records were wrongfully withheld” nor evidence that the agency “did not act in good faith,” fee-shifting is not proper. See *id.* at 1497-98; see also *Niagara Env’t Action by Raymond v. City of Niagara Falls*, 100 A.D.2d 742, 742 (4th Dep’t), *aff’d*, 63 N.Y.2d 651 (1984). Likewise, in *Hepps v. New York State Dep’t of Health*, 183 A.D.3d 283 (3d Dep’t 2020), the Third Department concluded that although the petitioners had “substantially prevailed,” there was no basis for fee-shifting award in the absence of evidence that the respondent lacked a reasonable basis for denying access to the requested records. See *id.* at 294; see also *L. Offs. of Cory H. Morris v. Cty. of Nassau*, 184 A.D.3d 830, 832 (2d Dep’t 2020)(“An agency may be found to have had a reasonable basis for initially denying access, even in cases where documents are ultimately required to be disclosed”).

Here, the SPD had a reasonable basis in law for withholding the requested materials. *Fichera*, 159 A.D.3d at 1497-98. In good faith reliance upon the *Committee*’s advisory opinion, the SPD “balanced the important presumption of access under FOIL against the equally important

interest of the privacy of the...employees.” *Suhr v. New York State Dept. of Civil Service*, No. 907373-19, 2020 WL 8771416, at *6 (Sup.Ct., Albany County Apr. 30, 2020)(“By denying disclosure of the subject records and providing all records responsive to the other requested information, it appears that [the agency] erred on the side of caution to protect the privacy interests of the ... employees.”), *modified on other grounds* 193 A.D.3d 129 (3d Dep’t 2021). This is fatal to Petitioner’s request.

Although there is nothing in the repeal of § 50-a that fundamentally changed FOIL, the City nonetheless exercised their due diligence and sought—and received—an advisory opinion from the *Committee* with respect to whether there was an obligation “to disclose all complaints against an employee regardless of outcome.” R.1. In response, the *Committee* adhered to its long-standing stance that unsubstantiated and unfounded complaints do not need to be disclosed by a municipality—even if redacted—if such disclosure would constitute an unwarranted invasion of personal privacy. R. 2-4. Such an opinion is entitled to the Court’s deference. *See Kwasnik v. City of New York*, 262 A.D.2d 171, 172 (1st Dep’t 1999); *see Forsyth*, 185 A.D.3d at 1499.

While Petitioner may disagree with the partial denial of access, that does not mean that partial denial was without a reasonable basis. Public Officers Law § 89(4)(c)(ii). Even assuming the NYCLU “substantially prevailed” in this proceeding, the SPD nonetheless had a reasonable basis in law for withholding the material requested by the NYCLU and the request must be denied.

CONCLUSION

For the foregoing reasons, the challenged determination was not affected by error of law. and the Court should dismiss the Petition in its entirety and grant Respondents costs and such other and further relief as the Court deems just and proper.

Dated: April 14, 2021
Syracuse, New York

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Petitioner's Reply Memorandum of Law in Support of Verified Petition
and in Opposition to Motion to Dismiss, dated April 23, 2021
[pp. 499 - 517]

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

INDEX NO: 002602/2021

Hon. Gerald J. Neri

Motion Seq. Nos. 001 and 002

**REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION AND
OPPOSITION TO THE MOTION TO DISMISS**

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Petitioner, the New York Civil Liberties Union (the “NYCLU”), respectfully submits this Reply Memorandum of Law in Support of its Verified Petition and Opposition to Respondents’ Motion to Dismiss seeking relief to redress the improper denial by the City of Syracuse and the Syracuse Police Department (the “SPD”) of the NYCLU’s September 15, 2020 request under the Freedom of Information Law (“FOIL”) for certain law enforcement disciplinary records.

INTRODUCTION

The Petition raises a single, narrow issue: the SPD’s categorical refusal to produce law enforcement disciplinary records if those records relate to complaints that were not substantiated or remain open. Petitioner has no quarrel at this time with any other aspect of the SPD’s response to Petitioner’s September 15, 2020 FOIL request (the “Request”), and every issue that the SPD raised in discussions with Petitioner’s counsel with regard to claimed burden has been addressed to the SPD’s stated satisfaction (notwithstanding some surprising, and factually baseless, contrary statements in the SPD’s motion to dismiss the Petition).

Even as to the one issue in dispute, Petitioner’s argument should not be controversial: the SPD has not complied with FOIL because its blanket assertion of “privacy” to justify the wholesale denial of an entire category of records is inconsistent with the privacy-related exemptions in the statute. Thus, the SPD’s suggestion that Petitioner seeks to afford law enforcement personnel *less* protection than others protected by FOIL is upside down and an invitation to error. All the NYCLU seeks is to hold the SPD to the strictures of FOIL in a manner consistent with (a) the text and structure of the statute, (b) other recent court decisions, and (c) the “Advisory Opinion” that the SPD invokes repeatedly.

Consistent judicial authority and the recent Advisory Opinion (the significance of which the SPD substantially overstates) agree that, following the repeal of Section 50-a and associated amendments to FOIL, New York mandates the production of all law enforcement disciplinary

records unless the agency can show both that the records fall into one of several specific statutory exceptions and that the records cannot be redacted to address statute-based privacy concerns.

Respondents failed to follow the law. Instead, they sought to avoid production by a broad and improper invocation of the privacy exemption, Public Officers Law (“POL”) Section 87(2)(b), without consideration of the companion requirements under POL Section 89(2) (which Respondents continue to ignore in their motion papers).

It is Petitioner that has assiduously adhered to the law and to every protection properly available to Respondents under FOIL. Of most relevance given the tack taken by Respondents in their papers, the record is undisputed that Petitioner offered to address statutorily-grounded privacy concerns well before it commenced this proceeding. *See* Dkt. No. 9, M. Lacovara Aff. Ex. E (“Petitioner’s Administrative Appeal”), at 3 n.10 (stating that the NYCLU would be “amenable to discussing the receipt of documents redacted as permitted under §89(2)(a)”).¹

The Court should also not be swayed by Respondents’ florid rhetoric. Rather than deal candidly with the record and address the single issue actually raised in the Petition, Respondents resort to calling Petitioner’s requests “expansively broad” and requiring a “massive investment of time, manpower, and resources.” *See* Dkt. No. 38, Resp’ts’ Mem. of Law in Opp’n and in Supp. of Mot. to Dismiss (“Respondents’ Brief”) at 9. There are two problems with this feint: it’s neither relevant nor true. As to relevance, no other aspect of Petitioner’s other FOIL requests is before this Court, and “burden” and “resource” commitment are not the SPD’s bases for refusing to produce the materials at issue. And, as to the facts, Petitioner worked with the SPD and addressed

¹ Respondents, perhaps mistakenly, also assert that Petitioner did not preserve, and the Court cannot now reach, issues related to FOIL’s personal privacy exception. That assertion withers under even minimal scrutiny. Petitioner, in its administrative appeal, specifically raised, and thus preserved for judicial review, the “SPD’s contention that the material sought would invade ‘personal privacy.’” *See* Petitioner’s Administrative Appeal at 2.

every burden and resource-related issue it raised, in a series of cordial and productive discussions. Thus, at the SPD's request, Petitioner agreed, at least initially, to reduce the time period covered by certain requests and to defer others entirely. *See* Dkt. No. 7, M. Lacovara Aff. Ex. C ("Nov. 17, 2020 Letter from SPD") at 1. Moreover (and with the exception of the issue litigated here), Petitioner has not taken issue with the SPD's compliance with the Request, including the materials produced and the proposed timeline for production.

On the one issue in dispute—the SPD's categorical refusal to produce law enforcement disciplinary records if they relate to complaints that were not substantiated or remain open—Petitioner respectfully requests that the Court direct the SPD to produce the records as required by the law.

ARGUMENT

I. THE SPD HAS NOT SHOWN THAT THE RECORDS AT ISSUE ARE EXEMPT FROM DISCLOSURE.

The parties do not appear to be in dispute about the core proposition of law here: Respondents' cited authority instructs that FOIL requires "each public agency to provide access to all records, with certain exceptions," and "place[s] the burden upon any agency resisting disclosure of proving that the material sought comes within the statutory exceptions." *Herald Co. v. Sch. Dist. of City of Syracuse*, 430 N.Y.S.2d 460, 462-63 (Sup. Ct., Onondaga Cnty. 1980). And no one challenges the further proposition that FOIL is to be "liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *LaRocca v. Bd. of Educ. of Jericho Union Free Sch. Dist.*, 220 A.D.2d 424, 426 (2d Dep't 1995). Thus, all agree that Respondents must produce the records at issue unless they can justify their objection.

The challenge Respondents face is that they have *never* properly supported their categorical withholding of all disciplinary records other than those that have resulted in discipline. Contrary to Respondents' attempts to undermine the repeal of Section 50-a, the legislative intent remains clear: to make law enforcement disciplinary records fully available, unless a specific exemption applies. And so multiple courts have held. *See, e.g., People v. Herrera*, No. CR-004539-20NA, 2021 WL 1247418, at *5 (N.Y. Dist. Ct. Apr. 5, 2021) (ordering pursuant to FOIL the production of, *inter alia*, all police officer disciplinary records regardless of disposition pertaining to any investigation of relevant officers). With the repeal of Section 50-a came amendments to the "key provisions" of FOIL, which collectively make that legislative direction clear. *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093, at *8-9 (Sup. Ct., Schenectady Cnty. Dec. 29, 2020). Of note, POL § 86 incorporated a broad definition of "law enforcement disciplinary records," one that does distinguish among unfounded, exonerated, substantiated, or unsubstantiated complaints. *Id.*; 86(6).

The repeal of Section 50-a did not make POL § 87(2)(b) inapplicable to law enforcement personnel, but Section 87 does not exist, or properly get applied, in isolation. Rather, that Section *requires* that the responding agency (or a court) assert only those privacy-related bases for non-production that are enumerated under POL Section 89. Respondents' repeated assertions that Petitioner seeks to strip law enforcement personnel of privacy protections are groundless. *See, e.g.,* Dkt. No. 36, Resp'ts' Ver. Answer to Art. 78 Pet. with Counterst. of Mat. Facts and Objs. in Point of Law ("Respondents' Answer") at ¶¶ 4, 5, 29-30 and 30-31; Dkt. No. 28, Powers Aff. at ¶¶ 3, 7, 50-51, 55, 84, 88; Respondents' Brief at 1, 10, 12, 18. All Petitioner argues, in respect of the repeal of Section 50-a and the application of FOIL to the Request, is that the SPD follow the law as now written.

In that regard, the Court should fill in the blank in Respondents' analysis. It must look to POL §§ 89(2-b) and (2-c), provisions added to provide FOIL coverage for all law enforcement disciplinary records that would be subject to disclosure following the repeal of Section 50-a. *See* N.Y. Pub. Off. L. §§ 89(2-b)-(2-c) (instructing law enforcement agencies to redact certain personal information from law enforcement disciplinary records prior to disclosure and permitting law enforcement agencies to redact law enforcement disciplinary records pertaining to "technical infractions"). Those provisions allow for the redaction of certain information that might implicate privacy concerns. *See id.* Their inclusion demonstrates both that Legislature cared about, and provided a remedy for, legitimate privacy concerns, and that FOIL does not permit Respondents' categorical refusal to produce the records at issue here.

It is well-established that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government," and in order to invoke one of the narrow exceptions for disclosure prescribed by FOIL, the agency seeking to deny access must articulate "particularized and specific justification" for its withholding. *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996) (finding that law enforcement complaint follow-up reports were not categorically exempt from disclosure under FOIL, even with the protection of Section 50-a). The SPD argues that FOIL provides specific carve-outs for law enforcement officials (and other public employees) to withhold the production of certain information in certain circumstances. Petitioner agrees and acknowledged as much in its opening brief. *See* Dkt. No. 3, Pet'r's Mem. of Law in Supp. of Ver. Pet. at 6 ("The legislature created a dedicated exemption to protect the privacy of officers, *see* N.Y. Pub. Off. L. § 89(2-b)"). Petitioner challenges only the SPD's invocation of POL Section 87(2)(b), without reference to, or application of, Section 89, as a supposed basis to withhold all unsubstantiated or open disciplinary records.

A. FOIL Section 89 defines the scope of the privacy exemption; Respondents ignore it.

Respondents invoke Section 87 countless times in their papers, but that section cannot be read without incorporating Section 89, a provision Respondents studiously ignore. Section 87(2)(b) provides that an agency must make available all records except those that “if disclosed would constitute an unwarranted invasion of personal privacy.” N.Y. Pub. Off. L. § 87(2)(b). Respondents invoke that language as a would-be talisman to excuse production of the records sought. *See, e.g.*, Respondents’ Answer at ¶¶ 8, 10 and 8, 32, 45; Powers Aff. at ¶¶ 6, 16, 22, 30, 41, 43, 68; Respondents’ Brief at 1-2, 9-12, 17, 18. But the statutory directive continues. “Personal privacy” is not a generic concept. In the context of the records sought here, “personal privacy” can be a basis for refusing production only if “*the provisions of subdivision two of section eighty-nine of this article*” are satisfied. N.Y. Pub. Off. L. § 87(2)(b) (emphasis added). Section 89(2) then offers eight distinct categories that could pose “unwarranted invasions of personal privacy” and thus permit redaction or withholding of records.² N.Y. Pub. Off. L. § 89(2). *None* of those categories applies to the disciplinary records at issue.

² Under POL Section 89(2)(b), examples of unwarranted invasions of personal privacy include:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

To the extent some portion of any of the records at issue implicates a specific privacy concern, Respondents are still not permitted categorically to withhold the records. Instead, it is their obligation to propose narrow redactions that protect exempt material and then produce redacted versions of the records. *See Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011) (requiring redaction instead of wholesale denial when an agency invokes the privacy exemption). Petitioner has repeatedly acknowledged that narrow privacy exemptions exist under FOIL and therefore offered to discuss redactions that could address specific privacy concerns. *See* Petitioner's Administrative Appeal at 3 n.10. Instead, Respondents continue to withhold records as a categorical matter, in violation of FOIL and derogation of ample judicial authority. Their arguments invoking only Section 87 of the POL are unsupported by its text and untethered to its explicit statutory companion, POL Section 89.

B. Respondents' authority is irrelevant or supports the relief sought in the Petition.

Respondents' treatment of judicial authority is comparable to their treatment of the statutory scheme; it is little more than misdirection and invitations to confusion and error. Again, Respondents begin with an undisputed observation, here that the SPD "relied upon" "the personal privacy exemption in § 87(2)(b)" when it refused in part to comply with Petitioner's FOIL request.

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;

vii. disclosure of electronic contact information, such as e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or

viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

N.Y. Pub. Off. L. § 89(2)(b).

See Respondents' Brief at 9. The SPD did not invoke any other enumerated exemption under FOIL, yet Respondents now ask the Court to rely on decisions that address exemptions not claimed here. It is true, for example, that, in *Herald Co.*, Onondaga County court allowed the School District of the City of Syracuse to withhold the production of charges filed against a tenured teacher. But the court acted not under POL § 87(2)(b), but under sections 87(2)(a) and (g). See *Herald Co.*, 430 N.Y.S.2d at 464 ("In view of the foregoing [analyses under POL §§ 87(2)(a) and (g)], it is not necessary to determine whether the records sought would constitute an unwarranted invasion of privacy if disclosed."). Section 87(2)(a) allows an agency to deny access to records that are "specifically exempted from disclosure by state or federal statute," N.Y. Pub. Off. L. § 87(2)(a), and subsection (g) allows an agency to withhold "inter-agency or intra-agency materials" that fall within certain specified categories, N.Y. Pub. Off. L. § 87(2)(g). Neither subsection applies or was invoked by the SPD in its responses to Petitioner's requests.³

Although they invoke it in the fee context, it is noteworthy that Respondents chose to rely on *Suhr v. New York State Dep't of Civil Service*, No. 907373-19, 2020 WL 8771416 (Sup. Ct., Albany Cnty. Apr. 30, 2020), *modified on other grounds* 193 A.D.3d 129 (3d Dep't 2021). *Suhr* is instructive indeed, but not helpful to Respondents. In *Suhr*, the court rejected the Department of Civil Service's (the "DCS") attempt to withhold certain payroll data under, among other things, the privacy exemption Respondents invoke here. The court did so because, just as has occurred here with regard to the SPD, the DCS "did not articulate a particularized and specific justification

³ *Herald Co.* relied principally on separate protection afforded to educational personnel under Education Law Section 3020-a, a provision somewhat analogous to Section 50-a. See *Herald Co.* 430 N.Y.S.2d at 463. Thus the decision *might* have had some relevance, *had the Legislature not repealed Section 50-a*. The other, and all education-related, cases that Respondents now seek to invoke, *see, e.g., Matter of Western Suffolk Bd. of Coop. Educ. Servs. v. Bay Shore Union*, 250 A.D.2d 772 (2d Dep't 1998); *Santomero v. Bd. of Educ. of the Bedford Cent. Sch. Dist.*, No. 08-25405, 2009 WL 6860644 (Sup. Ct., Westchester Cnty. 2009); *LaRocca*, 220 A.D.2d 424, are equally irrelevant given the recent and persuasive authority on the production of law enforcement disciplinary records following the repeal of Section 50-a.

to withhold records responsive to [part of] Petitioner’s FOIL request,” and instead merely “parroted the statutory language” of the exemption it sought to invoke. *Id.* at *4, *5. Applying *Suhr*, the Court must reject Respondents’ categorical refusal to provide disciplinary records without demonstrating how those records are subject to an enumerated privacy-based exemption. Doing so also comports with the Court of Appeals’ 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.*, 18 N.Y.3d at 46.

C. The most relevant authority supports the relief sought by the Petition, and the Advisory Opinions cited by the SPD do not counsel otherwise.

Every court to have considered this issue since the repeal of Section 50-a has 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, e.g., Schenectady PBA*, 2020 WL 7978093, at *10–11 (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 resolves without a professional discipline, must be disclosed in response to a [FOIL] request,” holding that it must be and rejecting the PBA’s privacy argument 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); *Herrera*, 2021 WL 1247418, at *5 (ordering the production of unsubstantiated and substantiated complaints pursuant to FOIL 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*, Nos. 20-2789-cv(L), 20-3177-cv(XAP), 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”).

Respondents generally ignore on-point judicial authority, choosing instead repeatedly to invoke the March 19, 2021 Advisory Opinion (the “March Opinion”) of the Committee on Open Government (the “Committee”). *See, e.g.*, Respondents’ Answer at ¶¶ 43, 44 and 22-25; Powers Aff. at ¶¶ 11, 12, 37, 85; Respondents’ Brief at 3, 7, 13, 17-18. The March Opinion adds virtually nothing of consequence to the analysis; it certainly does not provide the shield Respondents claim. To the contrary, the March Opinion acknowledges the repeal of Section 50-a and the associated amendments to the law and affirms that “FOIL now requires that upon a request [for law enforcement disciplinary records], a law enforcement agency must review all records of complaints, whether or not substantiated, to determine rights of access.” Dkt. No. 37, Respondents’ Certified Record, at R. 32. Having acknowledged the review responsibilities imposed on entities like the SPD, the March Opinion then addresses the recent judicial decisions on which Petitioner has relied here.

In doing so, the March Opinion seeks to limit those cases to their facts, but it does *not* claim that the cases were wrongly decided. Respondents’ Certified Record at R. 32-33. The March Opinion does not question, or give the Court a reasoned basis to ignore, components of each court’s reasoning directly relevant to the question posed. *See, e.g., Schenectady PBA*, 2020 WL 7978093, at *10–11 (“Where counseling pertains to job performance, or allegations relate to public duty, such records are publicly accessible, via FOIL request, regardless of reputational injury or validity. It is not the veracity of the allegations but, instead, whether they relate to the discharge of public duties which guides the analysis.”); *Uniformed Fire Officers Ass’n*, 2021 WL 561505, at *3 (“the public has a stronger legitimate interest in the disciplinary records of law enforcement officers

than in those of other public employees”); *see also Buffalo Police Benevolent Ass’n. v. Brown*, 134 N.Y.S.3d 150, 154 (Sup. Ct., Erie Cnty. 2020) (in rejecting officers’ request for an injunction categorically blocking the release of unsubstantiated or pending complaints, observing that “[w]hat Petitioners find objectionable is specifically authorized by statute” and concluding that the police union could not show likely success on the merits). The cases that the March Opinion addresses are well-reasoned, correctly decided, and persuasive authority here.

Respondents further incorrectly claim that *Schenectady* “simply [has] *nothing to do with* the analysis set forth in” an earlier Committee advisory opinion. Respondents’ Brief at 18 (emphasis in original) (citing Comm. on Open Gov’t FOIL AO 19775 (July 27, 2020) (the “July Opinion”)). Perhaps precisely because the July Opinion is not precedent, *Schenectady* did not discuss it explicitly. But *Schenectady* did consider, and reject, the construction suggested by the July Opinion and adopted by both the Schenectady Police Department in that matter and by Respondents here. The Court explained that “[i]t is POL § 87(2)(b)’s exceptions for records that, if disclosed, would constitute an ‘unwarranted invasion of personal privacy,’ that occupies the greatest significance to the instant matter,” and then held that the exemption did not shield “a police officer’s personnel and disciplinary record [that] contains uncharged or unsubstantiated allegations of misconduct.” *Schenectady PBA*, 2020 WL 7978093 at *9.

Respondents are correct that the court in *Schenectady* “did *not* hold that police officer records were treated differently or less favorably under FOIL § 87(2)(b) than other public employees,” Respondents’ Brief at 20 (emphasis in original), but that observation is just another attempt to avoid the real issue here, and the holding there. The *Schenectady* court rejected an argument identical to the core proposition Respondents advance, namely that Section 87(2)(b) can be read without reference to Section 89, and somehow creates an implicit, blanket personal privacy

protection in respect of records that relate to unsubstantiated or still-open claims of law enforcement misconduct. That construction is not faithful to the Legislature’s action or the statutory language that embodied that action: “there is simply no ambiguity . . . as to the legislature’s instructions when responding to FOIL requests,” and that “it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct.” *Schenectady PBA*, 2020 WL 7978093 at *10. In interpreting the legislature’s intent in repealing Section 50-a, the court noted that withholding any part of petitioner’s personnel record on the basis of “privacy” would “render the new statutory scheme meaningless [and] could not possibly have been . . . intended by the legislature.” *Id.* at *14–15. For all Respondents’ attempts to mine snippets of legislative history, *see, e.g.*, Respondents’ Answer at ¶ 28; Powers Aff. at ¶¶ 72-73; Respondents’ Brief at 13-17, the text of the statute controls, and it does not admit of the exception Respondents wish was there.

Petitioner notes that advisory opinions are no more than that; the Committee’s views are entitled to no special deference, especially if the view expressed is unreasonable. *See Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 181 (4th Dep’t 1979). But in the end, the Court need not reject the advisory opinions, because at bottom they stand only for an entirely benign and unchallenged proposition: “an agency that does not wish to proactively disclose the entire category of records (or waive exemptions that may apply) may still review such records and make determinations as to rights of access.” Respondents’ Certified Record at R.32.

The Committee’s advice thus reduces to “follow the statutes.” Petitioner has never suggested otherwise. Respondents can of course review records within the scope of the Request, can invoke particular privacy exemptions found in the statute, and can suggest redactions as a potential curative measure for any *statutorily-grounded* privacy claims. What they cannot do—

and what the advisory opinions neither endorse nor justify—is ignore both the repeal of Section 50-a and the extant, privacy-related statutory framework that the Legislature created in tandem with the repeal. That is what Respondents have sought to do here, and the Court should reject it and grant the relief sought by the Petition. *See Buffalo PBA*, 134 N.Y.S.3d at 155 (declining to countenance a “pre-emptive strike” that serves as a “blanket prohibition” to the release of all unsubstantiated disciplinary records).

D. Petitioner’s request for relief has been preserved.

Respondents seek to limit fulsome consideration of the issue raised by the Petition by asserting that the Court cannot consider the issue. *See, e.g.*, Respondents’ Brief at 22-23. Respondents rely on two decisions that stand for the sensible proposition that a petitioner can waive an argument by failing to raise it on administrative appeal. *See Ayuso v Graham*, 177 A.D.3d 1389, 1390 (4th Dep’t 2019); *Cappello v. Coughlin*, 178 A.D.2d 1026, 1027 (4th Dep’t 1991). Neither case is relevant here: Petitioner specifically raised as an issue in its administrative appeal the “SPD’s contention that the material sought would invade ‘personal privacy.’” *See* Petitioner’s Administrative Appeal at 2. All matters pleaded and briefed were preserved and are ripe for decision.

CONCLUSION

Petitioner respectfully requests that the Court grant the relief requested in the Petition, including the award of reasonable attorneys’ fees and costs associated with this special proceeding.

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NYSCEF DOC. NO. 39

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/23/2021

DATED: New York, New York
April 23, 2021

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Michael Lacovara, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 4,199 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: New York, New York
April 23, 2021

/s/ Michael Lacovara
Michael Lacovara

**Petitioner's Reply Memorandum of Law in Support of Verified Petition
and in Opposition to Motion to Dismiss, dated April 23, 2021
(Reproduced herein at pages 499 to 517)**

**Reply Affirmation of John G. Powers, for Respondents, in Further
Support of Motion to Dismiss, dated April 28, 2021**

[pp. 519 - 529]

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NYSCEF DOC. NO. 41

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/28/2021

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Petition of

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-vs-

CITY OF SYRACUSE and SYRACUSE POLICE
DEPARTMENT,

Respondents.

In a Proceeding Pursuant to CPLR Article 78.

REPLY AFFIRMATION

Index No. 002602/2021

Hon. Gerard J. Neri

JOHN G. POWERS, under penalties of perjury, affirms and says:

1. I am an attorney at law duly licensed to practice in the State of New York and a member of the law firm of Hancock Estabrook LLP, attorneys for Respondents City of Syracuse and the Syracuse Police Department (the “SPD”) (collectively, “SPD”). I submit this Affirmation in Reply to the Petitioner’s opposition to SPD’s Motion to Dismiss.

2. Comparing the arguments made in NYCLU’s initial brief (the “Opening Brief”) and its opposition/reply brief (the “Second Brief”) is like reading briefs written by two entirely different law firms about two entirely different issues. The retreat beaten by the NYCLU from their main argument in their Opening Brief is stunning. The new argument—advanced for the first time in Reply—is unpreserved, untimely, and ultimately unmeritorious. The Petition should thus be dismissed for lack of merit—*i.e.*, the SPD’s FOIL response was not affected by errors of law.

{H4377420.2}

The NYCLU's Initial Argument

3. In their Opening Brief, the NYCLU's main argument was that **“the text and legislative history of the [§ 50-a repeal statute]¹ require the disclosure of all disciplinary records, including complaints that did not result in discipline.”** NYCLU Opening Brief—Dkt. No. 3, § III(A)(1).

4. Thus, the NYCLU's *entire* argument in its Opening Brief centered on how the § 50-a repeal statute *mandated* the disclosure of *all* police disciplinary records including unsubstantiated complaints. NYCLU Opening Brief—Dkt. No. 3 at pp. 5-9. Even references to the “personal privacy exemption” in the Opening Brief were in the context of the NYCLU's argument that the § 50-a repeal statute had impliedly *changed* that existing exemption:

- “In an attempt to create such accountability, the legislature enacted a *full repeal* of Section 50-a in order to provide the public with access to *all* law enforcement records.” NYCLU Opening Brief—Dkt. No. 3 at 6.
- “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.” NYCLU Opening Brief—Dkt. No. 3 at 6.
- “As important, the legislature considered—and rejected—competing, narrower proposals [and in] its rejection of this competing bill, the legislature rejected Respondents' position.” NYCLU Opening Brief—Dkt. No. 3 at 6.
- “The repeal of Section 50-a empowers the public to hold individual officers accountable for past and repeat offenses, and it provides for inspection into the departments' policies and procedures (or lack thereof) for investigating and substantiating civilian complaints about such offenses.” NYCLU Opening Brief—Dkt. No. 3 at 7.
- “The Request seeks nothing more than that which the legislature deemed matters of public concern; denial of the Petition (and validation of the position

¹ The repeal of New York Civil Rights Law § 50 occurred in Law 2020, chapter 96, effective June 12, 2020, which is attached to the original Powers Affirmation as Exhibit “B” and is referred to herein as the “§ 50-a repeal statute.” Dkt. No. 30.

asserted by Respondents) would nullify a core, explicit basis for the Section 50-a repeal.” NYCLU Opening Brief—Dkt. No. 3 at 8.

- “Each New York court that has looked at the question *in the wake of the repeal of Section 50-a* has afforded access to the sorts of materials Respondents seek to shield on ‘personal privacy’ grounds.” NYCLU Opening Brief—Dkt. No. 3 at 8 (emphasis added).
- “In none of these decisions did the court conclude that vague, facial invocations of ‘personal privacy’ rights *overrode the legislature’s clarity in repealing Section 50-a*.” NYCLU Opening Brief—Dkt. No. 3 at 9 (emphasis added).
- “But the repeal of Section 50-a is exactly such a ‘legislative direction,’ and courts have provided ample ‘judicial precedent’ explaining why the privacy exemption relied upon by Respondents cannot shield unsubstantiated complaints from disclosure.” NYCLU Opening Brief—Dkt. No. 3 at 9.

5. Even the NYCLU’s fee shifting argument identified the thrust of their Petition as being based on the SPD invoking the personal privacy exemption in the face of “*the legislature’s actions and stated intent in repealing Section 50-a*.” NYCLU Opening Brief—Dkt. No. 3 at 10.

6. And finally, and most importantly, in the Article 78 Petition, which defines the contours of the present legal challenge, the NYCLU describes its grievance thusly:

In denying the NYCLU’s request, the SPD ignored the plain language of the [repeal] statute, as well as its legislative history, which support the NYCLU’s right to the requested records.

Verified Petition—Dkt. No. 1, ¶ 6.

7. The legal premise in the Opening Brief—that the § 50-a repeal statute somehow prohibited the SPD’s FOIL response—was dismantled in the SPD’s opposition briefing as inconsistent with: (i) the actual text of the § 50-a repeal statute; (ii) the New York State Department of State’s *Committee on Open Government’s* opinion published at AO 19775; (iii) the *Committee on Open Government’s* opinion published at AO 19785; and even (iv) the legislative history of the § 50-a repeal statute. *See* Dkt. Nos. 28-38.

The NYCLU's New Argument in Reply

8. Now, in reply to its initial position, and in opposition to SPD's Motion to Dismiss, the NYCLU's Second Brief fashions an *entirely new* basis for its challenge to the SPD's FOIL response, introduced and argued *for the first time* in the third filed brief addressing the allegations in the Petition.

9. The newly-minted argument advanced for the first time now: **that SPD's FOIL response was deficient because it did not further categorize its assertion of the § 87(2)(b) personal privacy exemption in terms of the listed privacy "examples" provided in FOIL § 89(2):**

- "Respondents failed to follow the law. Instead, they sought to avoid production by a broad and improper invocation of the privacy exemption, Public Officers Law ("POL") Section 87(2)(b), without consideration of the companion requirements under POL Section 89(2)." NYCLU Second Brief—Dkt. Nos. 39-40 at 2.
- "that Section [§ 87(2)(b)] *requires* that the responding agency (or a court) assert only those privacy-related bases for nonproduction that are enumerated under POL Section 89." NYCLU Second Brief—Dkt. Nos. 39-40 at 4.
- "Petitioner challenges *only* the SPD's invocation of POL Section 87(2)(b), without reference to, or application of, Section 89, as a supposed basis to withhold all unsubstantiated or open disciplinary records." NYCLU Second Brief—Dkt. Nos. 39-40 at 5.
- "FOIL Section 89 defines the scope of the privacy exemption; Respondents ignore it." NYCLU Second Brief—Dkt. Nos. 39-40, title of Section I(A).
- "Their arguments invoking only Section 87 of the POL are unsupported by its text and untethered to its explicit statutory companion, POL Section 89." NYCLU Second Brief—Dkt. Nos. 39-40 at 7.

10. This clear bait-and-switch tactic of advancing an *entirely new* argument in Reply is of course unfair, but there are *also* numerous procedural and substantive reasons why the Court should reject it.

NYCLU may not advance a new argument in Reply

11. *First*, a Petitioner in an Article 78 proceeding may *not* advance an entirely new ground for challenge in its reply papers. *See Hudson River Sloop Clearwater, Inc. v. New York State Pub. Serv. Comm'n*, 65 Misc. 3d 1219(A) (Sup. Ct., Albany County 2019) (“Reply papers may not be used to introduce new arguments, new grounds or new evidence in support of the relief requested in the initial submissions” in Article 78 proceeding); *Gibbons v. Kampe*, 44 Misc. 3d 1232(A) (Sup. Ct., Nassau County 2014) (“The function of reply papers is to address arguments made in opposition to the position taken by the petitioner and not to permit him to introduce new arguments in support of the petition.”).

NYCLU may not make a new argument that is not contained in the Petition

12. *Second*, the Article 78 proceeding is, of course, defined by the four corners of the Petition itself. *See Barnes v. Fischer*, 135 A.D.3d 1249, 1249 (3d Dep’t 2016) (Article 78 Petition must be “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action”); *Oliver v. Donovan*, 32 A.D.2d 1036, 1037 (2d Dep’t 1969) (noting that a petition in a special proceeding “shall be sufficiently particular to give the court and parties notice of, inter alia, the material elements of each cause of action or defense”); *see also* CPLR 402 (noting that a petition in a special proceeding must comply “with the requirements for a complaint in an action,” *i.e.*, CPLR 3013).

13. Thus, Petitioner is obligated to state its claim *why* it contends the SPD’s FOIL response is contrary to law with sufficient particularity *in the Petition itself*.

14. This, the NYCLU clearly did not do. *See* Verified Petition—Dkt. No. 1. *Nowhere* in the Verified Petition does the NYCLU take the position, or make the argument, that SPD’s FOIL response was deficient because its reliance on § 87(2)(b) personal privacy exemption did not attempt to categorize the withheld documents in terms of the non-exhaustive examples set forth in FOIL § 89(2). *See generally* Verified Petition—Dkt. No. 1 ¶¶ 1-44.

15. In fact, the Petition is completely silent on this issue. Thus, the NYCLU may *not* now advance this challenge when it is not contained within the Petition. *See Johnson Elec. Const. Corp. v. New York State Dep’t of Transp.*, 124 A.D.3d 1199, 1200 (3d Dep’t 2015) (“Although petitioners raise additional challenges to the validity of Hinck’s bid and the propriety of DOT’s acceptance thereof, these issues are either raised for the first time on appeal or in a reply affidavit *and not in the petition itself*. Accordingly, such issues are not properly before us and we decline to consider them”); *Univ. Heights Nursing Home v. Chassin*, 245 A.D.2d 776, 778-79 (3d Dep’t 1997) (noting that the specific claim was not in the petition and improperly “raised for the first time in a reply”).

NYCLU may not make an argument that it failed to make in its administrative appeal

16. *Third*, the NYCLU’s new argument was never raised in its administrative appeal. *See* R. 21-25. It has therefore failed to even preserve its new argument for Article 78 challenge.

17. The NYCLU’s administrative appeal was limited to two issues: (1) “SPD’s contention that the material sought would invade ‘personal privacy’ both contradicts the mandate of the repeal of Section 50-a and ignores other means to project legitimate privacy interests” and (2) SPD’s FOIL response denial only cited to a subsection of FOIL and thus was not sufficiently particularized. *See* R. 21-25.

18. The NYCLU argues that its administrative appeal issue—regarding particularity—somehow *also* captured the new argument now made in its Reply.

19. But that is not what the NYCLU’s administrative appeal *actually* says. See R. 21-25. The NYCLU explains what it was appealing in the last paragraph of the second page of its administrative appeal:

The Denial’s mere recitation of the FOIL statute is inadequate. Because the SPD “merely parrot[s]” the statutory language, it has not met its burden to articulate fully the reasons for its denial. Rather, the SPD has done what the Court of Appeals has prohibited by doing no more than merely recite “sections, subdivisions and subparagraphs of the applicable statute and conclusory characterization of the records sought to be withheld.

R. 22. Thus, the NYCLU’s actual argument on administrative appeal was that the SPD’s FOIL response was deficient because it purportedly only cited to a section number heading of FOIL as the reason for its withholding and did not otherwise give further explanation why that section applied. R. 22-23 (citing *W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884-85 (2009)).

20. In denying the NYCLU’s appeal, the SPD specifically addressed the lack of merit to this contention by reiterating that that its denial was not based solely on a citation to § 87(2)(b)—*it also was based on the reasoning set forth in AO 19775*. See R. 27-28; see also R. 18-20 (“consistent with our analysis of Public Officers Law § 87(2)(b) *and* the advisory opinion from the New York Committee on Open Government, dated July 27, 2020, SPD will not release records related to complaints that were ultimately determined to be unfounded or unsubstantiated, or those that are still open.” (emphasis added)).

21. The *Committee*’s advisory opinion (expressly cited as the basis for the FOIL denial) specifically explained how and why § 87(2)(b) applied to records of unsubstantiated

complaints of misconduct against police officers, thus satisfying the minimum particularity required in FOIL responses. *See* R. 27-28; *see also* R. 2-3.

22. What the NYCLU's administrative appeal *did not do* is advance any of the arguments now made in its Second Brief. *Compare* R. 21-25 with Dkt. Nos. 39-40.

23. If an argument is not made in a FOIL administrative appeal, the responding agency does not have the opportunity to address the purported shortcoming during the administrative process, and so the issue may *not* be raised in a later Article 78 challenge. *See Ayuso v. Graham*, 177 A.D.3d 1389, 1390 (4th Dep't 2019) (citing cases).

24. Accordingly, NYCLU's failure to raise its new Reply arguments in its administrative appeal precludes this Court from considering them.

The NYCLU's new argument lacks merit in any event

24. *Fourth*, and finally, the NYCLU's new argument lacks substantive merit.

25. While the NYCLU incorrectly accuses the SPD of assiduously ignoring the language of FOIL § 89(2), the NYCLU likewise concedes, as it must, that FOIL § 89(2) lists only *examples* of types of records that are subject to the personal privacy exemption.

26. FOIL § 89(2)'s list therefore, by definition, is *not exhaustive*. *See* N.Y. Pub. Off. Law § 89 ("An unwarranted invasion of personal privacy includes, *but shall not be limited to*"); *The New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d 477, 485 (2005) (noting that § 89(2) contain only a "partial definition of 'unwarranted invasion of personal privacy'" which does *not* control the application of the exemption).

27. *No case* has held that an agency relying on § 87(2)(b) must, in its response, shoehorn the particular record at issue into one of the listed examples in FOIL § 89(2).

28. The Court of Appeals has likewise *rejected* the NYCLU's proposition. *See New York Times Co.*, 4 N.Y.3d at 485 (finding that none of the six § 89(2) specific examples applied and then turned instead to "balancing the privacy interests at stake against the public interest in disclosure of the information" to determine whether the exemption existed).

29. Here, this Court does not have to make a new finding that unsubstantiated complaints of misconduct implicate privacy interests and fall squarely within the personal privacy exemption. The *Committee on Open Government's* has already reached that conclusion in AO 19775, finding that unsubstantiated complaints of police misconduct *do satisfy* the definition of a record implicating the personal privacy exemption § 87(2)(b). *See* AO 19775; *see also* AO 19785 (adhering to opinion outline in AO 19775).

30. As set forth in the SPD's original papers, the *Committee on Open Government* is the state agency *expressly created* to give opinions regarding the scope and interpretation of the FOIL statute, including its exemptions. *See* N.Y. Pub. Off. Law § 89.

31. Petitioners have done nothing to distinguish or undermine AO 19775. Relatedly, they also have not addressed the *Committee on Open Government's* adherence to this opinion outlined in AO 19775 when it was presented *with the same authority that the NYCLU's presents to this Court*. *See* R. 32-33.

32. Thus, there is no basis to find that the SPD's FOIL response was affected by errors of law.

WHEREFORE, Respondents respectfully request judgment dismissing the Verified Petition on the merits and granting Respondents costs and such other and further relief as the Court deems just and proper.

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NYSCEF DOC. NO. 41

INDEX NO. 002602/2021

RECEIVED NYSCEF: 04/28/2021

DATED: April 28, 2021



John G. Powers, Esq.

CERTIFICATION OF WORD COUNT

I, Mary L. D'Agostino, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the foregoing document complies with the word count limits set forth in 22 N.Y.C.R.R. § 202.8-b(a) because it contains 2,640 words.

In preparing this certification, I have relied on the word count of the word-processing system used to prepare this document.

DATED: April 28, 2021

A handwritten signature in cursive script, appearing to read "Mary L. D'Agostino", with a large, sweeping flourish at the end.

Mary L. D'Agostino, Esq.

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INDEX NO. 002602/2021

NYSCEF DOC. NO. 54

RECEIVED NYSCEF: 11/18/2021

STATE OF NEW YORK : COUNTY OF ONONDAGA
SUPREME COURT : CIVIL TERM

NEW YORK CIVIL LIBERTIES UNION,)
)
PETITIONER,)
) Index #002602/2021
vs.)
)
CITY OF SYRACUSE and)
SYRACUSE POLICE DEPARTMENT,)
)
RESPONDENTS.)

April 29th, 2021
Article 78 - via Microsoft TEAMS

Onondaga County Courthouse
420 Montgomery Street
Syracuse, New York 13202

BEFORE:

HONORABLE GERARD J. NERI
Supreme Court Justice

APPEARANCES:

For the Petitioner: LATHAM & WATKINS, LLP
Attorneys at Law
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New York, New York 10022
BY: CAITLIN FEENEY, ESQ.
MICHAEL LACOVARA, ESQ.

For the Respondents: HANCOCK ESTABROOK
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100 Madison Street
Syracuse, New York 13202
BY: JOHN G. POWERS, ESQ.

CVETA MURPHY
Official Senior Court Reporter

APPEARANCES: (CONTINUATION)

For the Respondent: PATRICK BLOOD, ESQ.
City of Syracuse
Corporation Counsel

For the Petitioner: LISA LAPLACE, ESQ.
ROBERT HODGSON, ESQ.

* * * * *

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1 THE COURT: Good morning everyone. I'm going
2 to ask everybody to keep their mics off unless they're
3 asked to be speaking so we don't have any reverberation
4 on our record. This is the matter of New York Civil
5 Liberties Union against City of Syracuse and the
6 Syracuse Police Department. It is Index number
7 002602/2021. Could each of you state your name for the
8 record beginning with the Petitioner and their
9 respective attorneys and then the Respondent.

10 MS. FEENEY: Good morning, your Honor. My
11 name is Caitlin Feeney. I'm counsel for the Petitioner.
12 I'm here with Michael Locovara who is also counsel for
13 the Petitioner, and Lisa Laplace and Bobby Hodgson,
14 attorneys for the Petitioner.

15 THE COURT: Thank you. Hold on a second.
16 Mr. Powers, are you trying to speak? Apparently he's
17 having some trouble. No one is frozen on this end.
18 Okay. I guess we'll wait for some technical
19 corrections. I'll be back on when Mr. Powers is on.

20 We'll try this thing again. I'm going to ask
21 everyone to turn off their mics unless they're speaking.
22 This is the matter of New York Civil Liberties Union
23 against the City of Syracuse, Syracuse Police
24 Department. Index number 002602/2021. Could each of
25 you state your name beginning with the Petitioner and

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1 then the Respondents, please.

2 MS. FEENEY: Good morning again. Your Honor,
3 my name is Caitlin Feeney. I represent the Petitioner,
4 the New York Civil Liberties Union. I'm here with
5 Michael Lacovara.

6 THE COURT: Thank you. Mr. Hodgson.

7 MR. HODGSON: Good morning, your Honor. My
8 name is Robert Hodgson, and along with my colleague,
9 Lisa Laplace, I also represent the New York Civil
10 Liberties Union. Ms. Feeney will be speaking on our
11 behalf.

12 THE COURT: All right. Thank you.
13 Mr. Powers.

14 MR. POWERS: Good morning, your Honor. My
15 name is John Powers. I represent the Respondents, City
16 of Syracuse Police Department.

17 THE COURT: Thank you. Mr. Blood.

18 MR. BLOOD: Good morning, your Honor. This is
19 Patrick Blood on behalf of the City of Syracuse
20 Corporation Counsel representing the Respondents.

21 THE COURT: Thank you. There is no picture on
22 your screen, just so you know. This video is a TEAMS
23 invite video only for our personal attendance in this
24 proceeding. You nor anyone on your behalf is authorized
25 to forward or invite another party without permission of

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1 this Court pursuant to Section 29.1 and 131 of the New
2 York State Rules of the Court. Audio visual coverage or
3 recording of any part of this proceeding is prohibited,
4 therefore, you nor any other party may record this
5 proceeding by order of the Court.

6 On March 18th, 2021, Petitioner, New York
7 Civil Liberties Union filed a Petition with a Notice of
8 Petition seeking to compel Respondents to release
9 certain documents -- hold on for a second. John, you're
10 going to have to have them turn off. Their AV room
11 should not be on any more. Okay -- seeking to compel
12 Respondents to release certain documents pursuant to
13 Public Officers Law Section 84, commonly known as the
14 Freedom of Information Law, FOIL, and are now seeking
15 enforcement via Article 78 of the CPLR for an order of
16 mandamus. The parties requested a brief adjournment of
17 the matter which was granted and the matter was placed
18 on the Court calendar for today, April 29th, 2021. On
19 April 14th, 2021, Respondents answered the Petition and
20 moved to dismiss the Petition.

21 Petitioner alleges that on September 15th,
22 2020, it submitted a FOIL request to the Syracuse Police
23 Department seeking, inter alia, disciplinary records,
24 records relating to the use of force, records relating
25 to stops, temporary detentions, field interviews,

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1 complaints about misconduct, immigration-related
2 enforcement, Syracuse Citizens Review Board Records,
3 records concerning diversity in ranks, and additional
4 policies and agreements.

5 On September 23rd, 2020, Respondents
6 acknowledged receipt of the FOIL request and stated
7 that, "our initial estimate is at the collection review
8 and redaction of these records will require one year
9 from the date of this letter." Acknowledgment was filed
10 in Docket Number 6 of the New York State E-file System.

11 In November 2020 the parties met concerning
12 the FOIL request whereat Respondent allegedly committed
13 a rolling production of documents partially responsive
14 to the Request. In a letter dated November 17th, 2020,
15 Respondents denied that portion of the FOIL request
16 seeking disciplinary records related to complaints not
17 yet substantiated. Petitioners allege that this denial
18 is unlawful and is the focus of this proceeding.
19 Petitioner alleges that the Respondents partial denial
20 contravenes the plain language of the recent repeal of
21 Civil Rights Law 50-a.

22 Petitioner notes that under FOIL, government
23 records are presumptively open for public inspection and
24 copying unless they fall within one of the enumerated
25 exceptions of Public Officers Law 87 Subdivision 2.

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1 Petitioner asserts that the repeal of CRL 50-a commands
2 disclosure of all disciplinary records regardless of the
3 status of disposition. Petitioner alleges that the
4 Legislature has considered and rejected a narrower
5 version of CRL 50-a repeal which would have limited the
6 release of documents to substantial claims. Petitioner
7 notes that the Public Officers Law 89 was also amended
8 to create limited disclosure shields for certain
9 personal information related to police officers.

10 Petitioners argue that Respondents'
11 interpretation of Public Officers Law 87 (2) (b) would
12 nullify the repeal of CRL 50-a. Petitioners point to
13 comments made during the debate of the bills that was
14 proffered that the intent was specifically to look at
15 the process, not just the results, of disciplinary
16 proceedings. Petitioner further alleges that other
17 Courts have rejected Respondents' interpretation, citing
18 those Courts in their papers. Petitioner urges this
19 Court to grant the relief sought.

20 Petitioner further argues it is entitled to
21 attorney fees. Petitioner notes the Court may assess,
22 against any such agency involved, reasonable attorney's
23 fees and other litigation costs reasonably incurred by
24 such person in any case under the provisions of this
25 section in which such person has substantially

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1 prevailed, and when the agency failed to respond to a
2 request or appeal within the statutory time; and shall
3 assess against such agency involved, reasonable
4 attorney's fees and other litigation costs reasonably
5 incurred by such person in any case under the provisions
6 of this section in which such person has substantially
7 prevailed and the Court finds that the agency had no
8 reasonable basis for denying access.

9 Petitioner asserts that SPD has invoked a
10 personal privacy exemption that was specifically
11 rejected by the Legislature, and, therefore, the denial
12 was done without reasonable basis. Respondents answer
13 and generally denied.

14 Respondents further move to dismiss the
15 Petition pursuant to CPLR 7804(f) and 409(b).
16 Respondents assert that the repeal of CRL 50-a did not
17 result in a change of FOIL resulting in police officers
18 being treated less favorably than any other public
19 employees. Respondents note the repeal did not change,
20 let alone mention Public Officers Law 87(2)(b), the
21 personal privacy exemption. Respondents cite numerous
22 cases where the courts determined that the Public
23 Officers Law 87(2)(b) required unsubstantiated records
24 to be shielded, and those cites are in the papers.

25 Respondents also point to an Advisory Opinion

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1 from the Committee on Open Government which similarly
2 found Public Officers Law 87 Subdivision 2-b affords
3 public employees, including police officers, certain
4 privacy protections in regards to unsubstantiated and
5 unfounded complaints. Respondents also point to the
6 floor debate of the repeal of CRL 50-a which they claim
7 supports their position.

8 Respondents argue the cases cited by
9 Petitioner are irrelevant to the issue at bar. The
10 Committee on Open Government reviewed the same cases
11 proffered by Petitioner and dismissed them as not being
12 on point. The Respondents urge the Court to grant
13 deference to the Committee on Open Government's
14 interpretation of the relevant statutes. Respondents
15 proceed to distinguish the Petitioner's proffered cases
16 from the facts at issue.

17 Respondents also argue the Petition failed to
18 preserve the issue as they did not take an
19 Administrative Appeal. Respondents allege that
20 Petitioner only appeals two issues: a) whether the SPD's
21 response was deficient because it did not fully
22 articulate the reasons for the denial; or b) whether the
23 repeal of 50-a mandated disclosure of all police
24 disciplinary records regardless of the existence of
25 other applicable FOIL exemptions. Respondents argue any

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1 challenge to SPD's application of Public Officers Law
2 87(2) (b) , outside of the Petitioner's argument
3 concerning the repeal of CRL 50-a was waived.

4 Respondents argue that their denial of
5 Petitioner's FOIL request was reasonable in light of the
6 Respondents' reliance on the opinion from the Committee
7 on Open Government, thus, Petitioner is not entitled to
8 an award of attorney's fees and costs.

9 Petitioner relies and notes the singular issue
10 before the Court concerns SPD's categorical refusal to
11 produce enforcement disciplinary records, if those
12 records relate to complaints that were not substantiated
13 or remain open. Petitioner further asserts that all the
14 NYCLU seeks is to hold the SPD to the strictures of FOIL
15 in a manner consistent with the text and structure of
16 the statute, other recent court decisions, and the
17 Advisory Opinion that SPD revokes repeatedly.

18 Petitioner asserts that Respondents have taken an
19 overbroad approach to Public Officers Law 87(2) (b) and
20 89(2). Petitioner relies on opinions from courts which
21 are not binding upon this Court to substantiate their
22 opinions. Petitioner argues that the privacy exceptions
23 of Public Officers Law 87 did not exist in a vacuum but
24 must be read in concert with Public Officers Law 89.

25 Petitioner further argues that Public Officers Law 89

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1 defines the scope of privacy exceptions.

2 Petitioner further argues that the cases cited
3 by Respondents are irrelevant to the matter at hand and
4 misdirection. Petitioner argues that the Harold Company
5 versus School District of City of Syracuse was decided
6 based on exceptions in Public Officers Law 87(2)(a) and
7 (g), not Public Officers Law 87(2)(b). The Court in
8 Harold Company specifically declined to determine
9 whether the records sought would constitute an
10 unwarranted invasion of privacy, if disclosed.

11 Petitioner also argues that the legislative
12 intent of the repeal of CRL 50-a was to open all records
13 to public inspections, regardless of whether the claims
14 were substantiated. Petitioners prays this Court grant
15 the relief requested.

16 So that's what I understand this action to be.
17 Those are the four corners of the arguments I believe
18 each of you have made on papers. I'm going to allow you
19 to proceed forward with any further arguments, but stay
20 within the four corners of the procedure, and
21 Ms. Feeney, did I say that correctly?

22 MS. FEENEY: Yes, you did, your Honor. Thank
23 you.

24 THE COURT: You may proceed.

25 MS. FEENEY: Thank you, your Honor. With that

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1 background there are three things I would like to focus
2 on today. First, I would like to take a moment briefly
3 just to correct Respondents repeated but unfounded
4 assertion, that Petitioner somehow waived or belatedly
5 raised any of the arguments before this Court.

6 The issue before this Court is and always has
7 been the applicable statutory framework that governs the
8 NYCLU -- the NYCLU's FOIL request for law enforcement
9 disciplinary records. The question here is and always
10 has been whether the Syracuse Police Department has
11 complied with that statutory framework, and the answer
12 is no.

13 Petitioner raised this issue in its
14 administrative appeal back in December and it raised it
15 again in its opening brief, and to the extent there is
16 anything new raised in the Petitioner's reply, it was in
17 response to arguments raised for the first time by
18 Respondents.

19 Second, your Honor, I would like to just
20 reiterate that what Petitioner is asking for here is no
21 more than what every judicial decision and the Advisory
22 Opinion on which Respondents rely has said an agency
23 must do after the repeal of section 50-a and the
24 associated amendments to FOIL. Specifically following
25 that repeal and the changes that were made to the law at

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1 the same time, all law enforcement disciplinary records,
2 regardless of disposition, are open to public's review
3 subject to a few privacy related exemptions that reflect
4 the Legislature's balance of the public's interest and
5 public records on the one hand, and individual
6 officers's interest and personal privacy on the other.
7 But Respondents here seek to ignore their obligations
8 under the law by invoking this blanket exemption that
9 they believe permits them to categorically withhold an
10 entire class of records.

11 And third, your Honor. I would just like to
12 clarify that the issue before this Court is a narrow one
13 and Petitioner takes issue, as you mentioned, only with
14 the unsubstantiated records that Respondents are
15 refusing to provide pursuant to this generic personal
16 privacy exemption, and the NYCLU has accommodated every
17 burden and resource issue raised by the Syracuse Police
18 Department since that first meet and confer that you
19 referenced back in November of 2020.

20 And so, it's Petitioner's position that the
21 statutory framework, as it's written, along with the
22 relevant and recent persuasive case law, should guide
23 this Court's decision to order the Syracuse Police
24 Department to produce all law enforcement disciplinary
25 records, regardless of disposition.

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1 Your Honor, I'm not sure if you asked a
2 question. I believe you're on mute.

3 THE COURT: No.

4 MS. FEENEY: Okay. First, as an initial
5 matter, Petitioner does not waive the argument that's
6 before this Court. It raised those issues in the
7 Administrative Appeal.

8 I would like to direct the Court to Docket
9 number 9, Exhibit "E", which is the Administrative
10 Appeal. On page two of that appeal, the NYCLU
11 categories as its second ground for the appeal, "SPD's
12 contention that the material sought would invade
13 personal privacy." Then again at page three of that
14 appeal, in footnote ten, the NYCLU writes: "While FOIL
15 exempts from disclosure information that would
16 constitute an unwarranted invasion of personal privacy"
17 quoting to Public Officers Law Section 87(2)(b). SPD
18 has not claimed that the disclosure of disciplinary
19 records would constitutes such an invasion. And again,
20 your Honor, on page four of that appeal in the final
21 paragraph, the NYCLU writes: "For the foregoing
22 reasons, we appeal both the sufficiency and the merits
23 of SPD's determination of November 17th that certain of
24 the requested records are exempt from disclosure under
25 Public Officers Law 87(2)(b)".

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1 So there can be no doubt here, your Honor,
2 that Petitioner has raised in its appeal, and therefore,
3 preserved for judicial review the issue that's before
4 this Court. And second, your Honor, the NYCLU has not
5 changed its position throughout this proceeding. The
6 NYCLU has challenged from the beginning Respondent's
7 claim that this generic privacy exemption, Section
8 87(2) (b) permits Respondents to categorically withhold
9 an entire set of documents without review, without
10 redaction, without anything.

11 The NYCLU did not claim in its opening brief
12 that the repeal altered the general personal privacy
13 exemption, and it doesn't claim as much here. Instead,
14 the NYCLU has explained that the repeal and associated
15 amendments both broaden the public access to law
16 enforcement disciplinary record to include
17 unsubstantiated records and carved out narrow exemptions
18 for law enforcement agencies to review those records and
19 redact from them any information that would infringe on
20 an officer's personal privacy.

21 THE COURT: Now, let me ask you a question. I
22 do have a question. When I read your papers, I thought
23 you were seeking not only the non-substantiated claims
24 but also cases that remain opened. I think that is what
25 it says in your papers. You're not asking for cases

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1 that are open?

2 MS. FEENEY: No, your Honor. We are asking
3 for the unsubstantiated and the open complaints, those
4 that remain opened.

5 THE COURT: So what in 87, and again, I read
6 all the cases you guys have provided me, but wouldn't it
7 say under 87, if there is a case that's pending, it can
8 interfere with an investigation or judicial proceedings
9 or fair trial or impartial adjudications, Subdivision E.
10 I mean, isn't there a whole litany of that section that
11 becomes exempt? Is this Court not suppose to look at
12 those in addition to the privacy request? And again, I
13 ask that because the way I read your papers, it seemed
14 that you wanted open cases also that were pending.

15 MS. FEENEY: Well, your Honor, Section 87 says
16 that under a different Subsection. Respondents have
17 never raised that Subsection. The only Subsection they
18 have raised is Subsection 87(2)(b) and have claimed
19 under that that they are permitted to withhold under the
20 personal privacy exemption, but they have never raised
21 another exemption that applies.

22 And the statutory framework here, your Honor,
23 in the text of the law, is clear. Just taking a step
24 back, Section 87 of the Public Officers Law governs the
25 public's access to agency records, and that law says

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1 that all -- "that an agency must make available for
2 public review all records subject to the exemptions that
3 are listed under the law." With the repeal of Section
4 50-a and the associated amendments made to the law, the
5 Legislature broaden the law enforcement disciplinary
6 records that are available to the public under the law.
7 Specifically, they added a definition of law enforcement
8 disciplinary records and defined them as "any record
9 created in furtherance of a disciplinary proceeding,"
10 and the definition includes complaints and allegations
11 and charges lodged against an employee. And at the same
12 time -- and under that law, it's clear now that all law
13 enforcement disciplinary proceedings -- disciplinary
14 records are subject to the public review and there is no
15 distinction between substantiated and unsubstantiated
16 records the way the Respondents now argue.

17 In addition to that broadening of the law by
18 the Legislature, they also -- they, in recognition of
19 that broadening, they incorporated new narrow carve-outs
20 that permit law enforcement agencies, and in some
21 instances, direct those agencies to redact from law
22 enforcement disciplinary records specifically
23 information that could be considered infringing on the
24 officer's personal privacy concerns, so that
25 information, as laid out in Section 89(2-b) and Section

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1 89(2-c), require the agency or allow the agency to
2 redact information that is unrelated to the officer's
3 public duties, you know, things like the social security
4 number or an officer's medical history to the extent
5 those are included in the complaint. And to the extent
6 Respondents here say that the information in these
7 complaints is private, they should be directed to turn
8 to the law to Section 89(2-b) or Section 89 in the
9 Subsection 2 within it, and they should redact -- review
10 the records and redact from them any information that,
11 under the law, they are permitted to redact.

12 Next, your Honor, I just like to clarify
13 that -- I would like to speak about the recent and
14 persuasive case law here, and specifically looking at
15 Justice Powers' decision in Schenectady PBA which is at
16 2020 WL 7978093.

17 THE COURT: I read the entire decision,
18 counsel, but go ahead.

19 MS. FEENEY: Okay. Just to raise to the
20 Court's attention again, on page six of that opinion,
21 Justice Powers rejected the position that Respondents
22 have here as has every Court that has considered this
23 issue. On page six the Court held a finding that the
24 personnel record or any portion thereof could be
25 withheld or redacted on the basis that this release

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1 would constitute an unwarranted invasion of personal
2 privacy would "render the Legislature's repeal of
3 Section 50-a utterly meaningless." And Justice Powers
4 has said it well in elsewhere in the opinion on page
5 four where he said he would be hard pressed to find that
6 any of the disciplinary records, open or
7 unsubstantiated, could fall into the personal privacy
8 exemptions that are listed in Public Officers Law
9 section 89 (2, numbers 1 through 8).

10 And in the face of this authority in this
11 recent persuasive case law, Petitioner raises only old
12 cases that are pre-repeal that deal with not law
13 enforcement disciplinary records but school district
14 records where other exemptions apply. As you mentioned,
15 Harold Company being one of those cases. Respondent --

16 THE COURT: -- so counsel, is it your position
17 that by eliminating 50-a, eliminating that statute, that
18 there was an altering of previously existing privacy
19 consideration that were found before? Is that basically
20 what you're saying, anything before that shouldn't be
21 considered by this Court?

22 MS. FEENEY: No, your Honor. I think, though,
23 that there is a different analysis now to be had by the
24 Court following the repeal on the associated amendments
25 because pre-repeal there hadn't been this specific

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1 direction regarding all law enforcement disciplinary
2 records and those record hadn't been defined more
3 broadly then the term record itself is defined currently
4 in the law, so now they are defined more broadly and
5 there are these new privacy related exemptions that the
6 Legislature has incorporated that relate directly to law
7 enforcement disciplinary records. I believe the
8 analysis should change, so I do believe that the recent
9 cases that have since the repeal of 50-a and the
10 associated amendments decided in Petitioners favor
11 should carry more weight then these pre-repeal cases
12 that have to do with school district records that are
13 irrelevant to the case at hand.

14 Your Honor, as you mentioned the Respondents
15 rely heavily on these Committee Advisory Opinions as
16 well. The March 2021 opinion that they rely so heavily
17 on in their recent papers, Petitioner believes at bottom
18 that that opinion is consistent with Petitioners'
19 position here, and if I could direct the Court back to
20 that opinion of that Respondents' record, Docket 37,
21 Record 32. The committee says that in light of the
22 repeal in the associated amendments to FOIL, "FOIL now
23 requires that upon a request therefore, a law
24 enforcement agency must review all records of complaint,
25 whether or not substantiated, to determine the rights of

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1 access." That's what Petitioner is asking for here.
2 We're asking for nothing more than what that Advisory
3 Opinion says.

4 Respondents here have not suggested that they
5 reviewed or redacted any of these -- any of the
6 documents. They just said that categorically as a class
7 of records they will not produce them to the public, and
8 that is wrong as a matter of law.

9 And finally, your Honor, this is, as I said, a
10 narrow issue before this Court. There seems to be some
11 confusion in the papers but the Syracuse -- excuse me.
12 The NYCLU narrowed its request for documents at that
13 first meet and confer that you referenced back in
14 November 2020. They narrowed the scope of documents
15 sought from 20 years down to six years, and they
16 De-prioritized certain requests that they had because
17 the Syracuse Police Department indicated that they would
18 be burdensome or difficult to locate certain documents,
19 and the NYCLU has taken no issue with the Respondents
20 production timeline which spans for nearly 12 months.

21 The only issue before this Court is their
22 refusal to produce these unsubstantiated records
23 pursuant to this generic privacy exemption, so for all
24 of these reasons and those listed in Petitioner's
25 briefs --

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1 THE COURT: -- and the open records? I want
2 to make sure I'm clear on what I'm ruling on here today.

3 MS. FEENEY: Yes, your Honor. I'm sorry, I
4 keep sweeping open into the unsubstantiated, but, yes,
5 open as well, but for all these reasons, we request that
6 the Court direct the Syracuse Police Department to
7 review the records and produce them with the limited
8 redactions as they are permitted under the law. Thank
9 you, your Honor.

10 THE COURT: Thank you, counsel. Any other
11 counsel on your side?

12 MS. FEENEY: No, your Honor.

13 THE COURT: Thank you. Mr. Powers or
14 Mr. Blood.

15 MR. POWERS: Thank you, your Honor. I do
16 agree with something that opposing counsel indicated. I
17 do agree that the issue in front of you is fairly
18 straight forward and it's simply this, Judge. We have a
19 defined subset of the requested documents which relate
20 to unfounded or unsubstantiated complaints, and those
21 that are still opened. And the question before you is:
22 Was the police departments' reliance on the public
23 policy exemption, 87(2)(b), to withhold those documents
24 effected by errors of law. Was it legally erroneous?
25 That's the issue in front of you, Judge.

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1 Now, that issue is also limited by another
2 very important legal point, and that is, in arguing that
3 the city was wrong, the Petitioner can't make any
4 argument that it wants, any argument that comes to mind
5 with respect to that issue. It can't, for example,
6 raise new arguments in the reply that aren't -- that
7 weren't in the Administrative Appeal and there is a good
8 reason for that, Judge.

9 The reason is, is that the FOIL statute
10 contemplates that the agency be given an opportunity to
11 correct any mistake and it does this through the appeal
12 process, and so if an argument is not raised to the
13 police department in the appeal, they can't correct it.
14 They can't act on it. And so when the NYCLU decides to
15 sue, they're limited to the arguments they made in the
16 appeal, and there are two of them, but there was only
17 one main argument. That was the argument that was
18 advanced in their Petition and advanced in their moving
19 papers. Their moving papers were really about one
20 issue, and that is whether or not this 50-a repeal
21 statute required all complaints, whether they're
22 substantiated or unsubstantiated, to be produced in
23 response to a FOIL request.

24 It was the Petitioners' position and they took
25 it throughout their moving papers that the 50-a repeal

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1 statute prohibited the police department from relying on
2 this personal privacy exemption to withhold these
3 documents. Now, whether or not that is an error of law
4 is the issue in front of you, Judge, but that precise
5 issue, that's already been addressed. It's already been
6 addressed by the Committee on Open Government in 2020,
7 in July 27, of 2020, it's Advisory Opinion 19775. The
8 precise question in front of you are unsubstantiated and
9 open claims against police officers properly withheld
10 under the personal privacy exemption. That's the issue
11 that the Committee on Open Government already
12 considered, and that's what -- that opinion is what the
13 city relied on. I mean, it didn't take this position
14 that it took out of the blue. It had an opinion from
15 the very agency that the Legislature created to
16 interpret the FOIL statute.

17 If you look at Section 89 of the Public
18 Officers Law, the Legislature created the committee to
19 advise agencies like the department on how to interpret
20 FOIL so there can be no question that the city is acting
21 reasonably in relying on this opinion. This opinion, we
22 also submit to you, your Honor, is on point and the
23 Petitioner has given you no reason to disregard it.

24 Now, the Court says that you should give
25 deference to these opinions and that is for good reason.

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1 This is the body whose job it is to interpret the FOIL
2 statute.

3 Now, you can make your own decision, but I
4 would submit to you that the Petitioners should give you
5 a good reason to disregard that opinion. Now, what they
6 said in their moving papers, this is a paraphrase, but
7 they actually did say it, is they said that that
8 Advisory Opinion was overruled by the three cases that
9 they cited. That's what they said in their moving
10 papers. The Buffalo PBA case. The Schenectady case and
11 this Second Circuit case involving the Mayor. Well,
12 that also -- that argument also has been vetted through
13 the Advisory Committee. That argument was made
14 explicitly. Do these three cases change the outcome of
15 Opinion 19775, and the committee said no.

16 So with respect to the issues in front of you,
17 Judge, you know, these opinions that you're entitled to
18 give deference are guiding the path for your decision,
19 but let's set those aside for a minute. Assuming you
20 want to, you know, independently go through the
21 analysis. The Committee on Open Government basically
22 had two main findings in their opinion. Neither one of
23 them is reasonably subject to dispute we would submit.
24 The first finding they made is, what the committee said
25 is we have this, and they use the terms "long-standing".

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1 We have this long-standing body of precedence in both
2 the case law, they cited the cases, multiple cases, and
3 their prior opinions. They cited more than five of
4 their prior opinions. They called it a long-standing
5 premise that unsubstantiated allegations against public
6 employees can implicate personal privacy. Obviously,
7 they effect the professional standing of these
8 employees. They have the potential to cause
9 embarrassment and they are not proven -- they are
10 unproven. They are mere allegations.

11 And the Committee on Open Government found
12 based on this precedent, an agency is completely within
13 their rights to rely on the personal privacy exemption
14 with respect to unsubstantiated allegations of
15 misconduct and it gave examples.

16 Now, that case law, we've cited in our brief,
17 it hasn't really been distinguished or under mind, so
18 the question is: Has it been changed? That's the next
19 question. Did the repeal of 50-a, did it somehow change
20 this body of law? Maybe not with respect to other
21 public employees but with respect to police officers,
22 and that's where we get to this description of the
23 issue.

24 The real issue in front of you is, did the
25 repeal of 50-a intend to protect police officers less

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1 then other public employees? Did the Legislature intend
2 that they would be less favorably treated than other
3 public employees by the repeal of 50-a?

4 Now, there are a lot of different ways to
5 measure that question, your Honor. The most important
6 way is to look at the text of the statute. Petitioner
7 hadn't provided you with a statute, by the way. We
8 provided it to you and I think it's important to read it
9 because when you read it you will discover that that
10 statute in no way mentions 87 (2) (b), the personal
11 privacy exemption. It doesn't change it. Even the case
12 cited by and relied on mainly by the Petitioner, the
13 Schenectady case, it held that the 50-a repeal statute
14 did not effect 87(2) (b).

15 And so the next question is, is there some
16 other part of the 50-a repeal statute which holds that
17 police officers are going to be a different status.
18 They are going to be in a different status than all
19 these other employees that may be protected by this
20 long-standing legal premise. That also is not in the
21 text of the statute anywhere. And that's also what the
22 Committee on Open Government found in 19775. They
23 addressed the issue. I'm paraphrasing here, but
24 basically what they said is, you know, we find no reason
25 to believe that the Legislature intended to treat police

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1 officers less favorably than other public employees.
2 And so all that the repeal statute did, at least with
3 respect to this issue, all that the repeal statute did
4 is it removed the extra protections in 50-a, and so
5 police officers, like other public employees, they're
6 protected the exact same way under FOIL, under the
7 existing exemptions just like every public employee.
8 And what does that mean for this case? It means that
9 all this body of law that was cited in 19775, this
10 long-standing premise, legal premise that
11 unsubstantiated complaints and misconduct do fall under
12 87(2)(b). Now that 50-a is gone, that case law applies
13 to police officers. That's essentially what the
14 committee found. It's not a remarkable finding. It's
15 very straight forward, and the committee said none of
16 these three cases, and they are each distinguishable on
17 their facts, especially the Schenectady case, change
18 that outcome.

19 So the question is, if the city is relying on
20 this long-standing premise that unsubstantiated
21 complaints of police misconduct can effect or impair the
22 personal privacy interests of police officers, is that
23 legally erroneous? It's not. It's not because they
24 were relying on an opinion from the very agency designed
25 to and intended to interpret FOIL, an opinion that has

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1 not been revoked. It hasn't been under mind, and, in
2 fact, the committee double down, did that. The
3 committee took the three cases that were central to the
4 New York -- NYCLU's position and they said this does not
5 effect the outcome. And so we look at the text of 50-a.
6 We look --

7 THE COURT: -- Mr. Powers, let me ask you a
8 question. Is that your position in regards to attorney
9 fees, whatever way this Court rules, the fact that they
10 had relied upon this opinion that they are somehow would
11 not be responsible for fees?

12 MR. POWERS: Absolutely, your Honor. What the
13 fee shifting provision intends is that fees are only
14 awarded if the responding party does not act in good
15 faith. There has been no case, there has been no case
16 that has found where an agency relied in good faith on a
17 prior legal precedent that's on point that they were not
18 acting in good faith. In fact, the standard is did they
19 have -- do you find that the department had no
20 reasonable basis for their decision, and that opinion is
21 a very reasonable basis for the department's position.
22 It's on point.

23 THE COURT: Let me ask you another question,
24 Mr. Powers. One of the things that I was struggling
25 with, and I think you heard it when I asked the

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1 Petitioner and her position on it. In regards to the
2 papers, its says unsubstantiated and open cases. They
3 seem to be two different things to me. Unsubstantiated
4 cases are cases that have been completed, for intense
5 purposes, and open cases are still being pending, so
6 what was your basis for open cases being denied?

7 MR. POWERS: Well, first of all open cases are
8 mentioned in the Advisory Committee Opinion 19775. It
9 doesn't just talk about unsubstantiated. It also talks
10 about cases where a result has not been reached yet and
11 I think your question to opposing counsel was, aren't
12 there other potential exemptions that apply to open
13 cases as opposed to unsubstantiated cases. I don't
14 disagree with you there, but I don't believe they are
15 different in terms of the personal privacy exemption
16 because it's really the same issue. An open case has
17 not reached the point where it either becomes
18 substantiated or unsubstantiated. It's unproven. It's
19 a mere allegation. And so until it is -- until you do
20 reach a determination on it, then there is no public
21 interest in getting the results and there is a great
22 potential for embarrassment and harm to the officer
23 where there has been -- there is no substantiation, at
24 least at that time. So the way that I look at it, your
25 Honor, and maybe you look at it differently is that an

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1 open complaint is also an unsubstantiated complaint.
2 It's just a different type of unsubstantiated complaint.

3 Now, I wanted to give you an example, you
4 know, because and I don't know that it's being
5 challenged, and I don't think it's been an issue that
6 has been raised on appeal, but, you know, there have
7 been arguments made.

8 The department is making this, what they call,
9 a blanket assertion of the personal privacy exemption.
10 I just want to give you an example of an analog. I'm
11 not suggesting that this is a FOIL issue but it's
12 something to think about with respect to how we
13 understand how unsubstantiated or unproven allegations
14 can harm a party like a police officer. Now, in any of
15 the attorneys in this room, if there is a complaint of
16 misconduct, a professional misconduct against us to the
17 Grievance Department, until that has been substantiated,
18 all those complaints, everything about those proceedings
19 are confidential. They are not available to the public,
20 and the reason given by the Grievance Department is they
21 state that unfounded allegations of misconduct may
22 negatively effect a lawyer's reputation and ability to
23 make a living, so every lawyer on this call enjoys
24 protection against their privacy interest if they're
25 unfounded or unproven allegations made about our

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1 professional standing. The same holds true for Judges,
2 your Honor. Complaints against Judges are also secret,
3 and for both categories, those things become unsecret,
4 they become public when they are substantiated. And why
5 are police officers treated differently? Why are
6 they -- why are they going to be exposed to things that
7 are going to effect the reputation, their ability --
8 their professional reputation. Their ability to do
9 their jobs. Their ability to be successful at their
10 jobs and potentially their safety with respect to their
11 family. Why are they going to be subject to unproven
12 complaints that are out in the public demand, and that
13 at its core is this privacy interest, this recognition
14 in the case law, not just for police officers, but any
15 other public employee that even though public employees
16 have less protection than other employees, and even that
17 there is this presumption and this policy in favor of
18 full disclosure, that the exception with respect to
19 personal privacy applies with respect to these unproven
20 allegations, and it's a weighing tests, isn't it; right.

21 What's the value of an unproven allegation
22 with respect to a substantiated allegation? It's very
23 little. That's in the case law, Judge. It's in a lot
24 of the case law. An unproven allegation is evidence of
25 nothing, and you weigh that against the potential harm,

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1 which is great. That's how this privacy exemption
2 applies.

3 Now, I want to briefly address this idea.
4 This is a new argument, Judge. The reason that we
5 erred, we, being the police department, is when we
6 relied on the personal privacy exemption, that we didn't
7 relate that to one of the listed categories of personal
8 privacy in Section 89(2). And then -- and I didn't
9 really understand this from the reply papers until
10 Ms. Feeney explained it, but it seems like they are also
11 making an argument that our assertion of 87(2) is
12 somehow limited to only the categories of information
13 that are redacted under rule 89 and it's very limited.
14 It's medical information, home address, social security
15 number and whether or not you have access to the
16 Employee Assistant Program. It seems to be, and I
17 wasn't sure about this from the papers but based on the
18 argument that was just made, that they're taking the
19 position that the only personal privacy that a police
20 officer can assert is in those four categories. Now,
21 what is that, Judge?

22 First of all nowhere in their Administrative
23 Appeal will you find that argument. Now, they may cite
24 you to strike clauses where they talk about personal
25 privacy, but unless they make that argument, it's not in

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1 front of you because how is the city going to respond to
2 such an argument if it's not made at the Administrative
3 level, but even setting that aside, the contention lacks
4 merit because what is this? That's just another way of
5 saying when the 50-a repeal statute amended 89, Section
6 89, it meant to treat police officers less favorable.
7 It's another way of saying the same thing. Regular
8 public employees, any unsubstantiated allegations can be
9 withheld at the personal privacy exemptions, but police
10 officers, no. Only medical information, social security
11 number, home address and substance abuse, Employee
12 Assistance Program access.

13 So there is a different standard for police
14 officers and other employees. Well, it's nowhere in the
15 statute. What those sections of Section 89 are, are
16 their extra protections. They don't limit 87(2)(b).
17 There is no authority that they do. And again, I cite
18 you to their own case, the Schenectady case. The Judges
19 stated that the 50-a repeal statute did not change
20 87(2)(b).

21 Now, with respect to the other argument that
22 somehow we have to shoe horn our justification into one
23 of these examples in Section 89, also not made in the
24 Administrative appeal. I scoured that thing several
25 times. It's not in there. It's not before you. But

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1 also lacks merit, Judge. And we cited in our reply the
2 New York Times' decision, the Court of Appeal case.
3 Those factors in 89 are not exhausted. They are
4 examples. The Court in the New York Times case said
5 these examples don't apply. Let's turn to this
6 balancing test to determine if this is some other kind
7 of personal privacy exemption.

8 Now, you can do that in this case and I think
9 it comes out in our favor, but I would submit to you
10 that you don't have to because the Committee on Open
11 Government has already done it for you and they have
12 already issued an opinion that you can give deference to
13 with respect to your opinion.

14 Now, what about this idea that we have to do
15 it, a document by document justification. Also newly
16 raised in this action. Also, not in the Petition, by
17 the way. Not in the Petition. Not in the
18 Administrative Appeal. Also unmeritorious. There is no
19 law that says that we have to by on a document by
20 document basis provide a justification for the personal
21 privacy exemption. All the case law, including the case
22 law cited by Petitioner, including the Gould case from
23 the Court of Appeals speaks to the exercise of these
24 exemptions in terms of categories of documents. We have
25 identified that category. That is, by the way, the same

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1 category -- the same way the category is defined in
2 Advisory Opinion 19775, and quite frankly, Judge, we're
3 obligated to give our objections within 20 business day
4 of that request. They've asked for 20 years of every
5 disciplinary file for every one of the 450 police
6 officers.

7 Now, counsel has represented that they've
8 agreed to narrow that to six years, but that's not my
9 understanding of the discussions. My understanding of
10 the discussions was what the NYCLU agreed to do is allow
11 us to produce six years for now and then they would take
12 up the issue of the remaining 14 years after they got
13 that production, but if they're going to stipulate in
14 front of you, your Honor, that they're narrowing their
15 request to six years, we'll accept that stipulation.
16 But, your Honor, everything that the department did was
17 compliant with FOIL. It relied on this Advisory
18 Opinion. The Advisory Opinion is sound in its
19 reasoning. It's hasn't been under mind by the
20 Petitioner. It provides a legal -- it provides a legal
21 basis for the departments' position and so it cannot be
22 said, your Honor, and again this is the sole issue that
23 you're deciding. It cannot be said that the
24 departments' withholding of this category of documents,
25 this limited category of documents, was effected by errs

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1 of laws. That's the only issue in front of you.

2 Unless you have any further questions, your
3 Honor, I'll rest on my papers with respect to the rest
4 of the issues.

5 THE COURT: Thank you. Ms. Feeney.

6 MS. FEENEY: Thank you, your Honor. I'll just
7 take a minute of your time, if that works. I think that
8 Petitioner adequately responded to all of these
9 arguments in their papers so I don't really want to
10 exhaust the issues too much for you, but I do want to
11 correct a few things.

12 One, what Mr. Powers said about us or now
13 limiting the exemptions to those that are listed out as
14 examples in Section 89. That's not what our argument
15 is. That list is non-exhaustive. The Court says that
16 in Schenectady. The law itself says that, and there are
17 other instances where there could be a balancing test to
18 consider the public's interest and the personal privacy
19 interest that's infringed upon to decide whether or not
20 there is another example that should be included there.
21 And the Schenectady Court looked at this and said that
22 it didn't matter, that the list wasn't exhausted and
23 that given the public interest in increased officer
24 transparency understanding and officers who have several
25 outstanding complaints lodged against them, that public

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1 interest far outweighs the privacy interest of the
2 officers as it relates to their public duties.
3 And second, I just would like to clarify that
4 the Advisory Opinion, as Mr. Powers relies heavily on
5 these Advisory Opinions. The July Advisory Opinion
6 caveats it's own language because this was prior to any
7 of the recent and relevant case law that have been
8 decided. That July Advisory Opinion on page two of the
9 Opinion, which is at Docket 37 at R7. It says,
10 accordingly it's our opinion in the absence of judicial
11 precedence or Legislative direction. That judicial
12 precedence has since come to be with Schenectady, as
13 Mr. Powers says, Schenectady, Buffalo, the recent case
14 in People versus Herrera. Every Court that has
15 considered this issue has found against Respondent, and
16 similarly that the March 2021 opinion, Mr. Powers
17 paraphrases that opinion, but I read for you and for
18 Mr. Powers in my argument a direct quote from that
19 opinion, and the opinion is not inconsistent with our
20 position. It says, and I'll quote it again at Docket
21 37, R32. "FOIL now requires that upon a request
22 therefore, a law enforcement agency must review all
23 records of complaint, whether or not substantiated, to
24 determine rights of access." Again, that is what
25 Petitioner request here.

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1 And then finally too, the preservation of our
2 arguments that the points that Mr. Powers raises, I
3 believe I adequately addressed those in my argument, but
4 that is obviously a very important point to us, so
5 please let me know if you have any further questions on
6 that, your Honor. I would be happy to provide further
7 example of where in our opening brief you can see these
8 arguments raised for the first time, but unless, your
9 Honor, has further questions, I'll rest on my papers.

10 THE COURT: Thank you. Anything else,
11 Mr. Powers.

12 MR. POWERS: I just wanted to apologize to the
13 Court and to all counsel for my ineptness with the
14 technology today. I had hoped by this point I would be
15 able to do it without a problem, but obviously that was
16 not the case, so I apologize for delaying everyone.

17 THE COURT: Thank you. Okay. So I think
18 everybody has done a good job with their papers, and
19 they have done a good job with their arguments. The
20 Court has really been involved in reviewing this. The
21 Court is going to go as quick as I can to get a decision
22 with all the arguments that were made today, and I will
23 relook at all those provisions that were brought up by
24 counsel today to make sure that I have a complete
25 understanding before I make my final decision. Thank

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you everybody.

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REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the aforementioned case to the best of my ability.

DATED this 29th day of April, 2021



CVETA MURPHY
Official Senior Court Reporter

Certification Pursuant to CPLR §2105

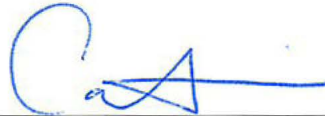
CERTIFICATION PURSUANT TO CPLR § 2105

I, Caitlin Feeney, a member of the firm of Latham & Watkins LLP, Attorneys for Petitioner-Appellant, hereby certify pursuant to § 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the clerk of the Supreme Court, County of Onondaga.

Dated: November 22, 2021

Latham & Watkins LLP

By:



Caitlin Feeney

Attorneys for Petitioner-Appellant