To be Argued by:
ROBERT HODGSON
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

In the Matter of the Application of

Docket No.: CA 21-01191

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

– against –

CITY OF ROCHESTER and ROCHESTER POLICE DEPARTMENT,

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

1. Can an agency use the narrow "unwarranted-invasion-of-privacy" exemption of Section 87[2][b] of FOIL to create a categorical bar to the production of any portion of any records regarding complaints of police misconduct that have not resulted in discipline, or is an agency instead required to produce redacted versions of the records pursuant to the redaction scheme pertaining to exactly these types of records recently added to the FOIL statute as part of the Section 50-a repeal Bill?

   The lower court erroneously ruled that Respondents-Respondents (hereinafter, "Rochester" or "Respondents") may not produce any portion of disciplinary files related to "unsubstantiated" claims or complaints.

2. Can an agency withhold records pursuant to a FOIL exemption that no longer exists—because it was eliminated by the Section 50-a repeal bill of June 12, 2020—to deny access to records dated before June 12, 2020?

   The lower court erroneously held that Respondents can continue to rely on Section 50-a, which has been repealed, to deny access to records dated before June 12, 2020.

3. Is the Petitioner-Appellant entitled to an award of attorney's fees, in particular because it received a response to its FOIL request only after commencing the instant CPLR Article 78 proceeding?

   The lower court erroneously denied the NYCLU's request for attorneys' fees and costs and failed to consider that Respondents only produced responsive documents after the commencement of litigation.

PRELIMINARY STATEMENT

This Freedom of Information Law case challenges Rochester's blanket refusal to produce any portion of any police misconduct complaint record where the police did not discipline the officer involved as well as Rochester's reliance on Civil Rights Law Section 50-a—a FOIL exemption that no longer exists—to deny access to all misconduct records from before June 2020. In light of the repeal of Section 50-a and the legislature's redrafting of FOIL to address exactly these records, such categorical denials violate the plain text of the statute, frustrate its purpose, and are precluded by binding case law. The lower court's brief decision allowing Rochester to withhold misconduct records on these bases should be reversed.

First, on the issue of what Rochester refers to as "unsubstantiated" complaints—meaning any complaint where the police chose not to discipline an officer or did not come to a decision—the lower court's decision to categorically withhold them all based on FOIL's general catch-all privacy provision cannot be

squared with the law. Binding Court of Appeals precedent mandates targeted *redaction* instead of blanket withholding when an agency invokes that privacy provision. Further, when the legislature fully repealed Section 50-a—which previously shielded all police misconduct complaints from FOIL disclosure—it simultaneously added language to the FOIL statute establishing a detailed *redaction* scheme specifically for police misconduct records to address the privacy concerns of police officers. Rochester should be ordered to produce versions of police misconduct records, regardless of their disposition, redacted as permitted by FOIL.

Second, on the issue of Rochester's "retroactivity" argument justifying the blanket denial of all records created prior to the June 2020 repeal of Section 50-a—substantiated or "unsubstantiated"—the lower court erred for three independent reasons. As an initial matter, the NYCLU does not seek the retroactive application of any law. FOIL requires an agency to produce all records currently in its possession, regardless of the date the record was created, unless a FOIL exemption applies. Section 50-a *no longer exists*. Rochester therefore cannot invoke it to deny access to any records currently in its possession. Separately, even if a retroactivity analysis were appropriate, the legislature plainly did not intend for Section 50-a to continue shielding every police misconduct record in existence on the date of the repeal's passage. Finally, Rochester waived this argument by not raising it during the administrative appeal process and by publishing hundreds of pre-2020 police

misconduct records that would—under the analysis Rochester now urges the Court to adopt—violate Section 50-a.

For all these reasons, the NYCLU respectfully requests that the Court reverse the lower court's decision, order Rochester to produce responsive police misconduct records redacted as permitted by FOIL, and remit this case for an award of reasonable attorneys' fees and costs. That result is the only outcome consistent with the amended FOIL law, and it reflects the legislature's clear intent to provide New Yorkers with basic transparency about how local police departments investigate allegations of police misconduct, not just with a small subset of examples where departments have chosen to impose discipline.

STATEMENT OF FACTS AND PROCEDURE

In response to the repeal of Section 50-a—and as part of a statewide effort to better understand police disciplinary practices in over a dozen jurisdictions around the state[1]—the NYCLU submitted a FOIL request to the Rochester Police Department ("RPD") on September 15, 2020. It sought records related to the RPD's police accountability processes, including many records that had previously been shielded from the public by Section 50-a. (R. at 75.) The Respondents refused to

[1] To date, the NYCLU has been involved in litigation associated with similar FOIL requests in Schenectady, Buffalo, New York City, Nassau County, Syracuse, Troy, Freeport, and Saratoga Springs.

engage with the NYCLU regarding its FOIL request and ignored the NYCLU's letters and phone calls seeking to work constructively on a production schedule. (R. at 85-94.) Given Rochester's refusal to engage, the NYCLU filed the instant action on December 14, 2020, seeking immediate production of responsive documents and attorneys' fees and costs. (R. at 14.)

It was only after briefing was completed that the municipal attorney for the City of Rochester indicated to the NYCLU that the Respondents would soon begin to produce some documents. (R. at 149.) On February 11, 2021, the Respondents published an online database containing the disciplinary records for 117 police officers—or roughly 17% of the City's total police force—dated between 1986 and 2021. The database, however, includes only "substantiated" records involving investigations in which the RPD imposed discipline on its officers, and it does not include the files of officers who have quit, retired, or been fired.

On March 1, 2021, the City began producing additional documents related to the NYCLU's FOIL request, but none of those productions filled the gaps in the February database relating to complaints that the RPD had deemed "unsubstantiated" or that have not been resolved. Accordingly, on March 12, 2021, the NYCLU communicated to the Respondents that its FOIL request was only partially satisfied. (*See* R. at 145-47.) In response, the Respondents provided a "supplemental response," in which they stated for the first time their position that

disciplinary files related to such complaints were not "encompassed within the definition of law enforcement disciplinary records set forth in the Freedom of Information Law." (*See* R. at 153-58.) Additionally, the Respondents asserted that disclosure of unsubstantiated complaints would constitute an unwarranted invasion of privacy. Having exhausted its available administrative remedies, on May 17, 2021, the NYCLU filed a supplemental brief to its Article 78 petition, seeking immediate production of all disciplinary records, regardless of disposition, redacted as permitted by FOIL, as well as reasonable attorneys' fees and costs related to this litigation.

The Supreme Court for Monroe County issued its decision and order on August 10, 2021, holding: (1) that Respondents need not produce any portion of any records related to "unsubstantiated" complaints against officers; (2) that Respondents were not required to provide *any* police misconduct records dated before June 12, 2020; and (3) that the NYCLU was not entitled to attorneys' fees and costs. (R. at 7-13.)

The NYCLU now appeals, seeking immediate production of all disciplinary records, regardless of disposition or date of creation, redacted as permitted by FOIL, as well as reasonable attorneys' fees and costs related to this litigation.

STANDARDS OF REVIEW

Article 78 relief should be granted if an agency determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." (CPLR § 7803[3].) With respect to FOIL, Article 78 relief is appropriate whenever a reviewing court determines the agency's determination was "affected by an error of law." (*Matter of Spring v County of Monroe*, 141 AD3d 1151, 1151 [4th Dept 2016] citing *Mulgrew v Bd. of Educ. of City Sch. Dist. of City of New York*, 87 AD3d 506, 507 [1st Dept 2011].) Furthermore, judicial review is "limited to the grounds invoked by the agency" in its determination. (*Matter of Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020].) In reviewing the lower court's disposition in an Article 78 proceeding, the Appellate Division reviews legal conclusions of the Supreme Court *de novo*. (*See Spring*, 141 AD3d at 1151; *Barry*, 185 AD3d at 505.)

The Supreme Court rejected the Petitioner-Appellant's arguments that Respondents' FOIL determination was affected by errors of law. The errors of law in the Supreme Court's analysis should be reviewed *de novo*.

ARGUMENT

I. THE LEGISLATURE REPEALED SECTION 50-A TO MAKE POLICE MISCONDUCT COMPLAINT RECORDS—REGARDLESS OF DISPOSITION OR THE DATE THEY WERE CREATED—PUBLIC, AND IT AMENDED THE FOIL TO ESTABLISH A DETAILED REDACTION SCHEME ADDRESSING OFFICER PRIVACY CONCERNS.

Until the summer of 2020, the greatest obstacle to police transparency in New York was Civil Rights Law Section 50-a, which generally excluded from disclosure "police personnel records used to evaluate performance towards continued employment or promotion" that were otherwise presumptively public. (C.R.L. § 50-a [repealed June 12, 2020].) Although the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope quickly expanded, with police departments and unions successfully arguing for ever-broader secrecy. Indeed, according to a report from the Department of State Committee on Open Government, by 2014 Section 50-a had been "expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." (*See* R. at 35.)

However, amid the nationwide reckoning with racism following the murder of George Floyd, then-Governor Andrew Cuomo signed the #Repeal50a Bill (S8496/A10611) on June 12, 2020. And when the legislature repealed Section 50-a, it simultaneously amended Public Officers Law Section 87 to add two new

provisions governing the privacy protections afforded to officers when "a law enforcement agency respond[s] to a request for law enforcement disciplinary records." (*See* S.8496, 243rd Leg., Sess. [NY 2020].) The first of these provisions states that "[a] law enforcement agency responding to a request for law enforcement disciplinary records . . . shall redact any portion of such record containing the information specified in [POL Section 89[2-b]] prior to disclosing such record under this article." (N.Y. Pub. Off. Law § 87[4-a].) To address valid, genuine privacy concerns, it requires the producing agency to redact: (i) the officer's medical history information; (ii) his or her home addresses, personal telephone numbers, personal cell phone numbers, and personal e-mail addresses, and those of their family members; (iii) the officer's social security number; and (iv) the officer's use of an employee assistance program, mental health service, or substance abuse assistance service. (*See* § 89[2-b].) The second new privacy provision permits—but does not require—redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." (*See* §§ 87[4-b], 89[2-c].) "Technical infractions" is a limited term of art and cannot include incidents stemming from an interaction with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. (*See* § 86[9] [defining "technical infractions"].)

Nowhere does the statute distinguish between complaints based on their disposition, nowhere does it distinguish between complaints based on the date of their creation, and nowhere does it create a categorical exemption for any type of law enforcement record.

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

The text of the amended FOIL, the legislative history of its passage, and binding Court of Appeals precedent all foreclose the lower court's conclusion that Rochester can invoke FOIL's general privacy provision to justify its refusal to produce any part of any record related to any police misconduct complaint that did not result in discipline. Considering versions of this exact question, multiple New York courts have agreed that FOIL compels the production of all such complaint records—appropriately redacted—irrespective of their disposition. (*See Zhang v City of New York*, No. 157088/2015, 2020 WL 12589238, at *1 [Sup Ct, NY County Nov. 5, 2020] [in the context of a discovery dispute, stating that "[i]n light of the repeal of Civil Rights Law 50-a, these records . . . are subject to Freedom of Information Law Requests under Public Officers Law sections 84-90."] *affd,* 198 AD3d 504 [1st Dept 2021] [unanimously affirming]; *People v Herrera*, 71 Misc 3d 1205(A), CR-004539-20NA, 2021 WL 1247418, at *5 [NY Dist Ct Apr. 5, 2021]

[declining to limit production to only "substantiated" records and noting that "privacy concerns should be allayed by" redactions listed in POL §§ 89[2-b] and [2-c]]; *People v Cooper*, 71 Misc 3d 559, 567 [Sup Ct, Erie County 2021] ["The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available."]; *Schenectady Police Benevolent Assn. v City of Schenectady*, No. 2020-1411, 2020 WL 7978093 at *14 [Sup Ct, Schenectady County Dec. 29, 2020] [holding that, under FOIL, withholding "unsubstantiated" complaints "would render the legislature's repeal of CRL §50-a utterly meaningless"]; *Buffalo Police Benevolent Assn. v Brown*, 69 Misc 3d 998, 1003 [Sup Ct, Erie County 2020] [holding that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated' – is not merely a drastic remedy, it is an inappropriate one."]; *People v Perez*, 71 Misc 3d 1214(A), 2021 NY Slip Op 50374[U], *4 [Crim Ct, Bronx County 2021] [holding that the repeal of Section 50-a requires "disclosing both substantiated and unsubstantiated records."]; *see also Uniformed Fire Officers Assn. v de Blasio*, 846 F. Appx 25, 30 [2d Cir. 2021] [rejecting police union's privacy argument].)

The trial court ignored these decisions and their analyses completely, and instead cited only one case holding to the contrary, *Matter of New York Civ. Liberties*

Union v City of Syracuse (72 Misc 3d 458 [Sup Ct, Onondaga County 2021]).[2] For the reasons described below, that case and this one were wrongly decided, and this Court should reverse.

a) The Text and Legislative History of the Section 50-a Repeal Bill Command Disclosure.

The trial court erred in ignoring the clear legislative intent behind the repeal of Section 50-a. A thorough inspection of the text and legislative history of the Section 50-a repeal bill makes clear that the legislature intended to make law enforcement disciplinary records available to the public, regardless of disposition. (*See Cooper*, 71 Misc 3d at 567 [finding that the legislative intent of the repeal of Section 50-a was to make all police disciplinary records, "subject to statutorily approved redactions," available to the public and further asserting that the definition of "law enforcement disciplinary records" encompasses all records, including unfounded, exonerated, substantiated and exonerated complaints].)

[2] Since the lower court's decision here, the Nassau County Supreme Court also appears to have broken from the majority view in two recent decisions (*see NYCLU v Freeport*, index No. 605669/2021 [Sup Ct, Nassau County Feb. 10, 2022]; *Newsday LLC v Nassau County Police Dept.*, index No. 601813/2021 [Sup Ct, Nassau County Nov. 3, 2021]), although in at least one of those cases, it is difficult to determine exactly what the court held (*see Newsday* at *5 [noting that an agency asserting the personal privacy exemption "has an obligation to redact those invasive details and disclose the remainder of the records," yet affirming the agency's determination to withhold such records in full]). The Petitioner-Appellant respectfully submits that nothing in these decisions persuasively counsels against reversal here.

When the legislature expressly invokes a purpose, it is fundamental that a court should effectuate it. (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] quoting *Tompkins v Hunter*, 149 NY 117 [1896].) Indeed, in cases involving statutory construction, the legislature's intent "is the controlling principle." (*Leach v Ocean Black Car Corp.*, 122 AD3d 587, 589 [2d Dept 2014].) The trial court's ruling contradicts the plain text of the amended statute and frustrates the legislature's intent—to provide and preserve the public's right of access to law enforcement disciplinary records, regardless of their disposition. (*See Matter of Capital Newspapers Div. of Hearst Corp. v Burns,* 67 NY2d 562, 565-66 [1986] [finding that FOIL was enacted "in furtherance of the public's vested and inherent right to know"].)

The legislature's intent in repealing Section 50-a is clear from its text. The Section 50-a repeal bill amended Public Officers Law Section 86 to add subdivisions 6 and 7, which define "law enforcement disciplinary records" and "law enforcement proceedings." Section 86[6] defines "law enforcement disciplinary records" as:

> any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to the *complaints, allegations, and charges against an employee*.

(POL § 86[6][a] (emphasis added).) Section 86[7] defines "law enforcement disciplinary proceeding" as:

> the *commencement* of any investigation *and* any subsequent hearing *or* disciplinary action conducted by a law enforcement agency.

(POL § 86[7] (emphasis added).) The trial court's ruling that "the repeal of CRL § 50-a [does not] require [that] records of unsubstantiated claims against police officers be released to the public" renders meaningless the legislature's distinctions between the commencement of an investigation, "any subsequent hearing," and any "disciplinary action." (*See* POL § 86[6].) This, in turn, contravenes the "well-established rule that courts should not interpret a statute in a manner that would render it meaningless." (*Suarez v Williams*, 26 NY3d 440, 451 [2015].)[3]

Further, during floor debates on the bill, the legislature made clear that repeal of Section 50-a would require the production of records related to so-called "unsubstantiated" complaints. While debating the repeal in the New York State Assembly, the bill's sponsor, Assemblymember Daniel J. O'Donnell, explicitly stated that the bill does not distinguish between substantiated and unsubstantiated records. (N.Y. Assembly, Floor Debate, 243rd N.Y. Leg., Reg. Sess. [June 9, 2020], at 61.) Assemblymember Philip Ramos further cited public access to unsubstantiated complaints as a possible means of establishing patterns of

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[3] *See also Matter of Brown v Wing*, 93 NY2d 517, 522 [1999] ["When an enactment displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that Branch's utterance"]; *Matter of Indus. Commr. of State of NY v Five Corners Tavern*, 47 NY2d 639, 646–647 [1979] ["It remains a basic principle of statutory construction that a court will 'not by implication read into a clause of a rule or statute a limitation for which no sound reason [can be found] and which would render the clause futile"].)

misconduct and identifying officers "[w]ho might be a problem and who might be a risk to the public[,]" arguing that "the core of the problem is that throughout history, crimes against people of color have been unsubstantiated." (*Id.* at 100; *see also* 243rd Leg. Sess. [June 6, 2020] [Justification] ["Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct"].)

This makes sense, because knowing whether or not a complaint of police misconduct resulted in discipline or remains pending for years is a critical data point in the public's understanding of the credibility (or lack thereof) of police accountability systems. Assemblymember O'Donnell and Senator Bailey remarked on the significance of the dual purpose served by the repeal and stressed the importance of examining all records regardless of disposition. (N.Y. Assembly, supra, at 98, 168 [commenting that "19 percent of the complaints against members of the NYPD have been substantiated"]; N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. 1805-06 [June 9, 2020] ["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."].) Indeed, the NYPD's Internal Affairs Bureau substantiated *none* of the 2,495 complaints alleging biased policing made against NYPD officers 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].) The legislature, therefore, plainly determined that the public has a significant interest in the specific issue of which complaints go unsubstantiated and why.

Additionally, when contemplating the repeal of Section 50-a, the legislature considered and rejected competing narrower proposals. The final repeal measure was one of five Section 50-a related bills of the 2019-2020 session. One of those bills, S.4213, provided for the release of specific categories of records only in situations where the allegations had been substantiated. (*See* S.4213, 242nd Leg., Reg. Sess. [NY 2019].) The legislature, therefore, rejected Rochester's position when it rejected this narrower, competing bill, and the trial court made a legal error by effectively re-writing the Section 50-a repeal bill in a manner that wholly disregards this clear legislative intent.

b) FOIL's Longstanding General "Unwarranted-Invasion-of-Privacy" Exemption, Section 87(2)(b), Cannot Justify the Respondents' Blanket Refusal to Produce Any Portion of Any Complaint That Did Not Result in Discipline.

Declining to analyze the text or the purpose of the changed statutory scheme, the lower court held that FOIL's preexisting privacy provision—POL § 87[2][b], which protects material that would constitute an "unwarranted invasion of privacy"—should be read to permit the categorical refusal to produce any portion of any record related to misconduct complaints that did not result in the RPD

disciplining its own officers. (*See* R at 12-13.) This holding cannot be squared with binding Court of Appeals precedent that creates a presumption in favor of disclosure, prohibits the categorical withholding of records pursuant to Section 87[2][b], and mandates targeted redaction instead. It also cannot be squared with the amended statute, which prescribes a redaction scheme that applies to exactly these types of records.

As an initial matter, FOIL creates a presumption that all records should be available for public inspection unless they fall within a narrow set of exceptions. (*See Gould v New York City Police Dept.*, 89 NY2d 267, 274-75 [1996] ["[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)."].) The burden rests on the agency to establish that requested material qualifies for any of the exemptions, which must be narrowly construed. (*Id.* at 275; POL § 89[4][b]; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979].) An agency is required to meet this burden in "more than just a 'plausible fashion,'" by articulating a "particularized and specific justification" for withholding information. (*Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *see also Matter of Fink*, 47 NY2d at 571 ["Only where the material requested falls squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld."].)

In the context of Section 87[2][b]—the general privacy exemption invoked by Rochester here—binding precedent from the Court of Appeals provides that agencies must employ redaction instead of blanket withholding, specifically holding that they cannot "refuse to produce the whole record simply because some of it may be exempt from disclosure." (*See Schenectady Cnty. Socy. for Prevention of Cruelty to Animals v Mills*, 18 NY3d 42, 46 [2011]; *see also, Capital Newspapers*, 67 NY2d at 569 [noting that a court did not need to grant a blanket exemption from FOIL disclosure to police records because redaction of material that fit within narrowly-construed exemption adequately provided protection]; *see also Newsday LLC v Nassau Cty. Police Dep't*, No. 8172/13 2014 WL 258558, *6 [Sup Ct, Nassau County Jan. 16, 2014] ["A blanket refusal based on the 'mixed' nature of requested documents cannot be countenanced"].)

Consistent with that scheme, here, to address legitimate privacy concerns, the amended FOIL law introduced an entire new mandatory redaction scheme specific to law enforcement discipline records. (*See* POL §§ 89[2-b], [2-c] [requiring redaction of a host of sensitive information including an officer's address, telephone number, and medical history].) Beyond that, other sensitive material from such records may be redacted as an "unwarranted invasion of privacy" pursuant to Section 89[2][b] *on a case-by-case basis*. But the disclosure of alleged police misconduct records that—for many different reasons, including possible lackluster

investigations or faulty oversight systems—did not result in the RPD imposing discipline, does not and cannot rise to the level of an unwarranted invasion of privacy justifying the categorical withholding of every single complaint record.

Indeed, courts have repeatedly held that the release of job performance-related information of public employees—even negative information such as that involving misconduct or alleged misconduct—does not constitute an *unwarranted* invasion of privacy, even if it obviously implicates privacy concerns, because of the public's strong interest in how public employees do their jobs. (*See Capital Newspapers*, 67 NY2d at 569-70; *Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 499 [1st Dept 2013] ["public employees enjoy a lesser degree of privacy than others"] quoting Committee On Open Government, FOIL Advisory Opinion 10399 [Oct. 31, 1997]; *Mulgrew v Board of Educ. Of City Sch. Dist. Of City of New York*, 31 Misc 3d 296, 301-03 [Sup Ct, NY County 2011] [collecting cases]; *see also Faulkner v. Del Giacco*, 139 Misc 2d 790, 794 [Sup Ct, Albany County 1988] [finding "no basis to support the claim that releasing the names of guards accused of inappropriate behavior is an unwarranted invasion of their personal privacy"]; *Schenectady Police Benevolent Assn.*, 2020 WL 7978093 at *5 ["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."]; *Uniformed Fire Officers*, 846 F. Appx 25, at 33

[finding that police unions' stated interests in preserving confidentiality over unsubstantiated complaints "are counterbalanced by other important policies" and denying the unions' requests to block the publication of such complaints].) And here, specifically regarding the records at issue, the people of Rochester's compelling public interest is as much in *how and why* allegations were determined "unsubstantiated" as it is in the substance of substantiated complaints.

Turning to the authorities on which the lower court's decision purported to rely (*see* R. at 11-12), the Petitioner-Appellant respectfully submits that they do not support the conclusion that court reached. For example, the court cited *Matter of LaRocca v Bd. Of Educ. Of Jericho Union Free Sch. Dist.* (220 AD2d 424, 427 [2d Dept 1995]), a case about education professionals, in its discussion of the "unwarranted invasion of privacy" exemption established by Section 87[2][b] (*see* R. at 12). But *LaRocca* in fact highlights the error of the trial court here: in *LaRocca*, unlike this case, the court engaged in a fact-specific inquiry, including in camera review of the settlement agreement at issue, before it decided that the release of the portion of a specific agreement containing references to charges that were denied and not admitted by the school principal, or containing names of teachers, would constitute an unwarranted invasion of privacy under Section 87[2][b]. *LaRocca* was about fact-specific redaction; it does not stand for the sweeping principle that every part of every "unsubstantiated" complaint constitutes de facto exempt material.

LaRocca is further distinguishable from the case at bar because FOIL recognizes that the public has a unique interest in disciplinary complaints against police officers, who, unlike teachers and principals, routinely use physical force in the discharge of their duties. (*See* NY Senate, Floor Debate, 243rd NY Leg, Reg Sess 1846 [June 9, 2020] ["[W]ith police officers, because they are given the power to make arrests and use deadly force when necessary, they must also be held to a very high standard and oversight of their conduct."]; N.Y. Assembly, Floor Debate, 243rd N.Y. Leg. Sess. 99 [June 9, 2020] ["And when somebody has the power to take a human life, I believe there should be more light shining on that person and what he does."].) Accordingly, unlike the records of teachers and other educational professionals, law enforcement records are singled out in the text of FOIL. Not only did the legislature define "law enforcement disciplinary records" under the statute, but it also promulgated specific guidance for their redaction and even thought it necessary to delineate the technical infractions law enforcement agencies are permitted to redact. (*See* POL §§ 86[6, 9]; 89 [2-b],[2-c].) Considering these specific and narrow directives, "it is not for the court to draft or correct legislative enactment." (*Accord Dyte v Lawley*, 31 Misc 2d 182, 184 [Sup Ct, Erie County 1961], *affd,* 14 AD2d 827 [4th Dept 1961]; *see also Majewski*, 91 NY2d at 583 ["[I]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which

involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning"]; *M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp*., 62 NY2d 75, 81 [1984] ["[A]n express statement … is not necessary to establish an exemption from FOIL … [but] what is required is clear legislative intent to establish and preserve confidentiality."].)

Also, the trial court cited an outdated Committee on Open Government ("COOG") opinion in support of its holding (R. at 12 [citing Committee on Open Government, FOIL Advisory Opinion 19775 [2020]). But the COOG has issued more recent—albeit similarly non-binding—opinions that clarify its position and directly contradict the conclusions reached by the lower court here. In March of 2021, the COOG concluded that "[i]n light of the repeal of Section 50-a of the Civil Rights Law and the provisions added to FOIL to address law enforcement agency disciplinary records, FOIL now requires that upon a request therefor [*sic*], a law enforcement agency must review all records of complaints, *whether or not substantiated*, to determine rights of access." (Advisory Op. from Shoshanah Bewlay, Exec. Dir., COOG, FOIL AO 19785 [Mar. 19, 2021] [emphasis added].) In reaching this conclusion, the COOG considered the decisions in *Buffalo*, *Schenectady*, and *Uniformed Fire Officers* and found them "consistent with [its] opinion issued in 2020." A month later, the COOG further opined that FOIL "imposes an obligation on an agency to review records sought, in their entirety, to

determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder." (Advisory Op. from Kristin O'Neill, Ass. Dir., COOG, FOIL AO 19805 [April 30, 2021].) In other words: even pursuant to the authority cited by the lower court, targeted redaction, as proposed by the NYCLU, not wholesale refusal to produce, is what FOIL requires here.

In any event, COOG's advisory opinions are not binding on courts. (*See Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994] [holding that the advisory opinions of the COOG are "neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency"].)[4] But it is notable that one of the few authorities cited by the court below in support of its conclusion has explicitly found the approach endorsed by that court—*i.e.*, a blanket bar on public access to all unsubstantiated complaints—

[4] Indeed, the NYCLU does not agree with those portions of the COOG's analysis seeming to suggest that all the names of individual officers should or must be redacted before records related to "unsubstantiated complaints" are produced. (*See* Comm on Open Govt. FOIL-AO-19805 at 2.) That result would be preferable to the RPD's blanket withholding, but it is not what the amended statute requires or permits. The COOG correctly explains, though, that categorical withholding is particularly unsupportable because, if an agency wished to shield officers from any possible invasion of privacy, that agency could redact all identifying details and anonymize the records. (*Id.*) While such extensive redactions would be a drastic means to address privacy concerns—though, of course, far less drastic than the categorical withholding that the RPD chose—the COOG is correct that, pursuant to the plain text of FOIL, an agency can no longer invoke § 87 (2) (b)'s privacy exemption if identifying details have been redacted. (Public Officers Law § 89 [2][c][i] ["[D]isclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted."].) The RPD's refusal to produce even anonymized versions of the disputed records cannot be squared with this basic FOIL principle.

unlawful in light of the repeal of Section 50-a. For this reason, and all those described above, this Court should reverse.[5]

III. ROCHESTER CANNOT INVOKE SECTION 50-a, A FOIL EXEMPTION THAT NO LONGER EXISTS, TO DENY ACCESS TO RECORDS CURRENTLY IN ITS POSSESSION BUT CREATED BEFORE JUNE 2020.

a) Respondents Waived Their Argument That Section 50-a Still Applies to Records Dated Before June 12, 2020.

The trial court erroneously held that Rochester need not produce any complaint records—substantiated, "unsubstantiated," or otherwise—dated prior to June 12, 2020, holding that Section 50-a continues to bar their release because the repeal cannot be applied "retroactively." (R. at 11-13.) As an initial matter, the trial court should not have ruled on the "retroactivity" of Section 50-a because Respondents did not raise this argument during the administrative proceeding or in

[5] Separately, Rochester argued before the trial court that a "plain reading of the collective bargaining agreement between the City of Rochester and the Rochester Locust Club could prohibit documents detailing unsubstantiated complaints from being released." (Resp't Opp. to Supp'l Mem. [NYSCEF Doc No. 46] at 6.) The trial court did not reach this issue (*see* R. at 11-13), but, to be clear: it is black-letter law that collective bargaining agreements cannot affect the range of disclosures made possible by the repeal of Section 50-a. (*Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984] ["Finally, it is noted that just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption [to FOIL]."]; *see also LaRocca*, 220 AD2d at 426; *accord Schenectady Police Benevolent Assn.*, 2020 WL 7978093, *12 [NY Sup Ct, Schenectady County 2020] ["It is axiomatic that the public right of access to records under FOIL cannot be bargained away in collective bargaining between management and labor."]; *Washington Post Co. v United States Dept. of Health & Human Servs.*, 690 F2d 252, 263 [DC Cir. 1982] ["[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate"].)

subsequent responses to the Petitioner-Appellant's FOIL request but only later in response to the NYCLU's Article 78 petition. The Court of Appeals has held that, if an agency "did not rely on" a particular exemption "in its administrative denial," to allow it to do so for the first time in litigation "would be contrary to our precedent, as well as to the spirit and purpose of FOIL." (*Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 75 [2017]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Services*, 77 NY2d 753, 754 [1991] ["The alternative ground for petitioner's removal belatedly raised by respondents for the first time in their answers to the petition, and relied upon by the courts below, may not serve to sustain her dismissal."].) Accordingly, pursuant to binding precedent, Respondents were not permitted to rely on an exemption—Section 50-a—that they failed to raise during the administrative proceeding and subsequent responses to the NYCLU's FOIL request. (*Madeiros*, 30 NY3d at 79.)

Rochester also undermined its "retroactivity" argument in a more striking manner: in February 2021 it voluntarily published an entire online database consisting almost entirely of pre-2020 "substantiated" complaints and related disciplinary records—all Section 50-a material, the publication of which *violates the law* under the analysis Rochester now urges this Court to adopt. (*See* Rochester

Police Department Discipline Database.[6]) The website remains live, and Rochester prominently states that it "has been made available to the public in response to the June 2020 repeal of Section 50a." (*Id.*) That statement, and this entire website, cannot be reconciled with Rochester's late-in-litigation position that Section 50-a somehow continues to apply to records created prior to June 2020. For all these reasons, the issue has been waived.

b) The NYCLU Does Not Seek Retroactive Application of Any Law; Rather, It Seeks Records Currently in Rochester's Possession That Are Not Subject to Any Existing FOIL Exemption.

Even if Rochester had not waived its argument—and it has—the Petitioner-Appellant respectfully submits that the question presented is not whether the repeal of Section 50-a should be applied "retroactively," but instead whether, as of the date of the NYCLU's *September* 2020 request, Rochester could invoke a nonexistent FOIL exemption to justify the denial of records currently in its possession. It could not. Put another way: in a post-June-2020 world, Rochester must respond to FOIL requests as it always has, by producing all responsive records currently in its possession unless a specific exemption applies. Section 50-a, which does not exist, cannot be one of those exemptions.

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[6] *Also available at* https://www.cityofrochester.gov/policediscipline/ (last visited Feb. 17, 2022) (in which, for example, the first ten alphabetically-listed discipline records appear to span the years 2001-2019—making all of them legally prohibited from being made public pursuant to Rochester's retroactivity argument).

It is axiomatic that, if an agency has responsive records in its possession at the time a FOIL request is made, those records must be produced unless a specific exemption applies. (*Gould*, 89 NY2d at 274-75 [all government records are "presumptively open for public inspection [] unless they fall within one of the enumerated exemptions"].) The date the records were *created* is not and has never been relevant to the FOIL analysis. (*See* Public Officers Law § 87[2] [requiring agencies to produce "all records, except those records or portions thereof that may be withheld pursuant to the exceptions"]; § 86[4] [defining "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency"]; § 87[3][c] [requiring agencies to maintain a "current list by subject matter of all records in the possession of the agency"]). The text of the law is straightforward, and indeed this is the only reasonable and practicable way to interpret FOIL's mandate: Section 87 has been amended more than *thirty times* since FOIL was created in 1977 (*see* Public Officers Law § 87 [McKinney's 2021] [history of amendments]), and under Rochester's proposed analysis courts would constantly be forced to engage in the near-impossible task of applying different outdated versions of the law to records based on the exact date of their creation and the specific exemptions available on that date. FOIL simply does not work that way.

Indeed, courts in other states that passed strikingly similar laws—updating their freedom-of-information statute to make police misconduct records available—

have adopted the analysis outlined above. In *Los Angeles Police Protective League v. City of LA*, the court squarely rejected the same argument Rochester makes here and held that "*[t]he question of retroactive application . . . is of no consequence*" because the amended law "merely prescribes a law enforcement's agency's *prospective duty* as of January 1, 2019, to make certain categories of peace officer personnel records available to a requestor through the [California Public Records Act]." (No. 18STPCP03495, 2019 WL 1449721, at *3 [Cal Super Ct, Feb. 15, 2019] (emphasis added) [noting that the FOIL law applied to all records "maintained" by an agency and had "nothing to do with the date on which a personnel record was created"].) The court also found that "this interpretation of the statute is consistent with the high courts of other states interpreting similar statutes." (*Id.* at *4 n 2 [citing *State of Hawai'i Org. of Police Officers v Soc'y of Pro. Journalists*, 83 Hawai'i 378, 389-391 [Hawaii 1996]; *State ex rel. Beacon Journal Pub. Co. v Univ. of Akron*, 64 Ohio St2d 392, 395-396 [Ohio 1980]].)

The same analysis applies here: Rochester had a "prospective duty" as of June 12, 2020, to produce responsive records in its possession that are not exempt from disclosure. This is not akin to requiring law enforcement agencies to go back and revisit old requests from pre-June-2020 and update their responses, which is what a "retroactive application" of the law would actually require (*see LAPD*, 2019 WL 1449721, at *3), but which the NYCLU does not seek.

c) A Traditional Retroactivity Analysis Would Still Require Rochester to Produce Pre-June-2020 Records Because the Legislature Intended Section 50-a Repeal to Serve a Remedial Purpose.

In any event, even if the release of previously exempt records were considered a retroactive application of the repeal of Section 50-a—which it should not be—such retroactive application would be justified because the law serves a remedial purpose. Retroactive effect is given to remedial statutes that are "designed to correct imperfections in prior law" (*Nelson v HSBC Bank*, 87 AD3d 995, 998 [2d Dept 2011]) or "should be given retroactive effect in order to effectuate [their] beneficial purpose" (*Gleason v Michael Vee, Ltd.*, 96 NY2d 117, 122 [2001]; *see also Majewski*, 91 NY2d at 584 [acknowledging the "settled maxim" that remedial legislation should be applied retroactively]). Here, the legislature plainly intended the repeal of Section 50-a to have such a remedial application.

In deciding whether a law is "remedial" and thus should have retroactive effect, courts consider whether the legislature has "conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." (*Gleason*, 96 NY2d at 122.) Here, the legislature was clear that it intended the repeal of Section 50-a to be a remedial law because it (i) pronounced that the repeal of Section 50-a was justified due to the need to access records concerning law enforcement officers' past disciplinary histories (*i.e.*, records created

prior to repeal); (ii) conveyed a sense of urgency by enacting the repeal less than a month after nationwide protests over police misconduct began; and (iii) made clear its "legislative judgment" about the reasons that past complaints must be disclosed. (*See e.g.*, N.Y. Senate, Floor Debate, 243rd NY Leg., Reg. Sess. 1821-23 [June 9, 2020] [repeal would give the family of Ramarley Graham, killed by police in 2012, access to records relating to his death]; *id.* at 1823 [repeal allows New Yorkers to learn "whether police departments have taken these misconduct complaints seriously in the past or whether they have ignored or dismissed them"].)

The majority of courts that have applied a "retroactivity" analysis to the repeal of Section 50-a agree that the legislature did not intend to limit the availability of police disciplinary records to those created after June 12, 2020. (*See Schenectady Police Benevolent Assn.*, 2020 WL 7978093; *Puig v City of Middletown*, 71 Misc 3d 1098 [Sup Ct, Orange County, 2021].) In *Schenectady Police Benevolent Assn.*, the court found that "[t]he 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" and that "there is strong evidence that retroactive effect was intended by the legislature." (2020 WL 7978093 at *6.) In *Puig*, the court found that the repeal "was remedial in nature, and should be applied retroactively," in part because the legislative history indicated that Section 50-a repeal was intended to correct a "judicial interpretation

of the statute"—the courts' ever-broadening interpretation of Section 50-a—that "had strayed from its intended purpose." (2021 WL 1433396 at *6 [citing Committee Report, SB 8496, 243rd NY Leg., Reg. Sess. [NY 2020]].)

Rather than considering any of these factors, the trial court cited a single case from 1932 to hold that General Construction Law § 93—which provides "a principle of construction" that "in the absence of evidence of contrary intent," legislation repealing an earlier statute "is not to be given retroactive effect" (*People v. Roper*, 259 NY 635, 635 [1932])—required it to hold that the repeal of Section 50-a could not have retroactive effect (*see Trial Court Order* (R. at 11-12) [citing *Roper*, 259 NY at 635]). But, when applying the General Construction Law, the Court of Appeals has "long recognized" that "the Legislature is free to enact laws that have retroactive application" (*Kellogg v Travis*, 100 NY2d 407, 411 [2003] [citing *Roper*]), and here, as described above, there is overwhelming evidence of the legislature's clear intent to do so.

Since the repeal, this trial court is the only court to have held that General Construction Law § 93 must be read to prohibit the release of any material dated prior to June 2020 that was previously covered by Section 50-a.[7] It did so in error,

[7] In addition to this case, the same trial court came to the same conclusion using the same flawed reasoning in *Brighton Police Patrolman Assn. v Town of Brighton*, (No. I2020002814 [Sup Ct, Monroe County Apr. 16, 2021].)

without considering the relevant factors or the legislature's clear intent, and it should be reversed.

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

Finally, the trial court erred in summarily denying the Petitioner-Appellant's request for attorney's fees and litigation costs. The NYCLU is entitled to mandatory attorneys' fees and costs because the Respondents failed to provide any basis, reasonable or otherwise, for failing to produce any records at all until the NYCLU filed the present lawsuit. (*See Sapienza v City of Buffalo*, 197 AD3d 914, 915 [4th Dept 2021] [affirming award of attorney's fees where "petitioners received a complete response to their requests only after commencing the [CPLR article 78] proceeding"].)[8]

Courts must assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the records in dispute (POL § 89 [4][c]). Respondents constructively denied both the NYCLU's FOIL request and the administrative appeal when they failed to articulate any basis, let alone a reasonable one, for denying access to the records. Because the Respondents began producing documents in response to the

[8] *See also Madeiros*, 30 NY3d at 79 (same); *Bottom v Fischer*, 129 AD3d 1604, 1605 [4th Dept 2015] (same).

NYCLU's Article 78 petition, the NYCLU has "substantially prevailed" for the purposes of this provision regardless of the Court's determination regarding the production of unsubstantiated complaints. (*Matter of Madeiros*, 30 NY3d at 79 [finding that the petitioner "substantially prevailed" when the respondent had "made *no* disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding" even where a majority of the respondent's challenged redactions were found to be appropriate]; *Bottom v Fischer*, 129 AD3d 1604, 1605 [4th Dept 2015] [petitioner substantially prevailed when respondent made disclosures only after "the court directed it to justify their nondisclosure"].) Having made no disclosures—redacted or otherwise—before the Petitioner-Appellant's commencement of this proceeding, Rochester is statutorily obligated to pay attorneys' fees and costs for the time the Petitioner-Appellant reasonably spent litigating the case.

In addition, even if the Petitioner-Appellant were not entitled to mandatory fees—which it is—it is within the court's discretion to grant fees when a government agency flouts its legal obligations under FOIL by failing to respond to a FOIL request within the statutory time, as Rochester did here. (*See Sapienza*, 197 AD3d

at 914 [finding attorneys' fees warranted where the respondent's "failure to timely respond to petitioners' FOIL requests constituted a denial of access"].)[9]

CONCLUSION

For the foregoing reasons, the Petitioner-Appellant NYCLU respectfully requests that the Court reverse the rulings below and order the City of Rochester and the Rochester Police Department to produce records responsive to the NYCLU's September 2020 FOIL request in the manner described above, and to pay reasonable attorneys' fees and costs associated with this litigation.

[9] *See also Acme Bus Corp. v County of Suffolk*, 136 AD3d 896, 898 [2d Dept 2016] (finding an award of attorneys' fees appropriate, when, among other things "the Respondents did not timely decide the petitioner's agency appeal").

Dated: February 22, 2022
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