SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK STATE POLICE,

Respondent.

INDEX NO: _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

On September 15, 2020, the New York Civil Liberties Union (the "NYCLU") submitted a request for records relevant to police behavior and accountability under the Freedom of Information Law ("FOIL") (the "Request") to the New York State Police ("NYSP" or "Respondent"). Over the next 16 months, Respondent failed to substantively engage with the NYCLU concerning the Request, and only produced a minimal amount of documents. On January 20, 2022, Respondent for the first time argued that several parts of the Request—Section A (disciplinary records), Section D(7) (investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints), and Section F (records regarding complaints filed with the New York State Police Professional Standards Bureau) (together, the "police disciplinary records")—were not reasonably described and are overly burdensome to produce.

Respondent also produced an excel spreadsheet listing the number of complaints per calendar year in response to Section D(5) of the Request, but impermissibly redacted all officer names from the spreadsheet. The spreadsheet simply lists case numbers, categories of allegations, and dispositions. Despite the fact that the spreadsheet contains only general information, Respondent is refusing to provide officer names in light of FOIL's personal privacy exemption, and claiming that to production of names of officers that were the subject of complaints it did not substantiate would be an unwarranted invasion of personal privacy.

Respondent is incorrect on all accounts. *First*, the police disciplinary records are described in detail. In fact, in its January 2022 letter, Respondent identifies where the requested documents are held, thereby undermining any claim that they were not reasonably described. *Second*, the police disciplinary records are not overly burdensome to produce as they are limited by time frame, and limited to employees directly covered by FOIL. In any event, the FOIL statute expressly

prohibits an agency from denying a request on the basis of burden (*see* N.Y. Pub. Off. L. § 89[3]). *Third*, the personal privacy exemption does not justify withholding names of officers who were the subject of complaints that NYSP decided not to substantiate. Rather, withholding officer names runs afoul of the purpose and express statutory language of FOIL, and it is contrary to several recent decisions across the state.

Because these are the only exemptions that Respondent asserted over the police disciplinary records, Respondent has no well-found basis to refuse to produce the police disciplinary records at issue or to withhold officer names when providing information responsive to Section D(5) of the Request.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

I. THE REPEAL OF SECTION 50-A

Governor Andrew Cuomo signed the repeal of Section 50-a into law in June 2020, in the wake of the public murder of George Floyd. Mr. Floyd's death sparked nationwide protests and prompted lawmakers across the country to re-examine the public's interest in enhanced law enforcement transparency and accountability. From its enactment in 1976 until its repeal, Section 50-a served as the greatest obstacle to transparency regarding the conduct of police officers in New York. Although this Section, which generally shielded police disciplinary records from public disclosure, was intended to be applied narrowly and sparingly, it rapidly expanded in scope and application. 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 conceivably could be used to evaluate the performance of a police officer" (*see* Exhibit A to the Verified

Petition).[1]

However, there was a growing consensus in New York that Section 50-a impeded police accountability and racial justice. Amid the nationwide reckoning following the deaths of George Floyd, Breonna Taylor, and others, the deepening societal frustration with police secrecy and misconduct, and the public demand for increased police transparency and oversight, Governor Cuomo signed the #Repeal50a Bill (S8496/A10611) on June 12, 2020 (*see* Exhibit B).

II. UPON THE REPEAL OF SECTION 50-A, THE NYCLU SUBMITTED A FOIL REQUEST TO RESPONDENT

The NYCLU submitted the Request to Respondent on September 15, 2020, seeking records—many of which had previously been shielded from the public by Section 50-a—related to conduct of NYSP officers (*see* Exhibit C). On September 15, 2020, Respondent acknowledged receipt of the NYCLU's request and indicated it would respond on or before November 19, 2020 (*see* Exhibit D). However, Respondent failed to produce any response by that date. Instead, on November 30, 2020, Respondent indicated it would respond to the Request on or before June 1, 2021, more than *eight months* after the NYCLU's initial Request (*see* Exhibit F).

On December 9, 2020, the NYCLU identified several categories of readily available documents responsive to the Request and proposed a rolling production arrangement under which Respondent could provide its readily available police disciplinary records while reviewing other categories of documents (*see* Exhibit G). On January 27, 2021, Respondent rejected the NYCLU's proposal for a rolling production arrangement and stated it would adhere to its proposed schedule (*see* Exhibit J). But on June 1, 2021, Respondent made only a small initial production of

[1] All Exhibits referenced in this memorandum are attached to the NYCLU's corresponding Verified Petition.

documents related to departmental policies, directives, and orders and represented it required additional time to respond to the rest of the Request (*see* Exhibit K).

Over the next several months, Respondent repeatedly wrote to the NYCLU requesting to extend its deadline to produce the requested documents without substantive justification or explanation short of noting that "[a]dditional time [was] needed to respond" to the Request (*see* Exhibits M, O). On three occasions—August 17, 2021, October 6, 2021, and December 21, 2021—given that Respondent failed to meet its self-imposed deadlines, the NYCLU wrote to Respondent about its delays in production (*see* Exhibits L, N, P). In each of Respondent's communications to the NYCLU, Respondent indicated it required additional time to respond to the Request, and set future deadlines for October 1, 2021, December 1, 2021, and January 14, 2022, respectively (*see id.*). Respondent failed to meet each deadline it set.

On January 20, 2022, Respondent produced redacted records responsive to Section D(5) of the Request—which sought documents showing "the total number of complaints per calendar year" regarding NYSP employee misconduct (*see* Exhibit Q)—in the form of a spreadsheet. Also on January 20, 2022, for the first time in sixteen months and despite more than a dozen communications between the parties, Respondent argued that three sections of the Request failed to "reasonably describe the records" sought by the Request, and that it would be overly burdensome to produce them (*see id.*). Specifically, Respondent argued that the NYCLU had failed to reasonably describe the records sought in Section A, which seeks "copies of all law enforcement disciplinary records . . . as defined in [N.Y. Pub. Off. Law. § 86]," along with related training documents; Section D(7), which seeks "[a]ll investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints"; and Section F, which seeks "copies of records regarding complaints filed with the NYSP

Professional Standards Bureau ('PSB')" (*see* Exhibit R). Respondent categorically refused to produce documents related to those requests (*see id.*). Respondent also indicated it had redacted officer names in providing a response to Section D(5) of the Request in order to "prevent an unwarranted invasion of personal privacy of those concerned" (*see id.*). Respondent stated that its January 20, 2022 production and letter "completes our response to your request" (*see id.*).

On February 16, 2022, the NYCLU submitted an administrative appeal regarding Respondent's partial denial of the Request (*see* Exhibit S). On March 14, 2022, Respondent denied the appeal. Respondent reiterated only its objections that parts A, D(7), and F of the Request failed to reasonably describe the records sought and would be unduly burdensome to produce (*see* Exhibit T). Respondent did not address the appealed redactions applied to part D(5) of the Request (*see id.*).

Having exhausted its administrative remedies, the NYCLU files this Article 78 Petition seeking the production of responsive documents, without improper redactions, on a reasonable rolling basis. Petitioner also seeks an award of attorneys' fees and costs in light of Respondent's failure to adhere to FOIL's statutory requirements.

ARGUMENT

I. THE NYCLU IS ENTITLED TO BRING THIS ACTION

The NYCLU has exhausted its administrative remedies and is entitled to bring this action. Respondent's March 14, 2022 email denying the NYCLU's administrative appeal entitles the NYCLU to initiate this action in state court (*see* N.Y. Pub. Off. L. § 89[4][b] ["[A] person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules."]).

II. RESPONDENT VIOLATED FOIL BY REFUSING TO PRODUCE THE POLICE DISCIPLINARY RECORDS WITHOUT JUSTIFICATION

A. Respondent Cannot Meet Its Burden to Show That the Records Are Not Reasonably Described or Overly Burdensome to Produce

On January 20, 2022—after five written responses to the NYCLU and several small productions between November 2020 and November 2021—for the first time Respondent took the position that "parts A, D(7), and F" of the Request "fail[ed] to reasonably describe the records sought," and were overly burdensome to produce (*see* Exhibit R). These are the only bases that Respondent has asserted for refusing to produce these records, and they are without merit.[2]

1. The NYCLU Reasonably Described the Records Sought

Respondent carries the burden of establishing that the descriptions in the Request "were insufficient for purposes of locating and identifying the documents sought" (*see M. Farbman & Sons, Inc. v NYC Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984] [quoting N.Y. Pub. Off. L. § 89[3]). Respondent cannot meet that burden here, where Respondent admits that it knows where and how to search for the documents sought in the Request.

In *Konigsberg v Coughlin*, the Court of Appeals held that "demands under FOIL need not meet the stringent requirement under CPLR 3120 that documents be specifically designated" (*see* 68 NY2d 245, 249 [1986] [internal citation omitted]). The Court noted that the requirement of Public Officers Law § 89(3) that documents be "reasonably described" "was to enable the agency to locate the records in question" (*Id.*). In *Konigsberg*, records were reasonably described where

[2] Respondent may not justify its failure to produce responsive documents by relying on any exemptions other than those alleged in its denial of Petitioner's administrative appeal (*see Matter of Madeiros v New York State Educ. Dept.,* 30 NY3d 67, 74 [2017] [rejecting the education department's reliance on an exemption "because the department failed to invoke that particular exemption in its denial of petitioner's FOIL request"]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991] ["[J]udicial review of an administrative determination is limited to the grounds invoked by the agency[.]").

an inmate records coordinator acknowledged where a petitioner's requested records were found, including in his central file, education folder, hospital records, and grievance file (*see id.* at 248). Similarly, here, Respondent indicates that the documents are "maintained in employee's [*sic*] personnel jackets" and "employee file[s]" (*see* Exhibit T). Indeed, Respondent has a list of those employees whose files it must search, and Respondent produced a redacted version of this list in response to Request D(5) (*see* Exhibit Q).

Each category of documents sought is described in great detail. Specifically, the Request reasonably describes three types of documents within Section A, all of which Respondent refuses to produce. *First*, the NYCLU requested "copies of all law enforcement disciplinary records . . . as defined in Public Officers Law § 86(6)"—a category of documents literally *defined by statute* (*see* Exhibit C). The NYCLU provided examples of such records, listing for example "complaints, allegations, and charges against an employee," and "transcript[s] of any disciplinary trial or hearing" (*see id.*). *Second*, the NYCLU requested "all documents related to any trainings officers are required to complete regarding the handling of disciplinary records" (*see id.*). *Finally*, the NYCLU requested "documents demonstrating the measures that NYSP has in place to ensure that all officers complete the required trainings" during the time period set forth in the request (*see id.*).

Respondent also refuses to produce documents responsive to Section D(7) of the Request, which requests "[a]ll investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints," and Section F of the Request, which requests "copies of records regarding complaints filed with the NYSP Professional Standards Bureau ('PSB')." Each disputed section of the Request is clearly and carefully worded, substantively describing the records sought and identifying the applicable time frame.

Respondent asserts that a reasonably described request for records must include specific

parameters such as the names of the employees for whom Respondent should search (*see* Exhibit T). This interpretation is neither supported by the statute, nor by case law, which requires only that documents be "reasonably described" to "enable the agency to locate the records in question," *Konigsberg*, 68 NY2d at 249. Furthermore, Respondent ignores that the NYCLU does not—and cannot—identify names of specific employees, because Respondent has impermissibly withheld their names and other information relevant to Request categories A, D(7), and F. Respondent has also made clear that it already has a list of relevant officer names in the form of its response to D(5) (*see* Exhibit Q). Respondent cannot defeat FOIL requests by requiring a level of specificity that can only be met with the very information Respondent is withholding.

2. Respondent Cannot Properly Refuse to Comply With the NYCLU's Request for the Outstanding Records Due to Claims of Burden

Respondent alternatively argues that the Request is overly burdensome (*see* Exhibit T). However, the FOIL statute expressly prohibits an agency from denying a Request "on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome" (*see* N.Y. Pub. Off. L. § 89[3][a]). Respondent "cannot evade the broad disclosure provisions of [FOIL] . . . upon the naked allegation that the request will require review of thousands of records" (*see Konigsberg*, 68 NY2d at 249).

Nor may Respondent skirt the requirements of FOIL by claiming that searching for these records would be "costly and prohibitively time consuming to produce," as it claims (*see* N.Y. Pub. Off. L. § 89[3][a] ["An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis" if the agency may engage an outside professional service to assist in compiling the records, to be paid for by the requestor]). Here, the NYCLU proposed a rolling document production schedule more than one

year ago in order for the parties to address more voluminous and/or longer-term productions. Respondent refused the NYCLU's offer for rolling productions. Respondent's claim that it would be prohibitively time consuming to produce responsive documents disregards the NYCLU's good-faith effort to assist Respondent and ignores that Respondent has had sixteen months to produce responsive documents.

Indeed, recent proceedings in cases dealing with substantially similar FOIL requests further undermine Respondent's burden argument. In *NYCLU v Buffalo*, for example, the NYCLU and the Buffalo Police Department agreed to the rolling production and redaction of several thousand full disciplinary files associated with BPD officers (*see* Index No. 805097-2021 [Sup Ct Erie County 2021], agreements attached as Exhibits U, V). And in *NYCLU v NYC Dept. of Corr.*, the court ordered New York City to roll out redacted discipline files involving tens of thousands of complaint records over several months (*see* 2022 WL 1156208, at *2 [Sup Ct NY County Apr. 19, 2022]). Respondent's argument that New York State should not be expected to undertake a similar production on a similarly reasonable time frame in this case should be rejected.

Respondent improperly relies on *Fisher & Fisher v Davidson*, 1988 WL 1656692, at *4 [Sup Ct, NY County Sep. 27, 1988], to claim that it may deny the Request because it would lead to an "enormous administrative burden that would interfere with [Respondent's] day-to-day operations" (*see* Exhibit T). But *Fisher* is inapposite. The central questions in *Fisher* were whether the New York City Department of Health could withhold records and data because the nature of the organization seeking them established the information was sought for a commercial purpose, and whether the information sought threatened an unjustified intrusion into individuals' privacy (*see id.* at *1). The court in *Fisher* denied a petitioner's request primarily because it violated the privacy interests of thousands of civilians and non-government employees and

"*subserve[d] a commercial purpose outside the concerns of the Freedom of Information Law*" (*see id.* at *4 [emphasis added]). That is not the case here, where the information requested relates to employees who are directly covered by FOIL, and where the withheld information is central to ensuring transparency and accountability in policing. "It is well settled that a request pursuant to FOIL cannot be rejected merely because of its 'breadth or burdensomeness'" (*see Time Warner Cable News NY1 v NYC Police Dep't*, 2017 N.Y. Misc. LEXIS 1373, at *2 [Sup Ct, NY County Apr. 7, 2007]). Respondent's attempt to evade its responsibility under FOIL therefore fails.

III. FOIL'S NARROW PERSONAL PRIVACY EXEMPTION DOES NOT PERMIT RESPONDENT TO WITHHOLD THE NAMES OF OFFICERS WHO WERE THE SUBJECTS OF "UNSUBSTANTIATED" COMPLAINTS

In Respondent's response to Section D(5) of the Request, which seeks documents sufficient to show the total number of complaints against the NYSP, Respondent impermissibly redacted the names of officers who were the subject of complaints it did not substantiate. The spreadsheet to which Respondent applied these improper redactions merely lists case numbers, categories of allegations, and dispositions—in short, general, innocuous information.

The withholding of officer names is plainly barred by FOIL, which the legislature amended in June 2020—at the same time it repealed Section 50-a—to include a broad definition of "law enforcement disciplinary records" that are subject to disclosure. Specifically, the text of FOIL now defines "law enforcement disciplinary records" as 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 hearing" (*see* N.Y. Senate Bill S.8496, 243rd N.Y. Leg. Sess. § 2 [emphasis added]); *see also* N.Y. Pub. Off. L. § 86[6][a], [b], and [c]). There is no exception for unsubstantiated complaints.

The legislative history at issue confirms that officer names in complaint records are to be disclosed, regardless of disposition (*see e.g.* Ex. A at 60-61 [N.Y. Assembly, Floor Debate, 243rd

N.Y. Leg., Reg. Sess. [June 9, 2020] ["Q: . . . [T]he items that will be disclosed . . . is essentially any complaint . . . [i]t makes no distinction regarding substantiated or unsubstantiated? MR. O'DONNELL: . . . [W]e don't distinguish between those two things in this law."], 98 [when asked whether information about "unsubstantiated cases" is "discoverable . . . the public can see it, right? MR. O'DONNELL: The public will have access to it through the FOIL process. . ."], 133 [describing the bill as "providing a form of transparency in terms of being able to get unsubstantiated claims"]). Legislators also repeatedly emphasized that a key benefit of amending the statute would be allowing the public to understand how and why complaints end up *not* being substantiated (*see id.* at 98 [noting that, of 4,000 CCRB complaints alleging racial profiling, "zero" were substantiated], 100 ["Now they're unsubstantiated, but isn't it relevant that there's a pattern here?"]).

Given that officer names in complaint records are subject to disclosure, FOIL requires that Respondent provide them unless it can demonstrate a specific exemption justifies their withholding (*see Gould v New York City Police Dept.*, 89 NY2d 267, 274-75 [1996] [stating that "the burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption"]). Respondent cannot do so here. The only justification Respondent offers for redacting officer names is the personal privacy exemption,[3] N.Y. Pub. Off. L. § 87(2)(b), which requires disclosure unless it "would constitute an unwarranted invasion of personal privacy" (*see* N.Y. Pub. Off. L. § 87[2][b]). As a preliminary matter, POL § 87(2)(b) refers to eight categories that are *per se* unwarranted invasions of personal privacy, none of which are at issue here (*see* N.Y. Pub. Off. L. § 89[2]). Notably, the Court of Appeals has made clear that this exemption is to be narrowly

[3] Respondent raised the personal privacy exemption only with respect to Section D(5) of the Request. It did not assert this exemption with respect to any other portion of the Request.

interpreted (*see Washington Post Co. v New York State Ins Dept.*, 61 NY2d 557, 564 [1984] [holding that "FOIL is generally liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government."]).

Because officer names in complaint records do not fall under any of the eight categories specifically enumerated in N.Y. Pub. Off. L. § 87(2)(b), Respondent has the burden to demonstrate that disclosing them "would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" (*see Beyah v Goord*, 309 AD2d 1049, 1050 [3d Dept 2003]), and that the privacy interests outweigh the public interest in disclosure (*see Matter of Dobranski v Houper*, 154 A.D.2d 736, 737 [3d Dept 1989]; *see also Matter of Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d 129, 134-35 [3d Dept 2021] [stating that agencies asserting the personal privacy exemption must show that the privacy interests outweigh the public interest in disclosure]). Respondent cannot demonstrate either.

Here, the personal privacy exemption does not justify redacting officer names on a document that merely lists the case number, the category of allegation, and the disposition (*see* Exhibit Q). Disclosing officer names in relation to this general information is in no way "offensive and objectionable," and for that reason alone Respondent must disclose the officer names.

Additionally, the personal privacy exemption does not justify withholding officer names, because the public interest in disclosure far outweighs any privacy interests. When considering the privacy interests at stake, "it is clear that public officers and employees enjoy a lesser degree of privacy than others because those individuals are required to be more accountable than others" (*see* FOIL AO 19771 [May 7, 2020]). It is a "general rule" that "records that are relevant to the duties of [public officers] are available [for disclosure]" (*see id.*). Particularly, "*where records relate to performance of public duties, no [personal] privacy right exists*" (*see Police Benev. Ass'n*

v City of Schenectady PBA, 2020 WL 7978093 at *5-6 [Sup Ct, Schenectady County Dec. 29, 2020] [emphasis added] [Ordering the disclosure of unsubstantiated complaints associated with Schenectady's police officers, noting that "[i]n the balance between the public's right of access and the impact of disclosure upon the officer . . . the latter (the impact upon the officer) must bow to the former (the public's right of access)"]).

Any personal privacy interests at stake in the redacted spreadsheet are minimal. The spreadsheet contains personal information regarding complaints about police officers' performance of *public* duties, and as such, the *personal* privacy interests in the Records are limited at best (*see id).* ["[W]here records relate to performance of public duties, no privacy right exists. It may well be true that a public employee (including a police officer) . . . 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."]). Furthermore, the spreadsheet to which Respondent applied these improper redactions contains no personal information—no zip codes, no phone numbers, no addresses (*see* Exhibit Q). The spreadsheet merely lists case numbers, categories of allegations, officer names, and dispositions.

On the other hand, the public interest in disclosure of officer names is significant. As New York courts acknowledge, "the underlying purpose of FOIL [is] to promote transparency in governmental operations so that the process of governmental decision-making is on public display and governmental actions can be more readily scrutinized" (*see Matter of Suhr*, 193 AD3d at 135). More specifically, the public has a significant interest in the identification of officers against whom complaints—substantiated or not—were lodged. This interest is evidenced by the Legislature's purpose in repealing Civil Rights Law § 50-a (*see* Exhibit W at 4 [Sponsoring Memorandum to

the bill repealing Civil Rights Law § 50-a] [stating the importance of the public's ability to access "records of complaints or findings of law enforcement misconduct" and "histories of misconduct complaints"]), by legislators' repeated references to the large number of complaints that go "unsubstantiated" (*see* Exhibit X at 98, 100 ["[T]hroughout history, crimes against people of color have been unsubstantiated."]), and by their acknowledgement that the actions of law enforcement officials in particular are of immense public interest because of the power they hold (*see id.* at 99 ["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."]).

The majority of New York courts that have considered the issue have agreed that the personal privacy exemption does not shield officer names from the public eye merely because the complaint against that officer resulted in an unsubstantiated disposition. In *NYCLU v New York City Dep't of Correction*, for example, the court comprehensively rejected the argument that the privacy exemption shields the disclosure of unsubstantiated complaints, and it ordered the production of multiple spreadsheets similar to the ones at issue here including those columns that include the officers' names (*see* 2022 WL 1156208, at *2.) The court explained that "if the legislature's intent was to shield unsubstantiated records it could have specified as such . . . the Legislature made clear that [unsubstantiated records] are well within the scope of the law" and "are required to be disclosed" (*see id.* at *2.) Similarly, in *Schenectady*, the court held that "where counselling pertains to job performance, or allegations related to public duty, such records are publicly accessible, via FOIL request, regardless of reputational injury or validity," (2020 WL 7978093 at *13); *see also Rickner PLLC v City of New York*, 2022 WL 1664298, at *2 [Sup Ct, NY County May 25, 2022] ["[I]f the legislature's intent was to shield unsubstantiated [disciplinary] records it could have specified as such."]; *Zhang v City of New York*, 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 [FOIL] requests"], *aff'd*, 198 AD3d 504, 504 [1st Dept. 2021] [unanimously affirming]; *People v Herrera*, 2021 WL 1247418, at *5 [Nassau Dist Ct Apr. 5, 2021] [declining to limit production to only "substantiated" records]; *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."]; *Buffalo Police Benev. Assn. v Brown*, 69 Misc 3d 998, 1004 [Sup Ct, Erie County 2020] [holding that "a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated' " is a "drastic" and "inappropriate" remedy]; *People v Perez*, 71 Misc 3d 1214(A), *4 [Crim Ct, Bronx County 2021] [holding that the repeal of Section 50-a requires "disclosing both substantiated and unsubstantiated records"]; *NYCLU v Nassau County*, Index No. 612605/2021, at *1 [Sup Ct, Nassau County Apr. 12, 2022] [ordering release of requested "Disciplinary Records" and "Civilian Complaints" regardless of disposition] (*see* exhibit Y); *Uniformed Fire Officers Assn. v de Blasio*, 846 Fed Appx 25, 31 [2d Cir 2021] [rejecting police union's privacy argument]; *Fowler-Washington v City of New York*, 2020 WL 5893817, at *3 [US Dist Ct, EDNY Oct. 5, 2020] ["[B]y repealing Section 50-a, the State of New York has legislatively required that police officers' personnel records should be available to the public," including "unsubstantiated, exonerated, and unfounded allegations."]). This Court should do the same.

Accordingly, the personal privacy exemption does not apply and the unredacted records responsive to Section D(5) of the Request must be disclosed.

IV. THE NYCLU IS ENTITLED TO ATTORNEYS' FEES

If this Court rules in favor of the NYCLU on any portion of its petition, the NYCLU requests the opportunity to brief the issue of attorneys' fees. Courts are required to assess attorneys' fees and costs where (1) the agency had "no reasonable basis for denying access" to the

records in dispute and (2) a party has "substantially prevailed" (*see* Public Officers Law § 89 [4][c]), and courts also have discretion to grant fees when a party has "substantially prevailed" and the "agency failed to respond to a request or appeal within the statutory time" (N.Y. Pub. Off. L. § 89 [4][c]). The NYCLU respectfully submits that, if the Court orders Respondent to produce responsive documents, it will have met the elements for both mandatory and discretionary fees, and further briefing on the issue will be appropriate at that time.

CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that the Court order Respondent to produce promptly all the records at issue, and to pay reasonable attorneys' fees and costs associated with this litigation.

Dated: New York, New York
July 1, 2022

By: */s/*Jamie L. Wine

Jamie L. Wine
Lawrence E. Buterman
Jaclyn D. Newman
Ben N. Herrington-Gilmore
Margaret Babad
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Telephone: (212) 906-1200

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
Robert Hodgson
Lisa Laplace
125 Broad Street, 19th Floor
New York, NY 10004
Telephone: (212) 607-3300

Counsel for Petitioner the New York Civil Liberties Union

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-B

I, Jamie Wine, 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 in 22 NYCRR § 202.8-b, because it contains 4809 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 Memorandum.

Dated: New York, New York
July 1, 2022

*/s/*Jamie L. Wine
Jamie L. Wine