SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of NEW YORK CIVIL LIBERTIES UNION, Petitioner, - against - SUFFOLK COUNTY and SUFFOLK COUNTY POLICE DEPARTMENT, Respondents. For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules	Index No. _____ IAS Part ____ **MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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I. PRELIMINARY STATEMENT

Following the 2020 repeal of section 50-a of the Civil Rights Law (the "50-a Repeal Law" or "Repeal"), the New York Civil Liberties Union (the "NYCLU") made a Freedom of Information Law ("FOIL") request (the "Request") for disciplinary and other police records maintained by the Suffolk County Police Department (the "SCPD"). In response, the SCPD refused to produce any part of any complaint record in which the SCPD did not impose discipline (the "Withheld Records"). Furthermore, while the SCPD produced a limited number of records where discipline had been imposed, it applied overbroad and unexplained redactions that obscure the contents of the documents (the "Redacted Records"). The NYCLU appealed both of these issues to the County of Suffolk ("Suffolk County" and together with the SCPD, "Respondents"), but Suffolk County denied the appeal. Having exhausted its administrative remedies, the NYCLU now challenges the Respondents' determination on these two issues.

On the first issue, FOIL does not permit Respondents' blanket denial as to the Withheld Records. Their invocation of FOIL's limited "unwarranted-invasion-of-privacy" exemption to categorically withhold every portion of every record the SCPD labels "unsubstantiated" cannot be squared with the plain text of the amended FOIL, its legislative history, and with binding precedent mandating targeted *redaction* instead of blanket withholding to address any legitimate privacy concerns. The authorities Respondents cite are all inapposite and in fact undermine their argument, while the public's interest in these documents weighs strongly in favor of disclosure. Finally, Respondents have failed to provide the particularized and specific justification for each of their proposed withholdings and redactions. They must therefore be required to produce the Withheld Records with the limited redactions sanctioned by FOIL.

On the second issue, Respondents' reasoning also fails—or more precisely, is absent—when it comes to the Redacted Records. Respondents have not justified their redactions as required

by the statute. They should therefore be compelled to take the routine step of explaining the basis for specific redactions—rather than the blanket approach they elected to employ—or submit those documents for an in-camera review.

Finally, the determinations of Respondents as to these two issues are without reasonable basis. Accordingly, the NYCLU requests that the Court award reasonable attorneys' fees and costs associated with this litigation.

II. FACTUAL BACKGROUND

On September 15, 2020, the NYCLU submitted its FOIL request to the SCPD for the disclosure of certain disciplinary and other police records, the majority of which are not at issue in this proceeding. (Ex. C.[1]) Between the time of the Request and the relevant production on October 15, 2021, the parties had come to an understanding that the SCPD would produce documents on a rolling basis. (Ex. F at 1-2 (discussing the delays in production, initial administrative appeal, and subsequent agreement for rolling productions).)

On October 15, 2021, the SCPD attached a letter to a production of redacted disciplinary records that formally denied the NYCLU's request in part. (Ex. D.) The letter characterized all disciplinary records responsive to the NYCLU's request that did not result in discipline as containing allegations of misconduct that are "Unsubstantiated," "Unfounded," or "Exonerated," and it argued that production of any portion of any of these records would *per se* constitute "an unwarranted invasion of person privacy." (*Id.*) On November 12, 2021, the NYCLU timely appealed the SCPD's partial denial to the Suffolk County FOIL Appeal Officer. (Ex. F.) On November 30, 2021, the FOIL Appeal Officer denied the NYCLU's appeal, reasoning that "[d]isclosure of the records…of unsubstantiated matters, and of records that were provided in an

[1] All exhibits referenced herein are attached to the Affirmation of Michelle Six.

un-redacted instead of redacted form would constitute an 'unwarranted invasion of personal privacy' within the meaning of Public Officers Law § 87(2)(b)." (Ex. G.) The Appeals Officer did not explain how unsubstantiated matters would constitute an "unwarranted invasion of personal privacy," and did not explain how or why they could not be redacted to address any genuine privacy concerns. (*Id.*) Furthermore, she offered a grab-bag of reasons for the Redacted Records—that certain records contained "medical information of a private nature concerning police officers," information of "private individuals who were victims of crimes or otherwise injured parties," and "identities, addresses, dates of birth or other private information of witnesses to crimes"—but demurred to explain which reasons supported which redactions, even in outline form.

On March 8, 2022 the NYCLU received a letter from the SCPD asking for the opportunity to "rectify anything that remains outstanding without legal interaction, as it is truly my goal to finalize and fully satisfy your request." (Ex. H.) A meet-and-confer between the parties created hope that the parties might be able to resolve certain disputes without resort to litigation, and the parties signed a tolling agreement on March 30, 2022, (Ex. I), and have since agreed on several extensions. However, after nearly six months of additional time, little progress was made on producing the documents that the NYCLU is entitled to under FOIL. The NYCLU informed Respondents that it would not agree to any additional extensions of time and filed its timely Article 78 proceeding.

III. ARGUMENT

Pursuant to CPLR 7803 [3], Article 78 relief should be granted whenever an agency determination "was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." Under FOIL, "all records of an agency are presumptively available for public inspection" except as exempted by the statute, and those

"statutory exemptions are narrowly interpreted." (*M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.*, 62 NY2d 75, 79–80 [1984].) The standard of review of an Article 78 proceeding challenging an agency's denial of a FOIL request is therefore more stringent than the general standard applicable to most Article 78 petitions. (*Riverkeeper, Inc. v Port Auth. of New York and New Jersey*, 66 Misc 3d 250, 254 [Sup Ct, NY County 2019].) That is, a court must determine whether the agency's determination "was affected by an error of law." (*Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York*, 87 AD3d 506, 507 [1st Dept 2011].) Here, for all the reasons discussed below, they were.

A. Respondents May Not Withhold Every Part of Every Misconduct Record That Did Not Result in Discipline.

1. The Text of the 50-a Repeal Law Precludes a Categorical Denial of Disciplinary Records That Have Not Resulted in Discipline.

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature." (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] (internal quotes omitted).) "[T]he plain language of the statute…is the clearest indicator of legislative intent." (*T-Mobile Ne., LLC v DeBellis*, 32 NY3d 594, 607 [2018].) Here, the Respondents' *categorical* denial of the NYCLU's Request for the Withheld Records cannot be squared with the plain language of the FOIL provisions in the New York Public Officers Law ("POL") as amended in the repeal of Section 50-a.

In repealing Section 50-a, the New York Legislature added a subdivision to Section 87 of the Public Officers Law:

> 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 information specified in subdivision two-b of section eighty-nine of this article ***prior to disclosing such record*** under this article.
>
> (POL § 87 [4-a] (emphasis added).)

The Legislature then defined "[l]aw enforcement disciplinary records" in Section 86 (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;
> … (d) [and] the ***disposition*** of any disciplinary proceeding ….
>
> (POL § 86 [6] (emphasis added).)

"Law enforcement disciplinary proceeding" was in turn defined by the Legislature in Section 86 (7):

> "Law enforcement disciplinary proceeding" means ***the commencement of any investigation*** and any subsequent hearing ***or*** disciplinary action conducted by a law enforcement agency.
>
> (POL § 86 [7] (emphasis added).)

With these amendments to the FOIL provisions, there is now (1) an explicit requirement to produce "[l]aw enforcement disciplinary records"—with the necessary redactions; (2) a definition of "law enforcement disciplinary records" that includes "complaints, allegations and charges" against an officer that were created in furtherance of a law enforcement disciplinary proceeding, as well as any "disposition" of that proceeding; and (3) a definition that a "law enforcement disciplinary proceeding" includes the "commencement of any investigation" as well as any subsequent hearing *or* disciplinary action. Thus, a complaint made against a police officer that led to an investigation and an "unsubstantiated" disposition but did not result in disciplinary action constitutes a "law enforcement disciplinary record" that was created in furtherance of a "law enforcement disciplinary proceeding" under FOIL, which an agency is required to produce after applying the necessary redactions.

And the Legislature was thoughtful about what those necessary redactions entailed. To address numerous privacy concerns, the Legislature added a detailed scheme mandating the *redaction* of certain sensitive information within law enforcement disciplinary records, such as

officers' addresses, phone numbers, and medical histories, (POL § 89 [2-b]), and permitting the redaction of "technical infractions," (POL § 89 [2-c]). But absent from this detailed scheme is a carve-out for complaints that are deemed "unsubstantiated" or otherwise do not result in discipline, which, as described above, are built into the very *definition* of a law enforcement disciplinary record. Accordingly, Respondents' position—that they can categorically deny access to every part of every record associated with "unsubstantiated" complaints—could not possibly prevail without rendering the Legislature's language meaningless. (*See Suarez v Williams*, 26 NY3d 440, 451 [2015] [courts must not "interpret a statute in a manner that would render it meaningless"].)

Consistent with FOIL, beyond the items covered by Sections 89 (2-b) and (2-c), Respondents could consider the redaction of specific material that would, on a case-by-case basis, otherwise constitute an unwarranted invasion of privacy under Section 87 (2) (b) (*see infra* at Section III[A][5]). But the law cannot be read to permit Respondents' blanket withholding here.

2. The Legislative History of the 50-a Repeal Law Further Confirms that Respondents May Not Categorically Withhold Complaints That Did Not Result in Discipline from Any Form of Disclosure.

The legislative history of the 50-a Repeal Law may also be utilized by the Court to ascertain the Legislature's intent. (*Int'l Union of Painters & Allied Trades v N.Y. Dept. of Labor*, 32 NY3d 198, 2019 [2018] ("[W]here the question is one of pure statutory reading and analysis…courts are free to ascertain the proper interpretation from the statutory language and legislative intent.") (quoting *Seittelman v. Sabol*, 91 NY2d 618, 625 [1998]).) Here, a review of the legislative history makes it clear that the amended FOIL cannot be read to permit Respondents' categorical withholding.[2]

[2] Other New York courts have come to the same conclusion. (*See People v Cooper*, 71 Misc 3d 559, 567 [County Ct, Erie County 2021] (requiring disclosure of disciplinary records regardless of disposition after examining the legislative history).)

In 1976, Section 50-a first came to be, in part, because the Legislature understood that FOIL, as drafted, would not provide a basis for wholesale withholding of records of dismissed disciplinary proceedings. (*See* Ex. A at 13 (Mem. of Senator Padavan and Assemblymember DeSalvio).) In the ensuing decades, New York courts understood Section 50-a to be the necessary basis for rejecting requests for production of records of all disciplinary proceedings. (*See, e.g.*, *Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 20 [1st Dept 2017] (noting that each Judicial Department before the Repeal had found civilian complaints against police officers to fall within the statutory exemption contained in Civil Rights Law § 50-a (1)); *see also Matter of Gannett Co. v James*, 86 AD2d 744, 745 [4th Dept 1982] (holding that, under 50-a, "[t]he fact that some complaints are unfounded and the officers are cleared of any wrongdoing is of no moment").) Section 50-a thus served a significant role in the overall statutory scheme: it, and it alone, blocked release of police disciplinary records that would otherwise have been released under FOIL.

Although subject to mounting criticism precisely because it was so effective in preventing the release of disciplinary records (*see New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 573 [2018, Rivera, J., dissenting]), Section 50-a remained in place until June 12, 2020, when it was repealed by the Legislature in a comprehensive effort to significantly widen disclosure of police records in general—and disciplinary records in particular—to address concern that the public had little insight into whether internal police disciplinary processes were effectively responding to unjustified use of force against civilians. (Ex. B at 8 (Mem. of Senator Jamaal Bailey) ("Police-involved killings by law enforcement officials who have had histories of misconduct complaints…have increased the need to make these records more accessible…. The

broad prohibition on disclosure created by § 50-a is therefore unnecessary, and can be repealed as contrary to public policy."))

The repeal of Section 50-a was intended to effect "not just a change in law but, rather, a change in culture." (*Schenectady Police Benevolent Assn. v City of Schenectady*, 2020 NY Slip Op 34346[U], *15 [Sup Ct, Schenectady County 2020].) Importantly, the 50-a Repeal Law did not stop with simply repealing that statutory language, but it went on to add a series of provisions to the FOIL statute that made it plain that FOIL would now cover all disciplinary records, whatever the result of the proceedings they described. (2020 NY Session Laws 780–81. *See infra,* § III.A.1.)

The debate in the Assembly and Senate centered around exactly the question presented in this case—whether the records of disciplinary proceedings in which a law enforcement agency did not impose discipline (whether "unsubstantiated," "unfounded," "exonerated," or simply uninvestigated) would also be subject to disclosure. Both supporters and detractors of the legislation agreed that the statute as passed would require those records to be disclosed. (*See, e.g.*, Ex. B at 87 (Letter from Police Benevolent Association of the City of New York, et al. on Memorandum of Opposition to Gov. Andrew Cuomo (June 5, 2020)) (stating that repeal would result in the "release of *all* complaints, even those that have not been fully investigated and substantiated and where the law enforcement officer has had a chance to be heard.").) This is consistent with the Sponsoring Memorandum to the 50-a Repeal Law, which stated that the public's inability to access "complaints *or* findings of law enforcement misconduct" (emphasis added) was the primary purpose behind Section 50-a's repeal and the corresponding amendments to FOIL: "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." (*Id.* at 8 (emphasis added).)

Moreover, the Legislature was concerned by a deeply disturbing pattern in which complaints raised by persons of color were disproportionately found to be unsubstantiated. (*See id.* at 235 ("MR. O'DONNELL: "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.").) The 50-a Repeal Law sought not merely to publicly disclose those officers who had been properly disciplined but to provide the public with the information necessary to review the disciplinary process itself, relying on transparency to root out potentially inadequate disciplinary processes.

Accordingly, in addition to the plain text of the amended statute being clear on its face, the context and legislative history of the 50-a Repeal Law are equally clear: the Legislature intended *all* disciplinary records, whether unfounded, unsubstantiated, or exonerated, be subject to release, subjected to narrow targeted redactions. To hold otherwise would be to eviscerate the Repeal.

3. The Respondents' Categorical Refusal is Also Inconsistent with Persuasive Decisions from the Appellate Division and Many Lower Courts.

The Respondents' position also cannot be squared with the first, and to date only, Appellate Division decision addressing the effect of the 50-a Repeal Law on police misconduct complaint records. In *Zhang v City of New York* (198 AD3d 504 [1st Dept 2021]),[3] in the context of a civil

[3] This is not the first time the First Department has rejected sweeping exclusions like the one proposed by the Respondents. Even *before* the passage of the 50-a Repeal Law, the First Department held in *Matter of Thomas v New York City Dept. of Educ.* (103 AD3d 495 [1st Dept 2013]) that "[t]here is no statutory blanket exemption for investigative records, even where the allegations of misconduct are 'quasi criminal' in nature or not substantiated," (*id*. at 498).

discovery dispute, the trial court held that an officer's full "personnel records from the NYPD and from the Civilian Complaint Review Board" must be disclosed, without making any exception for unsubstantiated, unfounded, or open investigations, noting that "[i]n light of the repeal of Civil Rights Law 50-a, these records are not only discoverable in court proceedings, but are subject to Freedom of Information Law Requests under Public Officers Law sections 84–90." (*Zhang v City of New York*, 2021 NY Slip Op 32257[U], *1 [Sup Ct, NY County 2020].) The First Department unanimously affirmed. (*Zhang*, 198 AD3d at 504.)

Multiple trial courts, considering versions of this exact question, have come to the same conclusion and squarely rejected the privacy argument Respondents put forth. The analysis of Supreme Court, Schenectady County, is particularly instructive:

> [T]here 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 [2005]).

(Schenectady Police Benevolent Assn. v City of Schenectady, 2020 NY Slip Op 34346[U], *4 [Sup Ct, Schenectady County 2020] (cleaned up).) The *Schenectady* court's analysis is consistent with a long string of recent cases. (*See NYCLU v N.Y.C. Dept. of Correction*, 2022 NY Slip Op 31113[U], *3 [Sup Ct, NY County 2022] (ordering disclosure of complaint records with limited redactions regardless of disposition pursuant to FOIL, rejecting privacy exemption argument, and finding "the Legislature made it clear that . . . records that are required to be disclosed are . . . not limited to where there is a finding that leads to discipline"); *Rickner PLLC v The City of New York*, 2022 NY Slip Op 31694[U], *2 [Sup Ct, NY County 2022] [ordering disclosure with limited redactions in a FOIL case seeking police misconduct records and noting, "[i]f the legislature's

intent was to shield unsubstantiated [disciplinary] records it could have specified as such"]; *People v Herrera*, 71 Misc 3d 1205[A], 2021 NY Slip Op 50280[U] [Dist Ct, Nassau County 2021] (the legislature "[did] not distinguish between unfounded, exonerated, substantiated or unsubstantiated claims" as the "legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available"); *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."]; *People v Cooper*, 71 Misc 3d 559, 2021 NY Slip Op 21039 [County Ct, Erie County 2021] ["The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available."]; *cf. Uniformed Fire Officers Assn. v De Blasio*, 846 Fed Appx 25, 32 [2d Cir 2021] (rejecting officers' "unwarranted invasion of privacy" argument and affirming release of NYPD complaint records regardless of disposition); *Fowler-Washington v City of New York*, 2020 WL 5893817, *3, 2020 US Dist. LEXIS 184364, *8 [ED NY, Oct. 5, 2020, No. 19-CV-6590(KAM)(JO)] ["[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."]; *Buffalo Police Benevolent Assn., Inc. 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).) The reasoning of these courts is sound and should be particularly persuasive here.

4. The Respondents' Categorical Refusal Is Inconsistent with the Advisory Opinions of the Committee on Open Government on Which It Relies.

The SCPD references two Advisory Opinions by the New York Committee on Open Government ("COOG") in justifying its denial: FOIL Advisory Opinions 19775 and 19785, issued in July 2020 and March 2021, respectively.[4] The SCPD's reliance is misplaced for two reasons.

First, these COOG opinions ***do not support*** the Respondents' categorical denial of the records. The March 2021 opinion which the Respondents cite to instructs agencies to *not* engage in a blanket denial of unsubstantiated disciplinary records on the basis of privacy:

> [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, a law enforcement agency must review all records of complaints, ***whether or not substantiated***, to determine rights of access.
>
> (Comm. on Open Govt. FOIL AO 19785 (Mar. 19, 2021) (emphasis added));

It cannot be that COOG believes each police department must review each complaint, substantiated or not, only to categorically deny them.

This position is confirmed by a later COOG opinion, not cited by the Respondents, affirming that there is an obligation under FOIL for "an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder." (COOG FOIL AO 19805 (Apr. 30, 2021).[5]) These 2021 opinions further clarify that they are wholly consistent with COOG's previous opinion, confirming that AO

[4] Comm. on Open Govt. FOIL AO 19775 [July 27, 2020], https://docs.dos.ny.gov/coog/ftext/f19775.html [last accessed Sept. 24, 2022]; Comm. on Open Govt. FOIL AO 19785 [Mar. 19, 2021], https://docs.dos.ny.gov/coog/ftext/f19785.html [last accessed Sept. 24, 2022].

[5] Comm. on Open Govt. FOIL AO 19805 (Apr. 30, 2021) https://docsopengovernment.dos.ny.gov/coog/ftext/f19805.pdf [last accessed Sept. 24, 2022].

19775 never stood for the sweeping proposition that "unsubstantiated," "unfounded," or "exonerated" disciplinary records may be entirely withheld on privacy grounds. (*Id.)*

Second, the Court of Appeals has held that COOG's advisory opinions are "neither binding . . . nor entitled to greater deference in an article 78 proceeding than is the construction of the agency" (*Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994]), and the Appellate Division has in fact rejected an older COOG opinion that purported to justify the blanket withholding of "unsubstantiated" records in the education context (*see Matter of Thomas v. New York City Dept. of Educ.*, 103 AD3d 495, 498 [1st Dept 2013]). For all these reasons, nothing in Respondents' cited COOG opinions weighs in favor of endorsing its categorical withholding.

5. Both the Statutory Framework and Balancing of Privacy Concerns against the Public's Interest Support the NYCLU's Request.

Even if the statutory text did not outright reject the Respondents' position, well-established principles controlling the application of the general privacy exemption in FOIL lead to the same result. The relevant balancing test weighs strongly in favor of public disclosure of the disputed records, and, to address any legitimate privacy concerns, binding Court of Appeals case law mandates redaction instead of blanket withholding when an agency invokes Section 87 (2) (b). Here, the Respondents' categorical denial of every part of every record associated with a misconduct complaint that did not result in discipline is in direct conflict with this precedent.

FOIL permits an agency to deny access to records "or portions thereof" that, "if disclosed[,] would constitute an unwarranted invasion of personal privacy." (POL § 87 [2] [b].) FOIL enumerates several specific categories of records that constitute "[a]n unwarranted invasion of personal privacy," which include "employment, medical, or credit histories," "medical or personal records of a client or patient in a medical facility," "lists of names and addresses . . . used for solicitation or fund-raising purposes," and "information of a personal nature reported in confidence

to an agency and not relevant to the ordinary work of such agency" (*id.* § 89 [2] [b]), and beyond that, other sensitive material from such records may be redacted as an "unwarranted invasion of privacy" on a case-by-case basis—but an agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure" pursuant the privacy exemption. (*Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46, [2011].)

Furthermore, as New York courts have repeatedly made clear, "[t]he exemptions [under FOIL] are narrowly construed, with the burden on [the agency] to demonstrate that an exemption applies." (*Union Carbide Corp. v New York State Dept. of Envt. Conservation*, 189 AD3d 1805, 1808 [3d Dept 2020] (internal quotes omitted); *see also Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 570 [1986] (same).) To invoke an exemption under FOIL, the agency must also "articulate particularized and specific justification for not disclosing requested documents." (*Union Carbide*, 189 AD3d at 1809.) "In the absence of proof establishing the applicability of one of these specifically-enumerated categories" (*Suhr v. New York State Dept. of Civ. Serv.*, 193 AD3d 129, 134 [3d Dept 2021]), the Respondents (or a reviewing court) would still be obliged to "balanc[e] the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 485 [2005]).

Here, not only did the Respondents fail to articulate any "particularized and specific justifications" that the withheld records categorically and as a blanket matter constitute an "unwarranted invasion of privacy," but also there are large swaths of withheld material that could not plausibly implicate anyone's privacy interest while being of great interest to the public. For example, material within these records showing the number of allegations, their dispositions, the

general category of alleged misconduct, and the length of the investigative process has all been withheld and, standing alone, does not implicate any officers' privacy.

More generally, the balance between privacy and public interest in these misconduct complaints overwhelmingly tilts decisively in favor of disclosure. The public interest in the disclosure of complaints that—for many different reasons, including possible lackluster investigations or faulty oversight systems—did not result in the SCPD imposing discipline, is clear. It was set out by the sponsors of the 50-a Repeal Law: it is the only means by which the public can scrutinize the operation of the disciplinary system *as a whole*. This is especially crucial as police officers often police themselves, deciding (particularly at the initial stages) whether a complaint is substantiated or unfounded.

Indeed, in addition to the courts noted above that have addressed the impact of the 50-a Repeal Law directly, courts across the state have found that, for public employees, the "release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy." (*Mulgrew v Bd. of Educ. of the City Sch. Dist. of the City of New York*, 31 Misc 3d 296, 302 [Sup Ct, NY County], *affd* 87 AD3d 506 [1st Dept 2011]; *see also Matter of 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"); *cf. Capital Newspapers*, 67 NY2d 562 at 570 (authorizing release of report of sick days taken by individual police officer).)

The Appellate Division has already reached much the same conclusion. In a 2011 case, the Third Department rejected an attempt to invoke the privacy exemption to prevent disclosing the identities of dismissed traffic ticket recipients in the context of a FOIL request to determine

whether politically connected individuals were having tickets dismissed. While noting that "recipients of the dismissed tickets may 'be offended' by the disclosure of their identities," the Court held this inadequate to warrant application of the privacy exemption to prevent disclosure or redact their names. (*Matter of Hearst Corp. v City of Albany*, 88 AD3d 1130, 1132 [3d Dept 2011].) "Far outweighing that personal umbrage, however, is the public's interest in the circumstances surrounding respondent's administrative dismissal of tens of thousands of parking tickets, which necessarily requires the disclosure of the recipients' identities given the allegations that respondent afforded preferential treatment in dismissing tickets issued to certain classes of individuals." (*Id.* at 1132–33.) Here, the public has an even stronger interest in determining whether public officers with the power to deprive people of their liberty, armed with lethal weapons, are being disciplined when they commit misconduct, as well as whether the disciplinary process is infected by deficiencies or discrimination. For these reasons, FOIL does not permit the SCPD's categorical denial of access to every part of every record associated with a complaint where it did not impose discipline.

6. The SCPD Has Failed to Provide a Particularized and Specific Justification for Denying Access.

To be clear, the Respondents provide no information, much less "particularized and specific" information, as to how they concluded they could categorically withhold every portion of every misconduct complaint that has not resulted in discipline. (Ex. D (stating only that a review of the "unsubstantiated" records "indicates that disclosure would constitute an unwarranted invasion of personal privacy").) This is fatal to its effort to withhold the records, as the burden rests on the agency seeking to withhold documents to establish that the disclosure of the requested records constitutes an unwarranted invasion of personal privacy. (POL §§ 87 [2] [b]; 89 [4] [b]). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient;

evidentiary support is needed." (*Empire Ctr. for Pub. Policy v New York City Police Pension Fund*, 65 Misc 3d 636, 640 [Sup Ct, NY County 2019]; *see also Matter of Laveck v Vil. Bd. of Trustees of the Vil. of Lansing*, 145 AD3d 1168, 1170 [3d Dept 2016] (rejecting agency's attempted assertion of privacy exception when agency did "not articulate[] the implicated privacy interests, if any, that are to be weighed against the community's interest in [disclosure]").)

In response to a written request for records, "an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search." (*Legal Aid Socy. v. New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1121 [3d Dept 2013] (quotation omitted); *see* POL § 89 [3] [a]).) But the SCPD's response communicating its categorical withholding provides no explanation for how any specific FOIL exemption applies. Instead, the SCPD's entire rationale is as follows:

> Portions of your request involving disciplinary records in which the allegations of misconduct have been classified as "Unsubstantiated," "Unfounded," or "Exonerated" are hereby denied pursuant to Public Officers Law Section 87 2(b) [sic] as a review of such records indicates that disclosure would constitute an unwarranted invasion of personal privacy (*please see Committee on Open Government, FOIL Advisory Opinion 19775 (7/27/2020) and FOIL Advisory Opinion 19785 (3/19/2021)*).

This purported explanation is merely a citation to Public Officers Law § 87 (b) (2) and a reiteration of that exemption's text (that disclosure would constitute an "unwarranted invasion of personal privacy"). This kind of conclusory assertion is a far cry from the "particularized and specific justification for denying access" (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]), that FOIL requires (*see Empire Ctr.*, 65 Misc 3d at 640).

In fact, the Respondents have done precisely what the Court of Appeals has forbidden: merely recited "sections, subdivisions and subparagraphs of the applicable statute and conclusory

characterizations of the records sought to be withheld." (*Church of Scientology of New York v State of New York*, 46 NY2d 906, 907–08 [1979].) For this reason alone, the SCPD's invocation of the exception fails. (*See Matter of Allen Group (Allen Testproducts Div.) v New York State Dept. of Motor Vehicles*, 147 AD2d 856, 857 [3d Dept 1989] (holding agency's response consisting of "general denials" and conclusory allegations "was totally inadequate to permit the conclusion that respondents sustained their burden of showing that the requested material fell within a statutory exemption").)

The closest the Respondents' denial comes to a reasoned explanation for its denial under the personal privacy exemption is its citation to COOG FOIL Advisory Opinions 19775 and 19785. But, as described in the previous section (*see* Section III.A.4 *supra)*, those opinions neither endorse nor allow the type of categorical denial Respondents imposed. The Respondents' invocation of the exemption necessarily fails for want of providing the requisite particularized and specific justification it is obliged to assert under FOIL.

B. Respondents Violated FOIL by Redacting Critical Information and Failing to Properly Justify Its Redactions in Its Production of a Limited Number of Substantiated Disciplinary Records.

Separate and apart from its categorical withholding of every portion of every complaint that did not result in discipline, the Respondents have improperly redacted what documents they have produced such that it is nearly impossible to discern who was disciplined for what, by whom, with what result. (*See, e.g.,* Exs. E-21, E-35.) These overbroad and unfettered redactions, made without justification, violate FOIL.

The redaction of a document, no less than the withholding of a document, requires particularized and specific justification. (*See Matter of Villalobos v New York City Fire Dept.*, 130 AD3d 935, 937 [2d Dept 2015]; *see generally Matter of New York Times Co. v District Attorney of Kings County*, 179 AD3d 115, 125 [2d Dept 2019].) Yet the Respondents provide no

justification for the redactions at all: as with the Withheld Records, the SCPD simply asserts that "[r]edactions have been effected to the attached / enclosed records pursuant to Public Officers Law § 87(2)(b) (disclosure would constitute an unwarranted invasion of personal privacy) and [Public Officers Law §§] 89(2-b)(a) and 89(2-b)."[6] Suffolk County offers near-verbatim quotes of the statutory exemptions, but no further explanation is given for *why* the redacted information fell into any of these exemptions. As described in more detail above, the Respondents' failure to provide specific explanations for the redactions at issue renders the redactions unlawful under FOIL.

Unfortunately, without any more specific description of what material was redacted or why, the NYCLU cannot make a specific challenge the appropriateness of any particular redactions. If the Respondents redacted any part of the Redacted Records because they relate to unsubstantiated claims, these redactions are inappropriate for the reasons stated in the previous sections of this memorandum. If the Respondents made these overbroad redactions for a separate reason, they are inappropriate to the extent that the Respondents failed to provide a particularized and specific justification for not disclosing the information.

At this stage, the NYCLU submits that Respondents should provide a log (or a markup on the documents themselves) describing generally, for each redacted document, what information is redacted, and why the Respondents contend that the redacted information falls within a FOIL exemption. (*See, e.g.*, *Forsyth v City of Rochester*, 129 NYS3d 220, 222 [4th Dept 2020]; *Kirsch v Bd. of Educ. of Williamsville Cent. Sch. Dist.*, 57 NYS3d 870, 872 [4th Dept 2017].) Only with

[6] Most relevant here, Public Officers Law § 89 (2-b) provides that law enforcement disciplinary records must contain redactions of (a) medical history of law enforcement employees; (b) home addresses, telephone numbers, and email addresses of law enforcement employees; (c) any social security numbers; and (d) disclosure of law enforcement employee use of employee assistance or mental health programs.

such additional specificity will it be possible for the NYCLU to sensibly determine whether and to what extent specific redactions should or should not be challenged.

Alternatively, "if the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material." (*New York Times Co. v Dist. Attorney of Kings County*, 179 AD3d 115, 125 [2d Dept 2019] (cleaned up).)

C. The NYCLU is Entitled to Reasonable Attorneys' Fees and Costs Associated with this Litigation

Because Respondents have refused to provide the Withheld Records or revise the Redacted Records, and have 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* POL § 89 [4] [c].) 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. De Blasio*, 161 AD3d 120, 126 [1st Dept 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*, 161 AD3d at 127.)

Here, Respondents have ignored the plain textual meaning and legislative history of the Repeal, acted contrary to well-reasoned opinions in the Appellate Division and lower courts, went

against the COOG opinions which they themselves rely upon, improperly invoked "an unwarranted invasion of person privacy" against the strong public interest in the requested records, and overall have failed to provide a particularized and specific justification for not producing the Withheld Records or revising the Redacted Records. Because Respondents' determinations were without reasonable basis, the NYCLU is entitled to the costs and fees associated with this litigation.

IV. CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that the Court order the Respondents to (1) produce the Withheld Records subject to only the narrow redactions permitted by FOIL; (2) to reproduce the Redacted Records with only the narrow redactions permitted by FOIL or, in the alternative, conduct an *in camera* review of the Redacted Records; (3) pay reasonable attorneys' fees and costs associated with this litigation.

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New York, New York

Respectfully submitted,

/s/ Michelle Six

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Michelle Six, 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 6,514 words, excluding the words in 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
September 25, 2022

/s/ Michelle Six
Michelle Six