To Be Argued By:
ROBERT HODGSON
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

—against—

NASSAU COUNTY and NASSAU COUNTY POLICE DEPARTMENT,

Respondents-Respondents.

DOCKET NO. 2022-04443

BRIEF FOR PETITIONER-APPELLANT

ERROL TAYLOR
ATARA MILLER
ANDREW WELLIN
SAMANTHA LOVIN
GIO CRIVELLO
MONICA GROVER
LYNDSEY PERE
MILBANK LLP
55 Hudson Yards
New York, New York 10001
(212) 530-5000
etaylor@milbank.com
amiller@milbank.com
awellin@milbank.com
slovin@milbank.com
gcrivello@milbank.com
mgrover@milbank.com
lpere@milbank.com

REBECCA OLSON
MEREDITH BRUMFIELD
MILBANK LLP
1850 K Street NW, Suite 1100
Washington, DC 20006
(202) 835-7500
rolson@milbank.com
mbrumfield@milbank.com

ROBERT HODGSON
LISA LAPLACE
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
rhodgson@nyclu.org
llaplace@nyclu.org

Attorneys for Petitioner-Appellant

Nassau County Clerk's Index No. 612605/21

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QUESTIONS PRESENTED

1. Can an agency withhold records pursuant to a Freedom of Information Law ("FOIL") exemption that no longer exists—because it was eliminated by the Civil Rights Law Section 50-a ("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-Respondents Nassau County and Nassau County Police Department (hereinafter "Nassau" or the "NCPD") may continue to rely on Section 50-a, which has been repealed, to deny access to records created before June 12, 2020.

2. Is the Petitioner-Appellant (hereinafter the "NYCLU" or "Appellant") entitled to an award of attorneys' fees and costs?

   The NYCLU is entitled to attorneys' fees and costs.

I. PRELIMINARY STATEMENT

This Freedom of Information Law case challenges Nassau'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 (i) violate the plain text of the statute; (ii) frustrate its purpose; and (iii) are precluded by binding case law. The lower court's brief decision allowing Nassau to withhold misconduct records created prior to June 2020 was an error of law and should be reversed.

Regarding what Nassau inaccurately characterizes as a "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 two independent reasons. First, 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***. Nassau therefore cannot rely on its application to deny access to any records currently in its possession and, as multiple persuasive authorities have confirmed, the "retroactivity" of Section 50-a's repeal is not at issue here. Second, even if a retroactivity analysis were appropriate, the Legislature plainly intended for Section 50-a's repeal to serve a remedial purpose

and did not intend for it to continue shielding every police misconduct record already in existence on the date of the repeal's passage.

For all the reasons stated above, the NYCLU respectfully requests that the Court (i) reverse the lower court's decision to deny Appellant access to records created prior to the repeal of Section 50-a; (ii) order Nassau to produce all responsive police misconduct records, redacted as permitted by FOIL; and (iii) 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.

II. 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 NCPD on September 15, 2020 (the "Request"). The Request sought records related to the NCPD's police accountability processes, including many records that Section 50-a had previously shielded from the public. (R. at 82-89.)

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

As described in Appellant's Verified Petition, the NCPD confirmed receipt of the Request and stated that the NYCLU "should receive a response within forty-five (45) business days." (R. at 90.) The NCPD failed to respond within that time period and further failed to respond within the extended deadline of December 4, 2020. (R. at 91-92.) On December 11, 2020, the NCPD finally responded to the Request (the "December Response"). (R. at 92.)

In its December Response, the NCPD denied certain portions of the Request. (R. at 92-97.) As explained in greater detail in Appellant's Verified Petition, Appellant and the NCPD held several productive meet-and-confers, after which Appellant sent a letter to the NCPD clarifying several items in the Request, as part of Appellant's ongoing effort to work collaboratively with the NCPD in locating and identifying records. (R. at 106-111.) The NCPD responded to these efforts by delaying and failing to produce responsive records. (R. at 112-125.) Eventually, Appellant understood the NCPD's silence to be a constructive denial and on May 20, 2021, Appellant sent an administrative appeal letter to the NCPD's FOIL Appeals Officer, explaining the grounds for its appeal of the NCPD's constructive denial of the Request. (R. at 126-186.)

On June 3, 2021, the NCPD replied to Appellant's administrative appeal. (R. at 187-193.) This response supplemented the NCPD's December Response to Petitioner's Request, granting certain of Petitioner's requests but denying others. As

grounds for its denials, the NCPD cited various FOIL provisions, including Public Officers Law ("POL") Sections 87(2)(b), (e), (g), and 89(3)(a). The NCPD also constructively denied two of Petitioner's requests for statistical information related to the filing and investigation of civilian complaints against officers. The NCPD's response further stated that the NCPD refused to produce records created prior to the June 12, 2020 repeal of Section 50-a on grounds that the repeal "d[oes] not extinguish the expectation of privacy created by CRL § 50-a prior to June 12, 2020." (R. at 187.)

On October 1, 2021, Appellant timely filed an Article 78 Petition (the "Petition") in the Nassau County Supreme Court, requesting that the NCPD comply with its duty under FOIL to disclose the records Appellant sought in its FOIL request and seeking an award of reasonable attorneys' fees and costs. (R. at 8-50.) In the Petition, Appellant challenged, among other things, the NCPD's failure to provide a particularized justification for withholding the requested records and the NCPD's argument that the repeal of Section 50-a does not apply to records created before the repeal's enactment. (R. at 31-35.) The matter was fully briefed before the trial court, and on April 12, 2022, the lower court issued its decision (i) ordering the NCPD to provide complete responses regarding the requests the NYCLU specified in its administrative appeal; and (ii) denying the NYCLU's request for records "to the extent [the NYCLU] seeks certain records prior to the Legislature's repeal [of

Section 50-a]" in a single sentence, stating only that "said legislation does not set forth that said enactment was to be given retroactive effect." (R. at 4-5.)

The NYCLU now appeals from that order, seeking the production of all disciplinary records, regardless of disposition or date of creation, redacted as permitted by FOIL, on a reasonable rolling timeline, as well as reasonable attorneys' fees and costs related to this litigation.

III. STANDARDS OF REVIEW

Article 78 relief should be granted where 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 N.Y.C.*, 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 trial court *de novo*. (*See Spring*, 141 AD3d at 1151; *Barry*, 185 AD3d at 505.)

The trial court rejected the Appellant's argument that Nassau's FOIL determination was affected by errors of law. The errors of law in the trial court's analysis should be reviewed *de novo*, and for the following reasons, that portion of its decision regarding records created prior to June 2020 should be reversed.

IV. ARGUMENT

A. NASSAU 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

1. The NYCLU Does Not Seek Retroactive Application Of Any Law; Rather, It Seeks Records Currently In The NCPD's Possession That Are Not Subject To Any Existing FOIL Exemption

As an initial matter, the question presented by this appeal is not whether the repeal of Section 50-a should be "given retroactive effect" (R. at 5), but instead whether, as of the date of the NYCLU's *September 2020* Request, the NCPD 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, the NCPD 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. Retroactivity has nothing to do with the analysis.

It is axiomatic that, if an agency has responsive records in its possession at the time a FOIL request is made, those records are presumptively open to the public and must be produced unless a specific exemption applies. (*Gould v NY City Police Dept.*, 89 NY2d 267 at 274-75 [1996] [all government records are "presumptively open for public inspection [] unless they fall within one of the enumerated exemptions"].) The date of record creation is not, and has never been, relevant to the FOIL analysis. (*See* POL § 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. (S*ee* POL § 87 [McKinney's 2021] [providing history of amendments].) Under the NCPD's proposed analysis, courts would be forced to engage in the near-impossible task of applying various 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, when presented with the precise question posed by this appeal, the New York State agency tasked with furnishing "advisory guidelines" and "advisory opinions" regarding FOIL (*see* POL § 89[1][b]) agreed with the Appellant and adopted the exact reasoning outlined above. In its December 2020 *Report to the Governor & Legislature by the Committee on Open Government* (*see id.* at 7),[2] the agency considered the effect of repeal on "records created before June 12, 2020," and it confirmed that the relevant "question is not whether the amendments to FOIL concerning the disclosure of law enforcement disciplinary records have retroactive effect" but "rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request" (*id.* at 7–8). If they are, they must be disclosed, subject only to the current list of "exemptions appearing in §§ 87[2][a]-[q] of the Law." (*Id.* at 8.) This is because "it has long been understood by courts . . . that FOIL renders records 'maintained by an agency,' regardless of creation date, subject to disclosure." (*Id.* at 7.)

Courts in other states that passed strikingly similar laws—updating their freedom-of-information statute to make police misconduct records available— have also adopted the approach outlined above. In *Los Angeles Police Protective League v City of LA* ("*LAPPL*"), the court squarely rejected the same argument Nassau makes here and held

[2] Available at https://opengovernment.ny.gov/system/files/documents/2021/01/2020-annual-report.pdf (last accessed November 17, 2022).

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. 18STCPP03495, 2019 WL 1449721, at *3 [Cal Super Ct, Feb. 19, 2019] [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, 389-91 [Hawaii 1996]; *State ex rel. Beacon Journal Pub. Co. v Univ. of Akron*, 64 Ohio St2d 392, 395-96 [Ohio 1980]].)

The same analysis applies here: the NCPD 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 before June 2020 and update their responses, which is what a "retroactive application" of the law would actually require. (*See LAPPL*, 2019 WL 1449721, at *3.) The NYCLU does not seek such retroactive application—it seeks only the application of the law as effective on the date of its September 2020 FOIL request.

Finally, while no New York State appellate court has yet ruled on the substance of this issue, the only appellate decision to have considered a

"retroactivity" argument similar to Nassau's reversed a lower court ruling that mirrored the one on appeal here and ordered the documents at issue to be produced. In *New York Civil Liberties Union v City of Rochester*, the Fourth Department ruled on procedural grounds that Rochester failed to properly raise its "retroactivity" argument in the first instance (*see* --- NYS 3d ---, 2022 WL 16848106, at *1 [4th Dept 2022]) and so did not consider the merits of the argument, but it is notable that the court there did not hesitate to "grant[] those parts of the petition seeking law enforcement records dated on or before June 12, 2020" (*id.*). This Court should do the same. For this reason and all the reasons discussed above, this Court should reverse on the issue of records created before June 12, 2020.

2. A Traditional Retroactivity Analysis Would Still Require Nassau To Produce Pre-June 2020 Records Because The Legislature Intended The 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 repeal of Section 50-a serves a remedial purpose. Retroactive effect is given to remedial statutes that are "designed to correct imperfections in prior law" (*Nelson v HSBC Bank USA*, 87 AD3d 995, 998 [2d Dept 2011]), and remedial statutes "should be given retroactive effect in order to effectuate [their] beneficial purpose." (*Matter of Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122 [2001]; *see also Majewski v Broadalbin-Perth Cent.*

Sch. Dist., 91 NY2d 577, 584 [1998] [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][3] [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"].)

[3] Available at https://www.nysenate.gov/transcripts/floor-transcript-060920txt (last accessed November 17, 2022).

Two courts that have applied a "retroactivity" analysis to the repeal of Section 50-a explain persuasively why 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. v City of Schenectady*, No. 2020-1411, 2020 WL 7978093, at *6 [Sup Ct, Schenectady County 2020]); *Matter of Puig v City of Middletown*, 71 Misc3d 1098 [Sup Ct, Orange County, 2021].) In *Schenectady*, 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 [noting also as part of this analysis that the "state legislature has spoken loudly toward its stated goal" and that "strong public policy considerations serve as the foundation for the new statutory scheme"].) 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 the 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." (71 Misc3d at 1108.)

Rather than considering any of these factors, the trial court held, in a single sentence and without citation to any binding authority, that "the Legislature's repeal of [Section] 50-a and the enactment of [POL] § 86(6) . . . does not set forth that said

enactment was to be given retroactive effect." (R. at 4-5.) The court relied exclusively on an unexplained citation to McKinney's N.Y. Stat. Law § 51 *et seq*., which stands for the uncontroversial proposition that there is a general presumption against the retroactive application of laws, but which explicitly codifies an "exception to the general rule" for "remedial statutes" (*id.* § 54). As explained above, the repeal of Section 50-a was clearly intended to have remedial effect, and the lower court's failure to consider that question—or to engage in any manner in the analysis required by the authority on which it relied—constituted legal error pursuant to binding Court of Appeals case law. (*See e.g. Gleason*, 96 NY 2d at 122 ["[R]emedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" even when the "Legislature did not state [explicitly in the statutory text] that it was to have retroactive effect."].)

As a result, even if this Court were to engage in a traditional retroactivity analysis—which for all the reasons described in the previous section is both unnecessary and inapposite—it should reverse the lower court's decision. Under any proper reading of the amended FOIL, Nassau is not permitted to withhold responsive documents created prior to June 12, 2020.

B. The Lower Court Erred In Failing To Grant Appellant's Request For Attorneys' Fees And Costs

Finally, the trial court erred in failing to grant the Appellant's request for attorneys' fees and litigation costs. 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].) The Court of Appeals has held that a party "substantially prevails" when it succeeds in obtaining "both disclosure that was volunteered by the agency and disclosure that was compelled by the Supreme Court's order." (*Madeiros v New York State Educ. Dept.*, 30 NY 3d 67, 72 [2017].)

Here, in addition to the NCPD's voluntary identification of certain documents responsive to the NYCLU's Request, the trial court ordered the agency to "provide complete responses within 60 days" to the NYCLU's requests related to "Disciplinary Records; Use of Force; Field Interviews; Civilian Complaints; Internal Affairs Unit: Investigative Reports; Diversity in the Ranks; Policies; Training and Collective Bargaining Agreements" (R. at 4.) Accordingly, Appellant has already substantially prevailed within the Court of Appeals' definition of that phrase. And while the agency may have asserted a "reasonable basis" for certain limited withholdings still at issue in this appeal, it did not articulate any basis—let alone a reasonable one—for the vast majority of the denials and delays rejected by the lower court's order.

Therefore, regardless of the outcome of this appeal on the issue of pre-June 2020 materials, the NYCLU has satisfied FOIL's requirements for obtaining fees. This Court should reverse the lower court on this issue and grant the NYCLU's request for attorneys' fees and costs.

V. CONCLUSION

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

Respectfully submitted,

Dated: November 22, 2022
New York, New York

By: _____

Errol Taylor
Atara Miller
Andrew Wellin
Samantha Lovin
Gio Crivello
Monica Grover
Lyndsey Pere
MILBANK LLP
55 Hudson Yards
New York, NY 10001-2163
Telephone: (212) 530-5000
Facsimile: (212) 530-5219

Becca Olson
Meredith Brumfield
MILBANK LLP
1850 K Street NW, Suite 1100
Washington, D.C. 20006
Telephone: (202) 835-7573

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

Counsel for Petitioner-Appellant the New York Civil Liberties Union

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

—against—

NASSAU COUNTY and NASSAU COUNTY POLICE DEPARTMENT,

Respondents-Respondents.

Nassau County Clerk's Index No. 612605/21

Appellate Division Docket No. 2022-04443

1. The index number of the case is 612605/21.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, Nassau County.

4. The action was commenced on October 1, 2021 by Notice of Petition; the answer of Defendant was served on November 24, 2021.

5. The nature and object of the action is an Article 78 proceeding.

6. This appeal is from an order and decision of the Honorable Roy S. Mahon entered on May 2, 2022, which partially denied Petitioner's Article 78 Petition.

7. The appeal is on a full reproduced record.

McKinney's Consolidated Laws of New York Annotated
Civil Rights Law (Refs & Annos)
Chapter 6. Of the Consolidated Laws
Article 5. Right of Privacy (Refs & Annos)

McKinney's Civil Rights Law § 50-a

§ 50-a. Repealed by L.2020, c. 96, § 1, eff. June 12, 2020

Effective: June 12, 2020

Currentness

McKinney's Civil Rights Law § 50-a, NY CIV RTS § 50-a
Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)

McKinney's Public Officers Law § 86

§ 86. Definitions

Effective: August 8, 2022

Currentness

As used in this article, unless the context requires otherwise:

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

4. "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

(a) the complaints, allegations, and charges against an employee;

(b) the name of the employee complained of or charged;

(c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(d) the disposition of any disciplinary proceeding; and

(e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

10. "Retiree" means a former officer or employee of an agency, the state legislature, or the judiciary who was a member of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law and is receiving, or entitled to receive, a benefit from such public retirement system.

11. "Beneficiary" means a person designated by a member or retiree of a public retirement system of the state to receive retirement or death benefits following the death of the member or retiree.

Credits

(Added L.1977, c. 933, § 1. Amended L.2003, c. 403, § 2, eff. Aug. 26, 2003; L.2020, c. 96, § 2, eff. June 12, 2020; L.2022, c. 482, § 1, eff. Aug. 8, 2022.)

Notes of Decisions (151)

McKinney's Public Officers Law § 86, NY PUB OFF § 86
Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)

McKinney's Public Officers Law § 87

§ 87. Access to agency records

Effective: December 29, 2021

Currentness

1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

i. the times and places such records are available;

ii. the persons from whom such records may be obtained, and

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

(c) In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision. A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes only to the extent that disclosure would:

i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Deemed repealed Dec. 1, 2024, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(l) [Expires and deemed repealed Sept. 20, 2025, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and deemed repealed July 1, 2025, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) Expired and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. (n) below.

(n) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, § 15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and deemed repealed Sept. 12, 2024, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

(p) [As added by L.2019, c. 59, pt. ZZZ, subpt. A, § 7. See, also, par. (p) below.] are data or images produced by an electronic toll collection system under authority of article forty-four-C of the vehicle and traffic law and in title three of article three of the public authorities law.

(p) [Expires and deemed repealed Sept. 6, 2024, pursuant to L.2019, c. 148, § 14. As added by L.2019, c. 148, § 12. See, also, par. (p) above.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-d of the vehicle and traffic law.

(q) [Expires and deemed repealed Dec. 1, 2024, pursuant to L.2019, c. 145, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred seventy-four-a of the vehicle and traffic law.

(r) [Expires and deemed repealed Oct. 6, 2026, pursuant to L.2021, c. 421, § 16. As added by L.2021, c. 421, § 14. See, also, pars. (r) below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-e of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2026, pursuant to L.2021, c. 460, § 14. As added by L.2021, c. 460, § 12. See, also, pars. (r) above and below.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-f of the vehicle and traffic law.

(r) [Expires and deemed repealed Dec. 1, 2025, pursuant to L.2021, c. 773, § 16. As added by L.2021, c. 773, § 13. See, also, pars. (r) above.] are photographs, microphotographs, videotape or other recorded images or information and data prepared under authority of section three hundred eighty-five-a of the vehicle and traffic law.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term “agency” or “state agency” means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the

agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

5. (a) An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency's records.

6. Repealed by L.2022, c. 155, § 1, eff. Dec. 29, 2021.

Credits

(Added L.1977, c. 933, § 1. Amended L.1981, c. 890, § 1; L.1982, c. 73, § 1; L.1983, c. 80, § 1; L.1984, c. 283, § 1; L.1987, c. 814, § 12; L.1988, c. 746, § 15; L.1990, c. 289, § 1; L.1999, c. 510, § 12, eff. Sept. 28, 1999, deemed eff. Jan. 1, 1999; L.2001, c. 368, § 1, eff. Oct. 16, 2001; L.2003, c. 403, § 3, eff. Aug. 26, 2003; L.2007, c. 102, § 1, eff. Oct. 31, 2007; L.2008, c. 223, §§ 1 to 3, eff. Aug. 6, 2008; L.2008, c. 499, § 1, eff. Jan. 2, 2009; L.2009, c. 19, § 8, eff. May 28, 2009; L.2009, c. 20, § 22, eff. May 28, 2009; L.2009, c. 21, § 20, eff. May 28, 2009; L.2009, c. 22, § 20, eff. May 28, 2009; L.2009, c. 23, § 7, eff. May 28, 2009; L.2009, c. 383, § 22, eff. Sept. 25, 2009; L.2010, c. 59, pt. II, § 12, eff. Sept. 20, 2010; L.2010, c. 154, § 1, eff. July 7, 2010; L.2013, c. 189, § 13, eff. Aug. 30, 2013; L.2014, c. 43, § 5, eff. July 25, 2014; L.2014, c. 99, § 13, eff. Aug. 21, 2014; L.2014, c. 101, § 13, eff. Aug. 21, 2014; L.2014, c. 123, § 13, eff. Aug. 21, 2014; L.2015, c. 222, § 13, eff. Sept. 12, 2015; L.2019, c. 59, pt. ZZZ, subpt. A, § 7, eff. April 12, 2019; L.2019, c. 145, § 15, eff. Sept. 5, 2019; L.2019, c. 148, § 12, eff. Sept. 6, 2019; L.2020, c. 96, § 3, eff. June 12, 2020; L.2021, c. 421, § 14, eff. Oct. 6, 2021; L.2021, c. 460, § 12, eff. Nov. 7, 2021; L.2021, c. 808, §§ 1, 3, eff. Dec. 29, 2021; L.2021, c. 773, § 13, eff. Dec. 22, 2021; L.2022, c. 155, §§ 1, 2, eff. Dec. 29, 2021.)

Notes of Decisions (1151)

Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 6. Freedom of Information Law (Refs & Annos)
McKinney's Public Officers Law § 89

§ 89. General provisions relating to access to records; certain cases

Effective: August 8, 2022

Currentness

The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties;

v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and

vi. report on its activities and findings regarding this article and article seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;

vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or

viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her; or

iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and

dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. 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 provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided

that the written requests do not seek a response in some other form.

(c) Each state agency, as defined in subdivision five of this section, that maintains a website shall ensure its website provides for the online submission of a request for records pursuant to this article.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

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

(d) (i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:

(A) shall be given preference;

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and

(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on public access to records.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d) (i) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision. The proceeding shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days.

(ii) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(iii) An appeal taken from an order of the court requiring disclosure:

(A) shall be given preference; and

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application by any party to the proceeding; and

(C) shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within sixty days after the date of the notice of appeal, unless consent of further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records. A denial of access to records or to portions thereof pursuant to this article shall not limit or abridge any party's right of access to such records pursuant to the civil practice law and rules, the criminal procedure law, or any other law.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public retirement system of the state, as such term is defined in subdivision twenty-three of section five hundred one of the retirement and social security law, or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

10. Nothing in this article shall be construed to limit a person or entity that is a party to any civil or criminal action or proceeding from gaining access to records pursuant to this article relating to such action or proceeding, provided, however, that nothing in this subdivision shall prevent the denial of access to such records or portions thereof after providing particularized and specific justification that such records may be withheld pursuant to this article.

Credits

(Added L.1977, c. 933, § 1. Amended L.1981, c. 890, §§ 2, 3; L.1981, c. 975, § 1; L.1982, c. 73, § 2; L.1983, c. 80, § 2; L.1983, c. 652, § 3; L.1983, c. 783, § 1; L.1984, c. 33, § 1; L.1984, c. 227, § 1; L.1989, c. 705, § 2; L.1998, c. 545, §§ 2, 3, eff. Jan. 1, 1999; L.2003, c. 403, § 4, eff. Aug. 26, 2003; L.2004, c. 339, § 1, eff. Aug. 10, 2004; L.2005, c. 22, § 1, eff. May 3, 2005; L.2006, c. 182, § 1, eff. Oct. 24, 2006; L.2006, c. 492, § 1, eff. Aug. 16, 2006; L.2008, c. 223, §§ 4 to 6, eff. Aug. 6, 2008; L.2008, c. 351, § 1, eff. July 21, 2008; L.2011, c. 61, pt. U, § 11, eff. March 31, 2011; L.2016, c. 487, § 1, eff. May 27, 2017; L.2017, c. 453, § 1, eff. Dec. 13, 2017; L.2018, c. 47, § 1, eff. Jan. 1, 2019; L.2019, c. 55, pt. II, subpt. K, § 2, eff. April 12, 2019; L.2019, c. 59, pt. GGG, § 2, eff. April 12, 2019; L.2019, c. 707, § 1, eff. June 17, 2020; L.2020, c. 96, § 4, eff. June 12, 2020; L.2021, c. 808, § 2, eff. Dec. 29, 2021; L.2022, c. 482, § 2, eff. Aug. 8, 2022.)

Notes of Decisions (677)

McKinney's Public Officers Law § 89, NY PUB OFF § 89
Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)
McKinney's CPLR § 7803

§ 7803. Questions raised

Effective: September 1, 2003

Currentness

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Credits

(L.1962, c. 308. Amended L.1962, c. 318, § 26; L.2003, c. 492, § 2, eff. Sept. 1, 2003.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2021

C7803:2. The "Arbitrary and Capricious" Standard.

A driver experienced the "quintessence of arbitrary and capricious action" when the DMV revoked his license based on a default traffic conviction that occurred 24 years ago, but which DMV never reported to him because of a data-entry error that, for 23 years, indicated he had a clean driving record. (The driver's last name was Sonders, but a DMV clerk entered the data under the name "Sanders.") *Sonders v. New York State Dep't of Motor Vehicles*, 2020, 187 A.D.3d 1, 4, 129 N.Y.S.3d 411, 413 (1st Dep't). For DMV to punish the driver "for its own admitted errors ... and thereafter [for over 20 years] affirming that he possessed a valid license" was "truly irrational"--indeed, "almost worthy of Kafka." Id. at 3, 129 N.Y.S.3d at 412, quoting *Hall v. New York State Dep't of Motor Vehicles*, 2002, 192 Misc.2d 300, 300-01, 745 N.Y.S.2d 892, 893 (Sup.Ct.Monroe Co.). More's the pity, it is submitted, that the Supreme Court upheld DMV's action, and the driver had to appeal to the Appellate Division to get his license restored.

2019

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

Abuse of discretion, which is specifically identified in CPLR 7803(3) as a ground for Article 78 review, can apply either to the content of the agency's determination or the procedure the agency followed in reaching the determination. Thus, in *Bursch v. Purchase College of SUNY*, 2019, 33 N.Y.3d 1014, 102 N.Y.S.3d 165, 125 N.E.3d 830, a procedural abuse of discretion by a college disciplinary board resulted in a new hearing for a college student who was expelled after being found guilty of sexually assaulting a fellow student. Two days before his scheduled hearing, the student and his recently retained attorney asked for a three-hour adjournment, from 9:00 AM to 12:00 noon, because the attorney had a previous engagement at 9:00 AM. The college said no, and the hearing proceeded in the absence of the attorney. In a terse memorandum, the Court said the college abused its discretion "as a matter of law by failing to grant the requested adjournment."

The facts are developed in detail in the opinion of the Appellate Division (164 A.D.3d 1324, 85 N.Y.S.3d 157 (2d Dep't, 2018)), which upheld, 3-2, the college's denial of the adjournment because, one, the student himself had caused the timing problem by not sooner executing a privacy release allowing the college to communicate with the attorney and, two, the college had "difficulty" in arranging a convenient hearing time for all of the various witnesses.

The forceful two-judge dissent (164 A.D.3d at 1329-40, 85 N.Y.S.3d at 162-70) stressed the importance of the presence of an attorney when an accused student faces grave consequences (permanent expulsion), especially when a parallel criminal investigation is underway, as it was here. Although administrative agencies have discretion when it comes to such matters as adjourning a hearing, "this discretion will be more narrowly construed where fundamental rights are at issue.... Courts have consistently held that, unless the record establishes the existence of a legitimate countervailing reason, it is an abuse of discretion to deny a request for a

short adjournment to permit an individual to secure the presence of an attorney." 164 A.D.3d at 1335, 85 N.Y.S.3d at 166-67 (internal quotation marks omitted). The college proffered no such countervailing explanation in its conclusory assertion that it was "unable" to grant the adjournment because of "the availability of the people involved in the hearing." All of the witnesses were either employees or students at the same college, all within easy reach, and the requested three-hour delay was both timely and "exceedingly minimal." Even if the assistance of the attorney was not mandated by constitutional due process, the circumstances of the student's potential punishment created a "fundamental right" to have the attorney's assistance at the hearing.

In reversing the Appellate Division majority, it is not clear whether the Court of Appeals agreed with everything the dissenters said, but this observer found their arguments powerful.

C7803:3. The "Substantial Evidence" Test.

In an Article 78 certiorari review of a state college disciplinary hearing, the Court of Appeals took the opportunity to once again state the contours of the substantial evidence standard. *Haug v. State University of New York at Potsdam*, 2018, 32 N.Y.3d 1044, 87 N.Y.S.3d 146, 112 N.E.3d 323. The student petitioner was charged with sexual assault of another student, found guilty after a hearing, and expelled. The evidence against him at the hearing was mostly hearsay (testimony and written notes about the complainant's statements by a campus police officer to whom she reported the incident shortly after it happened, other students, and a school administrator); the complainant herself did not appear at the hearing. In his own testimony, the accused student gave his version of his and the complainant's conduct and her consent, but he also described post-event conduct that reasonably could be interpreted as a consciousness of guilt on his part. The Appellate Division three-judge majority held that substantial evidence was lacking for the school's determination of guilt. The majority essentially re-evaluated the evidence, including the conduct of both participants in the sexual act, stressing the hearsay nature of complainant's statements, and concluded that no reasonable person could find that the complainant had not affirmatively given consent to the sexual activity that occurred. See 149 A.D.3d 1200, 51 N.Y.S.3d 663 (3d Dep't).

The Court of Appeals reversed, holding that the hearsay accounts, coupled with petitioner's testimony, constituted substantial evidence of the unconsented sexual misconduct. The Appellate Division had improperly second-guessed the school by "re-weighing the evidence" and "substituting its own factual findings for those of [the school]." It was within the hearing board's province to "resolve any conflicts in the evidence and make credibility determinations," including finding that the petitioner's testimony was not credible. 32 N.Y.3d at 1046-47, 87 N.Y.S.3d at 149, 112 N.E.3d at 326

The Court made the following observations about the substantial evidence rule. 32 N.Y.3d at 1045-46, 87 N.Y.S.3d at 148-49, 112 N.E.3d at 325-26 (internal citations and quotation marks omitted): First, the standard itself: "[S]ubstantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion of ultimate fact.... Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently." Second, it is possible that both sides present substantial evidence on contested issues. Even so, the agency's determination must be sustained. Third, the substantial evidence standard is a "minimal standard"--"less than a preponderance of the evidence"--that "demands only that a given inference is reasonable and plausible, not necessarily the most probable." Courts may not do what the Appellate Division majority did here, which is "to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." Finally, as to the use of hearsay evidence, it "is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds."

It is significant--and an important lesson for practitioners--that the petitioner in *Haug* waived potential due process and other procedural errors in the conduct of the hearing by failing to raise them at the disciplinary hearing. My fellow CPLR commentator Thomas F. Gleason has written elsewhere that seeking to invalidate an administrative determination solely for lack of substantial evidence is almost always an uphill battle. Thomas F. Gleason, "The Power of Administrative Agencies and the Peril of Substantial Evidence Review," N.Y.L.J., February 17, 2019, p.3, col.1. See, e.g., *Pena v. New York State Gaming Ass'n*, 2018, 32 N.Y.3d 1122, 91 N.Y.S.3d 783, 116 N.E.3d 74, reversing for the reasons stated by the dissenting opinion in the Appellate Division, 144 A.D.3d 1244, 1247-52, 40 N.Y.S.3d 665, 667-71 (3d Dep't 2016). In contrast, error-of-law review (CPLR 7803(3)), such as that based on unconstitutional or otherwise unlawful procedure, gives a court greater authority over the agency's adjudicative activity, but any such errors must be preserved by objection at the administrative level. See, on remand, *Haug v. State University of New York at Potsdam*, 2018, 166 A.D.3d 1404, 1405, 88 N.Y.S.3d 678, 679 (3d Dep't). See also 2019 Commentaries C7802:1 & C7803:1.

2018

C7803:3. The "Substantial Evidence" Test.

If the burden of proof at an agency hearing is the "clear and convincing evidence" standard, as, for example, at a DMV proceeding for the suspension of a driver's license, the court in an Article 78 challenge must apply the substantial-evidence standard of review through the lens of the elevated burden of proof that applied at the agency level. *Seon v. New York State Dep't of Motor Vehicles*, 2018, 159 A.D.3d 607, 74 N.Y.S.3d 20 (1st Dep't). "[W]hile the appellate standard of review of substantial evidence requires great deference to findings that a hearing officer makes based on the evidence placed before it, it still calls for the reviewing court to ensure that such findings are not made in the absence of evidence that could, again with the proper amount of deference, reasonably be called clear and convincing." Here, the First Department majority found that clear and convincing evidence was lacking for an agency determination that a bus driver's negligent driving was the cause of a pedestrian's death.

2017

C7803:2. The "Arbitrary and Capricious" Standard.

When an agency has made a determination on specified grounds, the reviewing court should not uphold the determination if those grounds are irrational or improper, even if some other ground might support the decision. See main text, p.16. The Third Department invoked this rule in *Tri-Serendipity, LLC v. City of Kingston*, 2016, 145 A.D.3d 1264, 42 N.Y.S.3d 682 (3d Dep't), where a landowner in a residential neighborhood challenged a zoning board's decision to deny its request to renovate a building that had acquired permissible non-conforming use status in 1963. The premises were now being used as a boarding house. The zoning board determined that the property's nonconforming use in 1963 was as a nursing home and therefore the new use as a boarding house could be restricted or eliminated.

In the Article 78 challenge, the Supreme Court rejected the board's finding that the premises were originally used as a nursing home. Rather, the Supreme Court found that it was always a boarding house, but the nature of the boarding had changed to such a degree as to justify elimination of the nonconforming use. The Third Department held that the Supreme Court acted improperly because the court may not "search the record for a rational basis to support [an administrative agency's] determination, substitute its judgment for that of the [agency] or affirm the underlying determination upon a ground not invoked ... in the first instance." 145 A.D.3d at 1266, 42 N.Y.S.3d at 684 (internal quotation marks and citation omitted). Nevertheless, after reviewing the evidence supporting the board's finding that the building was originally a nursing home, the Appellate Division

affirmed the rationality of the board's determination that such use had been discontinued.

C7803:2. The "Substantial Evidence" Test.

In *In re Yoga Vida NYC, Inc*., 2016, 28 N.Y.3d 1013, 41 N.Y.S.3d 456, 64 N.E.3d 276, a majority of the Court of Appeals held that substantial evidence was lacking to support the Unemployment Insurance Appeal Board's determination that certain instructors retained by a yoga school to teach yoga classes were employees rather than independent contractors. For an employer-employee relationship to exist, the hiring organization must either exercise control over the results reached by the worker or must control the means used to achieve the results. Here, there was evidence only of "incidental" control. The Court reached a similar conclusion a few years ago with respect to a car-rental company's imposition of certain "incidental" requirements on a promoter whose services the company engaged. *In re Hertz Corp*., 2004, 2 N.Y.3d 733, 778 N.Y.S.2d 743, 811 N.E.2d 5.

The two-judge dissent in *Yoga Vida* argued that there was enough evidence of control in the record to permit reasonable inferences that met the necessary standard, and that the Court should defer to the Board's drawing of those inferences. Since the evidence reasonably supported a decision either way, the majority was said to have erroneously substituted its judgment for that of the Board.

Yoga Vida demonstrates that the existence, or not, of substantial evidence sometimes can be a close question. The majority seems to have determined that it was simply unreasonable as a matter of law for the Board to have made a finding of an employer-employee relationship on the evidence presented. See also *Home Run KTV Inc. v. New York State Liquor Auth*., 2016, 142 A.D.3d 451, 36 N.Y.S.3d 641 (1st Dep't) (Liquor Authority's determination that licensee knew or should have known of the presence of illegal drugs on the premises was based on "surmise, conjecture, speculation or rumor," rather than substantial evidence) (3-2).

On another aspect of the substantial evidence test--the principle that substantial evidence may consist entirely of hearsay--the court in *Watson v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1025, 59 N.Y.S.3d 558 (3d Dep't), held that reliable hearsay can constitute substantial evidence by itself, "even where there is contrary sworn testimony." In the instant case, the hearsay, comprised of consistent eyewitness interview statements describing an abuse incident by two individuals, was substantial enough for the agency to have rejected contrary testimony by the accused individuals. See also *Roberts v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1021, 59 N.Y.S.3d 554 (3d Dep't).

2013

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

In the penalty review proceeding of *Perez v. Rhea*, 2013, 20 N.Y.3d 399, 960 N.Y.S.2d 727, 984 N.E.2d 925, the Court of Appeals overturned a "shock-the-conscience" determination by the Appellate Division that a tenant in a public housing project could not be evicted. Even though the tenant had lied to the housing authority over a seven-year period about her employment status and income--lies that resulted in her criminal conviction for larceny--the Appellate Division held that eviction was too severe a penalty because of the homelessness to which the tenant, the mother of three youngsters, would be subjected. The Court of Appeals, however, found no basis in the record for a finding that homelessness for the tenant was certain or even likely. The Appellate Division had improperly imported into its analysis an "assumption" that any termination of public housing was a " 'drastic penalty' ... that, by default, is excessive.... Instead, reviewing courts must consider each petition on its own

merit." Id. at 404, 960 N.Y.S.2d at 729-30, 984 N.E.2d at 927-28. As a policy matter, the Court of Appeals held that the threat of eviction from public housing is an important deterrent against false claims of poverty--a deterrent that is proper in light of the scarcity of public housing and the long lines of genuinely poor persons in need of such housing. The possibility that a tenant might be ordered in a criminal proceeding to make restitution to the housing authority, which is what happened in the instant case, "may not serve adequately to discourage" misrepresentation.

In *Kickertz v. New York University*, 2012, 99 A.D.3d 502, 952 N.Y.S.2d 147 (1st Dep't), appeal dismissed, 2013, 20 N.Y.3d 1004, 959 N.Y.S.2d 687, 983 N.E.2d 765, the Appellate Division expressed the view that a student's expulsion from dental school was shocking to the court's conscience where the offense was the first transgression by a student with an otherwise exemplary record, it was a lapse in judgment that lacked premeditation, and the penalty was not in conformity with discipline previously imposed under similar circumstances. See also 2013 Supplementary Practice Commentaries on CPLR 7802, at C7802:1.

C7803:2. The "Arbitrary and Capricious" Standard.

In *Ward v. City of Long Beach*, 2013, 20 N.Y.3d 1042, 962 N.Y.S.2d 587, 985 N.E.2d 898, all of the courts reviewing the matter, including the Court of Appeals, held that a city's denial of work-related disability retirement benefits to an injured fire department officer (Gen.Mun.Law § 207-a) lacked a rational basis and was therefore arbitrary and capricious. At the time he presented his claim to the city, the petitioner had already been found eligible for disability retirement benefits from the state based on the same medical evidence that was presented to the city; and the city's denial of benefits was based only on personal observations by the city's attorney together with hearsay allegations by the petitioner's estranged wife as to which he was given no notice or opportunity to respond.

The 2009 Supplementary Practice Commentary to this section discusses the *Infante* case, in which the Court of Appeals held that a medical agency, specifically the medical examiner's office, could not be impeded in its decision-making by the operation of common law presumptions such as the presumption against suicide. The situation is quite different, however, when the Legislature adopts a statutory presumption applicable to the decision-making of a particular agency. Such was the case in *Bitchatchi v. Board of Trustees of the New York City Police Dep't Pension Fund*, 2012, 20 N.Y.3d 268, 958 N.Y.S.2d 680, 982 N.E.2d 600. This was a consolidated appeal of three proceedings challenging the denial of work-related disability benefits to police officers and their families. Each of the three officers had experienced bad health after working on rescue, recovery and clean-up missions at the World Trade Center site in the immediate aftermath of the 9/11 attacks. The officers were entitled to take advantage of the so-called "World Trade Center" presumption in N.Y.C.Admin. Code § 13-252.1, which makes it conclusive, thereby eliminating the need for medical proof, that adverse health conditions discernible after work at the World Trade Center site were caused by work-related exposure to toxins at the site "unless the contrary be proved by competent medical evidence." (Firefighters, state police, and sanitation workers get the same presumption.) As to each of the officers, the medical board's evidence was insufficient to rebut the presumption largely because the board failed to enter relevant data in the administrative record, rendering its conclusions conjectural. The Court applied the World Trade Center presumption in the robust manner that the Legislature undoubtedly intended for the benefit of 9/11 first responders.

2011

C7803:3. The "Substantial Evidence" Test.

The Court of Appeals recently provided insight into the nature of the substantial evidence standard, defining it once again as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Ridge Road Fire District v. Schiano*, 2011, 16 N.Y.3d 494, 499, 922 N.Y.S.2d 249, 252, 947 N.E.2d 140, 143 (internal citation omitted). The rule "demands only that 'a given inference is reasonable and plausible, not necessarily the most probable.' " Id. (internal citations omitted). Significantly, the court stressed that an administrative decision supported by substantial evidence must be upheld even if there is substantial evidence in opposition. "It is of no consequence that the record ... indicates that there was evidence supporting [the agency opponent's] contention. Quite often there is substantial evidence on both sides." Id. at 500, 922 N.Y.S.2d at 252, 947 N.E.2d at 143.

Both the majority and dissenting judges in the case agreed with the articulation of the substantial evidence standard. The disagreement among the judges concerned the stage of the particular administrative proceedings in which the standard was applicable--a fire district's initial determination that a firefighter was not entitled to certain benefits (as contended by the majority), or only to a hearing officer's later review of the same issue (as contended by the dissent).

2009

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

The doctrine of administrative res judicata provides that the determination of an administrative tribunal generally should be given binding effect by agencies and courts if the fact-finding process that led to the first determination was substantially similar to that used in a court of law, i.e., a quasi-judicial (trial-type) hearing preserved in a fully developed record. *Ryan v. New York Telephone Co*., 1984, 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487, 489-90; *Evans v. Monaghan*, 1954, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58. An agency's improper refusal to give res judicata effect to a prior agency decision that was the product of a quasi-judicial hearing can be challenged in an Article 78 proceeding.

The key question is whether the first proceeding was truly quasi-judicial in nature. It was not in *Jason B. v. Novello*, 2009, 12 N.Y.3d 107, 876 N.Y.S.2d 682, 904 N.E.2d 818. There, a young man was found eligible in 2003 to receive certain disability support services based on the relevant agency's review of the applicant's medical records. No hearing was conducted. Three years later, an interested party requested the agency to reconsider the man's eligibility. Based on a reassessment of the same medical records, the agency terminated his benefits. There was no need for a showing of newly discovered evidence, which is a possible exception to the operation of res judicata (see *Evans v. Monaghan*, supra, 306 N.Y. at 326, 118 N.E.2d at 459), because the original determination was not the product of quasi-judicial fact-finding. Res judicata simply did not apply. The Court stressed that an agency should have the freedom to reconsider prior administrative action "where a nonadjudicative determination was initially made."

C7803:2 The "Arbitrary and Capricious" Standard.

As noted in Commentary C7803:3, main volume at p.19, the rules of evidence do not apply with strictness in quasi-judicial (trial-type) hearings conducted by administrative tribunals. See, e.g., *Tsirelman v. Daines*, 2009, 61 A.D.3d 1128, 1130, 876 N.Y.S.2d 237, 240 (3d Dept.) (medical license revocation proceeding). Even greater informality attends administrative fact-finding that takes place outside the context of trial-type hearings. See *125 Bar Corp. v. State Liquor Auth*., 1969, 24 N.Y.2d 174, 178-79, 299 N.Y.S.2d 194, 198, 247 N.E.2d 157, 159 ("competent common-law evidence" not necessary to sustain denial of license renewal); Commentary C7803:1, main volume at p.10.

It is not surprising, therefore, that the Court of Appeals refused to impose the common law presumption against suicide on a medical examiner's inquiry into the cause of a person's death. *Infante v. Dignan*, 2009, 12 N.Y.3d 336, 879 N.Y.S.2d 824, 907 N.E.2d 702. Here, the medical examiner who conducted an autopsy relied on toxicological findings and the circumstances at the scene of death in making a determination of suicide. In the decision below, a majority of the Appellate Division held that the presumption against suicide precluded such a determination. 55 A.D.3d 1258, 865 N.Y.S.2d 167 (4th Dep't). But the Court of Appeals ruled that the presumption against suicide "has no role to play" either in the medical examiner's decision-making or judicial review thereof. The Court wrote, "If medical examiners were forced to leaven their decision-making with a common-law evidentiary presumption, the medical and scientific quality of their work would be seriously compromised to the detriment of the citizenry." 12 N.Y.3d at 340, 879 N.Y.S.2d at 826-27, 907 N.E.2d at 704-05.

Thus, the sole standard of judicial review in such cases is that of arbitrariness. So long as the evidence considered by the medical examiner raised reasonable inferences of death by either accident or suicide, the court must respect the medical expert's decision. The evidence relied upon by the medical examiner in the instant case contained such conflicting inferences. The Court concluded by citing *Flacke v. Onondaga Landfill Systems, Inc.*, 1987, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 693, 507 N.E.2d 282, 286, which reiterated a policy of judicial deference to the factual evaluations of administrative agencies, especially in matters involving medical and scientific expertise.

PRACTICE COMMENTARIES

by Vincent C. Alexander

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

CPLR 7803 specifies "the only questions" that may be raised in an Article 78 proceeding. As discussed in the Practice Commentaries on CPLR 7801, at C7801:1, supra, Article 78 was adopted for the purpose of achieving procedural, not substantive, reform in the law of prerogative writs. Some of these procedural reforms are embodied in the scope of judicial review contained in this section. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958); N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, pp.750-51 (1961).

The first question in CPLR 7803--"whether the body or officer failed to perform a duty enjoined upon it by law"--corresponds with the writ of mandamus to compel. The scope of this writ and its modern application in an Article 78 proceeding are discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to

Compel."

The second question--"whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction"--restates the writ of prohibition. Commentary C7801:4, supra, describes the present-day contours of this remedy.

By-passing question (3) for the moment, the fourth question--whether substantial evidence, on the entire record, supports a determination based on a hearing at which evidence was taken pursuant to direction by law--covers ground occupied exclusively by certiorari, which is described in Commentary C7801:2, supra. Briefly, certiorari encompasses review of judicial and quasi-judicial determinations of an agency that are made on the basis of statutorily or constitutionally required trial-type hearings in which all of the evidence relied upon by the agency must be contained in a written record of the hearing. Whether the agency's factual determination in such a proceeding is justified depends on whether it is supported by substantial evidence. Much judicial ink has been spilled in analyzing the substantial evidence test, thus warranting treatment of this topic in its own subsection, Commentary C7803:3, below.

To be distinguished from certiorari is mandamus to review, which is discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to Review." Mandamus to review is the category of judicial review of agency determinations that are "administrative," as opposed to judicial or quasi-judicial, in nature. Administrative determinations may properly be made without a trial-type hearing and may be based on "whatever evidence is at hand," regardless of whether it appears in the record of a hearing. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 757-58, 570 N.Y.S.2d 474, 477, 573 N.E.2d 562, 565.

Having made the distinction between certiorari and mandamus to review, we can now return to question (3) of CPLR 7803. Three of the grounds listed in CPLR 7803(3) for challenging agency action--violation of lawful procedure, error of law and abuse of discretion--may be relevant in both certiorari and mandamus to review.

To determine whether an agency has violated lawful procedure, reference must be made to the statutes, rules and regulations governing the particular agency and its area of regulatory competence. The legality of the procedure will often turn on the nature of the action taken. For example, if the agency took purely "administrative" action, such as denying an application for a license, the agency could have properly relied on ex parte information and need not have conducted an adversarial trial. See, e.g., *125 Bar Corp. v. State Liquor Auth.,* 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157. Conversely, if the action taken by the agency was of a quasi-judicial nature, such as revoking an existing license, the agency's failure to conduct a trial-type hearing (see, e.g., *Application of Brody's Auto Wreckers, Inc.,* 1961, 31 Misc.2d 466, 220 N.Y.S.2d 936 (Sup.Ct.Bronx Co.)) or to confine itself to evidence in the hearing record (see, e.g., *Mulligan's Night Club & Cafe, Inc. v. Buffalo Common Council,* 1992, 184 A.D.2d 1016, 584 N.Y.S.2d 499 (4th Dep't)) would be grounds for annulment of the determination. Similarly, in a trial-type hearing to impose a penalty, an administrative tribunal's reliance on evidence that was seized by the agency's investigators in violation of the fourth amendment may constitute a procedural violation sufficient to require annulment. See *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91. But see *Boyd v. Constantine,* 1993, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511 (exclusionary rule inapplicable where seizure was not made by police officers acting on behalf of the agency).

Courts seldom single out "error of law," by name, as the question for consideration in an Article 78 proceeding. This question is often implicit, however, in the nature of the grievance, such as an allegation that the agency improperly interpreted or applied a statute or regulation. See *New York City Health and Hospitals Corp. v. McBarnette*, 1994, 84 N.Y.2d 194, 205, 616 N.Y.S.2d 1, 6, 639 N.E.2d 740, 745. In this regard, courts will uphold

the interpretation of statutes and regulations by the agencies responsible for their administration if such interpretation is reasonable. See *Howard v. Wyman,* 1971, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 685-86, 271 N.E.2d 528, 529-30; *Marburg v. Cole,* 1941, 286 N.Y. 202, 212, 36 N.E.2d 113, 117.

"Abuse of discretion," another of the specified grounds for review under CPLR 7803(3), arguably is superfluous. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963) (abuse of discretion is encompassed by arbitrary and capricious test). Historically, abuse of discretion was not included as an independent ground of review in the original version of Article 78 of the Civil Practice Act. If a court overturned an agency's exercise of discretion, the agency was said to have acted arbitrarily and capriciously or unreasonably, and this was a sufficient basis to annul the determination both at common law and under the Civil Practice Act. See, e.g., *People ex rel. Empire City Trotting Club v. State Racing Comm'n,* 1907, 190 N.Y. 31, 82 N.E. 723; *Rochester Colony, Inc. v. Hostetter,* 1963, 19 A.D.2d 250, 241 N.Y.S.2d 210 (4th Dep't).

On the other hand, the measure of an agency's imposition of a punishment--a discretionary determination--originally was held to be unreviewable by the courts. *Barsky v. Board of Regents of University of New York,* 1953, 305 N.Y. 89, 111 N.E.2d 222, affirmed 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829; *Sagos v. O'Connell,* 1950, 301 N.Y. 212, 93 N.E.2d 644. This limitation on judicial review was changed by an amendment to the Civil Practice Act that expressly permitted courts to consider whether an agency had abused its discretion in the measure of punishment, penalty or discipline imposed. Laws of 1955, ch.661. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958). CPLR 7803(3) goes one step further by making abuse of discretion, standing alone, a ground for review and specifying that the mode or measure of punishment is merely one possible type of such abuse. The purpose of this additional change, according to the Advisory Committee, was to "extend the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term." N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, p.751 (1961).

Aside from consideration of administrative sanctions, however, most courts continue to analyze abuses of discretion in traditional terms of whether the agency's action was arbitrary and capricious or lacked a rational basis. See, e.g., *Older v. Board of Educ. of Union Free School District No. 1, Town of Mamaroneck,* 1971, 27 N.Y.2d 333, 318 N.Y.S.2d 129, 266 N.E.2d 812 (board of education's exercise of discretion in assigning students to schools had a rational basis and was not arbitrary and capricious); *Burke's Auto Body, Inc. v. Ameruso,* 1985, 113 A.D.2d 198, 495 N.Y.S.2d 393 (1st Dep't) (agency's exercise of discretion in rejecting all bids lacked a rational basis and was arbitrary).

With respect to the harshness of penalties and discipline meted out by administrative agencies, the standard for judicial review is as follows: An administrative sanction "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 2000, 95 N.Y.2d 550, 554, 720 N.Y.S.2d 93, 96, 742 N.E.2d 607, 610. In *Featherstone*, the Court of Appeals stressed that the Appellate Division lacks discretionary authority to substitute its judgment for that of the agency under an "interest-of-justice" inquiry. Furthermore, judicial review of the penalty issue must be limited to the evidentiary submissions that were before the administrative agency; consideration may not properly be given to circumstances that may have developed after the agency's final determination, such as subsequent ameliorating conduct by the person who was punished.

A few months after *Featherstone*, the Court again addressed the shock-the-conscience standard in *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280. There, the Court said the standard "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or the harm to the agency or the public in general." Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1283.

The Court made clear that the shock-the-conscience standard requires significant judicial deference: " '[G]reat leeway' must be accorded to the [Police] Commissioner's determinations ... for it is the Commissioner, not the courts, who 'is accountable to the public for the integrity of the Department.' " Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1284. See also *Scahill v. Greece Central School District*, 2004, 2 N.Y.3d 754, 778 N.Y.S.2d 771, 811 N.E.2d 33. *Kelly* also made the point that in reviewing a penalty, the court may not properly consider facts outside the administrative record.

The shock-the-conscience standard has its origins in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 N.Y.2d 222, 233, 356 N.Y.S.2d 833, 841, 313 N.E.2d 321, 327. The *Pell* Court, in turn, relied heavily on the Appellate Division decision in *Stolz v. Board of Regents of the University of the State of New York*, 1957, 4 A.D.2d 361, 165 N.Y.S.2d 179 (3d Dep't), where it was said that an administrative punishment or discipline may be set aside only if it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 364, 165 N.Y.S.2d at 182. The *Stolz* court reasoned that the abuse of discretion standard in the statutory predecessor of CPLR 7803(3) was intended to preclude courts from substituting their judgment on the appropriate measure of punishment for that of the administrative agency. Otherwise, "the power of administration would, to a large extent, be transferred from the administrative agency to the courts." 4 A.D.2d at 364, 165 N.Y.S.2d at 182.

Both *Featherstone* and *Kelly* involved the scope of judicial review in the Appellate Division. It is a fair inference that the same shock-the-conscience standard should also apply to the Supreme Court's review of administrative punishments and penalties. See, e.g., *Zuntag v. City of New York*, 2007, 18 Misc.3d 210, 853 N.Y.S.2d 469 (Sup.Ct.Richmond Co.) (permanent revocation of attorney's visitation rights at jail facilities based on isolated incident of unknowing transfer of contraband tobacco to inmate was held to be "shocking to one's sense of fairness").

As a practical matter, the Supreme Court seldom passes on penalty issues. The question of excessive penalties is most frequently presented in the context of certiorari review of trial-type hearings. In such a case, the agency's fact-findings with respect to the underlying conduct are reviewed in accordance with the substantial evidence test. See Commentary C7803:3, below. Although a certiorari proceeding is commenced in the Supreme Court, the case will be transferred to the Appellate Division for determination of the substantial evidence question. CPLR 7804(g). The only matters that Supreme Court may decide prior to transfer are "objections as could terminate the proceeding," such as CPLR 3211-type defenses. See Practice Commentaries on CPLR 7804, at C7804:8. Petitioner's challenge to a penalty imposed by the agency does not qualify as such an objection. Cf. *Donofrio v. City of Rochester*, 1988, 144 A.D.2d 1027, 534 N.Y.S.2d 630 (4th Dep't), leave to appeal denied, 1989, 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355. Thus, the penalty issue will be transferred to the Appellate Division where it will be reviewed in the first instance along with the substantial evidence question. See, e.g., *Diefenthaler v. Klein*, 2006, 27 A.D.3d 347, 811 N.Y.S.2d 653 (1st Dep't); *Dewey v. Powley*, 1999, 261 A.D.2d 901, 902, 690 N.Y.S.2d 365, 366 (4th Dep't).

If the reviewing court concludes that the punishment was too harsh, the court may either remand the matter to the agency for a lesser penalty (see, e.g., *Diefenthaler v. Klein*, supra) or specify the appropriate sanction itself (see, e.g., *Mitthauer v. Patterson,* 1960, 8 N.Y.2d 37, 42, 201 N.Y.S.2d 321, 324, 167 N.E.2d 731, 733).

The final question listed in CPLR 7803(3) is whether a determination was arbitrary and capricious. The arbitrary and capricious standard is used to examine fact-finding determinations only in mandamus to review. Like its substantial evidence counterpart in certiorari, the arbitrary and capricious test merits its own subsection, Commentary C7803:2, below.

Subdivision (5) of CPLR 7803 was added to the statute in 2003. This subdivision, together with amendments to Education Law § 4404(3), was intended to bring New York law into compliance with federal regulations regarding the scope of judicial review of determinations regarding children with disabilities. According to the legislative memorandum in support of the amendments, continued federal financing would be forfeited in the absence of such compliance. The relevant federal regulations require that judicial review of these matters be based on the entire administrative record, allow for additional evidence at the request of the parties and be determined on the basis of a preponderance of the evidence. Article 78 proceedings in this context are determined in accordance with the substantial evidence standard and do not provide for the presentation of additional evidence. By taking judicial review of these matters out from under the umbrella of Article 78, it was thought that the desired compliance with federal law could be achieved. Judicial review in this specialized area is now governed by CPLR Article 4, augmented by the procedural specifics set forth in Education Law § 4404(3).

C7803:2 The "Arbitrary and Capricious" Standard.

Whether a determination was arbitrary and capricious is the standard used in mandamus to review, i.e., where the agency was not required to conduct a trial-type hearing. See Practice Commentaries on CPLR 7801, at C7801:3, supra. Although the phrase "arbitrary and capricious" was not used in Article 78 of the Civil Practice Act, this was the standard used by the courts to analyze the legality of administrative determinations. See, e.g., *Marburg v. Cole,* 1941, 286 N.Y. 202, 36 N.E.2d 113. CPLR 7803(3) aligned Article 78 with judicial practice. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963).

The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County,* 1974, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321: "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The question, said the Court, is whether the determination has a "rational basis." Id. Interestingly, the *Pell* Court observed that rationality is the underlying basis for both the arbitrary and capricious standard and the substantial evidence rule of CPLR 7803(4).

125 Bar Corp. v. State Liquor Auth., 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157, provides an example of the operation of the arbitrary and capricious standard. Inherent in mandamus to review is the principle that the agency, in making its determination, was authorized to consider ex parte materials generated by an independent investigation or materials that were already in its files. The agency's reliance on such information, however, must be rationally based. Thus, in *125 Bar Corp.,* an agency's refusal to renew a tavern-owner's liquor license was held to be arbitrary and capricious because the agency had relied principally on investigatory reports that were "insufficient, inapplicable, or irrelevant" on their face. The data before the agency simply did not provide a rational basis for its action. The determination was thus annulled and the case was remanded to the agency for appropriate proceedings.

Another aspect of the arbitrary and capricious test is that the reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination. If those grounds are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper, alternative ground in the Article 78 proceeding. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566. Similarly, the court is not permitted to consider facts or claims that were not presented at the agency level. *Fanelli v. New York City Conciliation and Appeals Bd.*, 1982, 90 A.D.2d 756, 757, 455 N.Y.S.2d 814, 816 (1st Dep't), affirmed for reasons stated below, 1983, 58 N.Y.2d 952, 460 N.Y.S.2d 534, 447 N.E.2d 82. See also *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency").

Occasionally, however, it may be necessary for the court to take evidence or conduct a hearing for the purpose of ascertaining the facts upon which the agency based its decision. See, e.g., *Pasta Chef, Inc. v. State Liquor Auth.*, 1976, 54 A.D.2d 1112, 389 N.Y.S.2d 72 (4th Dep't), affirmed, 1978, 44 N.Y.2d 766, 406 N.Y.S.2d 36, 377 N.E.2d 480. See generally Practice Commentaries on CPLR 7804, at C7804:9, infra. By definition, mandamus to review involves a situation in which the agency did not conduct a trial-type hearing with a formal record. Thus, factual questions may arise as to exactly what evidence was considered by the agency in making its determination. The rationality of the agency's decision cannot be determined until the evidence relied upon by the agency is made known.

Loose language in judicial opinions sometimes makes it difficult to say whether a particular type of agency determination should be reviewed under the arbitrary and capricious standard or that of substantial evidence. The Appellate Division, Second Department, recently struggled with this problem in the context of challenges to the decisions of municipal land use agencies regarding applications for zoning variances. The court concluded that such matters fall within the Article 78 category of mandamus to review and are therefore to be evaluated under the arbitrary and capricious standard. *Halperin v. City of New Rochelle*, 2005, 24 A.D.3d 768, 769-72, 809 N.Y.S.2d 98, 103-05 (2d Dep't), leave to appeal dismissed, 2006, 6 N.Y.3d 890, 817 N.Y.S.2d 624, 850 N.E.2d 671. The substantial evidence standard of review, which applies to certiorari, is inappropriate for the review of zoning agency decisions, the Appellate Division reasoned, because the public hearings conducted in connection with variance applications are not quasi-judicial in nature. Such hearings do not involve sworn testimony, cross-examination and the making of an evidentiary record within the meaning of CPLR 7803(4). See generally Practice Commentaries on CPLR 7801, at C7801:2, supra, and 7803, at C7803:3, below.

The *Halperin* court was put to the task of reconciling conflicting language in certain opinions in which the Court of Appeals sought to explain how "substantial evidence" was part of the standard of review in zoning variance cases. See *Wilcox v. Zoning Board of Appeals of the City of Yonkers,* 1966, 17 N.Y.2d 249, 255, 270 N.Y.S.2d 569, 572, 217 N.E.2d 633, 635; *Sasso v. Osgood*, 1995, 86 N.Y.2d 374, 384 n.2, 633 N.Y.S.2d 259, 264, 657 N.E.2d 254, 259; *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2004, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 237, 814 N.E.2d 404, 407. The Appellate Division discerned in *Pecoraro*, the most recent of these decisions, a commitment by the Court of Appeals to the arbitrary and capricious standard in order to ensure, as a policy matter, that significant deference be paid to zoning decisions of local officials regarding land use in their communities. 24 A.D.3d at 771, 809 N.Y.S.2d at 104.

Often, the shadowy distinction between the arbitrary and capricious standard and the substantial evidence standard makes no practical difference because the Court of Appeals, as previously noted, has said that rationality is the underlying basis for both standards. *Pell v. Board of Educ. of Union Free School Dist. No. 1*, supra, 34 N.Y.2d at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The distinction made a difference in *Halperin* because the Supreme Court, mistakenly thinking the variance determination at issue was to be judged under the substantial evidence standard, transferred the case to the Appellate Division for review pursuant to CPLR 7804(g) (question of substantial evidence to be transferred to Appellate Division when Supreme Court's ruling on other objections, if any, does not dispose of case). See Practice Commentaries on CPLR 7804, at C7804:8, infra. The Appellate Division, however, held that the Supreme Court should have retained jurisdiction and addressed the merits because the proceeding was in the nature of mandamus to review, requiring application of the arbitrary and capricious standard.

C7803:3 The "Substantial Evidence" Test.

The substantial evidence test is the exclusive standard for the review of an agency's fact-finding determination in an Article 78 proceeding in the nature of certiorari. CPLR 7803(4). The test was given shape by the Court of Appeals in the 1940 decision of *Stork Restaurant v. Boland,* 282 N.Y. 256, 26 N.E.2d 247:

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based. That requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' .... The same test is applied in trials before a court and jury. Evidence which is sufficient to require the court to submit a question of fact to a jury is sufficient to support a finding by the administrative board.

Id. at 273-74, 26 N.E.2d at 255.

Another formulation appears in *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, where the Court said, "In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically.... Put a bit differently, 'the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision.' " Id. at 181-82, 408 N.Y.S.2d at 57, 379 N.E.2d at 1186-87, quoting C. McCormick, *Evidence* 847 (2d ed. 1972).

Yet another variation appears in *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, where the Court quotes Learned Hand: "While the quantum of evidence that rises to the level of 'substantial' cannot be precisely defined, the inquiry is whether 'in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' " Id. at 139, 495 N.Y.S.2d at 337, 485 N.E.2d at 1002, quoting *N.L.R.B. v. Remington Rand,* C.A.N.Y.1938, 94 F.2d 862, 873, certiorari denied 304 U.S. 576, 58 S.Ct. 1046, 82 L.Ed. 1540.

Under the substantial evidence test, the court is not to weigh the evidence, for that would usurp the function of the administrative fact-finder. Thus, courts may not "reject the choice made by [the agency] where the evidence is conflicting and room for choice exists." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. The court, in other words, may not substitute its own view, even if it would have reached a different conclusion. *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 336, 296 N.Y.S.2d 760, 767, 244 N.E.2d 243, 247. Similarly, the credibility of witnesses who testified at the hearing is essentially beyond the scope of judicial review: " '[W]here reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [agency].' " *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 443-44, 522 N.Y.S.2d 478, 481-82, 517 N.E.2d 193, 196, quoting *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. See generally *Café La China v. New York State Liquor Auth.*, 2007, 43 A.D.3d 280, 841 N.Y.S.2d 30 (1st Dep't) (summary of characteristics of substantial evidence standard of review).

The determination of whether substantial evidence supports the agency's conclusion is to be made upon the record as a whole. Thus, "[t]he evidence produced by one party must be considered in connection with the evidence produced by the other parties." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 274, 26 N.E.2d at 255. A corollary of the "whole record" rule is that a decision may be upheld even if evidence was erroneously admitted at the administrative hearing, provided a review of the entire record discloses independent substantial evidence in support of the decision. See, e.g., *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 296 N.Y.S.2d 760, 244 N.E.2d 243 (results of polygraph examination should not have been admitted, but other evidence in the record was sufficient). In a "rare case," however, the admission of improper evidence may taint the proceeding to such an extent that the "fundamentals of a fair hearing" are violated regardless of whatever other evidence is in the record. Id. at 334, 296 N.Y.S.2d at 765, 244 N.E.2d at 246. Cf. *Freymann v. Board of Regents of University of State of New York*, 1984, 102 A.D.2d 912, 477 N.Y.S.2d 494 (3d Dep't), appeal dismissed 64 N.Y.2d 645, 485 N.Y.S.2d 1032, 474 N.E.2d

260 (in proceeding for revocation of license, even if evidence of physician's prior disciplinary "conviction" violated the *Molineux* rule, such error was not so prejudicial as to require annulment). Obviously, if the agency's decision is based entirely on improper evidence, annulment will be the result. See, e.g., *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (decisive evidence seized in violation of the fourth amendment).

A question that often arises in connection with the substantial evidence test is the extent to which the agency may properly rely on hearsay that is introduced at the hearing. It is well settled, of course, that trial-type proceedings of an administrative agency are not governed by the same formal rules of evidence that are operative in the courts. See *Hecht v. Monaghan,* 1954, 307 N.Y. 461, 470, 121 N.E.2d 421, 425; *Sowa v. Looney*, supra, 23 N.Y.2d at 333, 296 N.Y.S.2d at 764, 244 N.E.2d at 245. See also N.Y.State Admin.Proc.Act § 306(1) (in adjudicatory proceedings, agencies generally need not observe formal rules of evidence except rules of privilege); *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 522 N.Y.S.2d 478, 517 N.E.2d 193 (rule of criminal procedure that prohibits conviction based solely on uncorroborated testimony of accomplice is inapplicable in police disciplinary hearing). Thus, hearsay is admissible in such proceedings. See, e.g., *Lumsden v. New York City Fire Dep't,* 1987, 134 A.D.2d 595, 522 N.Y.S.2d 4 (2d Dep't); *King v. McMickens,* 1986, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1st Dep't), affirmed sub nom. *Perez v. Ward,* 1987, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296.

May an agency's determination be based exclusively on hearsay? A 1916 decision of the Court of Appeals answered this question in the negative when it held that "there must be a residuum of legal evidence to support the [determination]." *Carroll v. Knickerbocker Ice Co.,* 1916, 218 N.Y. 435, 440, 113 N.E. 507, 509. In other words, among the data in the hearing record, there had to be some evidence--a "legal residuum" of either non-hearsay evidence or evidence that fell within a hearsay exception--that would be admissible in a court of law. The legal residuum rule, however, was roundly criticized by commentators as an artificial ingredient in a review process that should focus solely on the rationality of the agency's fact-findings in the particular circumstances. See, e.g., Davis, "Hearsay in Administrative Hearings," 32 Geo.Wash.L.Rev. 689, at 689 (1964); Weinstein, "Probative Force of Hearsay," 46 Iowa L.Rev. 331, 347-48 (1961).

The CPLR did not explicitly jettison the legal residuum rule, but the Court of Appeals interpreted the statutory adoption of the substantial evidence test in CPLR 7803(4) as an implicit rejection of the rule. See *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 180 n. *, 408 N.Y.S.2d 54, 56, 379 N.E.2d 1183, 1185. Substantial evidence, we are told, is evidence that a reasonable person would rely upon in reaching a conclusion, and relevant and probative hearsay, standing alone, can satisfy this standard. See *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 139, 495 N.Y.S.2d 332, 337, 485 N.E.2d 997, 1002. At the hearing, potential unfairness caused by the absence of confrontation of the hearsay declarant can be overcome, in most instances, by the aggrieved party's ability to demand that the declarant be subpoenaed to appear for examination as a hostile witness. See N.Y.State Admin.Proc.Act § 304(2); *Gray v. Adduci,* 1988, 73 N.Y.2d 741, 536 N.Y.S.2d 40, 532 N.E.2d 1268. Thus, it is now well settled that the legal residuum rule is a dead letter in New York in virtually all trial-type agency proceedings. See *Gray v. Adduci*, supra (revocation of driver's license based on arresting officer's written report of driver's refusal to submit to chemical test); *Eagle v. Paterson,* 1982, 57 N.Y.2d 831, 455 N.Y.S.2d 759, 442 N.E.2d 56 (finding of untrustworthy conduct by real estate brokers based on homeowners' written communications to Secretary of State); *People ex rel. Vega v. Smith*, supra (prison discipline based on correction officers' written misbehavior reports); *Hirsch v. Corbisiero,* 1989, 155 A.D.2d 325, 548 N.Y.S.2d 1 (1st Dep't), appeal denied, 1990, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279 (suspension of horse racing license on basis of investigating officer's report).

This is not to say, however, that an agency determination based solely on hearsay will always pass the substantial evidence test. In some cases, the quality and reliability of the hearsay may be so poor as to render reliance thereon unreasonable. See, e.g., *In re National Basketball Ass'n,* 1985, 115 A.D.2d 365, 495 N.Y.S.2d 904 (1st Dep't), affirmed 1986, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222 (conclusory affidavit of physician describing

patient's physical condition was insufficient to establish patient's ability to perform physical duties of professional basketball referee). See also *Hoch v. New York State Dep't of Health*, 2003, 1 A.D.3d 994, 768 N.Y.S.2d 53 (4th Dep't) (substantial evidence lacking where critical issue of student's age was based on uncorroborated hearsay).

In applying the substantial evidence standard, courts must confine their review to the record as it existed at the time of the agency's determination. See *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency"). See also *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566 (judicial review of agency determination is limited to grounds stated by agency; if those grounds are inadequate or improper, court may not uphold agency's determination by substituting a proper basis).

LEGISLATIVE STUDIES AND REPORTS

This section is based on part of § 1296 of the civil practice act. The comprehensive discussion of this section in the Second Report states that the first question specified is the same as the first of § 1296; the second combines the second and third stated in § 1296; the third question specified combines the three paragraphs in § 1296 numbered 4, 5 and 5-a. Paragraph 5-a was enacted to overcome the rule stated in the cases of Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E.2d 222, aff'd, 347 U.S. 442 (1953), and Sagos v. O'Connell, 301 N.Y. 212, 93 N.E.2d 644 (1950), which held that the degree of punishment was not reviewable. In the final draft of the third question in this section it was amended to indicate that abuse of discretion may include, but is not limited to, the measure or mode of punishment, and the Revisers comment in the Fifth Report that this change extends the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term.

The Second Report further states that the fourth question specified in this section replaces numbered paragraphs 6 and 7 in § 1296 of the civil practice act, as well as the qualifying paragraph preceding those paragraphs. Paragraph 6 is formulated in terms of a lack of competent proof of all the facts necessary to be proved; paragraph 7 speaks of such a preponderance of proof against the existence of a material fact that a jury verdict would be set aside as against the weight of the evidence. These formulations have been severely criticized and their amendment has been proposed. See 1 Benjamin, Administrative Adjudication in New York 335-340 (1942); Communications to N.Y.Temp.Comm'n on the Courts. The statement in this section accords with the amendments suggested and reflects the law as construed by the courts in Miller v. Kling, 291 N.Y. 65, 68-69, 50 N.E.2d 546, 547-48 (1942), and Kilgus v. Board of Estimate of City of New York, 308 N.Y. 620, 626-27, 127 N.E.2d 705, 709 (1955). Similar language may be found in § 9(e) of the Federal Administrative Procedure Act, 5 U.S.C.A. § 1009(e), § 207(f) of the proposed Administrative Code, and § 12(7)(e) of the Model State Administrative Procedure Act. The final draft of question 4 stated the question affirmatively rather than negatively, by changing the word "unsupported" to "supported." The Revisers remark in the Fifth Report that this change is intended to clarify the meaning, and that the language in question 4 more aptly describes the "substantial evidence" test of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940); Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943), and Brennan v. Rubino, 8 N.Y.2d 16, 21, 167 N.E.2d 332, 334 (1960); see generally, Toch, Judicial Review of Administrative Determinations in New York State, 24 Albany L.Rev. 95, 115-19 (1960). This rule is not intended to change, affect or impair in any manner established principles of judicial review which hold the burden of overcoming an administrative determination to be upon the petitioner; as for example, a proceeding by a taxpayer to review a determination of the State Tax Commission under McKinney's Tax Law §§ 199 and 375, where the burden rests upon the taxpayer to show the determination is "clearly erroneous." See, e.g., People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346, 146 N.E. 622 (1925); People ex rel. Hull v. Graves, 289 N.Y. 173, 45 N.E.2d 161 (1942); Young v. Bragalini, 3 N.Y.2d 602, 148 N.E.2d 143 (1958).

Finally, the Revisers explain in the Second Report that paragraph 5-a was added to § 1296 of the civil practice act in 1955, with no express indication of where it was to be placed. N.Y.Laws 1955, c. 661. It seems apparent, however, that it was not intended that paragraph 5-a be qualified by the paragraph preceding paragraphs 6 and 7. This may be inferred from the numbering "5-a" rather than "8" and from the simultaneous amendment of the paragraphs following paragraph 7. The latter

amendment included paragraph 5-a with paragraphs 1 through 5 as describing matters to be decided in the first instance by the Special Term. Ibid.

The last phrase of the qualifying paragraph which was added in 1951 (Laws 1951, c. 663) is discussed in the notes to § 7804 of CPLR.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 398.

5th Report Leg.Doc. (1961) No. 15, p. 750.

6th Report Leg.Doc. (1962) No. 8, p. 671.

Notes of Decisions (5489)

McKinney's CPLR § 7803, NY CPLR § 7803
Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

185 A.D.3d 503
Supreme Court, Appellate Division, First Department, New York.

In re Sergeant Hugh BARRY, Petitioner–Appellant,
v.
James P. O'NEILL, etc., et al., Respondents–Respondents.

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Index 157969/18
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Entered: July 16, 2020

Synopsis

Background: Freedom of Information Law (FOIL) requester commenced article 78 proceeding seeking review of New York Police Department's redactions and withholdings of requested documents related to incident in which police officer fatally shot an emotionally disturbed person. The Supreme Court, New York County, Arthur F. Engoron, J., denied requester's amended petition and granted police department's cross motion to dismiss proceeding. Requester appealed.

Holdings: The Supreme Court, Appellate Division held that:

police department could not rely on FOIL exemption for nonroutine criminal investigation techniques;

disclosure of documents under FOIL did not moot proceeding; and

requester was not entitled to metadata of documents disclosed.

Reversed.

Attorneys and Law Firms

****184** Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

Manzanet–Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

Opinion

***503** Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered July 8, 2019, which denied the amended petition seeking the disclosure of documents under the Freedom of Information Law (FOIL), and granted respondent's cross motion to dismiss this proceeding ***504** brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the amended petition granted to the extent of ordering disclosure of withheld documents, and the proceeding remanded to Supreme Court for review of any necessary redactions in all documents disclosed both before entry of judgment and as a result of this decision, pursuant to the exemptions based upon invasions of personal privacy, preserving the safety of persons, and the attorney-client privilege, as well as for consideration of petitioner's request for attorneys' fees and litigation costs.

In October 2016, petitioner responded to a call, which resulted in him fatally shooting an emotionally disturbed person (EDP). In February 2018, he was acquitted of murder and manslaughter charges after a trial. In the meantime, respondent Police Department (N.Y.P.D), which brought disciplinary charges in 2016, amended those charges after the acquittal.

In May 2018, petitioner's union submitted a FOIL request seeking "complete copies of any communications" between respondent O'Neill or the NYPD and the Mayor or the Mayor's Office related to the incident. The union also sought "complete copies of any documents" related to an NYPD task force convened to review its ****185** EDP policy and make recommendations for changes thereto. Respondents denied the request in its entirety, invoking the exemption pertaining to interference with a law enforcement investigation or judicial proceeding, in both the NYPD FOIL Unit's June 21, 2018 decision and the Records Access Appeals Officer's July 9, 2018 decision upon administrative appeal (Public Officers Law § 87[2][e][i]). Petitioner commenced this proceeding on August 27, 2018.

On December 21, 2018, respondents issued a second decision on the same administrative appeal, producing over 3,200 pages of responsive documents, with

numerous redactions, and withholding 462 pages pursuant to, inter alia, the inter- and intra-agency materials exemption (Public Officers Law § 87[2][g]). For the redactions, they relied on, inter alia, exemptions for nonroutine criminal investigation techniques and preserving the integrity of agency information technology assets (Public Officers Law § 87[2][e][iv], [2][i]). They also raised protection of individuals' privacy and safety, and the attorney-client privilege (Public Officers Law § 87[2][a], [2][b], [2][f]; CPLR 4503), which petitioner does not challenge. There was no mention of the previously raised law enforcement exemption.

After petitioner filed an amended petition challenging respondents' reliance on exemptions not previously raised, ***505** respondents cross-moved to dismiss, asserting that the proceeding was moot, relying only on those new exemptions, and arguing that judicial review was not limited to the original determination since the proceeding was in the nature of mandamus to compel. Supreme Court granted the cross motion. We now reverse. First, respondents' challenge to petitioner's standing, although reviewable for the first time on appeal (*Matter of Fleisher v. New York State Liq. Auth.*, 103 A.D.3d 581, 584, 960 N.Y.S.2d 395 [1st Dept. 2013], *lv denied* 21 N.Y.3d 856, 2013 WL 2395583 [2013]), is unavailing. Petitioner's union filed the FOIL request on his behalf and respondents specifically referenced him in their administrative appeal determinations (*see Matter of Norton v. Town of Islip*, 17 A.D.3d 468, 470, 793 N.Y.S.2d 133 [2d Dept. 2005], *lv denied* 6 N.Y.3d 709, 813 N.Y.S.2d 45, 846 N.E.2d 476 [2006]).

This proceeding is not in the nature of mandamus to compel. Instead, the standard of review is whether the denial of the FOIL request was "affected by an error of law" (CPLR 7803[3]; *see Matter of Empire State Beer Distribs. Assn., Inc. v. New York State Liq. Auth.*, 158 A.D.3d 480, 481, 67 N.Y.S.3d 833 [1st Dept. 2018], *lv denied* 31 N.Y.3d 907, 2018 WL 2123207 [2018]), for which judicial review is "limited to the grounds invoked by the agency" in its determination (*Matter of Madeiros v. New York City Educ. Dept.*, 30 N.Y.3d 67, 74, 64 N.Y.S.3d 635, 86 N.E.3d 527 [2017] [internal quotation marks omitted]). Since respondents abandoned the exemption raised in their initial decision, they cannot meet their burden to "establish[ ] that the ... documents qualif[y] for the exemption" (*id.* [internal quotation marks and ellipsis omitted]). Further, as respondents "did not make any contemporaneous claim that the requested materials" fit the newly raised exemptions, "to allow [them] to do so now would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL" (*id.* at 74–75, 64 N.Y.S.3d 635, 86 N.E.3d 527).

Contrary to respondents' contention, the disclosure of documents did not moot this proceeding. Hundreds of pages were still withheld and petitioner challenged the bases for both the failure to produce and the redactions made to the documents disclosed (*see* ****186** *Matter of Madeiros*, 30 N.Y.3d at 72, 64 N.Y.S.3d 635, 86 N.E.3d 527; *compare Matter of Corbett v. New York City Police Dept.*, 160 A.D.3d 415, 73 N.Y.S.3d 568 [1st Dept. 2018], *lv denied* 31 N.Y.3d 913, 2018 WL 3151743 [2018]).

Petitioner's demand for the metadata of documents disclosed must be denied. An agency is only required to produce "a record reasonably described" (Public Officers Law § 89[3][a]). Contrary to petitioner's contention, the FOIL request for "complete copies" of communications and documents cannot fairly be read to have implicitly requested metadata associated with those copies. His reliance on a Fourth Department case, ***506** which held that a request for "all computer records that are associated with published [photographs] ... included a demand for the metadata associated with those images," is misplaced, as petitioner's request is distinguishable and the Fourth Department "decision is limited to the facts of th[e] case" (*Matter of Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314, 319, 895 N.Y.S.2d 262 [4th Dept. 2010]). Respondents emailed petitioner records maintained in electronic form, as required (*see* Public Officers Law § 89[3][a]; *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]).

The issue of attorneys' fees and litigation costs is remanded to Supreme Court, which failed to address it (*see Matter of Reiburn v. New York City Dept. of Parks & Recreation*, 171 A.D.3d 670, 670–671, 98 N.Y.S.3d 49 [1st Dept. 2019]). Petitioner "substantially prevailed" even prior to this appeal (Public Officers Law § 89[4][c][ii]), as respondents made "*no* disclosures, redacted or otherwise, prior to petitioner's commencement of this ... proceeding," and he "ultimately succeeded in obtaining substantial ... post-commencement disclosure responsive to [his] FOIL request" (*Matter of Madeiros*, 30 N.Y.3d at 79, 64 N.Y.S.3d 635, 86 N.E.3d 527). On remand, the court must determine whether there was "no reasonable basis" for the NYPD to deny access based on the law enforcement exemption, and if so, it "shall assess" fees and costs (Public Officers Law § 89[4][c][ii]).

All Citations

185 A.D.3d 503, 128 N.Y.S.3d 183, 2020 N.Y. Slip Op.

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89 N.Y.2d 267
Court of Appeals of New York.

In the Matter of Khalib GOULD,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT et al., Respondents.
In the Matter of Harold SCOTT,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT, Respondent.
In the Matter of Joseph F. DeFELICE ex
rel., on Behalf of Christopher BARBERA,
Appellant,
v.
NEW YORK CITY POLICE
DEPARTMENT, Respondent.

Nov. 26, 1996.

Synopsis
Criminal defendant brought Article 78 petition challenging police department's denial of Freedom of Information Law (FOIL) request for police officers' memo books and complaint follow-up reports. The Supreme Court, New York County, Tolub, J., denied petition. Petitioner appealed. The Supreme Court, Appellate Division, 223 A.D.2d 468, 636 N.Y.S.2d 1009, affirmed. Petitioner appealed. In separate proceeding, criminal defendant brought Article 78 petition to compel police department's disclosure of police officer's memo book and other records under FOIL. The Supreme Court, New York County, McCooe, J., denied application. Petitioner appealed. The Supreme Court, Appellate Division, 225 A.D.2d 338, 638 N.Y.S.2d 612, affirmed. Petitioner appealed. In separate proceeding, criminal defendant filed FOIL application challenging police department's denial of access to complaint follow-up reports and police officer's memo book. The Supreme Court, New York County, Cohen, J., granted department's motion to dismiss. Applicant appealed. The Supreme Court, Appellate Division, 226 A.D.2d 176, 640 N.Y.S.2d 536,affirmed. Applicant appealed. After consolidation, the Court of Appeals, Ciparick, J., held that: (1) police complaint follow-up reports were not entitled to blanket exemption to FOIL as intraagency material; (2) police activity logs were available under FOIL; but (3) applicant's conjecture that documents existed some ten years ago was insufficient to establish existence of records sought.

Two holdings reversed, one holding affirmed as modified.

Bellacosa, J., filed dissenting opinion.

Attorneys and Law Firms

*****55 *269 **809** Rosemary Herbert, E. Joshua Rosenkranz and Richard M. Greenberg, New York City, for appellant in the first above–entitled proceeding.

*****56 **810** Steven B. Wasserman, Robert M. Baum, Daniel L. Greenberg and Laura R. Johnson, New York City, for appellant in the second above–entitled proceeding.

***270** Joseph F. DeFelice, Kew Gardens, pro se.

Paul A. Crotty, Corporate Counsel of New York City (Margaret G. King and Barry P. Schwartz, of counsel), New York City, for respondents in first, second and third above–entitled proceedings.

***271** Robert M. Baum, Steven B. Wasserman and Laura R. Johnson, New York City, for Legal Aid Society, amicus curiae in the first above–entitled proceeding

***272** Charles J. Hynes, District Attorney of Kings County, Brooklyn (Roseann B. MacKechnie, Virginia C. Modest and Thomas M. Ross, of counsel), for New York State District Attorneys Association, amicus curiae in the first, second and third above–entitled proceedings.

OPINION OF THE COURT

CIPARICK, Associate Judge.

The three separate proceedings on appeal all involve petitioners' efforts, pursuant to the Freedom of Information Law (FOIL), to obtain documents relating to their arrests from the New York City Police Department.

In response to petitioners' FOIL requests, the Police Department furnished assorted documents to petitioners, but refused to disclose complaint ***273** follow-up reports (commonly referred to as DD5's) and police activity logs (commonly referred to as memo books). We hold that the complaint follow-up reports are not categorically exempt from disclosure as intra-agency material and that the activity logs are agency records subject to the provisions of FOIL. Consequently, we remit these proceedings to Supreme Court to determine whether the Police Department can make a particularized showing that a statutory exemption applies to justify nondisclosure of the requested documents.

I.

In *Matter of Gould,* 223 A.D.2d 468, 636 N.Y.S.2d 1009 attorneys for petitioner Khalib Gould submitted a FOIL request to the Police Department for all documents pertaining to his arrest and the related police investigation leading to his conviction for murder in the second degree and attempted murder in the second degree. In response, the Police Department furnished arrest, complaint and ballistic reports to Gould, but withheld complaint follow-up reports on the ground that the reports are exempt from FOIL production as intra-agency material and withheld police activity logs on the ground that the logs are the officers' personal property. Gould instituted a CPLR article 78 proceeding challenging the Police Department's decision, which was dismissed by Supreme Court. The Appellate Division unanimously affirmed.

In *Matter of DeFelice,* 226 A.D.2d 176, 640 N.Y.S.2d 536, petitioner Christopher Barbera, through his attorney, requested police reports relating to his 1993 arrest that led to his conviction for attempted murder in the second degree and assault in the first degree. The Police Department provided Barbera with complaint reports, property vouchers, and arrest reports, but refused to produce the requested complaint follow-up reports and activity logs. On Barbera's CPLR article 78 challenge, Supreme Court upheld the Police Department's action, finding that the complaint follow-up reports and activity logs are exempt intra-agency material. The Appellate Division unanimously affirmed.

In *Matter of Scott,* 225 A.D.2d 338, 638 N.Y.S.2d 612, petitioner Harold Scott, in a series of FOIL requests, sought Police Department documents relating to his 1983 arrest and subsequent conviction for rape and homicide. In response to the latest of these requests, the Police Department refused to produce police activity logs and interviews of witnesses who had testified at Scott's criminal trial on the ground that the documents are exempt from disclosure under FOIL and further informed Scott that all ***274** other responsive documents had been provided to him in response to prior FOIL requests. On Scott's subsequent CPLR article 78 challenge, Supreme Court upheld the Police Department's refusal to produce the activity *****57 **811** logs, but ordered the Department to disclose the interview reports. As to Scott's request for additional documents which the Police Department certified it did not possess, Supreme Court denied the petition concluding that Scott only speculated that these documents existed. On Scott's appeal, the Appellate Division unanimously affirmed, holding that police activity logs are exempt intra-agency material and that the Police Department's certification sufficed to establish the nonexistence of other records. This Court granted leave to appeal in all three proceedings.

II.

To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (*see,* Public Officers Law § 84 [legislative declaration]). Moreover, access to government records does not depend on the purpose for which the records are sought. We recognize that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article 240 as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such a categorical limitation into the statute (*see,* Public Officers Law § 87[2][a]; *accord, Matter of Farbman & Sons v New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 81, 476 N.Y.S.2d 69, 464 N.E.2d 437 [absent an express provision or unequivocal legislative intent so indicating, CPLR article 31—the civil litigation disclosure article—is not a statute specifically exempting public records from disclosure under FOIL]).[1]

All government records are thus presumptively open for public inspection and copying unless they fall within one of ***275** the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that

the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; *see,* Public Officers Law § 89[4][b]). As this Court has stated, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

In keeping with these settled principles, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (*accord, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 569, 505 N.Y.S.2d 576, 496 N.E.2d 665). Instead, to invoke one of the exemptions of section 87(2), the agency must articulate "particularized and specific justification" for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra,* 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). 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 (*see, Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74; ****812** *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra,* *****58** 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437).

Despite these principles, the courts below relied on the case of *Matter of Scott v. Chief Med. Examiner of City of N.Y.,* 179 A.D.2d 443, 577 N.Y.S.2d 861, *lv denied* 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, *cert denied* 506 U.S. 891, 113 S.Ct. 259, 121 L.Ed.2d 190 as establishing a blanket exemption from FOIL disclosure for complaint follow-up reports and police activity logs. We conclude that this was error and hold, first, that the complaint follow-up reports are not entitled to a blanket exemption as intra-agency material, and, second, that the police activity logs are agency "records" available under FOIL. In addition, we hold that the Police Department adequately established the nonexistence of other documents requested by petitioner Scott. Accordingly, we reverse in *Gould* and *DeFelice,* modify in *Scott,* and remit in all three proceedings for Supreme Court to determine, upon an in camera inspection if necessary, whether the Police Department can make a particularized showing that any claimed exemption applies.

***276** A.

A complaint follow-up report is a form document on which a police officer "report[s] additional information concerning a previously recorded complaint" (New York City Police Dept Patrol Guide § 108–8). The courts below held that the Police Department properly withheld these reports under the intra-agency exemption, which provides that an "agency may deny access to records or portions thereof that: * * * are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; or iv. external audits" (Public Officers Law § 87[2][g]). Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree.

Initially, we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute *nonfinal* intra-agency material, irrespective of whether the information contained in the reports is "factual data" (*see, Matter of Scott v. Chief Med. Examiner of City of N.Y.,* 179 A.D.2d 443, 444, 577 N.Y.S.2d 861, *supra* [citing Public Officers Law § 87(2)(g)(iii)]). However, under a plain reading of section 87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain "statistical or factual tabulations or data" are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (*see, Matter of Farbman & Sons v New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra; Matter of MacRae v. Dolce,* 130 A.D.2d 577, 515 N.Y.S.2d 295).

The question before us, then, is whether the complaint follow-up reports contain "factual data." Although the term "factual data" is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is " 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' " (*Matter of Xerox Corp. v. Town of Webster,* 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [quoting *Matter of Sea Crest Constr. Corp. v. Stubing,* 82 A.D.2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of "statistical or factual tabulations or data" (***277** Public Officers Law § 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or

advice exchanged as part of the consultative or deliberative process of government decision making (*see, Matter of Johnson Newspaper Corp. v. Stainkamp,* 94 A.D.2d 825, 827, 463 N.Y.S.2d 122, *mod on other grounds* 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613; *Matter of Miracle Mile Assocs. v. Yudelson,* 68 A.D.2d 176, 181–182, 417 N.Y.S.2d 142).

Against this backdrop, we conclude that the complaint follow-up reports contain substantial ***59 **813** factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated "details" in which the officer records the particulars of any action taken in connection with the investigation.

However, the Police Department argues that any witness statements contained in the reports, in particular, are not "factual" because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase "factual data," as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (*see, Matter of Ingram v. Axelrod,* 90 A.D.2d 568, 569, 456 N.Y.S.2d 146 [ambulance records, list of interviews, and reports of interviews available under FOIL as "factual data"]). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made. In this connection, we are well aware that an indeterminate amount of data collected during a criminal investigation may find its way into police files regardless of whether it ultimately proves to be reliable, credible, ***278** or relevant. Disclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures. The statutory exemptions contained in the Public Officers Law, however, strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files (*see, e.g.,* Public Officers Law § 87[2][b], [e], [f]).

B.

We next address the Police Department's refusal to disclose police activity logs. The Police Department, which is indisputably an "agency" for FOIL purposes (*see,* Public Officers Law § 86[3]), contends that the activity logs are the officers' personal property and, therefore, not agency "records." We disagree. Because the activity logs contain "information kept [or] held * * * for an agency," they are "records" available under FOIL (Public Officers Law § 86[4]).[2]

Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York* ***60 **814** *State Ins. Dept.,* 61 N.Y.2d 557, 564–565, 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation and turned over to Insurance Department for inspection, are "records" under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless "kept [or] held" by the officers for the Police Department, which places these ***279** documents squarely within the statutory definition of "records" (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.,* 87 N.Y.2d 410, 417, 639 N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see,* Public Officers Law § 87[1][b][iii]), the activity logs are agency records available under the provisions of FOIL.

C.

Supreme Court did not abuse its discretion in concluding that the Police Department adequately established the nonexistence of additional records requested by petitioner Scott. Once the records access officer for the Police Department certified to Supreme Court that the Police Department had provided Scott with all responsive documents in its possession, Scott was required to articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department's control (*see, Matter of Calvin K. v. De Francesco,* 200 A.D.2d 619, 608 N.Y.S.2d 850; *Matter of Ahlers v. Dillon,* 143 A.D.2d 225, 226, 532 N.Y.S.2d 22). Scott's conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.

Finally, we note the Police Department's argument and the dissent's concern that the requests serve not the underlying purposes of FOIL, but the quite different private interests of petitioners in obtaining documents bearing on their cases and will produce an enormous administrative burden. This argument, however, is unavailing as the statutory language imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved. Should the Legislature see fit to do so, it might, as the dissent suggests, amend the statute to balance the rights accorded.

Accordingly, the order in *Gould* should be reversed, with costs, the order in *DeFelice* should be reversed, with costs, and the order in *Scott* should be modified, without costs, and, as so modified, affirmed, and all three proceedings remitted to Supreme Court for further proceedings in accordance with the opinion herein.

BELLACOSA, Judge (dissenting).

The Freedom of Information Law (FOIL) (Public Officers Law § 84 *et seq.*) and this Court's implementing and interpretive precedents (*see, e.g., Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.,* 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302; ***280** *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns,* 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437) combine to produce an unintended and anomalous set of results in these cases (*see, New York State Bankers Assn. v. Albright,* 38 N.Y.2d 430, 438, 381 N.Y.S.2d 17, 343 N.E.2d 735; *Doctors Council v. New York City Employees' Retirement Sys.,* 71 N.Y.2d 669, 675, 529 N.Y.S.2d 732, 525 N.E.2d 454).

The net practical result is a super-discovery tool affecting criminal proceedings by overarching application of FOIL. This overshadows this Court's many specific precedents governing disclosure in criminal proceedings and the specific, calibrated remedies of the CPL (art 240) (*see, e.g., People v. Mobil Oil Corp.,* 48 N.Y.2d 192, 200, 422 N.Y.S.2d 33, 397 N.E.2d 724 [general statutory provisions apply only where particularized statutory provisions do not]; McKinney's Cons Laws of N.Y., Book 1, Statutes § 238). It also evokes serious concern that systemic overload and inordinate delays in police departments and courts will result. Occasional FOIL efforts are more likely now to be encouraged and pursued as standard operating practice. File-by-file FOIL reviews and evaluations *****61 **815** in virtually every criminal case will be the standing orders of the day, with many personnel displaced from other direct-line duties to process and evaluate eligibility, compliance, confidentiality, privilege, safety, security, and redactions galore in connection with massive document turnovers. The validation of this new staple of discovery is not within FOIL's purpose and contemplated effectuation, though the acronym forecasts an ironic set of consequences.

For these reasons and with the shared hope that legislative attention will be alerted promptly to restore, at least prospectively, a fair and sensible balance of proportionate rights in this discovery field, I respectfully dissent and vote to affirm.

The fundamental policy underlying FOIL is the "people's right to know the process of governmental decision-making and to review the documents and statistics *leading to determinations* " made by government (Public Officers Law § 84 [emphasis added]). The focus of this fresh and open air reform is to provide the public with access to the same information used by public officials to arrive at official "determinations." This statutory focus should be key in interpreting the interagency exemption contained in Public Officers Law § 87(2)(g) as applied to these cases.

The petitioners here argue that criminal complaint follow-up reports (DD5's) and the personal memo books of individual police officers are subject to and not exempt from FOIL because ***281** they are "statistical or factual tabulations or data" (*see,* Public Officers Law § 87[2][g][i]). This proffered interpretation fails to consider

this subsection of the statute in its particular context and full import (*New York State Bankers Assn. v. Albright,* 38 N.Y.2d 430, 436–438, 381 N.Y.S.2d 17, 343 N.E.2d 735, *supra*). Public Officers Law § 87(2)(g) additionally subjects three other categories of interagency materials to disclosure: instructions to staff that affect the public, final agency policy or determinations, and external audits. Thus, this subsection focuses on subjecting to disclosure only those internal agency documents which pertain to official actions affecting the public generally. This limitation is further understood by reference to other subsections of the statute specifically exempting evidence compiled for law enforcement purposes in certain circumstances and where disclosure would risk life or safety (*see,* Public Officers Law § 87[2][e], [f]).

The latter specifications are markedly different from those here. The contents of investigatory files which contain raw information gathered for the purposes of criminal investigation, and potentially prosecution, do not constitute the type of information upon which official determinations and actions are taken in the context framed and intended by FOIL. Raw evidence acquired by the police has not been "tabulated," or processed, but simply recorded. As such, it has not been filtered or subjected to any analysis, verification or protective shielding by the relevant agency under specific regulatory guidelines.

This Court, in effect, shifts the emphasis of FOIL so that it will functionally eclipse the nuanced procedural safeguards governing disclosure in criminal matters, as such. This is done with no evidence that the Legislature ever contemplated by language or history this significant joint availability.

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, *supra,* need not be applied so inexorably and extended in this fashion. In *Farbman,* this Court held that records which were subject to disclosure under FOIL could not be withheld merely because the requestor was a civil litigant against the agency, and rejected a blanket exemption from FOIL based on CPLR article 31 (*id.,* at 78, 80–81, 476 N.Y.S.2d 69, 464 N.E.2d 437). That holding relied on especially the fact that " 'the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced * * * nor restricted * * * because he is also a litigant or potential litigant' " (*id.,* at 82, 476 N.Y.S.2d 69, 464 N.E.2d 437, quoting *Matter of John P. v. Whalen,* 54 N.Y.2d 89, 99, 444 N.Y.S.2d 598, 429 N.E.2d 117 [citations omitted]).

***282** In these cases, the official respondents do not seek exemption from FOIL because the petitioners are defendants in criminal proceedings, but because of the interagency *****62 **816** nature of the requested documents themselves (DD5's and officers' memo books). Interestingly and perhaps ironically, the rule of this case should entitle victims, and others, to disclosure of these same materials under a fair-game-for-all application of these enhanced FOIL principles. That may well multiply the administrative difficulty and, perhaps, even impossibility of compliance.

Substantial public policy considerations underlie the encouragement of and incentives for members of the community to be forthcoming with information serving the investigation of criminal activity and the apprehension and prosecution of criminals. Accurate and complete recordkeeping by officers is also important. Granting general access to raw observations, suppositions, notations and opinions, as in these cases, cannot well serve those overriding objectives in the criminal jurisprudence arena.

Thus, I vote to affirm in each case.

In *Matter of Gould v. New York City Police Dept.* and *Matter of DeFelice v. New York City Police Dept.:* Order reversed, with costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents and votes to affirm in a separate opinion.

In *Matter of Scott v. New York City Police Dept.:* Order modified, without costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents in part and votes to affirm in a separate opinion.

All Citations

89 N.Y.2d 267, 675 N.E.2d 808, 653 N.Y.S.2d 54, 25 Media L. Rep. 1104

Footnotes

1 The dissent reads *Farbman* to stand primarily for the proposition that an individual's status as a litigant in an action against a governmental entity does not preclude reliance on FOIL. Although the Court did make this important point in *Farbman,* the Court also concluded, as an independent ground of decision, that "[g]iven FOIL's purpose, its broad implementing language, and the narrowness of its exemptions, [CPLR] article 31 cannot be read as a blanket exception from its reach. * * * Nowhere in FOIL * * * is there specific reference to records already subject to production under article 31, and no provision of FOIL bars simultaneous use of both statutes" (62 N.Y.2d, at 81, 476 N.Y.S.2d 69, 464 N.E.2d 437). Because CPL article 240 likewise fails to specifically exempt criminal-disclosure documents from FOIL, we are, just as in *Farbman,* not free to disregard the open-government mandate of FOIL based on what is perceived as some generalized tension between FOIL and a distinct statutory disclosure scheme.

2 Although it was suggested in the courts below that police activity logs could be withheld under the privacy and intra-agency exemptions (*see,* Public Officers Law § 87[2][b], [g]), the Police Department does not advance these positions on appeal. Neither does the Police Department make the argument that *all* documents relating to law enforcement are categorically exempt from FOIL. Indeed, the Police Department acknowledges that it routinely discloses law-enforcement documents pursuant to FOIL requests, which is evidenced not only by the arrest, complaint, and ballistic reports turned over to petitioners herein, but also by the myriad lower court cases evaluating whether the Police Department justifiably withheld particular law-enforcement documents requested under FOIL.

96 N.Y.2d 117
Court of Appeals of New York.

In the Matter of the Arbitration between Joseph M. GLEASON et al., Appellants, and MICHAEL VEE, LTD., et al., Respondents.

May 1, 2001.

Synopsis
Buyers of restaurant commenced special pre-arbitration proceeding to enforce covenant not to compete. The Supreme Court, Saratoga County, William H. Keniry, J., granted motion to confirm arbitration award in favor of buyers, and sellers appealed. The Supreme Court, Appellate Division, 271 A.D.2d 736, 707 N.Y.S.2d 243, reversed, and buyers appealed by permission. The Court of Appeals, Ciparick, J., held that statute requiring that postjudgment applications relating to an arbitration be brought within the proceeding in which the first application was made applies retroactively.

Reversed and remitted.

Attorneys and Law Firms

*****45 *118 **724** DeGraff, Foy, Holt–Harris & Kunz, L.L.P., Albany (Kelly L. Munkwitz and James H. Tully, Jr., of counsel), for appellants.

Bond, Schoeneck & King, L.L.P., Albany (Carl Rosenbloom and Mary Ellen Ladouceur of counsel), for respondents.

***119 OPINION OF THE COURT**

CIPARICK, J.

In *Matter of Solkav Solartechnik, G.m.b.H. (Besicorp Group)* (91 N.Y.2d 482, 672 N.Y.S.2d 838, 695 N.E.2d 707), we held that when a pre-arbitration special proceeding ends in a final judgment, a new proceeding must be commenced to confirm an arbitration award, and we invited ***120** the Legislature to amend CPLR 7502(a) if it intended otherwise. The Legislature responded promptly with CPLR 7502(a)(iii), which provides that: "Notwithstanding the entry of judgment, all subsequent applications shall be made by motion in the special proceeding or action in which the first application was made." This appeal presents the issue of how to treat an application to confirm an arbitration award that was dismissed for failure to commence a new proceeding in the interval between *Solartechnik* and the amendment to CPLR 7502(a). We conclude that the amendment *****46 **725** should be applied retroactively and the order of the Appellate Division dismissing the petition reversed.

The underlying dispute arises from respondents' 1994 sale of a Saratoga County restaurant to petitioners. In connection with the sale, respondents agreed not to engage in a competing restaurant business within five miles of their former place of business for a period of five years. The agreement also provided that all disputes arising out of the transaction would be resolved by arbitration and that the prevailing party would be entitled to attorneys' fees. Approximately one year after the sale, respondents Esther and Michael Viggiani informed petitioners that they intended to accept employment at a nearby restaurant, the Lodge, and provided assurances that the business was dissimilar, in terms of menu, dress code and price, to their former enterprise. The parties, however, failed to agree on the applicability of the covenant not to compete and respondents began working at the Lodge.

In August 1995, petitioners commenced a special proceeding in Supreme Court seeking to enjoin respondents from further employment at the Lodge pending arbitration of their dispute. By order dated August 23, 1995, Supreme Court denied petitioners' request for injunctive relief and the matter proceeded to arbitration. On April 13, 1998, after winning compensatory damages and attorneys' fees at arbitration, petitioners moved in Supreme Court for an order confirming the arbitration award with moving papers bearing the same index number as that used in the 1995 proceeding for injunctive relief. On May 15, 1998, three days after *Solartechnik,* respondents cross-moved, under the same index number, for an order vacating the arbitration award.

In August 1998, respondents sent a letter to Supreme Court citing *Solartechnik* and requesting dismissal of the

application to confirm the arbitration award. Supreme Court denied respondents' request and confirmed the award. The Appellate ***121** Division reversed and dismissed the application in April 2000, prior to enactment of CPLR 7502(a)(iii).* We granted leave to appeal and now reverse.

In *Solartechnik,* we construed CPLR 7502(a), in order to determine whether an application to confirm an arbitration award could be brought under the same index number as a pre-arbitration proceeding that resulted in a final judgment. Reading CPLR 7502(a) to permit a confirmation application only within a pending proceeding or a pending action, we concluded that a new proceeding had to be commenced when a pre-arbitration proceeding ended with entry of final judgment because the pre-arbitration proceeding was no longer pending. We further noted that the Legislature might wish to amend CPLR 7502(a) if it intended that all matters relating to a particular arbitration be treated as a single, ongoing proceeding.

Legislative reaction was swift. At the next session, the Assembly introduced a bill to amend CPLR 7502(a) to require that all applications relating to an arbitration be brought within a single action or proceeding (1999 N.Y. Assembly Bill A 5937). The Sponsor's Memorandum noted that the original purpose of CPLR 7502(a) was "to ensure that all applications concerning an arbitration [be] presented in the same case" and that the *Solartechnik* holding would "add[ ] costs and also present[[*****47**] ****726** the opportunity to bring a second proceeding before a different judge, or even in a different county" (Mem. of Assembly Member Mark S. Weprin, A 5937). In the words of the Sponsor, the " Court of Appeals recognizes this situation and has invited remedial legislation" (*id.*).

The bill passed both Houses of the Legislature but not before the inclusion of language that would have exempted certain automobile accident arbitrations from the "one proceeding" requirement (1999 N.Y. Senate–Assembly Bill S 3071A, A 5937A). The Governor vetoed the bill, disapproving the special exemption. However, in his Veto Message the Governor noted his agreement "with the sponsors that by correcting this technical defect [identified in *Solartechnik*], the bill furthers the State's policy of concentrating all arbitration[-]related applications in a single action or proceeding in order to promote judicial economy and prevent forum shopping" (Governor's ***122** Veto Mem. No. 7, 1999 N.Y. Legis. Ann., at 394). In doing so, the Governor stressed that the bill "would clarify" what the statute intended all along—"that all applications to a court pertaining to an arbitration shall be made within the same action or proceeding" (*id.; see also,* Mem. of Assembly Member Mark S. Weprin, A 5937, *supra*). A new bill, without the exemption, was passed and signed into law on August 16, 2000 (L. 2000, ch. 226, N.Y. Senate–Assembly Bill S 6672–D, A 9631–D [enacted]). The amendment, enacted to "address the problems of [*Solartechnik*]," took immediate effect (*see,* Mem. of Senator Dean G. Skelos, S 6672–D).

This amendment, making subsequent arbitration-related applications within a prior pre-arbitration proceeding not only permissible but also mandatory, came weeks after the Appellate Division dismissed petitioners' application. Petitioners argue that the amendment should be applied retroactively. We agree.

In determining whether a statute should be given retroactive effect, we have recognized two axioms of statutory interpretation. Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated (*see, People v. Oliver,* 1 N.Y.2d 152, 157, 151 N.Y.S.2d 367, 134 N.E.2d 197). However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose (*see, Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978; *Becker v. Huss Co.,* 43 N.Y.2d 527, 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205). Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or 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 (*see e.g., Brothers v. Florence,* 95 N.Y.2d 290, 299, 716 N.Y.S.2d 367, 739 N.E.2d 733; *Matter of OnBank & Trust Co.,* 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 688 N.E.2d 245).

In amending CPLR 7502(a), the Legislature did not state that it was to have retroactive effect. However, in two respects it conveyed a sense of immediacy: it acted swiftly after *Solartechnik,* and it directed that the amendment was to take effect immediately, thus evincing "a sense of urgency" (*Brothers v. Florence, supra,* 95 N.Y.2d, at 299, 716 N.Y.S.2d 367, 739 N.E.2d 733, citing *Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978). Additionally, the legislative history establishes that the purpose of the amendment was to clarify what the law *****48** ****727** was always meant to do and say: that all arbitration-related applications ***123** should be concentrated in a single proceeding or action, to promote

judicial economy and prevent forum shopping. These factors together persuade us that the remedial purpose of the amendment should be effectuated through retroactive application (*see, Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245).

Petitioners' remaining arguments are without merit.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to the Appellate Division for consideration of issues raised but not determined on appeal to that court.

Chief Judge KAYE and Judges SMITH, LEVINE, WESLEY and ROSENBLATT concur; Judge GRAFFEO taking no part.

Order reversed, etc.

All Citations

96 N.Y.2d 117, 749 N.E.2d 724, 726 N.Y.S.2d 45, 2001 N.Y. Slip Op. 03607

Footnotes

* We may consider this previously unraised question of law as to the retroactivity of CPLR 7502(a)(iii), which could not have been raised below as those proceedings predated the amendment (*see, Matter of OnBank & Trust Co.,* 90 N.Y.2d 725, 665 N.Y.S.2d 389, 688 N.E.2d 245).

30 N.Y.3d 67
Court of Appeals of New York.

In the Matter of Pamela A. MADEIROS, Appellant, v. NEW YORK STATE EDUCATION DEPARTMENT et al., Respondents.

Oct. 17, 2017.

Synopsis
Background: Freedom of Information Law (FOIL) requester commenced article 78 proceeding seeking review of New York State Education Department's denial of her request for documents related to municipalities' audit plans for special education preschooler provider costs. The Supreme Court, Albany County, Francis T. Collins, J., granted petition in part by requiring Department to disclose two previously redacted pages and dismissed petition in part. Requester appealed. The Supreme Court, Appellate Division, Devine, J., 133 A.D.3d 962, 18 N.Y.S.3d 782, affirmed. Requester appealed.

Holdings: The Court of Appeals, Stein, J., held that:

Department could not rely on FOIL exemption for information concerning non-routine law enforcement investigative techniques and procedures;

FOIL exemption for documents that would interfere with law enforcement investigations or judicial proceedings applied; and

requester was eligible for award of attorney fees under FOIL.

Affirmed as modified.

Attorneys and Law Firms

*****637** Greenberg Traurig, LLP, Albany (Cynthia E. Neidl of counsel), for appellant.

Eric T. Schneiderman, Attorney General, Albany (Jeffrey W. Lang, Barbara D. Underwood and Andrew D. Bing of counsel), for respondents.

OPINION OF THE COURT

STEIN, J.

****529 *70** The question before us is whether the Freedom of Information Law exempts from disclosure certain records compiled by respondent New York State Education Department relating to municipalities' plans for auditing special education preschool provider costs. We hold that the materials at issue, as redacted, are exempt from disclosure under Public Officers Law § 87(2)(e)(i).

*****638 *71 **530** I.

The board of every school district is responsible for providing special education services and programs to preschool-age children with disabilities (*see* Education Law § 4410[2]; *see generally* Education Law § 4401). Such programs are often furnished by private providers approved by respondent New York State Education Department (hereinafter, the Department) (*see* Education Law §§ 4401[2]; 4410[9]; 8 NYCRR 200.20). Each county and New York City (for the counties contained therein) is charged with the costs of sending resident children to these special education preschool programs (*see* Education Law § 4410[1][g]; [11][a]). The tuition rates charged by such programs are set by the Department—based on financial statements submitted by the provider, as well as state and municipal audits, which establish, among other things, the costs of administering such programs—and municipalities are reimbursed by the State for a statutory percentage of the costs paid out to providers (*see id.* § 4410[10], [11][b][i]; 8 NYCRR 200.9).

The Office of the State Comptroller conducted a series of audits of approved preschool special education programs. These audits revealed widespread fraud and abuse in the reporting of allowed costs, and ultimately prompted

several criminal prosecutions and professional disciplinary investigations. As a result, in 2013, the legislature amended Education Law § 4410 in an attempt to increase fiscal oversight and, specifically, to incentivize municipal audits of such programs. Although municipalities were already authorized to perform audits of programs for which they bore fiscal responsibility, the 2013 amendments further permitted municipalities to recover overpayments and retain all disallowed costs discovered (L. 2013, ch. 57, § 1, part A, § 24; *see* Education Law § 4410[11][c][i], [ii]; 8 NYCRR 200.18). The amendments to section 4410 also required the Department to "provide guidelines on standards and procedures to municipalities and boards, for fiscal audits of [preschool] services or programs" (L. 2013, ch. 57, § 1, part A, § 24; *see* Education Law § 4410[11][c][i]). In addition to complying with that statutory mandate, the Department amended its regulations to require municipalities to submit, for approval by the Department, new "detailed audit plan[s] and audit program[s]" consistent with the Department's guidelines prior to undertaking any audits after a specific date (8 NYCRR 200.18[b][2], [3]). Once approved, a municipality's audit plan is valid for five years (*see id.*).

***72** Shortly after the enactment of the statutory and regulatory amendments relating to Education Law § 4410, petitioner Pamela Madeiros submitted a request to the Department pursuant to the Freedom of Information Law (*see generally* Public Officers Law art. 6 [FOIL]), seeking disclosure, as relevant here, of "any and all [Education Law § 4410(11)(c) and 8 NYCRR 200.18] audit standards in [the Department's] possession, including any audit program and audit plan submitted by a municipality or school district ..., whether approved, not approved, disapproved, pending or such other status." The Department denied petitioner's request in its entirety, asserting that the records were exempt from disclosure pursuant to Public Officers Law § 87(2)(e) because disclosure "would interfere with investigations of compliance with the provisions of the reimbursable cost manual and the preschool special education rate setting system." Petitioner administratively appealed, and the Department failed to respond within the statutory time frame, thereby constructively denying her appeal (*see* Public Officers Law § 89[4][a]).

*****639 **531** Petitioner subsequently commenced the instant CPLR article 78 proceeding, seeking a judgment vacating the denial of her FOIL request and directing the Department to provide her with the records sought. Petitioner also requested attorneys' fees pursuant to Public Officers Law § 89(4)(c).

Before answering the petition, the Department released to petitioner 55 pages of documents responsive to her FOIL inquiry. The documents consisted of the New York City and Onondaga County audit plans, the contents of which were partially redacted, certain unredacted Department records relating to the regulatory amendments, and the guidelines promulgated by the Department for fiscal audits of preschool providers undertaken by municipalities. After disclosing these documents, the Department answered the petition and sought dismissal of the proceeding, arguing that: petitioner's claim was moot in light of its disclosures; the redactions were permitted under both section 87(2)(e) and (g) of the Public Officers Law; and petitioner had failed to demonstrate her entitlement to attorneys' fees. The Department submitted unredacted copies of the documents to the trial court for in camera review.

Supreme Court granted the petition only to the limited extent of requiring the Department to disclose two previously redacted pages due to the Department's failure to invoke Public Officers Law § 87(2)(g) as a basis for its administrative ***73** denial, upheld the remainder of the redactions, and otherwise dismissed the proceeding. Supreme Court reasoned that the majority of the Department's redactions were appropriate under Public Officers Law § 87(2)(e) because the audit plans contained non-routine audit techniques and procedures compiled for law enforcement purposes, and disclosure would interfere with law enforcement investigations (*see* Public Officers Law § 87 [2] [e][i], [iv]). Supreme Court did not award petitioner attorneys' fees. On petitioner's appeal, the Appellate Division affirmed (133 A.D.3d 962, 18 N.Y.S.3d 782 [3d Dept.2015]),* and we granted petitioner leave to appeal (27 N.Y.3d 903, 2016 WL 1313253 [2016]).

II.

FOIL generally "requires government agencies to 'make available for public inspection and copying all records' subject to a number of exemptions" (*Matter of Harbatkin v. New York City Dept. of Records & Info. Servs.,* 19 N.Y.3d 373, 379, 948 N.Y.S.2d 220, 971 N.E.2d 350 [2012]; quoting Public Officers Law § 87[2]). FOIL is based on a presumption of access in accordance with the underlying "premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393

N.E.2d 463 [1979]; *see Matter of Data Tree, LLC v. Romaine,* 9 N.Y.3d 454, 462, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]). The exemptions set forth in the statute are interpreted narrowly in order to effect the purpose of the statutory scheme (*see Matter of Data Tree,* 9 N.Y.3d at 462, 849 N.Y.S.2d 489, 880 N.E.2d 10).

This appeal centers on the meaning and interpretation of the exemption embodied ****532 ***640** in Public Officers Law § 87(2)(e). Pursuant to this provision, an agency may deny public access to records or portions thereof that, as relevant here, "are compiled for law enforcement purposes and which, if disclosed, would" either "interfere with law enforcement investigations or judicial proceedings" (subparagraph [i]) or "reveal criminal investigative techniques or procedures, except routine techniques and procedures" (subparagraph [iv]). Petitioner argues that the courts below erred in concluding that the Department's redactions of the documents responsive to her FOIL request are exempt pursuant to either of these provisions. More specifically, ***74** petitioner asserts that any records relating to municipal audit plans were not compiled for law enforcement purposes, do not relate to and would not interfere with a law enforcement investigation or judicial proceeding, and are not criminal investigative techniques. Petitioner further contends that she is entitled to attorneys' fees because she has substantially prevailed in this proceeding given the Department's belated disclosures following its commencement. In response, the Department urges us to affirm the Appellate Division order under either subparagraph (i) or (iv) of section 87(2)(e), and disputes petitioner's claim that she is entitled to attorneys' fees.

III.

Initially, we reject the Department's reliance on Public Officers Law § 87(2)(e)(iv)—pertaining to non-routine criminal investigative techniques—because the Department failed to invoke that particular exemption in its denial of petitioner's FOIL request. "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Matter of Scherbyn v. Wayne–Finger Lakes Bd. of Coop. Educ. Servs.,* 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 573 N.E.2d 562 [1991] [internal quotation marks and citations omitted]; *see Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.,* 16 N.Y.3d 360, 368, 922 N.Y.S.2d 224, 947 N.E.2d 115 [2011]; *Matter of Scanlan v. Buffalo Pub. School Sys.,* 90 N.Y.2d 662, 678, 665 N.Y.S.2d 51, 687 N.E.2d 1334 [1997]). It is also settled that the "agency relying on the applicability of [a FOIL] exemption[ ] ... ha[s] the burden of establishing that the ... documents qualif [y]" for the exemption and, to meet that burden, the agency must " 'articulate particularized and specific justification' " for denying disclosure (*Matter of West Harlem Bus. Group v. Empire State Dev. Corp.,* 13 N.Y.3d 882, 885, 893 N.Y.S.2d 825, 921 N.E.2d 592 [2009], quoting *Matter of Fink,* 47 N.Y.2d at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463; *see* Public Officers Law § 89[4] [b]).

Here, the Department's administrative denial cited to Public Officers Law § 87(2)(e), without referencing a specific subparagraph. However, the justification offered—namely, that disclosure would "interfere with investigations of compliance"—plainly tracks the language of subparagraph (i), not subparagraph (iv). The Department did not make any contemporaneous claim that the requested materials constituted non-routine ***75** "criminal investigative techniques" (Public Officers Law § 87[2][e][iv]). Because the Department did not rely on subparagraph (iv) in its administrative denial, to allow it to do so now would be contrary to our precedent, as well as to the spirit and purpose of FOIL.

IV.

The propriety of the Department's redactions of the disclosed records, therefore ****533 ***641** turns on whether the redacted portions qualify for exemption under Public Officers Law § 87(2)(e)(i). This requires us to address both prongs of the exemption: (1) whether the records were compiled for law enforcement purposes; and (2) whether disclosure of the records would interfere with law enforcement investigations or judicial proceedings. We conclude that, under the circumstances presented here, both of these prongs are satisfied and the records were properly redacted.

As to the first prong, we are persuaded that the records at issue were compiled for law enforcement purposes. The phrase "law enforcement purposes" is not defined in the FOIL statutes (*see* Public Officers Law § 86 [definitions]). "In the absence of a statutory definition, 'we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining

the meaning of a word or phrase' " (*Yaniveth R. v. LTD Realty Co.,* 27 N.Y.3d 186, 192, 32 N.Y.S.3d 10, 51 N.E.3d 521 [2016], quoting *Rosner v. Metropolitan Prop. & Liab. Ins. Co.,* 96 N.Y.2d 475, 479–480, 729 N.Y.S.2d 658, 754 N.E.2d 760 [2001]). To that end, "law enforcement" is generally defined by Black's Law Dictionary as "[t]he detection and punishment of violations of the law" (Black's Law Dictionary [10th ed. 2014], law enforcement). It is undisputed that the Department lacks jurisdiction to punish criminal violations of the law. However, as the dictionary further provides, the term "law enforcement" is "not limited to the enforcement of criminal laws" (Black's Law Dictionary [10th ed. 2014], law enforcement).

Consistent with this definition, we conclude that the exemption set forth in Public Officers Law § 87(2)(e) does not apply solely to records compiled for law enforcement purposes in connection with criminal investigations and punishment of violations of the criminal law. Notably, the exemptions provided in two of the subparagraphs under section 87(2)(e) expressly apply only to "criminal" matters, a limitation that would be ***76** superfluous if the term "law enforcement" was confined to criminal matters at the outset (Public Officers Law § 87[2][e][iii], [iv]).

In addition, we have recognized that " '[f]ederal case law and legislative history ... are instructive' " when interpreting Public Officers Law § 87(2)(e) because the FOIL law enforcement exemption is modeled on the federal counterpart found in the Freedom of Information Act (*Matter of Lesher v. Hynes,* 19 N.Y.3d 57, 64, 945 N.Y.S.2d 214, 968 N.E.2d 451 [2012], quoting *Matter of Fink,* 47 N.Y.2d at 572 n., 419 N.Y.S.2d 467, 393 N.E.2d 463; *see generally* 5 U.S.C. § 552 [FOIA]). Significantly in that regard, the federal analogue exempting certain materials compiled for law enforcement purposes has been held to encompass both civil and criminal law enforcement matters (*see e.g. Sack v. United States Dept. of Defense,* 823 F.3d 687, 694 [D.C. Cir.2016]; *Cooper Cameron Corp. v. United States Dept. of Labor, Occupational Safety & Health Admin.,* 280 F.3d 539, 545 [5th Cir.2002]; *Tax Analysts v. Internal Revenue Serv.,* 294 F.3d 71, 77 [D.C. Cir.2002]; *Rugiero v. United States Dept. of Justice,* 257 F.3d 534, 550 [6th Cir.2001]; *see also Milner v. Department of Navy,* 562 U.S. 562, 582, 131 S.Ct. 1259, 179 L.Ed.2d 268 [2011, Alito, J., concurring] ["The ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity"]). The Committee on Open Government—which issues advisory opinions relating to FOIL obligations—has ****534 ***642** also recognized that "entities other than criminal law enforcement agencies may in certain circumstances cite [Public Officers Law] § 87(2)(e) as a basis for denial," providing, as an example, an agency audit that uncovers possible illegality (Comm. on Open Govt. FOIL–AO–7332 [1992]).

Our decision should not be read to hold that every audit necessarily serves "law enforcement purposes" (Public Officers Law § 87[2][e]). The audits at issue here, however, are not simply routine fiscal audits. The statutory scheme of Education Law § 4410, as amended in 2013, and the Department's regulations pertaining to municipal audit plans and audit programs, indicate that these audits are specifically targeted at ferreting out the improper and potentially illegal or fraudulent reporting of costs by preschool special education providers. The goal of the statutory and regulatory scheme and, in particular the 2013 amendments, is not only to ensure the establishment of an accurate tuition rate, but also to encourage compliance with the applicable reporting rules and curb existing fraud and ***77** abuse (*see generally* Senate Introducer's Mem. in Support, Bill Jacket, L. 2013, ch. 545 at 9, 2013 McKinney's Session Laws at 2087). Thus, the obvious inference arising from the statutory requirement that the Department issue guidelines for municipalities in conducting these audits is that the legislature sought to increase the efficacy of audit procedures in an effort to strengthen enforcement measures. Under these circumstances, we conclude that the records sought by petitioner were compiled for law enforcement purposes.

Turning to the second inquiry, we agree with the courts below that the redactions made by the Department were necessary to prevent interference with a law enforcement investigation (*see* Public Officers Law § 87[2][e][i]). We have cautioned that "the purpose of [FOIL] is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution" (*Matter of Fink,* 47 N.Y.2d at 572, 419 N.Y.S.2d 467, 393 N.E.2d 463). Here, the Executive Coordinator for Special Education explained that the Department's redactions were imperative because releasing specific methods and procedures used by auditors in particular counties would supply providers subject to audit with "a road-map to avoid disclosure of inappropriate costs" and would enable such providers to more effectively conceal fraudulent and criminal activities, thereby undermining the audit process. In other words, "disclosure of th[e redacted] procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their

conduct in anticipation of avenues of inquiry to be pursued by agency personnel" (*Matter of Fink,* 47 N.Y.2d at 572, 419 N.Y.S.2d 467, 393 N.E.2d 463).

To the extent petitioner claims that Public Officers Law § 87(2)(e)(i) is inapplicable because there were no ongoing audits at the time that she submitted her FOIL request, her argument is unpersuasive. While an agency may not rely on section 87(2)(e)(i) to refuse disclosure of records upon a wholly speculative claim of potential interference with an unspecified future investigation to which the documents may or may not be relevant (*see Church of Scientology of N.Y. v. State of New York,* 61 A.D.2d 942, 943, 403 N.Y.S.2d 224 [1st Dept. 1978], *affd. on other grounds* 46 N.Y.2d 906, 907, 414 N.Y.S.2d 900, 387 N.E.2d 1216 [1979]), that is not the case here. Rather, the municipal audits of special education preschool providers were expressly encouraged ****535 ***643** by statute and were plainly contemplated in the near future.

A municipality must submit an audit plan for approval as the necessary first step to conducting an audit (*see* ***78** 8 NYCRR 200.18). That is, the very purpose of a municipality's submission of an audit plan to the Department for approval is to obtain authorization to conduct such investigations. We have previously recognized that section 87(2)(e)(i) applies to prospective investigations (*see Matter of Lesher,* 19 N.Y.3d at 68, 945 N.Y.S.2d 214, 968 N.E.2d 451 [observing that disclosure may be required where there was "no longer any pending or *potential* law enforcement investigation" (emphasis added)]; *see also Sussman v. United States Marshals Serv.,* 494 F.3d 1106, 1114 [D.C. Cir.2007] [under FOIA, the interference need not be with an ongoing investigation, as disclosure may be refused if it would interfere with a reasonably anticipated proceeding]; *Lynch v. Department of Treasury,* 210 F.3d 384 [9th Cir.2000] [table; text at 2000 WL 123236, *3, 2000 U.S. App. LEXIS 1392, *11 (2000)] [FOIA exemption applied where legal action was " 'contemplated' or 'in prospect' "], *cert. denied* 530 U.S. 1215, 120 S.Ct. 2219, 147 L.Ed.2d 251 [2000]; *Manna v. United States Dept. of Justice,* 51 F.3d 1158, 1164 [3d Cir.1995] [under FOIA, the agency must show that an enforcement proceeding is "pending or prospective"], *cert. denied* 516 U.S. 975, 116 S.Ct. 477, 133 L.Ed.2d 405 [1995]; *Miller v. United States Dept. of Agric.,* 13 F.3d 260, 263 [8th Cir.1993] [same]).

Here, considering the municipalities' submissions of audit plans in the context of the statutory and regulatory amendments aiming to uncover and curtail fraudulent and criminal reporting, the existence of reasonably anticipated investigations at the time of petitioner's FOIL request is clear. The municipalities in question, by virtue of having submitted plans pursuant to which audits could be conducted, were plainly contemplating impending audits of preschool program providers for which they bore financial responsibility. Thus, the redactions at issue fit squarely within the exemption permitting an agency to deny access to records compiled for law enforcement purposes where their disclosure would interfere with an investigation.

V.

As a final matter, we agree with petitioner that, even accepting the Department's redactions as proper, she "substantially prevailed" in this litigation (Public Officers Law § 89[4][c]). The Public Officers Law authorizes an award of attorneys' fees where the petitioner "has substantially prevailed" in the FOIL proceeding and the agency either lacked a reasonable basis for denying access to the requested records or "failed to respond to a request or appeal within the statutory time" (***79** Public Officers Law § 89 [4][c][i], [ii]). "Where ... a court determines that one of the requirements has not been met, we review whether the court erred as a matter of law in reaching that conclusion" (*Matter of Beechwood Restorative Care Ctr. v. Signor,* 5 N.Y.3d 435, 441, 808 N.Y.S.2d 568, 842 N.E.2d 466 [2005]; *see Matter of Niagara Envtl. Action v. City of Niagara Falls,* 63 N.Y.2d 651, 652, 479 N.Y.S.2d 512, 468 N.E.2d 694 [1984]). If the statutory requirements have been satisfied, the determination of whether to award fees rests within the court's discretion, subject to review only for an abuse of that discretion (*see Matter of Capital Newspapers Div. of the Hearst Corp. v. City of Albany,* 15 N.Y.3d 759, 761, 906 N.Y.S.2d 808, 933 N.E.2d 207 [2010]; *Matter of Beechwood Restorative Care Ctr.,* 5 N.Y.3d at 441, 808 N.Y.S.2d 568, 842 N.E.2d 466; Governor's Approval Mem., Bill Jacket, L. 1982, ch. 73 at 8, 1982 ****536 ***644** McKinney's Session Laws of N.Y. at 2592–2593).

Here, the Appellate Division concluded that the statutory requirement that petitioner "substantially prevail" was not met because the "majority of the [Department's] challenged redactions were appropriate" (133 A.D.3d at 965, 18 N.Y.S.3d 782). However, this analysis fails to take into account that the Department made *no* disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding. Although the Department's redactions in the

eventually-released records have been upheld, petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.

Under these circumstances, petitioner substantially prevailed within the meaning of Public Officers Law § 89(4)(c) and the Appellate Division erred in determining that petitioner failed to meet the statutory prerequisites for an award of attorneys' fees. Indeed, to conclude otherwise would be to permit agencies to circumvent section 89(4)(c) because "only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter—however dilatorily" (*Matter of New York Civ. Liberties Union v. City of Saratoga Springs,* 87 A.D.3d 336, 339–340, 926 N.Y.S.2d 732 [3d Dept. 2011]; *see Matter of Kohler–Hausmann v. New York City Police Dept.,* 133 A.D.3d 437, 438, 18 N.Y.S.3d 848 [1st Dept. 2015]; *Matter of Jaronczyk v. Mangano,* 121 A.D.3d 995, 997, 996 N.Y.S.2d 291 [2d Dept. 2014]; *Matter of* ***80** *Purcell v. Jefferson County Dist. Attorney,* 77 A.D.3d 1328, 1329, 909 N.Y.S.2d 238 [4th Dept. 2010]; *Matter of Powhida v. City of Albany,* 147 A.D.2d 236, 239, 542 N.Y.S.2d 865 [3d Dept. 1989]). We, therefore, must remit for Supreme Court to exercise its discretion in relation to petitioner's fee request.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting the matter to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Chief Judge DIFIORE and Judges RIVERA, FAHEY, GARCIA, WILSON and FEINMAN concur.

Order modified, without costs, by remitting to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

All Citations

30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. Slip Op. 07209

Footnotes

* During the pendency of petitioner's appeal, New York City released to petitioner an unredacted copy of its audit plan and program. Thus, insofar as petitioner sought disclosure of that plan, her request for that specific relief with regard to those particular documents is rendered academic (*see Matter of Fappiano v. New York City Police Dept.,* 95 N.Y.2d 738, 749, 724 N.Y.S.2d 685, 747 N.E.2d 1286 [2001]).

91 N.Y.2d 577
Court of Appeals of New York.

Thomas MAJEWSKI, Respondent,
v.
BROADALBIN–PERTH CENTRAL SCHOOL DISTRICT, Defendant and Third–Party Plaintiff–Respondent.
Adirondack Mechanical Corporation, Third–Party Defendant–Appellant.

May 12, 1998.

Synopsis
Worker who was injured while performing repair work brought action against premises owner, and owner filed third-party claim against worker's employer for contribution and/or indemnification. The Supreme Court, Fulton County, Stephen A. Ferradino, J., 169 Misc. 2d 429, 653 N.Y.S.2d 822, granted employer's motion for summary judgment. Worker and premises owner appealed. The Supreme Court, Appellate Division, 231 A.D.2d 102, 661 N.Y.S.2d 293,reversed, denied employer's motion and certified question for review. The Court of Appeals, Smith, J., held that amendments to Workers' Compensation Law barring third-party claims against employer for contribution or indemnity except when employee has sustained "grave injury" did not apply retroactively to actions pending on effective date of amendments.

Affirmed.

Attorneys and Law Firms

***966 *578 **978** Thuillez, Ford, Gold & Johnson, L.L.P., Albany (Michael J. Hutter, Dale M. Thuillez and Debra J. Schmidt, of counsel), and James P. O'Connor, New York City, for third-party defendant-appellant.

Richard T. Aulisi, Gloversville, and Thorn and Gershon, Albany (Robert F. Doran and Paul D. Jureller, of counsel), for respondent.

***967 *579 **979** Maynard, O'Connor, Smith & Catalinotto, L.L.P., Albany (Leslie B. Neustadt and Michael E. Catalinotto, of counsel), for defendant and third-party plaintiff-respondent.

Dennis C. Vacco, Attorney–General, Albany (Barbara G. Billet, *580 Peter H. Schiff and Michael S. Buskus, of counsel), for State of New York, amicus curiae.

Menagh, Trainor, Mundo & Falcone, P.C., New York City (Christopher A. Bacotti, of counsel), for Electrical Employers Self Insurance Safety Plan, amicus curiae.

Schneider, Kleinick, Weitz, Damashek & Shoot, New York City (Brian J. Shoot, Harry Steinberg and John C. Cherundolo, of counsel), for New York State Trial Lawyers Association, amicus curiae.

***581 OPINION OF THE COURT**

SMITH, Judge.

This case requires this Court to examine whether certain amendments to the Workers' Compensation Law should be construed as retroactively applicable to pending actions. We conclude that the Appellate Division properly held that the relevant provisions of the new legislation should not apply to actions pending on the effective date of the amendments. Rather, the provisions should be applied prospectively to actions filed postenactment. Thus, the order of the Appellate Division should be affirmed and the certified question should be answered in the negative.

I

As alleged in the complaint, plaintiff was employed by third-party defendant Adirondack Mechanical Corporation (AMC). On October 26, 1994, plaintiff was assigned by AMC to perform certain repair work at a school operated and maintained by defendant ***582** Broadalbin–Perth Central School District. AMC had contracted with defendant for the completion of this work.

While performing the assigned repair work on the school's premises, plaintiff fell from an allegedly

defective ladder which had been provided by defendant. Plaintiff commenced a lawsuit on December 20, 1995 against defendant to recover for his personal injuries based upon claimed violations of Labor Law §§ 200 and 240(1). On January 29, 1996, defendant commenced a third-party action against AMC which alleged that AMC had negligently supervised and failed to protect its employee. Defendant further claimed that AMC owed defendant a duty of contribution and/or indemnification for damages plaintiff might recover.

On July 12, 1996, new legislation, commonly referred to as the Omnibus Workers' Compensation Reform Act of 1996, was passed which amended Workers' Compensation Law § 11 to provide that:

> "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' " (L. 1996, ch. 635, § 2).

However, the amendments did not affect the power of a third party to recover under express contractual obligations between the employer and the third party (*id.*). The legislation was signed into law by Governor Pataki on September 10, 1996 with the relevant portions of the Act designated to "take effect immediately." Thereafter, on September 20, 1996, AMC filed a motion for summary judgment against the third-party complaint arguing that the action for contribution and/or indemnification was now barred by the recent enactment.[1]

Finding that the legislation was to have retroactive application to pending actions, Supreme Court granted AMC's summary judgment motion and dismissed the third-party complaint. In reversing and denying AMC's motion, the Appellate Division concluded "that the clear legislative intent underlying sections 2 through 9 of the Omnibus Act was that those provisions ***583** apply prospectively only" (231 A.D.2d 102, 111, 661 N.Y.S.2d 293). That Court certified the following *****968 **980** question to this Court: "Did this court err as a matter of law in reversing the order of the Supreme Court and denying the third-party defendant's motion for summary judgment?" We answer that question in the negative, and affirm the Appellate Division order.

II

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. v. City of New York,* 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338; *see also, Longines–Wittnauer v. Barnes & Reinecke,* 15 N.Y.2d 443, 453, 261 N.Y.S.2d 8, 209 N.E.2d 68). As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:

> "In 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" (*Tompkins v. Hunter,* 149 N.Y. 117, 122–123, 43 N.E. 532; *see also, Matter of Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98, 667 N.Y.S.2d 327, 689 N.E.2d 1373).

Here, the Act says only that the subject provisions are to "take effect immediately" (L. 1996, ch. 635, § 90). However, the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence (*see, Shielcrawt v. Moffett,* 294 N.Y. 180, 61 N.E.2d 435 [separately analyzing retroactive or prospective application of a statute enacted to "take effect immediately"]).

While the fact that a statute is to take effect immediately "evinces a sense of urgency," "the meaning of the phrase is equivocal" in an analysis of retroactivity (*Becker v. Huss Co.,* 43 N.Y.2d 527, 541, 402 N.Y.S.2d 980, 373 N.E.2d 1205). In fact, we noted in *Becker* that "[i]dentical language in other acts has not been enough to require application to pending litigation" (*id.,* at 541, 402 N.Y.S.2d 980, 373 N.E.2d 1205). Here, the significance of the effective date upon our analysis of the reach of the subject provisions is further obscured because the Legislature explicitly designated prospective or retroactive application for other provisions of the Act not at issue here (L. 1996, ch. 635, § 90). Under the circumstances, the proviso that the subject provisions were ***584** to "take effect immediately" contributes little to our understanding of whether retroactive application was intended on the issue presented.

It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it (*see, Jacobus v. Colgate,* 217 N.Y. 235, 240, 111 N.E. 837 [Cardozo, J.] ["It takes a clear expression of the

legislative purpose to justify a retroactive application"]; *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 ["the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"]). An equally settled maxim is that "remedial" legislation or statutes governing procedural matters should be applied retroactively (*see, Matter of OnBank & Trust Co.,* 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 688 N.E.2d 245; *Becker v. Huss Co., supra,* 43 N.Y.2d, at 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205).

However, such construction principles are merely navigational tools to discern legislative intent. Classifying a statute as "remedial" does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to "supply some defect or abridge some superfluity in the former law" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 321). As we have cautioned, "General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available" (*Shielcrawt v. Moffett, supra,* 294 N.Y., at 189, 61 N.E.2d 435; *see also,* ***969 *Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 730, 665 N.Y.S.2d 389, 688 N.E.2d 245; *Becker v. Huss Co., supra,* 43 N.Y.2d, at 540, 402 N.Y.S.2d 980, 373 N.E.2d 1205). **981 To that end, we turn to legislative history to steer our analysis.

It is clear that one of the key purposes of the Act was the legislative modification of *Dole v. Dow Chem. Co.* (30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288) insofar as that case related to third-party actions against employers. That intention was repeatedly expressed by all sides during the legislative debates and is included in the official statement of intent (*see,* L. 1996, ch. 635, § 1 ["It is the further intent of the legislature to create a system which protects injured workers and delivers wage replacement benefits in a fair, equitable and efficient manner, while reducing time-consuming bureaucratic delays, and repealing *Dole* liability except in cases of grave injury."]). In *Dole,* this Court examined the share of losses to be apportioned between joint tortfeasors. Notwithstanding which tortfeasor was sued by an injured plaintiff, this Court concluded that the defendant, if found liable, could recover a proportionate share from a joint tortfeasor. **585 As we stated, "where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party" (*Dole v. Dow Chem. Co., supra,* 30 N.Y.2d, at 148–149, 331 N.Y.S.2d 382, 282 N.E.2d 288; *see also, Raquet v. Braun,* 90 N.Y.2d 177, 182, 659 N.Y.S.2d 237, 681 N.E.2d 404). Such equitable principles are codified in article 14 of the CPLR.

In *Dole,* the plaintiff was the employee of the third-party defendant so no recovery could be had against the employer by the employee or "anyone otherwise entitled to recover damages * * * on account of such injury or death" under Workers' Compensation Law § 11. Nevertheless, we extended our reasoning concerning the apportionment of liability to allow contribution or indemnification from an employer even though the employer could not have been liable directly to a plaintiff who had chosen to sue the joint tortfeasor. It was this part of the decision that proved most controversial.

> With the recent passage of the Act, the Legislature endeavored to clarify and restore "the force of 'exclusive remedy' (or 'no fault') provisions. Specifically, amendments would protect employers and their employees from other than contract-based suits for contribution or indemnity by third parties (such as equipment manufacturers which have been deemed liable for causing employees injuries or deaths)—in effect, repealing the doctrine of *Dole* " (Assembly Mem in Support, 1996 McKinney's Session Laws of N.Y., at 2562).

Memoranda issued contemporaneously with the passing and signing of the Act provided that "the exclusive remedy" would be "restored and reinforced" (*id.,* at 2565; *see also,* Governor's Approval Mem, 1996 McKinney's Session Laws of N.Y., at 1915). In an analysis of retroactive application, we have found it relevant when the legislative history reveals that the purpose of new legislation is to clarify what the law was always meant to say and do (*see, Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245). However, labeling the legislation as "remedial" in this regard is not dispositive in light of other indicators of legislative intent.

For example, legislators made declarations during floor debates that conclusively state that the Act was not intended to be applied retroactively (231 A.D.2d, at 109, 661 N.Y.S.2d 293). Moreover, a report entitled "New York State Assembly Majority Task Force **586 on Workers' Compensation Reform" explicitly states (at 25) that the provisions would apply only to "accidents that occur [after the effective] date forward," and was "not intended to limit the rights of parties to a lawsuit filed after the law takes effect, but involving a claim arising from an accident that occurred before the law took effect." Although these averments "may be accorded

some weight in the absence of more definitive manifestations of legislative purpose" (*Schultz v. Harrison Radiator Div. Gen. Motors Corp.,* 90 N.Y.2d 311, 318, 660 N.Y.S.2d 685, 683 N.E.2d 307), such indicators of legislative intent must be cautiously ***970 **982** used (*see, Woollcott v. Shubert,* 217 N.Y. 212, 221, 111 N.E. 829 ["statements and opinions of legislators uttered in the debates are not competent aids to the court in ascertaining the meaning of statutes"]). As the Supreme Court has noted:

> "it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other" (*United States v. Freight Assn.,* 166 U.S. 290, 318, 17 S.Ct. 540, 550, 41 L.Ed. 1007).

On the same footing are statements contained in the Governor's Memorandum issued with the signing of the Act. In it, the Governor states his view that the legislation was intended to be retroactive (1996 McKinney's Session Laws of N.Y., at 1912 ["(o)f primary importance is the retroactive repeal" of *Dole*]). The Governor further stated that:

> "This new system, which takes effect immediately, is enacted with the specific intent of maximizing savings in workers' compensation premiums through its application to all cases currently pending in the courts of our State wherein the primary action has neither been settled nor reduced to judgment" (*id.,* at 1913).

Although postenactment statements of the Governor may be examined in an analysis of legislative intent and statutory purpose (*see, e.g., Crane Neck Assn. v. New York City/Long Is. County Servs. Group,* 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336 [relying upon gubernatorial memoranda]; *see also,* Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History,* 48 Ark. L. Rev. 239), such statements suffer from the same infirmities as those made during floor debates by legislators. ***587** Here, the reports and memoranda simply indicate that various people had various views.[2]

Importantly, we note that the initial draft of the Act expressly provided that it would apply to *"lawsuit[s] [that have] neither been settled nor reduced to judgment"* by the date of its enactment (231 A.D.2d, at 107, 661 N.Y.S.2d 293). That language does not appear in the enacted version. A court may examine changes made in proposed legislation to determine intent (*see, United States v. St. Paul, Minneapolis & Manitoba Ry. Co.,* 247 U.S. 310, 318, 38 S.Ct. 525, 528, 62 L.Ed. 1130; *Woollcott v. Shubert, supra,* 217 N.Y., at 221, 111 N.E. 829; *People v. Korkala,* 99 A.D.2d 161, 166, 472 N.Y.S.2d 310 ["rejection of a specific statutory provision is a significant consideration when divining legislative intent"]). Here, such evidence is consistent with the strong presumption of prospective application in the absence of a clear statement concerning retroactivity.

Appellant points to the general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided (*Matter of OnBank & Trust Co., supra,* 90 N.Y.2d, at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98[a]). In this regard, appellant argues that sections 87 and 88 of the Act would be rendered meaningless if the provisions concerning third-party contribution claims were not applied retroactively. We disagree.

Section 88 of the Act mandates an audit of all workers' compensation insurance carriers and the State Insurance Fund to determine "the value as of December 31, 1996 of any reduction in reserves, hereinafter referred to as the reserve adjustment, required to be established for losses or claims pursuant to section 1303 of the insurance law and, concerning the state insurance fund, section 88 of the workers' compensation law that result from the application" of the Act's provisions related to *Dole* liability (L. 1996, ch. 635, § 88[a]). Section 87 of the Act imposes a $98 million "special assessment" on all licensed ***971 **983** workers' compensation insurance carriers that is to be deposited in the general fund of the State (L 1996, ch. 635, § 87). There is nothing in the law itself indicating the reason ***588** for the assessment or the intent behind these sections of the Act.

Section 88 refers to "reserves * * * required to be established for losses or claims pursuant to section 1303 of the insurance law." The referenced provision states that:

> "[e]very insurer shall * * * maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, *whether reported or unreported,* which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims" (Insurance Law § 1303 [emphasis supplied]).

Plainly, the statute requires insurers to set aside "reserves" for losses or claims that have been incurred but not reported to the company. Such reserves are calculated

actuarially based upon a statistical analysis of the insurance company's loss experience (*see, Matter of Stewart v. Citizens Cas. Co.,* 23 N.Y.2d 407, 414–415, 297 N.Y.S.2d 115, 244 N.E.2d 690). Examined under the circumstances presented, workers' compensation carriers are required to maintain reserves for (1) reported and expected *Dole* losses on pending actions; and (2) anticipated *Dole* losses on claims already incurred but not yet reported or asserted. If the new amendments were applied prospectively, the second category of *Dole* losses would, by and large, never materialize and the reserves set aside to cover such claims would be reduced.

However, that "reduction" is mathematically related to monies already collected by carriers via the payment of premiums. The Legislature apparently decided that the State should receive such "reduction in reserves" rather than permit insurers to retain the monies. As noted in the "New York State Assembly Majority Task Force on Workers' Compensation Reform" report (at 31):

> "As a result of the changes in employer liability enacted (*Dole*), carriers would be collecting more premium than actuarial [*sic*] needed. As a result, the legislation provides that this money be returned to the State."

While the elimination of pending *Dole* claims might lead to a maximum reduction in insurance reserves, there is some reduction in reserves even upon a prospective application of the ***589** legislation. Thus, sections 87 and 88 of the Act would not be rendered meaningless in the absence of retroactive application. Indeed, it is impossible to determine from the record provided how the Legislature actually derived $98 million as the amount of the "special assessment." As for whether these accounting provisions necessitate the wholesale dismissal of pending *Dole* claims, we are reluctant to assume that the Legislature would choose such a vexing and circuitous means of conveying that intent.

We further note our agreement with the statement made by the Appellate Division in *Morales v. Gross* (230 A.D.2d 7, 657 N.Y.S.2d 711) that the "purpose of the subject provisions was to abolish most third-party actions so as to enhance the exclusivity of the Workers' Compensation Law, thereby reducing insurance premiums and decreasing the cost of doing business in New York" (*id.,* at 12, 657 N.Y.S.2d 711). An extensive subject of discussion in the floor debates surrounding the subject legislation was how employers of New York have been forced to pay the highest insurance premiums in the country due, in part, to the possibility of third-party contribution/indemnification claims.

Prospective application of the legislation would still accomplish the legislative purpose of reducing insurance premiums and workers' compensation costs for employers and, in that way, assist "our State's ability to attract and maintain businesses and jobs" (Governor's Approval Mem, 1996 McKinney's Session Laws of N.Y., at 1912). Current employers would presumably realize future savings through the elimination of *Dole* claims and the consequent reduction in insurance *****972 **984** premiums.[3] Moreover, prospective application still enables the payment of substantial sums to the State by insurance companies who have, indirectly, benefitted from the reduction of reserves.

That a statute is to be applied prospectively is strongly presumed and here, we find nothing that approaches any type of "clear" expression of legislative intent concerning retroactive application. Indeed, other than the Governor's statements, the direct evidence concerning retroactivity is either against that view or equivocal. Moreover, the discernible legislative purpose does not mandate a particular result. "In the end, it is in ***590** considerations of good sense and justice that the solution must be found" (*Matter of Berkovitz v. Arbib & Houlberg,* 230 N.Y. 261, 271, 130 N.E. 288 [Cardozo, J.]) in the specific circumstances of each case.

We conclude that, irrespective of the date of the accident, a prospective application of the subject legislation to actions by employees for on-the-job injuries against third parties filed after the effective date of the relevant provisions is eminently consistent with the overall and specific legislative goals behind passage of the Act.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

KAYE, C.J., and TITONE, BELLACOSA, LEVINE, CIPARICK and WESLEY, JJ., concur.

Order affirmed, etc.

All Citations

91 N.Y.2d 577, 696 N.E.2d 978, 673 N.Y.S.2d 966, 1998 N.Y. Slip Op. 04556

Footnotes

1 Not at issue is whether the plaintiff's injuries qualify as "grave" within the meaning of the newly amended Workers' Compensation Law § 11.

2 Under the circumstances, little weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation (*see,* Mem of Workers' Compensation Board, Susan Gravlich, Secretary, dated Aug. 8, 1996, Bill Jacket, L. 1996, ch. 635, at 2; Letter of Department of Insurance, Edward Muhl, Superintendent, dated Aug. 9, 1996, Bill Jacket, L. 1996, ch. 635, at 8).

3 The Compensation Insurance Rating Board estimated that the change in employer liability will save employers approximately 3.2% in premium (*see,* Report of "New York State Assembly Majority Task Force on Workers' Compensation Reform", at 31).

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87 A.D.3d 995
Supreme Court, Appellate Division, Second Department, New York.

Lina NELSON, et al., appellants,
v.
HSBC BANK USA, et al., respondents.

Sept. 13, 2011.

Synopsis
Background: African–American bank employees sued their employer for race discrimination on theories of disparate treatment and hostile work environment. The Supreme Court, Kings County, Starkey, J., entered judgment on jury verdict for defendants. Employees appealed.

Holdings: The Supreme Court, Appellate Division, held that:

amendment to New York City Human Rights Law, liberalizing standards of construction, applied retroactively, abrogating *Barnum v. New York City Tr. Auth.,* 62 A.D.3d 736, 878 N.Y.S.2d 454, and

jury was improperly instructed on hostile work environment.

Affirmed as modified, and remitted.

Attorneys and Law Firms

****260** Nourse & Bowles, LLP, New York, N.Y. (Alan C. Trachtman and Laura M. Trachtman of counsel), for appellants.

Harter Secrest & Emery, LLP, Buffalo, N.Y. (Robert C. Weissflach of counsel), for respondents.

****261** PETER B. SKELOS, J.P., THOMAS A. DICKERSON, LEONARD B. AUSTIN, and JEFFREY A. COHEN, JJ.

Opinion

***995** In an action, inter alia, to recover damages for discrimination in employment on the basis of race in violation of Executive Law § 296 and Administrative Code of the City of New York § 8–107, the plaintiffs appeal from a judgment of the Supreme Court, Kings County (Starkey, J.), entered March 31, 2009, which, upon a jury verdict, is in favor of the defendants and against them dismissing the complaint.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof dismissing the causes of action to recover damages based upon a hostile work environment pursuant to Administrative Code of the City of New York § 8–107; as so modified, the judgment is affirmed, with costs to the appellants, the jury verdict on the issue of liability based upon a hostile work environment pursuant to Administrative Code of the City of New York § 8–107 is set aside, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the causes of action alleging a hostile work environment pursuant to Administrative Code of the City of New York § 8–107.

The plaintiffs are four African–American women who worked ***996** at a Brooklyn branch of HSBC Bank USA. They commenced this action in 2003 alleging discrimination in employment on the basis of race in violation of the New York State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of City of N.Y. § 8–107). After summary judgment was awarded to the defendants on certain causes of action (*see Nelson v. HSBC Bank USA,* 41 A.D.3d 445, 837 N.Y.S.2d 712), the matter went to trial on the causes of action alleging disparate treatment and hostile work environment pursuant to both the New York State Human Rights Law and the New York City Human Rights Law. After trial, the jury found in favor of the defendants on all causes of action and a judgment was entered upon the verdict in favor of the defendants dismissing the complaint. The plaintiffs appeal, and we modify.

The Supreme Court providently exercised its discretion in admitting into evidence the challenged exhibits (*see Matter of Bergstein v. Board of Educ., Union Free School Dist. No. 1 of Towns of Ossining, New Castle & Yorktown,* 34 N.Y.2d 318, 324, 357 N.Y.S.2d 465, 313 N.E.2d 767). However, an error in the charge necessitates remittal to the Supreme Court, Kings County, for a new trial on the causes of action alleging hostile work environment pursuant to Administrative Code of the City of New York § 8–107.

In 2005 the New York City Council enacted the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of NY, hereinafter the Restoration Act), amending the New York City Human Rights Law (Administrative Code of City of N.Y. § 8–101 *et seq.*). The express purpose of the law was "to clarify the scope" of the City's Human Rights Law because it was "the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of New York § 1). The Council sought to "underscore" that the provisions of the City's law are to be construed independently of similar provisions of state and federal human rights laws and declared that interpretations of similarly worded provisions are to be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (Local Law No. 85 [2005] of City of N.Y. § 1).

****262** While there were some other changes, "the core of the measure was its revision of Administrative Code § 8–130, the construction provision of the City HRL" (*Williams v. New York City Hous. Auth.,* 61 A.D.3d 62, 66, 872 N.Y.S.2d 27; *see* Gurian, ***997** A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law, 33 Fordham Urb LJ 255 [2006]). The Administrative Code of the City of New York was amended to state:

> "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (Administrative Code § 8–130).

Indeed, it is now beyond dispute that the provisions of the New York City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v. City of New York,* 16 N.Y.3d 472, 477–78, 922 N.Y.S.2d 244, 947 N.E.2d 135).

The legislative history of the 2005 amendments conveys that they were undertaken to correct a perceived failure by courts to appreciate the scope of earlier comprehensive amendments to the City's Human Rights Law in 1991 and to "again underscor[e]" that the protections afforded by the City's law are not to be limited by restrictive interpretations of similarly worded state and federal statutes (Committee on General Welfare, Report on Prop. In. No. 22–A [Aug. 17, 2005] p 2; *see* Local Law No. 39 [1991] of City of NY). The Committee report accompanying the bill stated that it "aim[ed] to ensure construction of the City's human rights law in line with the purposes of fundamental amendments to the law enacted in 1991," and outlined a number of principles to guide courts in construing the law, including that discrimination should not play a role in decisions made by employers, that traditional methods and principles of law enforcement ought to be applied in the civil rights context, and that victims of discrimination suffer serious injuries, for which they ought to receive full compensation (Committee on General Welfare, Report on Prop. In. No. 22–A [Aug. 17, 2005] p 2, 5).

In determining whether statutory enactments should be given retroactive effect, there are two axioms of statutory interpretation. "Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*Matter of Gleason* [*Michael Vee, Ltd.*], 96 N.Y.2d 117, 122, 726 N.Y.S.2d 45, 749 N.E.2d 724 [citation omitted]; *Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 584, 673 N.Y.S.2d 966, 696 N.E.2d 978). These axioms are helpful guideposts, but "the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal" (*Matter of OnBank & Trust Co.,* 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 688 N.E.2d 245, *see* ***998** *Matter of Duell v. Condon,* 84 N.Y.2d 773, 783, 622 N.Y.S.2d 891, 647 N.E.2d 96; *Morales v. Gross,* 230 A.D.2d 7, 12, 657 N.Y.S.2d 711). Other factors to consider include "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a ****263** legislative judgment about what the law in question should be" (*Matter of Gleason* [*Michael Vee, Ltd.*], 96 N.Y.2d at 122, 726 N.Y.S.2d 45, 749 N.E.2d 724).

The Restoration Act does not expressly state that its provisions are to be applied retroactively. However, the Act is remedial in nature. "Remedial statutes are those 'designed to correct imperfections in prior law, by generally giving relief to the aggrieved party' " (*Coffman v. Coffman,* 60 A.D.2d 181, 188, 400 N.Y.S.2d 833, quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 35; *see Wade v. Byung Yang Kim,* 250 A.D.2d 323, 325, 681 N.Y.S.2d 355; *Matter of Hynson* [*American Motor Sales Corp.-Chrysler Corp.*], 164 A.D.2d 41, 48, 561 N.Y.S.2d 589; *Matter of City of New York* [*Long Is. Soung Realty Co.*], 160 A.D.2d 696, 553 N.Y.S.2d 789). The purpose of the Restoration Act was to rewrite unintended judicial interpretations and reaffirm the City

Council's judgment about the scope of the pre-existing protections of the City's Human Rights Law (*see* Local Law No. 85 [2005] of City of N.Y. § 1; Committee on General Welfare, Report on Prop. In. No. 22–A [Aug 17, 2005] p2). The Act clarified what the 1991 amendments "[were] always meant to say and do" (*Brothers v. Florence,* 95 N.Y.2d 290, 299, 716 N.Y.S.2d 367, 739 N.E.2d 733 [internal quotation marks omitted]; *see Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d at 585, 673 N.Y.S.2d 966, 696 N.E.2d 978; *Matter of OnBank & Trust Co.,* 90 N.Y.2d at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245). Further, the Act took effect immediately, which evinced a sense of urgency (*see* Local Law No. 85 [2005] of City of N.Y. § 7; *Matter of Gleason* [*Michael Vee, Ltd.*], 96 N.Y.2d at 122, 726 N.Y.S.2d 45, 749 N.E.2d 724).

"The remedial purpose of the amendment would be undermined if it were applied only prospectively" (*Matter of OnBank & Trust Co.,* 90 N.Y.2d at 731, 665 N.Y.S.2d 389, 688 N.E.2d 245). Accordingly, the current liberalized standards of construction applicable to the New York City Human Rights Law should be applied retroactively (*accord Albunio v. City of New York,* 16 N.Y.3d 472, 922 N.Y.S.2d 244, 947 N.E.2d 135; *Williams v. New York City Hous. Auth.,* 61 A.D.3d at 80, 872 N.Y.S.2d 27; *Sorrenti v. City of New York,* 17 Misc.3d 1102[A], 2007 N.Y. Slip Op. 51796[U], *6, 2007 WL 2772308; *Yanai v. Columbia Univ.,* N.Y.L.J., Aug. 8, 2006, at 26, col. 6; *Loeffler v. Staten Is. Univ. Hosp.,* 582 F.3d 268, 279 n. 7; *see* Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law,* 33 Fordham Urb. L.J. 255, 327–330 [2006]) and, therefore, to the extent that our decision in *Barnum v. New York City Tr. Auth.* (62 A.D.3d 736, 878 N.Y.S.2d 454) holds to the contrary, it should not be followed.

***999** In *Williams v. New York City Hous. Auth.,* 61 A.D.3d 62, 872 N.Y.S.2d 27, the Appellate Division, First Department, applied the liberalized standards of construction of the Restoration Act in construing the standards for liability for sexual harassment under the City Human Rights Law (*see* Administrative Code of City of N.Y. § 8–107). State law in this area, mimicking federal law, requires that harassment be "severe or pervasive" to be actionable (*Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49; *see Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382, 819 N.E.2d 998). The Court rejected this formulation for the City Human Rights Law, finding that "there is a wide spectrum of harassment cases falling between 'severe or pervasive' on the one hand and a 'merely' offensive utterance on the other" (*Williams v. New York City* ****264** *Hous. Auth.,* 61 A.D.3d at 76, 872 N.Y.S.2d 27). In light of the "uniquely broad and remedial purposes" of the City Human Rights Law (Administrative Code of City of N.Y. § 8–130), the Court concluded that "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability" (*Williams v. New York City Hous. Auth.,* 61 A.D.3d at 76, 872 N.Y.S.2d 27; *see Farrugia v. North Shore Univ. Hosp.,* 13 Misc.3d 740, 748–749, 820 N.Y.S.2d 718).

The Court noted that this construction was consistent with the principles articulated in the legislative history accompanying the Restoration Act, since it maximizes deterrence, ensures that discrimination plays no role in employment, and recognizes that discrimination violations are, per se, serious injuries (*see Williams v. New York City Hous. Auth.,* 61 A.D.3d at 76–77, 872 N.Y.S.2d 27). The Court concluded that, under the City Human Rights Law, liability for a harassment/hostile work environment claim is proven where a plaintiff proves that he or she was treated less well than other employees because of the relevant characteristic. Recognizing, however, that the broader purposes of the City's law "do not connote an intention that the law operate as a 'general civility code,' " (*id.* at 79, 872 N.Y.S.2d 27, quoting *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201), the Court recognized "an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences" (*Williams v. New York City Hous. Auth.,* 61 A.D.3d at 79–80, 872 N.Y.S.2d 27). We find the First Department's analysis persuasive and adopt the standard set forth by that Court for liability for causes of action alleging hostile work environment pursuant to the New York City Human Rights Law.

The charge in this case instructed the jury that proof that ***1000** unwelcome racial conduct was "severe and pervasive" is an element of a cause of action alleging hostile work environment pursuant to both the State and City Human Rights Laws. This error was not harmless. The jury could have reasonably found that the harassment complained of by the plaintiffs, while not severe and pervasive, constituted more than petty slights and trivial inconveniences. Accordingly, the judgment must be modified and the matter remitted to the Supreme Court, Kings County, for a new trial on the causes of action alleging hostile work environment pursuant to Administrative Code of the City of New York § 8–107.

All Citations

87 A.D.3d 995, 929 N.Y.S.2d 259, 113 Fair Empl.Prac.Cas. (BNA) 772, 2011 N.Y. Slip Op. 06481

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2022 WL 16848106
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of NEW YORK CIVIL LIBERTIES UNION, Petitioner-Appellant, v. CITY OF ROCHESTER and Rochester Police Department, Respondents-Respondents.

685
|
CA 21-01191
|
Entered: November 10, 2022

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 10, 2021 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

Attorneys and Law Firms

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT J. HODGSON OF COUNSEL), AND SHEARMAN & STERLING LLP, WASHINGTON, DC, FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

MEMORANDUM AND ORDER

***1** It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking disclosure of law enforcement disciplinary records dated on or before June 12, 2020 and seeking disclosure of law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Rochester (City) and Rochester Police Department (RPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. Petitioner appeals from a judgment that granted the petition in part and ordered the City and RPD to produce certain police disciplinary records under FOIL, but denied the petition with respect to the production of records from proceedings conducted on or before June 12, 2020 and with respect to records related to unsubstantiated claims or complaints.

Initially, we agree with petitioner that, as respondents correctly concede, respondents did not deny petitioner's FOIL request on the ground that the legislation repealing former Civil Rights Law § 50-a and amending FOIL concerning disciplinary records of law enforcement agencies (*see* L 2020, ch 96, §§ 1-4 [effective June 12, 2020]) should not be applied retroactively, and thus Supreme Court erred in relying on that theory as a ground for denying the petition in part (*see Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 74-75, 64 N.Y.S.3d 635, 86 N.E.3d 527 [2017]).

We conclude—for the reasons stated in (*Matter of New York Civ. Liberties Union v. City of Syracuse*, —— A.D.3d ——, ——, —— N.Y.S.3d ——, 2022 WL 16848033 [Nov. 10, 2022] [4th Dept. 2022] [decided herewith])—that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87 (2) (b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue. Further, for the reasons stated in (*New York Civ. Liberties Union,* —— A.D.3d at ——, —— N.Y.S.3d ——), we reject petitioner's contention that it should be awarded attorneys' fees and costs.

We therefore modify the judgment by granting those parts of the petition seeking law enforcement records dated on or before June 12, 2020 and seeking law enforcement disciplinary records concerning unsubstantiated claims of RPD officer misconduct, subject to redaction pursuant to

a particularized and specific justification under Public Officers Law § 87 (2). Respondents are directed to review the requested law enforcement disciplinary records, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any records or portions thereof that are redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (*see Matter of Kirsch v. Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 A.D.3d 1218, 1219-1220, 57 N.Y.S.3d 870 [4th Dept. 2017], *lv denied* 31 N.Y.3d 904, 2018 WL 1957383 [2018]).

All Citations

--- N.Y.S.3d ----, 2022 WL 16848106, 2022 N.Y. Slip Op. 06346

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71 Misc.3d 1098
Supreme Court, Orange County, New York.

In the Matter of Kenneth PUIG and Law Office of Kenneth Puig, Petitioner, v. CITY OF MIDDLETOWN, Office of the City of Middletown Mayor, Joseph DeStefano, City of Middletown Offices of the City Clerk, Registrar and Common Council Clerk, City of Middletown City Clerk John C. Naumchik, and the City of Middletown Police Department, Respondents.

000498-2021
|
Decided on April 7, 2021

Synopsis
Background: Petitioner brought action against city, city clerk, mayor, and city's police department challenging city's refusal to provide to provide disciplinary records of police officers as demanded under the Freedom of Information Laws (FOIL) and seeking attorney's fees.

Holdings: The Supreme Court, Robert A. Onofry, J., held that:

as a matter of apparent first impression, repeal of civil rights law that provided exemptions to FOIL requests for portions of police employment records applied retroactively, and

an award of attorney's fees was not warranted.

Ordered accordingly.

Attorneys and Law Firms

****350** Law Office of Kenneth Puig, Newburgh, for petitioners.

Alex Smith, Corporation Counsel, Middletown, for respondents.

Opinion

Robert A. Onofry, J.

***1099** In a proceeding, pursuant to CPLR article 78, to challenge the refusal to provide certain information demanded under the Public Officers Law, it is hereby,

ORDERED, ADJUDGED and DECREED, that the petition is granted as set forth herein.

Introduction

The Petitioner commenced this proceeding to challenge the refusal of the Respondents to provide certain information concerning the disciplinary records of police officers demanded under the Freedom of Information Laws (hereinafter "FOIL") codified in article 6 of the Public Officers Law.

The Petitioner argues, *inter alia*, that the repeal of Civil Rights Law § 50-a, which previously shielded such information against disclosure, warrants release of the same.

The Respondents argue, *inter alia*, that the repeal of Civil Rights Law § 50-a is to be applied prospectively only.

The petition is granted as set forth herein.

Procedural/Factual Background

By letter dated July 11, 2020, the Petitioner made demand under FOIL for the following information:

1. "Copies of the disciplinary records of all City of Middletown Police Officers who have been disciplined."

2. A copy of the City of Middletown Police Standard Operating Procedures, Manuals, Training Materials, Guidelines, Directives, ***1100** and Rules and Regulations concerning driving while intoxicated and arrests involving domestic abuse.[1] (Petition, Exhibit A).

By letter dated July 15, 2020, the request was denied by

the Respondent John Naumchik, the City Clerk of the City of Middletown.

Naumchik stated that the language of the first demand (*supra*) was not "reasonably descriptive of the records sought and is unreasonably overbroad. Middletown has been incorporated as a city since the 1880's [sic]."

By letter dated August 11, 2020, the Petitioner appealed the denial of his FOIL request to the Respondent Joseph DeStefano, the mayor of the City of Middletown (Petition Exhibit C).

Concerning his first demand, the Petitioner noted that he was not seeking the records of all officers throughout history, but only those currently on active duty.

By Decision dated August 17, 2020, DeStefano denied the appeal (Petition, Exhibit D).

****351** DeStefano found that the demands, as written, were not reasonably descriptive and were unreasonably overbroad. Thus, he found, the denial of the claims was proper and not in bad faith.

Indeed, DeStefano found, although, on appeal, the Petitioner had narrowed his demands to only those police officers on active duty, no such limitation was set forth in his demand.

Thus, DeStefano asserted, the Petitioner should have submitted a new, clarified, FOIL demand to Naumchik; not filed an appeal.

Thereafter, the Petitioner apparently filed an amended FOIL demand. [The demand was not made part of the record.]

By letter dated August 19, 2020, Naumchik granted in part and denied in part the Petitioner's amended requests for the information *supra* (Petition, Exhibit E).

Concerning disciplinary records, etc., Naumchik noted that it was not clear whether the repeal of Civil Rights Law § 50-a was to be applied retroactively. If not, the FOIL demand would be denied. Naumchik noted that legal analysis was being conducted.

By letter dated August 21, 2020, Naumchik appended an opinion letter from Alex Smith, Esq., corporation counsel for ***1101** the City of Middletown, concluding that the repeal of Civil Rights Law § 50-a was not to be applied retroactively. Thus, Smith opined, disciplinary records created prior to the June 12, 2020, effective date of the repeal remained exempt from disclosure.

By letter dated September 11, 2020, the Petitioner filed a second appeal with DeStefano (Petition, Exhibit G).

The Petitioner argued that there was no basis to hold that the repeal of Civil Rights Law § 50-a was prospective only. Indeed, he noted, in a recent decision from the federal District Court, Eastern District of New York, Judge Failla found that the repeal was to be applied retroactively.

Further, he noted, since the repeal went into effect, numerous other police departments had provided such records, including the New York City Police Department.

By letter dated September 29, 2020, DeStefano denied the Petitioner's second appeal, finding no basis to conclude that the repeal of Civil Rights Law § 50-a was to be applied retroactively.

The Proceeding at Bar

The Petitioner commenced the proceeding at bar to review the denial of his FOIL request for disciplinary records. The Petitioner argues that the repeal of Civil Rights Law § 50-a should be applied retroactively. Further, he argues, the Respondents' denial of his demand was in bad faith; and they should be compelled to pay him reasonable attorney's fees pursuant to Public Officers Law § 89.

In opposition, the Respondents submit an affirmation from Alex Smith.

Smith argues that, applying rules of statutory construction, the repeal of Civil Rights Law § 50-a should be applied prospectively only.

Indeed, he asserts, the issue of retroactivity should be decided by the Legislature, not the Courts.

Smith notes that the Respondents did not supply the Petitioner with disciplinary records created after June 12, 2020, at the time of his initial requests because no such records existed.

He notes that a search will be made for the same, and scrutinized under the rules otherwise applicable to police disciplinary rules under the Public Officers Law.

Finally, he notes, although there was a case from Supreme

Court, Schenectady County (Powers, J.), which found the repeal **352 *1102 of Civil Rights Law § 50-a retroactive, the decision did not provide any guidance as to how that conclusion was reached (Exhibit 1).

Discussion/Legal Analysis

In general, FOIL, codified in the Public Officers Law, provides that government records are presumptively open for public inspection unless specifically exempt from disclosure. *Matter of Karlin v. McMahon*, 96 N.Y.2d 842, 729 N.Y.S.2d 435, 754 N.E.2d 194; *Hughes Hubbard & Reed, LLP v. Civilian Complaint Review Board*, 171 A.D.3d 1064, 97 N.Y.S.3d 671 [2nd Dept. 2019]; *Crowe v. Guccione*, 171 A.D.3d 1170, 97 N.Y.S.3d 236 [2nd Dept. 2019].

In general, an agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosure would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

Public Officers Law § 87(2); Hughes Hubbard & Reed, LLP v. Civilian Complaint Review Board, 171 A.D.3d 1064, 97 N.Y.S.3d 671 [2nd Dept. 2019]; ***1103** *Crowe v. Guccione*, 171 A.D.3d 1170, 97 N.Y.S.3d 236 [2nd Dept. 2019].

Prior to June 12, 2020, one such specific statutory exemption was found in Civil Rights Law § 50-a, which provided in relevant part that all personnel records of police officers used to evaluate performance toward continued employment or promotion "shall be considered confidential and not subject to inspection or review without the express written consent of such police officer * * * except as may be mandated by lawful court order."

Effective June 12, 2020, Civil Rights Law § 50-a was repealed (L. 2020, c. 96, § 1, eff. June 12, 2020).

The Committee Report concerning the bill which resulted in the repeal of Civil Rights Law § 50-a, and the related amendments to the Public Officers Law, described the justification for the same as follows.

> [The initial] exemption was adopted in 1976 by the Legislature in order to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions. However, current law, as narrowly interpreted by the Court of Appeals, prevents access to both the records of the disciplinary proceedings themselves and the recommendations or outcomes of those proceedings. According to the 2014 annual report by the State Committee on Open Government to the Governor and the State Legislature, "this narrow exemption has been **353 expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."
>
> Due to the interpretation of § 50-a, records of complaints or findings of law enforcement misconduct that have not resulted in criminal charges against an officer are almost entirely inaccessible to the public or to victims of police brutality, excessive use of force, or other misconduct. The State Committee on Open Government has stated that § 50-a "creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred." FOIL's public policy goals, which are to make government agencies and their employees accountable *1104 to the public, are thus undermined. Police-involved killings by law enforcement officials who have had histories of misconduct complaints, and in some cases

> recommendations of departmental charges, have increased the need to make these records more accessible.
>
> FOIL already provides that agencies may redact or withhold information whose disclosure would constitute an unwarranted invasion of privacy. Recent changes to the Civil Rights Law have created additional, non- discretionary protections against the release of certain sensitive information such as contact information. Furthermore, this bill adds additional safeguards in the FOIL statute. Finally, courts have the ability to protect against improper cross-examination and determine if police records are admissible in a trial, without the denial of public access to information regarding police activity created by § 50-a. The broad prohibition on disclosure created by § 50-a is therefore unnecessary, and can be repealed as contrary to public policy.
>
> Repeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct.

2019 New York Senate Bill No. 8496, New York Two Hundred Forty-Third Legislative Session.

Specific to the case at bar, the Public Officers Law provides as follows to "law enforcement disciplinary records."

> a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:
>
> (a) items involving the medical history of a person employed by a law enforcement agency * * * not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
>
> (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency * * *, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the ***1105** civil rights law, or in accordance with subdivision four of section two hundred eight of the civil rights law, or as otherwise required by law. * * *
>
> (c) any social security numbers; or
>
> (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency * * * unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.
>
> ****354** 2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

Public Officers Law § 86(6) defines "Law enforcement disciplinary records" to mean:

> any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
>
> (a) the complaints, allegations, and charges against an employee;
>
> (b) the name of the employee complained of or charged;
>
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
>
> (d) the disposition of any disciplinary proceeding; and
>
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

"Law enforcement disciplinary proceeding" is defined to mean "the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency."

A court may award a reasonable attorney's fee and other litigation costs to a petitioner in a proceeding to review the denial ***1106** of a FOIL request where the petitioner has "substantially prevailed" in the proceeding, and "(i) the agency had no reasonable basis for denying access; or (ii) the agency failed to respond to a request or appeal within the statutory time." *Public Officers Law § 89[4][c]; South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 [2nd Dept. 2016]. The award of attorney's fees is intended to create a clear deterrent to unreasonable delays and denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of

FOIL. *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 [2nd Dept. 2016]. Specifically, in enacting FOIL, the Legislature declared that "government is the public's business" and expressly found that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions." *Public Officers Law § 84; South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 [2nd Dept. 1996].

Here, a threshold issue is whether the repeal of the Civil Rights Law § 50-a is to be given prospective application only. That is, whether the repeal is to be applied to disciplinary records created on or after June 12, 2020, only. The Court finds that it is not so limited.

It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998). The clearest indicator of legislative intent is the statutory text, and the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998).

In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed. If they have a definite meaning, which involves no absurdity or contradiction, ****355** there is no room for construction, and courts have no right to add to or take away from that meaning. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998). *Tompkins v. Hunter*, 149 N.Y. 117, 122–123, 43 N.E. 532

The date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998). While the fact that a statute is to take effect immediately evinces a sense of urgency, the meaning of the phrase is equivocal in an analysis of retroactivity. ***1107** *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998). Of course, the Legislature may explicitly designate the prospective or retroactive application of a statute. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998).

It is a fundamental canon of statutory construction that retroactive operation is not favored by courts, and statutes will not be given such construction unless the language expressly or by necessary implication requires it. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998).

However, an equally settled maxim is that "remedial" legislation, or statutes governing procedural matters, should be applied retroactively effect in order to effectuate its beneficial purpose. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998); *Marrero v. Crystal Nails*, 114 A.D.3d 101, 978 N.Y.S.2d 257 [2nd Dept. 2013]; *McKinney's Consol. Laws of New York, Statutes § 54* ["Remedial statutes constitute an exception to the general rule that statutes are not to be given a retroactive operation, but only to the extent that they do not impair vested rights."].

These axioms are helpful guideposts, but the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998); *Marrero v. Crystal Nails*, 114 A.D.3d 101, 978 N.Y.S.2d 257 [2nd Dept. 2013];

The factors to consider include whether the Legislature has made a specific pronouncement about retroactive effect or 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. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998); *Marrero v. Crystal Nails*, 114 A.D.3d 101, 978 N.Y.S.2d 257 [2nd Dept. 2013].

Such construction principles are navigational tools to discern legislative intent. Classifying a statute as "remedial" does not automatically overcome the strong presumption of prospectivity because the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998). General principles may serve as guides in the search for the intention of the Legislature in a particular case, but only where better guides are not available. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998).

****356** Finally, it is noted, statements made by legislators during floor debates may be accorded some weight in the absence of ***1108** more definitive manifestations of

legislative purpose, but should be cautiously used. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998).

Here, there is no new statutory language to interpret. Rather, the statute was merely repealed.

Further, the Legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to whether the repeal was to be applied retroactively.

Nor has the Court found any controlling case law deciding the issue.

Thus, the legislative history of the repeal must be considered.

Here, the limited Legislative history (the Committee Report *supra*) indicates that the repeal was remedial in nature, and should be applied retroactively.

First, the Committee noted, the judicial interpretation of the statute had been too narrow and, as a result, the application of Civil Rights Law § 50-a had strayed from its intended purpose, to wit: to prevent criminal defense attorneys from using the such records during cross-examinations of police witnesses.

As a further consequence, the Committee noted, relevant information about police officers had been almost entirely inaccessible to the public, and the case law had created a "legal shield" that prohibited disclosure even when it is known that misconduct has occurred. This, the Committee noted, was contrary to, and undermined, FOIL's public policy goals.

Moreover, the Committee found, police-involved killings by law enforcement officials who have histories of misconduct complaints, and in some cases recommendations of departmental charges, had increased the need to make the records more accessible. Indeed, the Committee noted, the repeal of section 50-a would help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct.

Finally, the Committee noted, FOIL otherwise already provided law enforcement officers with sufficient protections against things such as the release of certain sensitive information.

Here, given all of the above, the Court finds that the repeal of Civil Rights Law should be applied retroactively to reach all disciplinary reports, not just those created on or after June 12, 2020.

***1109** Thus, the Respondents are to consider the Petitioner's application for disciplinary records in light of the same.

Given the lack of clarity and guidance concerning the retroactive application of Civil Rights Law § 50-a, the Court does not find that an award of attorney's fees to the Petitioner is warranted pursuant to Public Officers Law § 89.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the petition is granted to the extent set forth herein and otherwise denied.

This constitutes the decision and order of the Court.

All Citations

71 Misc.3d 1098, 147 N.Y.S.3d 348, 2021 N.Y. Slip Op. 21096

Footnotes

1 The proceeding at bar is limited to the refusal to provide disciplinary records. Thus, this second category of demands will not be discussed.

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141 A.D.3d 1151
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Todd SPRING, Petitioner–Respondent, v. COUNTY OF MONROE, Monroe Community Hospital, Maggie Brooks, As Monroe County Executive, Justin Feasel, as Monroe County Records Access Officer and Director of Communications, and Daniel M. Delaus, Jr., as Monroe County Records Appeal Officer, Respondents–Appellants.

July 8, 2016.

Synopsis

Background: Requestor commenced Article 78 proceeding against county and county officials seeking disclosure of documents pursuant to Freedom of Information Law (FOIL). The Supreme Court, Monroe County, Thomas A. Stander, J., directed disclosure of several documents, and respondents appealed.

Holdings: The Supreme Court, Appellate Division, held that:

"affected by an error of law" standard, rather than "arbitrary and capricious" standard, applied;

e-mail correspondence between county employee and county's in-house counsel was protected by attorney-client privilege; and

draft informal dispute resolution (IDR) request was protected by attorney-client privilege, by attorney work product privilege, and as inter-agency material.

Affirmed as modified.

Attorneys and Law Firms

****331** Harris, Chesworth, Johnstone & Welch, LLP, Rochester (Eugene Welch of Counsel), for Respondents–Appellants.

PRESENT: CENTRA, J.P., PERADOTTO, DeJOSEPH, AND NEMOYER, JJ.

Opinion

MEMORANDUM:

***1151** Petitioner commenced this CPLR article 78 proceeding seeking disclosure of approximately 200 documents, emails, memoranda, and reports pursuant to the Freedom of Information Law (FOIL). After conducting an in camera review, Supreme Court directed the disclosure of several documents, and respondents appeal.

Initially, we note that the court erred in applying the arbitrary and capricious standard of review and instead should have determined whether the Records Appeal Officer's determination " 'was affected by an error of law' " (*Mulgrew v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 87 A.D.3d 506, 507, 928 N.Y.S.2d 701, *lv. denied* 18 N.Y.3d 806, 2012 WL 446222). In any event, we have conducted a de novo review applying the appropriate standard relating to the disputed documents, and we modify the judgment as discussed herein.

We conclude that the email correspondence between petitioner and "in-house" counsel for respondent County of Monroe ***1152** (County) found in the confidential record at pages 1, 2, 4 through 6, and 9 through 21 is exempt from FOIL disclosure. Counsel for the County represented petitioner only in petitioner's capacity as a County employee. Thus, only the County could waive the attorney-client privilege protecting the correspondence. Petitioner's "unilateral belief" that he was the client is, by itself, of no moment (*Berry v. Utica Nat. Ins. Group*, 66 A.D.3d 1376, 1376, 886 N.Y.S.2d 784). Similarly, the email correspondence found in the confidential record at pages 104 through 108, 110, 111, and 120 between a County employee ****332** and hired counsel for the County is protected by attorney-client privilege.

We also conclude that the draft informal dispute resolution (IDR) request found in the confidential record at pages 46 through 50 is also exempt from FOIL disclosure inasmuch as it is protected by attorney-client privilege, by attorney work product privilege, and as inter-agency material pursuant to Public Officers Law § 87(2)(g). The draft IDR request "does not contain

statistical or factual tabulations or data ... or final agency policies or determinations. It consists solely of ... evaluations, recommendations and other subjective material and is therefore exempt from disclosure" (*Matter of Rome Sentinel Co. v. City of Rome,* 174 A.D.2d 1005, 1006, 572 N.Y.S.2d 165). Similarly, the documents found in the confidential record at pages 54 through 58, representing a "chronological explanation" of a County Human Resources investigation are exempt from disclosure by attorney-client privilege and under section 87(2)(g).

We further conclude that the documents found in the confidential record at pages 59 through 64, 68, 72 through 74, and 88 through 99 are exempt from disclosure under Public Officers Law § 87(2)(g) inasmuch as those documents contain, inter alia, " 'opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making' " (*Matter of Sell v. New York City Dept. of Educ.,* 135 A.D.3d 594, 595, 24 N.Y.S.3d 41). The hearing transcript found in the confidential record at pages 75 through 82 constitutes predecisional intra-agency material and is also exempt from FOIL disclosure (*see Sinicropi v. County of Nassau,* 76 A.D.2d 832, 833, 428 N.Y.S.2d 312, *lv. denied* 51 N.Y.2d 704, 432 N.Y.S.2d 1028, 411 N.E.2d 797).

With respect to the remaining materials at issue, we conclude that respondents have failed to show that they are exempt from disclosure.

Finally, respondents are correct that there is an inconsistency between the decision portion of the "decision, order and judgment" on appeal and the decretal paragraphs therein. In its ***1153** decision, the court held that emails located in the confidential record at pages 112 through 119 were protected by attorney-client privilege. In the second and third decretal paragraphs, however, the court included those records as items to be disclosed to petitioner. We conclude that the second and third decretal paragraphs should be conformed to the decision by excluding the documents found in the confidential record at pages 112 through 119 (*see Nicastro v. New York Cent. Mut. Fire Ins. Co.,* 117 A.D.3d 1545, 1546, 985 N.Y.S.2d 806, *lv. dismissed* 24 N.Y.3d 998, 997 N.Y.S.2d 108, 21 N.E.3d 560). We further conclude, based on our review of those emails, that they are exempt from FOIL disclosure by attorney-client privilege.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition insofar as it seeks disclosure of documents contained in the confidential record at pages 1, 2, 4 through 6, 9 through 21, 46 through 50, 54 through 64, 68, 72 through 82, 88 through 99, 104 through 108, 110, 111, and 120, and as modified the judgment is affirmed without costs.

All Citations

141 A.D.3d 1151, 36 N.Y.S.3d 330, 2016 N.Y. Slip Op. 05465

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Los Angeles Police Protective League v. City of Los Angeles

Court of Appeal of California, Second Appellate District, Division Seven

May 19, 2022, Opinion Filed

B306321

Reporter
78 Cal. App. 5th 1081 *; 2022 Cal. App. LEXIS 434 **; 294 Cal. Rptr. 3d 271

LOS ANGELES POLICE PROTECTIVE LEAGUE, Plaintiff and Respondent, v. CITY OF LOS ANGELES et al., Defendants and Appellants.

Notice: REVIEW GRANTED. See *Cal. Rules of Court, rules 8.1105* and *8.1115* (and corresponding Comment, par. 2, concerning *rule 8.1115(e)(3)*), Aug. 17, 2022, S275272.

Subsequent History: Review granted by *Los Angeles Police Protective League v. City of Los Angeles, 2022 Cal. LEXIS 4908, 2022 WL 3452484 (Cal., Aug. 17, 2022)*

Later proceeding at *Los Angeles Police Protective League v. City of Los Angeles, 2022 Cal. LEXIS 5566 (Cal., Sept. 2, 2022)*

Request granted *L.A. Police Protective League v. City of L.A., 2022 Cal. LEXIS 5725 (Cal., Sept. 6, 2022)*

Prior History: [1]** APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC676283, Robert B. Broadbelt III, Judge.

Disposition: Affirmed.

Core Terms

complaints, peace officer, advisory, misconduct, knowingly false, anonymously, trial court, impermissible, injunction, viewpoint-based, accepting, violates, argues, false statement, investigate, forfeited, law enforcement agency, police misconduct, commendations, content-based, accusations, suppression, allegation of misconduct, police department, consent decree, police officer, charter city, regulation, viewpoints, mandatory

Case Summary

Overview

HOLDINGS: [1]-A city had standing to appeal a judgment that enjoined the city from accepting any complaint of peace officer misconduct without obtaining the signed advisory required by *Pen. Code, § 148.6*, because case law precluding local officials from refusing to enforce a statute absent a judicial determination of unconstitutionality did not impact the city's status as an aggrieved party under *Code Civ. Proc., § 902*, based on the entry of an injunction preventing the city from continuing a prior course of conduct; [2]-The injunction was properly entered because the California Supreme Court previously had ruled *§ 148.6* did not violate the *First Amendment*, U.S. Const., 1st Amend., but was a permissible content-based restriction seeking to prevent knowingly false complaints, which required investigation under *Pen. Code, § 832.5*, and thus were more harmful than other false statements.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Governments > Local Governments > Employees & Officials

HN1[] **Local Governments, Employees & Officials**

California requires law enforcement agencies to investigate complaints against peace officers. *Pen. Code, § 832.5, subd. (a)(1)*. *Pen. Code, § 148.6, subd. (a)(1)*, makes it a crime to file a knowingly false allegation of misconduct against a peace officer. And *§ 148.6, subd. (a)(2)*, requires law enforcement agencies, before accepting a complaint alleging misconduct by a

peace officer, to require the complainant to sign an advisory informing the complainant that filing a knowingly false complaint may result in criminal prosecution.

Governments > Local Governments > Employees & Officials

HN2 **Local Governments, Employees & Officials**

Under California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution. Therefore, a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN3 **Reviewability of Lower Court Decisions, Adverse Determinations**

Under *Code Civ. Proc., § 902*, any party aggrieved may appeal a judgment. An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. An aggrieved party includes the party against whom an appealable order or judgment, including an injunction, has been entered.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Governments > Legislation > Interpretation

HN4 **Reviewability of Lower Court Decisions, Adverse Determinations**

Standing to appeal is construed liberally, and doubts are resolved in its favor.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

HN5 **Case & Controversy Requirements, Actual Controversy**

California courts decide only justiciable controversies and do not resolve lawsuits that are not based on an actual controversy. For example, unripeness and mootness describe situations where there is no justiciable controversy. Where there is no justiciable controversy the proper remedy is not to render judgment for one side or the other, but to dismiss.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN6 **Fundamental Freedoms, Freedom of Speech**

Under the *First Amendment*, *U.S. Const., 1st Amend.*, governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based regulations target speech based on its communicative content. As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Viewpoint discrimination, where the government discriminates among viewpoints, is a more blatant and egregious form of content discrimination.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN7 **Fundamental Freedoms, Freedom of Speech**

The United States Supreme Court has identified three permissible types of content-based restrictions that do not pose the threat that the government may effectively drive certain ideas or viewpoints from the marketplace. The first is where the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable. The second is where the speech is associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the speech. And the third is where the nature of the content discrimination is such that there is no realistic possibility that official

suppression of ideas is afoot.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN8 **Fundamental Freedoms, Freedom of Speech**

Regarding the First Amendment, U.S. Const., 1st Amend., exception permitting content-based restrictions where the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, the California Supreme Court has held that the reason the entire class of speech involving knowingly false statements of fact is proscribable has special force when applied to false accusations against peace officers. When a person makes a complaint against a peace officer, the agency receiving the complaint is legally obligated to investigate it and to retain the complaint and resulting reports or findings for at least five years, and therefore the potential harm of a knowingly false statement is greater than in other situations. This reasoning applies whether Pen. Code, § 148.6, is viewed as a restriction based on whom the complainant accuses of misconduct (e.g., police officer or firefighter) or as a restriction based on whether a person is accusing an officer of misconduct or commending the officer for his or her service. When a person commends an officer, an agency is not legally obligated to investigate or retain the commendation. *Pen. Code, § 832.5*, requires agencies to investigate only complaints by members of the public and to retain the complaints and any reports or findings relating to these complaints. *§ 832.5, subd. (a)(1)*, *(2)*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN9 **Fundamental Freedoms, Freedom of Speech**

As for the First Amendment, U.S. Const., 1st Amend., exception permitting content-based restrictions where the category of proscribed speech is associated with particular secondary effects of the speech, the California Supreme Court has held that knowingly false accusations of misconduct against a peace officer have substantial secondary effects—they trigger mandatory investigation and record retention requirements that do not apply to other persons. In addition, public resources are required to investigate these complaints, resources that could otherwise be used for other matters; the complaints may adversely affect the accused peace officer's career, at least until the investigation is complete; and the complaints may be discoverable in criminal proceedings. False commendations of officers do not trigger mandatory investigation and retention requirements that demand use of public resources. It is hard to see how false statements commending an officer or defending an officer against alleged misconduct could adversely affect anyone's career. While complaints against an officer remain in the officer's personnel file and may be discoverable in future criminal proceedings where the officer is a witness, false statements defending the officer and accusations by an officer or against a complainant are less likely to surface.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN10 **Fundamental Freedoms, Freedom of Speech**

On the First Amendment, U.S. Const., 1st Amend., exception permitting content-based restrictions where the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot, the California Supreme Court has held there is no realistic possibility of official suppression of ideas under Pen. Code, § 148.6. The Legislature did not suppress all complaints of police misconduct, only knowingly false ones. The Legislature did not render complaints critical of peace officers a disfavored subject because such complaints are, in other respects, favored. The Legislature actually elevated the status of complaints against peace officers by requiring their investigation and retention of records, and, in doing so, sought only to strike a balance by penalizing those who invoke that status with knowingly false complaints.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN11 **Fundamental Freedoms, Freedom of Speech**

Because the Legislature has elevated the status of misconduct complaints against peace officers by imposing mandatory investigation and retention

requirements—an elevation it did not extend to other comments about peace officers—there is no realistic possibility the Legislature intended to suppress the viewpoint of speakers critical of such officers. Therefore, Pen. Code, § 148.6, does not raise the specter that the government was attempting to drive certain ideas or viewpoints from the marketplace.

Governments > Courts > Judicial Precedent

HN12[] Courts, Judicial Precedent

A California intermediate appellate court's role is not to second guess a majority opinion of the California Supreme Court, however persuasive the reasoning of concurring or dissenting opinions may be.

Governments > Courts > Judicial Precedent

HN13[] Courts, Judicial Precedent

Even statements by the California Supreme Court that do not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made after careful consideration, or in the course of an elaborate review of the authorities.

Governments > Courts > Judicial Precedent

HN14[] Courts, Judicial Precedent

A California intermediate appellate court must, when considering federal questions, follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently.

Governments > Legislation > Interpretation

Governments > Local Governments > Police Power

HN15[] Legislation, Interpretation

The Supreme Court specifically has considered whether the requirement in Pen. Code, § 148.6, subd. (a)(2), that complainants read and sign an admonition explaining the criminal sanction for knowingly false complaints demonstrates that official suppression of ideas is indeed afoot. The Supreme Court has held it does not. The admonition merely advises complainants of the law and impresses on them the significance of the formal complaint. Warning people of the consequences of a knowingly false complaint is no more impermissible than advising people they are signing a document or testifying under penalty of perjury. The explanation and admonition do not invalidate the statute.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN16[] Fundamental Freedoms, Freedom of Speech

The First Amendment, U.S. Const., 1st Amend., right of freedom of speech includes the right to remain anonymous, at least for some types of speech. Judicial recognition of the constitutional right to publish anonymously is a long-standing tradition.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN17[] Reviewability of Lower Court Decisions, Preservation for Review

As a general rule, constitutional issues not raised in earlier civil proceedings are waived on appeal.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN18[] Fundamental Freedoms, Freedom of Speech

There is no absolute right to anonymous speech. A court must balance the right against the government's interest in requiring disclosure of identifying information.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN19[] Reviewability of Lower Court Decisions, Preservation for Review

Where an argument involves an issue of fact rather than a pure question of law, it is forfeited by the appellant's failure to raise it below.

Headnotes/Summary

Summary
[*1081] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court enjoined a city from accepting any complaint of peace officer misconduct without obtaining the signed advisory required by statute (*Pen. Code, § 148.6*). (Superior Court of Los Angeles County, No. BC676283, Robert Broadbelt III, Judge.)

The Court of Appeal affirmed, noting that the city had standing to appeal because case law precluding local officials from refusing to enforce a statute absent a judicial determination of unconstitutionality did not impact the city's status as an aggrieved party (*Code Civ. Proc., § 902*), based on the entry of an injunction preventing the city from continuing a prior course of conduct. The injunction was properly entered because the California Supreme Court previously had ruled *§ 148.6* does not violate *U.S. Const., 1st Amend.*, but is a permissible content-based restriction seeking to prevent knowingly false complaints, which require investigation (*Pen. Code, § 832.5*) and thus are more harmful than other false statements. (Opinion by Segal, J., with Perluss, P. J., and Wise, J.,* concurring. Concurring opinion by Perluss, P. J. (see p. 1101).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Law Enforcement Officers § 11—Police—Disciplinary Proceedings—Investigation of Complaints—Admonition Against Knowingly Filing False Complaints.

California requires law enforcement agencies to investigate complaints against peace officers (*Pen. Code, § 832.5, subd. (a)(1)*). *Pen. Code, § 148.6, subd. (a)(1)*, makes it a crime to file a knowingly false allegation of misconduct against a peace officer. And *§ 148.6, subd. (a)(2)*, requires law enforcement agencies, before accepting a complaint alleging misconduct by a peace officer, to require the complainant to sign an advisory informing the complainant that filing a knowingly false complaint may result in criminal prosecution.

CA(2)[] **(2)**

Constitutional Law § 17—Constitutionality of Legislation—Judicial Power to Declare Legislation Void—Local Officials Prohibited from Determining Enforceability.

Under California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution. Therefore, a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional.

CA(3)[] **(3)**

Appellate Review § 7—Parties—Aggrieved.

Under *Code Civ. Proc., § 902*, any party aggrieved may appeal a judgment. An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision. An aggrieved party includes the party against whom an appealable order or judgment, including an injunction, has been entered.

CA(4)[] **(4)**

Appellate Review § 5—Who May Appeal—Standing Construed Liberally.

Standing to appeal is construed liberally, and doubts are resolved in its favor.

CA(5)[] **(5)**

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

Courts § 10—Jurisdiction—Justiciable Controversy.

California courts decide only justiciable controversies and do not resolve lawsuits that are not based on an actual controversy. For example, unripeness and mootness describe situations where there is no justiciable controversy. Where there is no justiciable controversy the proper remedy is not to render judgment for one side or the other, but to dismiss.

[*1083] CA(6)[] (6)

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Viewpoint Discrimination.

Under U.S. Const., 1st Amend., governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based regulations target speech based on its communicative content. As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. Viewpoint discrimination, where the government discriminates among viewpoints, is a more blatant and egregious form of content discrimination.

CA(7)[] (7)

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions.

The United States Supreme Court has identified three permissible types of content-based restrictions that do not pose the threat that the government may effectively drive certain ideas or viewpoints from the marketplace. The first is where the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable. The second is where the speech is associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the speech. And the third is where the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.

CA(8)[] (8)

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

A city argued that Pen. Code, § 148.6, was a flagrant content- and viewpoint-based restriction on speech, applying only to knowingly false statements against a police officer but not to knowingly false statements in favor of police officers. The city also argued that a California Supreme Court decision upholding the statute's constitutionality had nothing to do with the city's argument because it never considered whether the § 148.6 conflicting treatment of false complaints and false commendations was an acceptable regulation of speech. The decision had to be read differently. The California Supreme Court did not reject the exact argument the city made. But the California Supreme Court held all three categories of content discrimination the United States Supreme Court has identified as not threatening to drive ideas or viewpoints from the marketplace—and hence permissible—applied. And the California Supreme Court's analysis of why these exceptions applied to § 148.6 applied to the city's arguments.

[Cal. Forms of Pleading and Practice (2022) ch. 126A, Constitutional Law, § 126A.43.]

[*1084] CA(9)[] (9)

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

Regarding the First Amendment exception permitting content-based restrictions where the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, the California Supreme Court has held that the reason the entire class of speech involving knowingly false statements of fact is proscribable has special force when applied to false accusations against peace officers. When a person makes a complaint against a peace officer, the agency receiving the complaint is legally obligated to investigate it and to retain the complaint and resulting reports or findings for at least five years, and therefore the potential harm of a knowingly false statement is greater than in other situations. This reasoning applies whether Pen. Code, § 148.6, is viewed as a restriction based on whom the complainant accuses of misconduct (e.g., police officer

or firefighter) or as a restriction based on whether a person is accusing an officer of misconduct or commending the officer for his or her service. When a person commends an officer, an agency is not legally obligated to investigate or retain the commendation. *Pen. Code, § 832.5*, requires agencies to investigate only complaints by members of the public and to retain the complaints and any reports or findings relating to these complaints (*§ 832.5, subd. (a)(1)*, *(2)*).

CA(10) **(10)**

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

As for the *First Amendment* exception permitting content-based restrictions where the category of proscribed speech is associated with particular secondary effects of the speech, the California Supreme Court has held that knowingly false accusations of misconduct against a peace officer have substantial secondary effects—they trigger mandatory investigation and record retention requirements that do not apply to other persons. In addition, public resources are required to investigate these complaints, resources that could otherwise be used for other matters; the complaints may adversely affect the accused peace officer's career, at least until the investigation is complete; and the complaints may be discoverable in criminal proceedings. False commendations of officers do not trigger mandatory investigation and retention requirements that demand use of public resources. It is hard to see how false statements commending an officer or defending an officer against alleged misconduct could adversely affect anyone's career. While complaints against an officer remain in the officer's personnel file and may be discoverable in future criminal proceedings where the officer is a witness, false statements **[*1085]** defending the officer and accusations by an officer or against a complainant are less likely to surface.

CA(11) **(11)**

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

On the *First Amendment* exception permitting content-based restrictions where the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot, the California Supreme Court has held there is no realistic possibility of official suppression of ideas under *Pen. Code, § 148.6*. The Legislature did not suppress all complaints of police misconduct, only knowingly false ones. The Legislature did not render complaints critical of peace officers a disfavored subject because such complaints are, in other respects, favored. The Legislature actually elevated the status of complaints against peace officers by requiring their investigation and retention of records, and, in doing so, sought only to strike a balance by penalizing those who invoke that status with knowingly false complaints.

CA(12) **(12)**

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

Because the Legislature has elevated the status of misconduct complaints against peace officers by imposing mandatory investigation and retention requirements—an elevation it did not extend to other comments about peace officers—there is no realistic possibility the Legislature intended to suppress the viewpoint of speakers critical of such officers. Therefore, *Pen. Code, § 148.6*, does not raise the specter that the government was attempting to drive certain ideas or viewpoints from the marketplace.

CA(13) **(13)**

Courts § 39.5—Decisions and Orders—Doctrine of Stare Decisis—Opinions of California Supreme Court—Majority Opinion.

A California intermediate appellate court's role is not to second-guess a majority opinion of the California Supreme Court, however persuasive the reasoning of concurring or dissenting opinions may be.

CA(14) **(14)**

Courts § 39.5—Decisions and Orders—Doctrine of Stare Decisis—Opinions of California Supreme Court—Dicta.

Even statements by the California Supreme Court that do not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made after careful consideration, or in the course of an elaborate review of the authorities.

[*1086] *CA(15)*[] **(15)**

Courts § 39.5—Decisions and Orders—Doctrine of Stare Decisis—Opinions of California Supreme Court—Federal Questions.

A California intermediate appellate court must, when considering federal questions, follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently.

CA(16)[] **(16)**

Constitutional Law § 59—First Amendment—Regulation of Speech—Content-based Restrictions—Permissible Restrictions—Prohibiting Knowingly False Complaints Against Police Officers.

The Supreme Court specifically has considered whether the requirement in *Pen. Code, § 148.6, subd. (a)(2)*, that complainants read and sign an admonition explaining the criminal sanction for knowingly false complaints demonstrates that official suppression of ideas is indeed afoot. The Supreme Court has held it does not. The admonition merely advises complainants of the law and impresses on them the significance of the formal complaint. Warning people of the consequences of a knowingly false complaint is no more impermissible than advising people they are signing a document or testifying under penalty of perjury. The explanation and admonition do not invalidate the statute.

CA(17)[] **(17)**

Constitutional Law § 55—First Amendment—Scope and Nature—Freedom of Speech and Expression—Anonymous Speech.

The *First Amendment* right of freedom of speech includes the right to remain anonymous, at least for some types of speech. Judicial recognition of the constitutional right to publish anonymously is a long-standing tradition.

CA(18)[] **(18)**

Appellate Review § 33—Presenting and Preserving Questions in Trial Court—Claims for Relief—Constitutional Issues.

As a general rule, constitutional issues not raised in earlier civil proceedings are waived on appeal.

CA(19)[] **(19)**

Constitutional Law § 55—First Amendment—Scope and Nature—Freedom of Speech and Expression—Anonymous Speech.

There is no absolute right to anonymous speech. A court must balance the right against the government's interest in requiring disclosure of identifying information.

CA(20)[] **(20)**

Appellate Review § 32—Presenting and Preserving Questions in Trial Court—Issues of Fact and Law.

Where an argument involves an issue of fact rather than a pure question of law, it is forfeited by the appellant's failure to raise it below.

Counsel: **[*1087]** Michael N. Feuer, City Attorney, Kathleen A. Kenealy, Chief Deputy City Attorney, Scott Marcus, Assistant City Attorney, Blithe S. Bock, Managing Assistant City Attorney, and Michael M. Walsh, Deputy City Attorney, for Defendants and Appellants.

Rains Lucia Stern St. Phalle & Silver, Richard A. Levine and Michael A. Morguess for Plaintiff and Respondent.

Judges: Opinion by Segal, J., with Perluss, P. J., and Wise, J.*, concurring. Concurring opinion by Perluss, P. J.

Opinion by: Segal, J.

Opinion

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

SEGAL, J.—

INTRODUCTION

HN1[↑] ***CA(1)***[↑] **(1)** California requires law enforcement agencies to investigate complaints against peace officers. (See *Pen. Code, § 832.5, subd. (a)(1)*.)[1] *Section 148.6, subdivision (a)(1)*, makes it a crime to file a knowingly false allegation of misconduct against a peace officer. And *section 148.6, subdivision (a)(2)*, requires law enforcement agencies, before accepting a complaint alleging misconduct by a peace officer, to require the complainant to sign an advisory informing the complainant that filing a knowingly false complaint may result in criminal prosecution.

In 2002 the California Supreme Court upheld *section 148.6* against a challenge the statute was an impermissible content-based speech restriction under **[**2]** the *First Amendment to the United States Constitution*. (*People v. Stanistreet (2002) 29 Cal.4th 497 [127 Cal. Rptr. 2d 633, 58 P.3d 465]* (*Stanistreet*), cert. den. *sub nom*. *Stanistreet v. California (2003) 538 U.S. 1020 [155 L.Ed.2d 861, 123 S.Ct. 1944]*.) Three years later, a panel of the United States Court of Appeals for the Ninth Circuit reached a different conclusion. The Ninth Circuit ruled *section 148.6* was an impermissible viewpoint-based speech restriction under the *First Amendment* because the statute criminalized false statements that accused a peace officer of misconduct, but not false statements, made by the officer or a witness during the investigation, that supported the officer. (*Chaker v. Crogan (9th Cir. 2005) 428 F.3d 1215* (*Chaker*), cert. den. *sub nom*. *Crogan v. Chaker (2006) 547 U.S. 1128 [164 L.Ed.2d 780, 126 S.Ct. 2023]* .)

Until 2013 the City of Los Angeles and the United States were parties to a consent decree in the United States District Court that prevented the city from **[*1088]** requiring complainants to sign the advisory required by *section 148.6*. After the consent decree expired, the city continued to not require complainants to sign the advisory. The Los Angeles Police Protective League filed this action against the city and its chief of police, Charlie Beck, seeking an injunction requiring them to comply with *section 148.6, subdivision (a)(2)*.[2] Following a court trial, the court entered judgment in favor of the Police Protective League. Concluding it was bound to follow *Stanistreet*, the trial court rejected the City's *First Amendment* challenge to *section 148.6* and enjoined the City from accepting any complaint alleging misconduct **[**3]** by a peace officer unless the complainant has signed the advisory required by *section 148.6*.

The City appeals, asking us to hold, as the Ninth Circuit held in *Chaker*, *section 148.6* is an impermissible viewpoint-based speech restriction. The City correctly points out that the arguments the California Supreme Court rejected in *Stanistreet* are not entirely identical to the arguments the Ninth Circuit accepted in *Chaker*. The City also argues the injunction requires the City to enforce a statute federal courts have found is unconstitutional. That's a real problem. But the Supreme Court's analysis in *Stanistreet* of why *section 148.6* does not violate the *First Amendment* applies to the City's *Chaker*-based arguments here. Because the United States Supreme Court has not ruled *section 148.6* or an analogous statute is unconstitutional, we must follow *Stanistreet*. Therefore, we do, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Legislature Enacts Section 148.6*

The California Supreme Court in *Stanistreet* explained the circumstances that prompted the Legislature to enact *section 148.6*: After "'the Rodney King incident in March 1991, law enforcement agencies throughout the state … "revised their citizen complaint procedures to promote greater accountability on the part of their line officers."'" (*Stanistreet, supra, 29 Cal.4th at p. 502*.) But, according to the Legislature, **[**4]** "'a "glaringly negative side-effect [was] the willingness on the part of many of [California's] less ethical citizens to maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs." [Citation.] Against this backdrop, the Legislature enacted *section 148.6*, in an attempt to curb a perceived rising tide of knowingly false citizens' complaints of misconduct by officers performing their duties.'" (*Id. at pp. 502–503*.)

Section 148.6, subdivision (a)(1), states: "Every person who files any allegation of misconduct against any peace officer, … knowing the allegation **[*1089]** to be false, is guilty of a misdemeanor." *Section 148.6, subdivision (a)(2)*, states: "A law enforcement agency accepting an allegation of misconduct against a peace

[1] Undesignated statutory references are to the Penal Code.

[2] We refer to the City of Los Angeles and Beck collectively as the City.

officer shall require the complainant to read and sign the following advisory, all in boldface type:

"YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CIVILIANS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE **[**5]** RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CIVILIAN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.

"IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

"I have read and understood the above statement.

"Complainant ___."

B. *A Consent Decree Prevents the City from Requiring Complainants To Sign the Advisory*

In 2000 the United States filed a lawsuit against the City of Los Angeles alleging the City had failed to implement appropriate management practices, resulting in a pattern or practice of unconstitutional conduct that violated *title 42 United States Code former section 14141*.[3] The following year the United States and the City of Los Angeles entered into a consent decree that resolved the lawsuit. Under the decree, the City of Los Angeles and the Los Angeles Police Department agreed to receive complaints against peace officers "in writing or verbally, in person, by mail, by telephone … , [by] facsimile transmission, or by electronic mail . **[**6]** …"

The City of Los Angeles also **[*1090]** agreed to receive anonymous complaints and to "prohibit officers from asking or requiring a potential complainant to sign any form that in any manner limits … the ability of a civilian to file a police complaint with the [Department] or any other entity." The consent decree ended in 2013.

C. *The Trial Court Orders the City To Comply with Section 148.6, Subdivision (a)(2)*

In 2017 the Police Protective League—an employee organization[4] that represents peace officers employed by the City—filed this action, seeking a declaration *section 148.6, subdivision (a)(2)*, was "legally valid [and] enforceable." The Police Protective League also sought an order "enjoining the [City] from accepting an allegation of misconduct against" peace officers represented by the Police Protective League "without the complainant being required to read and sign" the required advisory.

The parties stipulated at trial that, after the consent decree ended in 2013, the City declined to require complainants filing allegations of police misconduct to sign the advisory required by *section 148.6*. The Police Protective League called one witness, Officer Steve Gordon, the director of the Police Protective League, who testified that serious complaints against officers **[**7]** may result in the Los Angeles Police Department removing the officers from an assignment pending an investigation. Therefore, Officer Gordon stated, gang members try to "get rid of an officer" by "continually mak[ing] complaints." Gordon testified that false complaints against an officer "could" adversely affect the officer's opportunity for promotion, but that he was not aware whether the police department had ever denied an officer a promotion because of a false complaint. He also testified that, if a complaint against an officer were adjudicated false, it would not affect the officer's ability to transfer to a different unit or division.

In its trial brief the City argued the court should not issue an injunction requiring the City to comply with *section 148.6* because the statute violates the *First Amendment*. Citing *Chaker, supra, 428 F.3d 1215*, the

[3] At the time, that section provided: "It shall be unlawful for any governmental authority … to engage in a pattern or practice of conduct by law enforcement officers … that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." (See *42 U.S.C. former § 14141*, eff. Sept. 13, 1994.) Congress has since renumbered that law as title *34 United States Code section 12601*.

[4] "'Employee organization' means … [¶] … [a]ny organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency" or "[a]ny organization that seeks to represent employees of a public agency in their relations with that public agency." (*Gov. Code, § 3501, subd. (a)*.)

City argued the statute was an impermissible content- and viewpoint-based speech restriction because it criminalized knowingly false complaints against police officers, but not "false statements by police officers or witnesses in the same context."
[*1091]

The trial court ruled section 148.6, subdivision (a)(2), was not unconstitutional under the First Amendment. The court ruled the California Supreme Court held in Stanistreet, supra, 29 Cal.4th 497 that "section 148.6 falls within all the categories **[**8]** of permissible 'content discrimination' identified by the [United States] Supreme Court … ." Recognizing "a split of authority between the California Supreme Court and the Ninth Circuit," the trial court concluded it was bound by the California Supreme Court's decision in Stanistreet. The trial court declared section 148.6, subdivision (a)(2), is valid and enforceable and enjoined the City "from accepting an allegation of misconduct against a peace officer without requiring the complainant to read and sign the advisory set forth in Penal Code [section] 148.6, subdivision (a)(2)."[5] The City timely appealed.

DISCUSSION

A. *The City Has Standing*

CA(2)[↑] **(2)** Relying on Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055 [17 Cal. Rptr. 3d 225, 95 P.3d 459] (Lockyer), the Police Protective League argues the City does not have standing to appeal or to raise its constitutional arguments. In Lockyer a city clerk refused to enforce then-existing provisions of California's marriage statutes that limited "the granting of a marriage license and marriage certificate only to a couple comprised of a man and a woman," after the mayor of the city determined the marriage statutes violated the California Constitution. (Lockyer, at pp. 1067, 1070.) Ruling the clerk could not refuse to enforce the statutes, the California Supreme Court stated that, HN2[↑] "under California law, the determination whether a statute is unconstitutional and **[**9]** need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution." (Id. at pp. 1092–1093.) Therefore, the Supreme Court held, "a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." (Id. at p. 1082.) According to the Police Protective League, because the City has a ministerial duty to comply with section 148.6, subdivision (a)(2), the City may not refuse to comply because it believes the statute is unconstitutional.

CA(3)[↑] **(3)** This argument does not implicate the City's standing to appeal. HN3[↑] "Under Code of Civil Procedure section 902, '[a]ny party aggrieved' may **[*1092]** appeal a judgment." (Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260, 263 [228 Cal. Rptr. 3d 106, 409 P.3d 281], fn. omitted.) "An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (In re K.C. (2011) 52 Cal.4th 231, 236 [128 Cal. Rptr. 3d 276, 255 P.3d 953]; see County of Riverside v. Public Employment Relations Bd. (2016) 246 Cal.App.4th 20, 27 [200 Cal. Rptr. 3d 573].) An aggrieved party includes "the part[y] against whom an appealable order or judgment," including an injunction, "has been entered." (Ely v. Frisbie (1861) 17 Cal. 250, 260; see County of Riverside, at p. 27.) The City is a party against **[**10]** whom an appealable judgment that includes an injunction has been entered. And the City's interests are not remote—the judgment enjoins the City from continuing to engage in a prior course of conduct (accepting unsigned complaints alleging misconduct by a peace officer). CA(4)[↑] **(4)** That is all that is required for standing to appeal. (See K.C., at p. 238 [HN4[↑] "standing to appeal is construed liberally and doubts [are] resolved in its favor"].)[6]

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[5] The trial court stayed the injunction "until either (1) the time to file an appeal has expired and no timely notice of appeal has been filed or (2) a timely notice of appeal is filed and the Court of Appeal issues a remittitur or the appeal is dismissed." Thus, the injunction is currently stayed.

[6] CA(5)[↑] **(5)** The Police Protective League similarly asserts that the constitutionality of section 148.6 is a "nonjusticiable" issue. This, too, is incorrect. HN5[↑] "California courts decide only justiciable controversies and do not resolve lawsuits that are not based on an actual controversy." (Bichai v. Dignity Health (2021) 61 Cal.App.5th 869, 879 [276 Cal. Rptr. 3d 154].) For example, "unripeness and mootness describe situations where there is no justiciable controversy." (*Ibid.*) "Where there is no justiciable controversy the proper remedy is not to render judgment for one side or the other, but to dismiss." (Connerly v. Schwarzenegger (2007) 146 Cal.App.4th 739, 752 [53 Cal. Rptr. 3d 203].) The Police Protective League effectively admitted there was a justiciable

The Police Protective League's argument, more properly framed, is that under Lockyer the City's assertion that section 148.6 is unconstitutional is not a valid defense to the Police Protective League's request for an injunction ordering it to comply with the statute.[7] The Police Protective League, however, forfeited this argument by not raising it in the trial court. (See Richey v. AutoNation, Inc. (2015) 60 Cal.4th 909, 920, fn. 3 [182 Cal. Rptr. 3d 644, 341 P.3d 438]; Reid v. City of San Diego (2018) 24 Cal.App.5th 343, 357 [234 Cal. Rptr. 3d 636].) In addition, as the City argues, the California Supreme Court in Lockyer held only that officials may not refuse to enforce a statute "in the absence of a judicial determination of unconstitutionality." (Lockyer, supra, 33 Cal.4th at pp. 1067, 1069, 1082.) Here, there is a judicial determination of unconstitutionality—the Ninth Circuit in Chaker held section **[*1093]** 148.6 violates the First Amendment. As has at least one other federal court. (See Hamilton v. City of San Bernardino (C.D.Cal. 2004) 325 F.Supp.2d 1087, 1095.)[8]

B. *Section 148.6 Is Not an Impermissible Content- or Viewpoint-based **[**11]** Speech Restriction*

1. *Applicable First Amendment Principles*

HN6[↑] **CA(6)**[↑] **(6)** Under the *First Amendment to the United States Constitution*, "governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'" (*National Institute of Family and Life Advocates v. Becerra (2018) 585 U.S. ___ [201 L.Ed.2d 835, 138 S.Ct. 2361, 2371]*; see *Reed. v. Town of Gilbert (2015) 576 U.S. 155, 163 [192 L.Ed.2d 236, 135 S.Ct. 2218]*.) "Content-based regulations 'target speech based on its communicative content.' [Citation.] As a general matter, such laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" (*National Institute*, at p. ___ [138 S.Ct. at p. 2371]; see *Reed, at p. 163*.) Viewpoint discrimination, where the "[g]overnment discriminat[es] among viewpoints[,] … is a 'more blatant' and 'egregious form of content discrimination.'" (*Reed, at p. 168*; accord, *McCullen v. Coakley (2014) 573 U.S. 464, 482–483 [189 L.Ed.2d 502, 134 S.Ct. 2518]*.)[9]

2. Stanistreet

In *Stanistreet* a jury convicted the defendant of violating *section 148.6*. (*Stanistreet, supra, 29 Cal.4th at p. 501*.) The Court of Appeal reversed the judgment, holding *section 148.6* was unconstitutional under the *First Amendment* "because it proscribes knowingly false accusations of misconduct against peace officers only and not against others," thereby "selectively prohibit[ing] expression because of its content." (*Ibid.*) The California Supreme Court reversed. The Supreme Court acknowledged the statute was a content-based speech restriction because it criminalized false allegations of misconduct against peace officers **[**12]** (only), and not (for example) firefighters, paramedics, teachers, and elected officials. (*Id. at pp. 503–504, 508*.) But the **[*1094]** California Supreme Court held the statute fell within each of the "three categories of content discrimination that … are permissible" under the United States Supreme Court's decision in *R. A. V. v. St. Paul (1992) 505 U.S. 377 [120 L.Ed.2d 305, 112 S.Ct. 2538] (R.A.V.)*. (*Stanistreet, at p. 508*.)

CA(7)[↑] **(7)** In *R.A.V.* **HN7**[↑] the United States Supreme Court identified three permissible types of content-based restrictions that do not "pose [the] threat" that "'the Government may effectively drive certain ideas or viewpoints from the marketplace … .'" (*R.A.V., supra, 505 U.S. at pp. 388, 387*.) The first is where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." (*Id. at p. 388*.) The second is where the speech is "associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the … speech … .'" (*Id. at p. 389*.) And the third is where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." (*Id. at p. 390*.)

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controversy when it filed a lawsuit seeking a judicial declaration and injunction. It also asks us to affirm the judgment, not to vacate the judgment or order the trial court to dismiss the action.

[7] The court in *Lockyer* did not refer to the issue as one of "standing."

[8] We assume without deciding that the decisions in *Chaker* and *Hamilton*, holding *section 148.6* violates the United States Constitution, are "judicial determinations of unconstitutionality" that allow the City to assert the statute's unconstitutionality as a defense in this action.

[9] The California "'state Constitution's free speech provision is "at least as broad" as [citation] and in some ways is broader than [citations] the comparable provision of the federal Constitution's *First Amendment*.'" (*Beeman v. Anthem Prescription Management, LLC (2013) 58 Cal.4th 329, 341 [165 Cal. Rptr. 3d 800, 315 P.3d 71]*; see *Cal. Const., art. I, § 2*.) The City does not challenge *section 148.6* under the California Constitution.

As we will discuss in more detail, the California Supreme Court in *Stanistreet* held all three exceptions applied to *section 148.6, subdivision (a)(2)*, because of the state's requirement, **[**13]** unique to peace officers, that agencies must investigate and retain a record of all complaints of misconduct. (*Stanistreet, supra, 29 Cal.4th at pp. 508–510*.)

3. Chaker

Three years after the California Supreme Court decided *Stanistreet*, the United States Court of Appeals for the Ninth Circuit held in *Chaker, supra, 428 F.3d 1215* that *section 148.6* violated the *First Amendment*. In *Chaker* a jury convicted the defendant in California state court of violating *section 148.6*. (*Chaker, at p. 1217*.) The defendant filed a petition for writ of habeas corpus in the United States District Court, alleging *section 148.6* violated the *First Amendment*. The district court denied the petition, but the Ninth Circuit reversed. (*Chaker, at p. 1218*.) The Ninth Circuit held *section 148.6* was an impermissible viewpoint-based speech restriction because "[o]nly knowingly false speech *critical* of peace officer conduct [during the course of a complaint investigation was] subject to prosecution under *section 148.6*," while "[k]nowingly false speech *supportive* of peace officer conduct [was] not similarly subject to prosecution." (*Chaker, at p. 1228*.) The Ninth Circuit in *Chaker* also rejected as a valid basis for the restriction the "state's asserted interest in saving valuable public resources and maintaining the integrity of the complaint process." (*Id. at p. 1226*.)[10]

[*1095]

4. *The City's Constitutional Challenge Is Inconsistent with the Supreme Court's Analysis in* Stanistreet

[14]** ***CA(8)***[↑] **(8)** Relying on *Chaker*, the City argues *section 148.6* "is a flagrant content and viewpoint-based restriction on speech, applying only to knowingly false statements against a police officer but not to knowingly false statements in favor of police officers … ." The City also argues the Supreme Court's decision in *Stanistreet* has "nothing to do" with the City's argument because "*Stanistreet* never considered whether *Section 148.6*'s conflicting treatment of false complaints and false commendations was an acceptable regulation of speech."

We read *Stanistreet* differently. True, the Supreme Court in *Stanistreet* did not reject the exact argument the City now makes for why *section 148.6* is an impermissible content- and viewpoint-based speech restriction. But the California Supreme Court in *Stanistreet* held all "three categories of content discrimination [the United States Supreme Court identified in *R.A.V.*] that do not threaten to drive ideas or viewpoints from the marketplace and hence are permissible [citation] … apply here." (*Stanistreet, supra, 29 Cal.4th at p. 508*.) And the California Supreme Court's analysis of why the three *R.A.V.* exceptions apply to *section 148.6* applies to the City's arguments.

HN8[↑] ***CA(9)***[↑] **(9)** Regarding the first *R.A.V.* exception—where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable" (*R.A.V., supra, 505 U.S. at p. 388*)—the California Supreme Court held: "The reason the entire class of speech at issue—knowingly false statements of fact—is proscribable has 'special force' [citation] when applied to false accusations against peace officers." (*Stanistreet, supra, 29 Cal.4th at p. 508*.) The California Supreme Court explained that, when "a person makes a complaint against a peace officer," the "agency receiving **[**15]** the complaint is legally *obligated* to investigate it and to retain the complaint and resulting reports or findings for at least five years" and that therefore "the potential harm of a knowingly false statement is greater … than in other situations." (*Ibid.*) This reasoning applies whether *section 148.6* is viewed as a restriction based on whom the complainant accuses of misconduct (e.g., police officer or firefighter) or as a restriction based on whether a person is accusing an officer of misconduct or commending the officer for his or her service. When a person commends an officer, an agency is not legally obligated to investigate or retain the commendation. *Section 832.5* requires agencies to investigate only "complaints by members of the public" and to retain the "[c]omplaints and any reports or findings relating to these complaints … ." (*§ 832.5, subds. (a)(1), (b)*.)

HN9[↑] ***CA(10)***[↑] **(10)** As for the second *R.A.V.* exception—where the category of proscribed speech is "associated with particular 'secondary effects' of the **[*1096]** speech" (*R.A.V., supra, 505 U.S. at p. 389*)—the California Supreme Court in *Stanistreet* held "[k]nowingly false accusations of misconduct against a peace officer have substantial secondary effects—they trigger mandatory investigation and record retention requirements" that do not apply **[**16]** to other persons.

[10] The court in *Chaker* discussed *R.A.V.*, but did not analyze the three exceptions to content-based speech restrictions the California Supreme Court in *Stanistreet* applied to *section 148.6*.

(*Stanistreet, supra, 29 Cal.4th at p. 509*.) In addition, "[p]ublic resources are required to investigate these complaints, resources that could otherwise be used for other matters; the complaints may adversely affect the accused peace officer's career, at least until the investigation is complete; and the complaints may be discoverable in criminal proceedings." (*Ibid.*) And again, false commendations of officers do not trigger mandatory investigation and retention requirements that demand use of public resources.[11] It is hard to see, and the City does not explain, how false statements commending an officer or defending an officer against alleged misconduct could adversely affect anyone's career. While complaints against an officer remain in the officer's personnel file and may be discoverable in future criminal proceedings where the officer is a witness, false statements defending the officer and accusations by an officer or against a complainant are less likely to surface.

HN10[↑] ***CA(11)***[↑] **(11)** On the final *R.A.V.* exception—where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot" (*R.A.V., supra, 505 U.S. at p. 390*)—the California Supreme Court in *Stanistreet* held there was "no realistic possibility **[**17]** of official suppression of ideas." (*Stanistreet, supra, 29 Cal.4th at p. 509*.) The California Supreme Court stated the Legislature did not suppress "all complaints of police misconduct, only knowingly false ones … ." (*Ibid.*) According to the California Supreme Court, the Legislature did not render complaints critical of peace officers a "'disfavored subject[]'" because such complaints were, "in other respects, *favored*." (*Id. at p. 510*.) The Legislature actually "elevate[d] the status" of complaints against peace officers by "requir[ing] their investigation and retention of records" and, in doing so, sought only to strike a balance by penalizing "those who invoke that status with knowingly false complaints." (*Ibid.*)

CA(12)[↑] **(12)** The Supreme Court's analysis in *Stanistreet* again applies whether *section 148.6* is considered a restriction based on whom the complainant accuses of misconduct or a restriction based on whether the speaker complains about or commends a peace officer. ***HN11***[↑] Because the Legislature elevated **[*1097]** the status of misconduct complaints against peace officers by imposing mandatory investigation and retention requirements—an elevation it did not extend to other comments about peace officers—there is no realistic possibility the Legislature intended to suppress the viewpoint **[**18]** of speakers critical of such officers. Therefore, *section 148.6* does not "'"raise[] the specter that the Government [was attempting to] drive certain ideas or viewpoints from the marketplace … ."'" (*Stanistreet, supra, 29 Cal.4th at p. 508*, quoting *R.A.V., supra, 505 U.S. at p. 387*.)

CA(13)[↑] **(13)** The City does not meaningfully explain why the California Supreme Court's analysis in *Stanistreet* of the third exception in *R.A.V.* would not apply to the City's viewpoint-based argument. Instead, the City urges us to adopt the reasoning of *Chaker* and of the two concurring justices in *Stanistreet* who would have held the third exception in *R.A.V.* did not apply to *section 148.6*. The concurring opinion in *Stanistreet* concluded there was a realistic possibility that criminalizing even false complaints against peace officers would suppress legitimate ones. (See *Stanistreet, supra, 29 Cal.4th at pp. 513–514* (conc. opn. of Werdegar, J.).) ***HN12***[↑] But our role is not to second-guess a majority opinion of the California Supreme Court, however persuasive the reasoning of concurring or dissenting opinions may be. (See *Jeld-Wen, Inc. v. Superior Court (2005) 131 Cal.App.4th 853, 868 [32 Cal. Rptr. 3d 351]* ["an appellate court may not properly disregard Supreme Court authority in favor of a [different] ruling that it prefers"]; *In re Marriage of Bryant (2001) 91 Cal.App.4th 789, 795 [110 Cal. Rptr. 2d 791]* ["[A] principle stated in a California Supreme Court opinion is not the opinion of the court unless it is agreed to by at least four of the justices."].)

CA(14)[↑] **(14)** The City argues that, because **[**19]** "*Stanistreet* and *Chaker* considered very different content-based distinctions," and "[b]ecause an opinion has no authority regarding an issue it did not address," we can follow the Ninth Circuit's holding in *Chaker* rather than the California Supreme Court's holding in *Stanistreet*. We cannot. ***HN13***[↑] Even statements by

[11] Quoting *Chaker, supra, 428 F.3d at page 1226*, the City argues "a peace officer or witness who lies during an investigation is equally to blame for wasting public resources by interfering with the expeditious resolution of an investigation." A peace officer or a witness who makes false statements during an investigation is certainly blameworthy. But once a complaint is filed, an agency must complete an investigation of the misconduct allegations; the marginal cost and additional "waste" of public resources caused by investigating false statements made after the complaint are more difficult to quantify. In contrast, a person who chooses to file a knowingly false complaint necessarily wastes public resources by triggering the investigation.

the California Supreme Court that do "'not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made … after careful consideration, or in the course of an elaborate review of the authorities … .'" (*Mero v. Sadoff (1995) 31 Cal.App.4th 1466, 1473 [37 Cal. Rptr. 2d 769]*.) Although the specific arguments the California Supreme Court rejected in *Stanistreet* are somewhat different from those the City advances here, the Supreme Court's reasoning in *Stanistreet* applies. That's enough to control our decision here. (See *Pogosyan v. Appellate Division of Superior Court (2018) 26 Cal.App.5th 1028, 1037 [237 Cal. Rptr. 3d 630]* ["we must examine the questions actually presented" to the Supreme Court and how the Supreme Court's "reasoning led to the statements at issue to determine the extent to which we must—or should—follow them"]; see also *Masellis v. Law Office of Leslie F. Jensen (2020) 50 Cal.App.5th 1077, 1093 [264 Cal. Rptr. 3d 621]* **[*1098]** [following the "Supreme Court's dicta" where the appellant did not identify "a compelling reason for rejecting [the] Supreme Court's statements"].)[12]

The City also argues *Stanistreet* has "questionable legitimacy **[**20]** in the wake of" the United States Supreme Court's decision in *United States v. Alvarez (2012) 567 U.S. 709 [183 L.Ed.2d 574, 132 S.Ct. 2537]*. In *Alvarez* six justices of the United States Supreme Court held the *Stolen Valor Act of 2005 (Pub.L. No. 109-437 (Dec. 20, 2006) 120 Stat. 3266)*—which made it a crime for a person to falsely represent he or she was awarded the Congressional Medal of Honor—violated the *First Amendment*. (See *Alvarez, at p. 715*; *id. at p. 730* (conc. opn. of Breyer, J.).) A majority of the United States Supreme Court stated there is no "general exception to the *First Amendment* for false statements." (*Alvarez, at p. 718*.) In *Stanistreet* the California Supreme Court stated that "knowingly false statements of fact are constitutionally unprotected." (*Stanistreet, supra, 29 Cal.4th at p. 505*.) Seizing on the difference in high court language, the City argues *Alvarez* disapproved the "legal pillar upon which the *Stanistreet* holding rested." The City, however, reads far too much into the California Supreme Court's statement in *Stanistreet*. Despite stating that false speech was "unprotected," the California Supreme Court recognized that "constitutional protection is not withheld from all such" false statements even assuming they, "by themselves, have no constitutional value." (*Id. at p. 505*.) More importantly, the California Supreme Court assumed a content-based restriction on even unprotected speech would violate the *First Amendment* unless one of the exceptions the United States Supreme Court **[**21]** enumerated in *R.A.V.* applied. (See *Stanistreet, at p. 506*.)[13]

[*1099]

CA(15)[↑] **(15)** Finally, the City contends that, because the Ninth Circuit in *Chaker* and at least one district court have held *section 148.6* violates the *First Amendment*,[14]

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[12] The City's insistence that the California Supreme Court "considered" a different content-based distinction than the one the City makes here is incorrect. In *Stanistreet* the respondents devoted an entire section of their brief in the Supreme Court to a viewpoint discrimination challenge to *section 148.6* that was essentially identical to the City's argument. (See *People v. Stanistreet, No. S102722*, answer brief on the merits, filed May 24, 2002.)[*] For example, the respondent in *Stanistreet* argued in its brief: "The statute and the required statutory advisory make it clear that only knowingly false statements 'AGAINST AN OFFICER' can be criminally punished. [Citation.] However, there is no threat of criminal punishment for knowingly false statements that the officer might make about the citizen in response to the complaint." (*Ibid.*, original capitalization.)

[*] We take judicial notice of the respondent's answer brief in *Stanistreet* "for the purpose of determining the procedural posture of [the] case before the" California Supreme Court. (*Davis v. Southern California Edison Co. (2015) 236 Cal.App.4th 619, 632, fn. 11 [186 Cal. Rptr. 3d 587]*; see *Evid. Code, §§ 452, subd. (d)*, *459*; *People v. Sanchez (1995) 12 Cal.4th 1, 85, fn. 10 [47 Cal. Rptr. 2d 843, 906 P.2d 1129]* [taking judicial notice of a brief filed in a different appeal], disapproved on another ground in *People v. Doolin (2009) 45 Cal.4th 390 [87 Cal. Rptr. 3d 209, 198 P.3d 11]*.)

[13] Other language in *Alvarez* supports the California Supreme Court's holding in *Stanistreet* that *section 148.6* does not violate the *First Amendment*. The majority in *Alvarez* identified several "examples of regulations on false speech" it did not intend to undermine, including the prohibition in title *18 United States Code section 1001* "on false statements made to Government officials, in communications concerning official matters … ." (*United States v. Alvarez, supra, 567 U.S. at p. 720*.)

[14] At least one state supreme court, however, has upheld a statute similar to *section 148.6* against a challenge essentially identical to the City's, disagreeing with the Ninth Circuit's decision in *Chaker*. (See *State v. Crawley (Minn. 2012) 819 N.W. 2d 94, 109, 114* ["Because speech that is supportive of peace officer conduct does not fall within the unprotected category of defamation, the statute does not discriminate on

the City "faces real consequences if it enforces section 148.6 by including the admonition." That may be—the City does seem caught between the Scylla of Chaker and the Charybdis of Stanistreet. HN14[↑] But as a California intermediate appellate court, we must, when considering federal questions, "'follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the *same* question differently.'" (Winns v. Postmates Inc. (2021) 66 Cal.App.5th 803, 811 [281 Cal. Rptr. 3d 460]; see Correia v. NB Baker Electric, Inc. (2019) 32 Cal.App.5th 602, 619 [244 Cal. Rptr. 3d 177].) Unless and until the California Supreme Court reconsiders its decision in Stanistreet (or the United States Supreme Court considers the constitutionality of § 148.6 or an analogous statute), we may not decide section 148.6 constitutes an impermissible restriction on content-based or viewpoint-based speech.

Which leaves the City in a practical quandary: The City must either disobey a state court injunction or enforce a statute federal courts have held is unconstitutional and cannot be enforced. The City currently has a temporary reprieve from this dilemma because the trial court stayed the injunction until this court issues its remittitur, which will not occur until **[**22]** the Supreme Court rules on a petition for review, if one is filed (or after the time to file such a petition expires). In the absence of intervention by the California Supreme Court (or the United States Supreme Court), the stay will expire, and the injunction will take effect.

C. *The Advisory and Signature Requirements of Section 148.6 Do Not Chill Protected Speech*

The City also argues section 148.6, subdivision (a)(2), violates the First Amendment by placing an impermissible burden on speech. According to the City, the requirement that complainants sign an advisory containing "a preemptive and explicit threat of criminal prosecution" for the filing of false complaints also deters people from filing good faith complaints.

CA(16)[↑] **(16)** The California Supreme Court in Stanistreet rejected this argument. HN15[↑] The Supreme Court specifically considered whether the requirement in section **[*1100]** 148.6, subdivision (a)(2), that complainants read and sign an admonition explaining the "criminal sanction for knowingly false complaints" demonstrated that "official suppression of ideas [was] indeed afoot." (Stanistreet, supra, 29 Cal.4th at p. 510.) The Supreme Court held it did not: "That admonition merely advises complainants of the law and impresses on them the significance of the formal complaint. Warning people of the consequences of a knowingly **[**23]** false complaint is no more impermissible than advising people they are signing a document or testifying under penalty of perjury. The explanation and admonition do not invalidate the statute." (*Ibid.*) Absent a contrary ruling by the United States Supreme Court, we may not second-guess the California Supreme Court on this (or any) issue.

D. *The City Forfeited Its Argument Section 148.6 Violates the First Amendment by Prohibiting Anonymous Complaints*

Finally, the City contends for the first time, on appeal, section 148.6, subdivision (a)(2), violates the First Amendment because, by requiring complainants to sign the admonition, it prohibits persons from anonymously reporting government misconduct. This is one argument the California Supreme Court in Stanistreet did not consider.

HN16[↑] CA(17)[↑] **(17)** "[T]he First Amendment right of freedom of speech includes the right to remain anonymous," at least for some types of speech. (Huntley v. Public Util. Com. (1968) 69 Cal.2d 67, 73 [69 Cal. Rptr. 605, 442 P.2d 685].) "'[J]udicial recognition of the constitutional right to publish anonymously is a long-standing tradition… . "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices … either anonymously or not at all."'" (John Doe 2 v. Superior Court (2016) 1 Cal.App.5th 1300, 1310 [206 Cal. Rptr. 3d 60].) The United States Supreme Court has recognized the right to speak anonymously, for example, when distributing **[**24]** handbills and pamphlets (see, e.g., Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton (2002) 536 U.S. 150, 166–167 [153 L.Ed.2d 205, 122 S.Ct. 2080]; McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 357 [131 L.Ed.2d 426, 115 S.Ct. 1511]; Talley v. California (1960) 362 U.S. 60, 64–65 [4 L.Ed.2d 559, 80 S.Ct. 536]) and when circulating ballot-initiative petitions (see Buckley v. American Constitutional Law Foundation, Inc. (1999) 525 U.S. 182, 199–200 [142 L.Ed.2d 599, 119 S.Ct. 636].)

CA(18)[↑] **(18)** There may be some merit to the City's anonymity argument. The City, however, forfeited the

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the basis of viewpoint."], cert. den. *sub nom. Crawley v. Minnesota (2013) 568 U.S. 1212 [185 L.Ed.2d 548, 133 S.Ct. 1493]*.)

argument by not making it in the trial court. (See ***HN17***[⬆] *Jackpot Harvesting Co., Inc. v. Superior Court (2018) 26 Cal.App.5th 125, 154 [237 Cal. Rptr. 3d 1]* ["As a general rule, 'constitutional issues not raised in earlier civil proceedings are waived on appeal.'"]; *In re M.H. (2016) 1 **[*1101]** Cal.App.5th 699, 713 [205 Cal. Rptr. 3d 1]* [by failing to raise the constitutional challenge in the trial court, appellant forfeited the argument a statute violated the *1st Amend.*]; *Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal.App.4th 563, 585 [71 Cal. Rptr. 3d 299]* [constitutional issues not raised in the trial court are forfeited on appeal].) ***CA(19)***[⬆] **(19)** Indeed, applying the forfeiture rule here is particularly appropriate given that ***HN18***[⬆] "there is no absolute right to anonymity" and that a court must balance the right against the government's interest in requiring disclosure of identifying information. (*Huntley v. Public Util. Com., supra, 69 Cal.2d at p. 75*.) In this case neither side presented evidence of the state's interests in requiring complainants to sign the advisory required by *section 148.6, subdivision (a)(2)*, so that the trial court could balance those interests against citizens' right to file complaints of police misconduct anonymously. ***CA(20)***[⬆] **(20)** (See *In re N.R. (2017) 15 Cal.App.5th 590, 598 [223 Cal. Rptr. 3d 260]* [***HN19***[⬆] where an argument "involves an issue of fact rather than a pure question of law," it is "forfeited by appellant's failure **[**25]** to raise it below"]; *Blankenship v. Allstate Ins. Co. (2010) 186 Cal.App.4th 87, 105 [111 Cal. Rptr. 3d 528]* ["arguments raised for the first time on appeal" that "involve questions of fact" are forfeited]; *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson (2005) 131 Cal.App.4th 1466, 1488 [33 Cal. Rptr. 3d 111]* [an argument is forfeited "if it was not raised below and requires consideration of new factual questions"].)

DISPOSITION

The judgment is affirmed.

Perluss, P. J., and Wise, J.,* concurred.

Concur by: Perluss, P. J.

Concur

PERLUSS, P. J., Concurring.—I fully agree with, and have signed, the court's opinion adhering to the Supreme Court's decision in *People v. Stanistreet (2002) 29 Cal.4th 497 [127 Cal. Rptr. 2d 633, 58 P.3d 465]*, holding *Penal Code section 148.6* (*section 148.6*) is not an unconstitutional restraint on speech. I add this grace note to briefly emphasize several issues our opinion does not address because the City of Los Angeles (City) focused its defense of the Los Angeles Police Protective League's lawsuit on the rights of individuals seeking to complain about police misconduct, not the City's own rights and responsibilities.

First, Los Angeles is a charter City. (See *Gov. Code, § 34101*.) As the Supreme Court explained in *State Building & Construction Trades Council of California v. City of Vista (2012) 54 Cal.4th 547 [143 Cal. Rptr. 3d 529, 279 **[*1102]** P.3d 1022]*, "Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs. *Article XI, section 5, subdivision (a) of the California Constitution* provides: 'It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect **[**26]** to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.'" (*Id. at p. 555*; italics omitted.) Known as the home rule doctrine, the broad authority of charter cities was originally "'enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.' [Citation.] The provision represents an 'affirmative constitutional grant to charter cities of "all powers appropriate for a municipality to possess …" and [includes] the important corollary that "so far as 'municipal affairs' are concerned," charter cities are "supreme and beyond the reach of legislative enactment."'" (*Id. at p. 556*; see *Johnson v. Bradley (1992) 4 Cal.4th 389, 394–398 [14 Cal. Rptr. 2d 470, 841 P.2d 990]*; *California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal.3d 1, 12 [283 Cal. Rptr. 569, 812 P.2d 916]*.)

Article XI, section 5, subdivision (b), of the California Constitution sets out a nonexclusive list of four core

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

categories that are, by definition, "municipal affairs." First on that list is "the constitution, **[**27]** regulation, and government of the city police force." (See *Johnson v. Bradley, supra, 4 Cal.4th at p. 398*.) Thus, if the City authorizes its police department to accept complaints of misconduct without a signed advisory, it may not be within the authority of the Legislature to prohibit it from doing so. (See generally *City of Huntington Beach v. Becerra (2020) 44 Cal.App.5th 243, 254, 259 [257 Cal. Rptr. 3d 458]* ["[h]ome rule authority under *article XI, section 5 of the California Constitution* does not mean charter cities can never be subject to state laws that concern or regulate municipal affairs"; the Supreme Court's analytical framework articulated in *City of Vista* and *California Fed. Savings* "appl[ies] to a state law that is claimed to intrude on a charter city's right under *article XI, section 5(b)* to create, regulate, and govern a police force"].)

Second, although *section 148.6, subdivision (a)(2)* provides a law enforcement agency "shall" require a complainant to read and sign the advisory, "shall" can be construed as mandatory or directory. (*People v. Ledesma (1997) 16 Cal.4th 90, 95 [65 Cal. Rptr. 2d 610, 939 P.2d 1310]*.) "When, as here, a statute sets forth a procedural requirement but does not set forth any penalty for noncompliance, a party may reasonably question whether the statute is merely directory, not mandatory. '[T]he "mandatory" or "directory" designation **[*1103]** does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes "'whether the failure to comply with a particular procedural **[**28]** step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.'"'" (*People v. Gray (2014) 58 Cal.4th 901, 909 [168 Cal. Rptr. 3d 710, 319 P.3d 988]*; see *Cal-Air Conditioning, Inc. v. Auburn Union School Dist. (1993) 21 Cal.App.4th 655, 673 [26 Cal. Rptr. 2d 703]* ["'provisions defining time and mode in which public officials shall discharge their duties and which are obviously designed merely to secure order, uniformity, system and dispatch in the public bureaucracy are generally held to be directory'"].) Even if *section 148.6* applies to the City's regulation of its police department despite the home rule doctrine, it is not clear—and we do not decide—that the City violates the statute by accepting a complaint of police misconduct without a signed advisory.[1]

Third, the import of a prohibition against "accepting an allegation of misconduct against a peace officer" without the signed advisory—the language of *section 148.6, subdivision (a)(2)* repeated in the injunction issued by the superior court—is, at best, unsettled. In an opinion issued in 1996 shortly after the enactment of *section 148.6*, Attorney General Daniel Lungren concluded, "A law enforcement agency may investigate an allegation of police misconduct even though the prescribed information advisory form has not been signed by the person filing the allegation." (*79 Ops.Cal.Atty.Gen. 163* (1996).) The Attorney General **[**29]** explained, "The plain wording and legislative history of *section 148.6*, along with the governing principles of statutory construction, including the duty to uphold the statute's constitutional validity, all support the conclusion that a law enforcement agency does not lose its power and jurisdiction to investigate allegations of police misconduct even though it fails to secure the signature of the complainant on the advisory form." (*Id. at p. 167*.) What, if anything, the City and its police department may do after receiving, but not "accepting," an unsigned or anonymous complaint is yet another issue we do not decide.

End of Document

[1] Presumably, an appellate court decision that *section 148.6* could not apply to the City under the home rule doctrine or that it was directory, not mandatory, would provide a basis for the City to seek to dissolve the injunction we affirm today.

Schenectady Police Benevolent Assn. v City of Schenectady

Supreme Court of New York, Schenectady County

December 29, 2020, Decided

2020-1411

Reporter
2020 N.Y. Misc. LEXIS 10947 *; 2020 NY Slip Op 34346(U) **

[1]** SCHENECTADY POLICE BENEVOLENT ASSOCIATION, On Behalf of BRIAN POMMER and On Behalf of All Other Similarly Situated Members of the SCHENECTADY POLICE BENEVOLENT ASSOCIATION, and BRIAN POMMER, Petitioners-Plaintifs, -against- CITY OF SCHENECTADY, MICHAEL C. EIDENS, in his official capacity as Public Safety Commissioner for the City of Schenectady, CITY OF SCHENECTADY POLICE DEPARTMENT, Respondents-Defendants. Index No. 2020-1411

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

records, disclosure, requests, Notice, disciplinary record, discipline, personnel, repeal, misconduct, charges, redacted, unwarranted invasion, unsubstantiated, privacy, arrest, personal privacy, statutory scheme, law enforcement, police officer, allegations, Counseling

Counsel: **[*1]** For Schenectady Police Benevolent Association, on behalf of Brian Pommer and on behalf of all other similarly situated members of the Schenectady Police Benevolent Association, and Brian Pommer, Petitioners-Plaintiffs: John P. Calareso, Jr., Esq., Gleason, Dunn, Walsh & O'Shea, Albany, N.Y.

For City of Schenectady, Michael C. Eidens, in his official capacity as Public Safety Commissioner for the City of Schenectady, and the City of Schenectady Police Department, Respondents-Defendants: Andrew B. Koldin, Esq., Assistant Corporation Counsel, Schenectady, New York.

For New York Civil Liberties Union, Intervenor-Party: Michael Sisitzky, Esq., Julissa Reynoso, Esq., Sofia Arguello, Esq., Lauren E. Duxstad, Esq., Brett Waters, Esq., Erin Baldwin, Esq., Samantha Rmppenthal, Esq., WINSTON & STRAWN LLP, New York, New York.

Judges: PRESENT: HON. MARK L. POWERS, SUPREME COURT JUSTICE.

Opinion by: MARK L. POWERS

Opinion

DECISION AND ORDER

NOTICE:

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

[2] HON. MARK L. POWERS, JSC**

The issue before this Court is whether a police officer's personnel and disciplinary record, to the extent it contains uncharged or unsubstantiated allegations of misconduct, or founded charges resolved without professional discipline, must be disclosed in response to a *Freedom of Information Law (FOIL)* request, in light of the repeal of *Civil Rights Law (CRL)* §50-a, on June 12, 2020.

Certainly, the repeal, which took effect immediately,

removed the blanket of secrecy with which law enforcement records, statewide, were previously cloaked in their entirety. However, the scope of the general public's reach, through the simple submission of a *FOIL* request, as far as the content of such records is the question now **[**3]** put to municipalities around the state.[1]

At the outset, the Court recognizes that strong lobbying by advocacy groups, coupled with recent nationwide protests in the name of racial equality and demanding massive reform, were the catalysts for the statutory repeal of *CRL 50-a*. Indeed, our nation's recent history is forever marked by anger and sorrow surrounding controversial arrests involving the use and **[*3]** degree of force, particularly as against black men, women and children. Although not an exhaustive rendition, police-caused fatalities of minorities, which garnered national media attention, peaceful public outcry and/or violent social unrest include: the death of Eric Garner, on July 17, 2014, resulting from police choke hold, during arrest for selling untaxed cigarettes; the death of Tamir Rice, a child, on November 22, 2014, who was carrying a toy gun; the death of Freddie Gray, on April 19, 2015, caused by spinal cord injuries sustained while already in police custody; the death of Elijah McClain, on August 24, 2019, after being cuffed, administered ketamine (a sedative), and then held against the ground in a choke hold for more than fifteen minutes; the death of Breonna Taylor, on March 13, 2020, after officers blindly fired multiple shots into her home while executing a search warrant; the death of Daniel Prude, on March 23, 2020, after being held face down to the pavement in excess of two minutes with a "spit hood" over his head; and the death of George Floyd, on May 25, **[**4]** 2020, while pinned to the ground with an officer's knee against his neck for more than eight minutes, during **[*4]** arrest for possession of a counterfeit $ 20.00 bill. Each of these deaths (and others not specifically referenced herein) sparked large-scale demonstrations decrying police brutality and systemic racism.

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

Given that our nation was gripped in demonstrations over the death of George Floyd merely six weeks earlier, parallels were drawn, locally, with respect to Patrolman Pommer's arrest of Gainderpersaud, prompting public interest in Patrolman Pommer's prior disciplinary record, if any. Specifically, on July 8, 2020, Michael Goodwin, a journalist with the Times Union, a newspaper in wide general **[*5]** circulation within New York State's Capital District, submitted a *FOIL* request to the City's Records Access **[**5]** Officer, seeking Patrolman Pommer's personnel record. On July 15, 2020 and September 30, 2020, respectively, the New York Civil Liberties Union (hereinafter, "the NYCLU") submitted *FOIL* requests, initially seeking Patrolman Pommer's disciplinary records and, subsequently, seeking the disciplinary records of all officers in the City's employ.

The instant combined *Civil Practice Law and Rules* (CPLR) *Article 78* special proceeding and declaratory judgment action, was brought on September 9, 2020, by the Schenectady Police Benevolent Association (hereinafter, "the PBA"), a labor organization and the exclusive representative for all police officers of the City of Schenectady, including Patrolman Pommer, (collectively, "the petitioners") seeking to prevent the City of Schenectady, its Public Safety Commissioner and its Police Department (hereinafter, collectively, "the respondents") from including particular documents, and those associated with them, within their response to the pending *FOIL* requests. The petitioners further seek to have this Court direct the respondents to redact

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

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

any **[*6]** and all references to conduct which was uncharged, unfounded, unsubstantiated, settled without discipline and/or otherwise resolved or exonerated, from the records of all officers, including Patrolman Pommer, prior to any disclosure.

The particular documents at issue are: a Counseling Notice, dated April 15, 2020, which Patrolman Pommer received relative to his response to a domestic call on November 10, 2019; and a Notice of Potential Charges, drafted on May 4, 2020, which was never signed, dated, nor served upon Patrolman Pommer, but arose from his handling of a group gathering outside a local business (Bumpy's Polar Freeze), relative to COVID-19 restrictions and for which he received a Notice of Discipline on May 21, **[**6]** 2020, which was, in turn, resolved via a Settlement Agreement on June 1, 2020.

Based upon a good cause showing by petitioners that there was an imminent intention, on the respondents part, to disclose these records, in response to the *FOIL* requests, albeit in redacted form, this Court granted, on September 9, 2020 (commensurate with the commencement of the proceeding) a temporary restraining Order prohibiting any further release of information from Patrolman Pommer's **[*7]** personnel record. The Court also directed the Schenectady County Clerk to seal the filings relative to this matter, pursuant to *22 New York Code of Rules and Regulations (NYCRR)* §216.1.

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

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

THE LAW AND DISCUSSION

The *Freedom of Information Law* (FOIL), codified at *New York State* Public Officers Law Article 6, §§84-90, is rooted in a presumption favoring access to all agency records, **[**7]** without the need of the person requesting access to provide any reason. In short, absent an express statutory exception allowing an agency to withhold disclosure of any requested public record, its availability is presumed. The theory is that "public **[*8]** records belong to the public."

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

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

Moreover, despite litigation to repudiate or, at least, scale back *CRL 50-a's* blanket safeguard against disclosure, its protections, prior to 2020, continued to receive expansive interpretation by the New York State Court of Appeals. *See, e.g.,* Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. of Correctional Services, 73 NY2d 26, 535 N.E.2d 243, 538 N.Y.S.2d 190 *[Ct. **[*9]** **[**8]** of Appeals, 1988]*, wherein the high Court ruled that inmate grievances against correction officers constituted the "very sort of record intended to be kept confidential under CRL §50-a. *See also* Matter of Daily Gazette Co. v. City of Schenectady, 93 NY2d 145, 710 N.E.2d 1072, 688 N.Y.S.2d 472 *[Ct. of Appeals, 1999]*, wherein the high Court ruled that records of police officers, who engaged in unruly conduct while off-duty, were protected from disclosure in light of the risk that such records might otherwise be used to "embarrass or humiliate" them. In fact, it was merely two years ago, in a holding viewed as "the high water mark" for the protection afforded police personnel records, that the high Court again reiterated the need to shield police officers from the disclosure of potentially embarrassing records. *See* Matter of New York Civ. Liberties Union v. New York City Police Dept, 32 NY3d 556, 94 N.Y.S.3d 185, 118 N.E.3d 847 *[Ct. of Appeals, 2018]*, wherein civilian complaints made to a review board, which may or may not be referred for discipline,

were held non-disclosable based upon CRL §50-a.

in a nutshell, CRL §50-a was interpreted broadly and applied so as to afford maximum confidentiality to all law enforcement disciplinary records. State lawmakers, however, responding to public demand, dramatically changed the landscape on June 12, 2020. On this date, a package of sweeping statutory reforms was enacted in combination **[*10]** with the complete repeal of CRL §50-a. The measures taken by the legislature were widely lauded as a giant leap forward in government accountability and transparency, focused on restoring the public's trust in the integrity of our police force.

As a result, access to law enforcement personnel records, including disciplinary history, is now governed by *FOIL* alone, with key provisions of *FOIL* having been **[**9]** amended accordingly. Specifically, there are newly enacted provisions to POL §86, to wit: the addition of subdivision (6) *[defining "law enforcement disciplinary records"]*; the addition of subdivision (7) *[defining "law enforcement disciplinary proceeding"]*; the addition of subdivision (8) *[defining "law enforcement agency"]* and the addition of subdivision (9) *[defining "technical infraction"]*. There are also newly enacted provisions to POL §87 to wit: the addition of subdivisions *(4-a)* and *(4-b) [providing for the mandatory or discretionary redaction of certain information prior to release]*. New provisions were also adopted in POL §89, to wit: the addition of subdivisions *(2-b) and (2-c) [likewise each providing for certain redactions prior to release]*.[3] At the same time, POL §87(2)(b), which provides an exemption for records which "if disclosed, would constitute an unwarranted invasion **[*11]** of personal privacy," was not changed. It is, however, POL §89(2)(b) which sets forth a non-exhaustive list of the types of information which, if released, would constitute "an unwarranted invasion of personal privacy."

Thus, with the repeal of CRL §50-a, *FOIL* requests for law enforcement personnel records are now to be considered in a light that makes them available *unless* a particular record, or portion thereof, falls within a recently enacted statutory exception or a pre-existing one which the legislature left unaltered. It is POL §87(2)(b)'s exceptions for records that, if disclosed, would constitute an "unwarranted invasion of personal **[**10]** privacy," that occupies the greatest significance to the instant matter.

Here, albeit the petitioners insistence that no public interest is served by the disclosure of the Counseling Notice, the Notice of Potential Charges, the Notice of Discipline and/or the Settlement Agreement, this Court is hard-pressed to find that any of these particular documents fall within the types of records to which POL §89(2)(b)(I-viii) ascribes a right of "personal privacy. "Nor does it particularly strengthen **[*12]** petitioners position to emphasize that *POL,* §89(2)(b)(I-viii), by its express language, does not provide an exhaustive list of personally private materials.

While there is no argument that the Settlement Agreement contains disciplinary information based on a founded charge(s), this Court acknowledges, and concurs with, the petitioners assertion that the Counseling Notice was not discipline but, merely, the noting of a job deficiency. Likewise, the Notice of Potential Charges does not contain any specifications, nor was it even served upon Patrolman Pommer. The assertion by petitioners that unsubstantiated charges, if disclosed, have the potential to cause embarrassment and/or give rise to officer safety issues is, indeed, made even more concerning by the possibility that veracity may be completely lacking. These points advanced by the petitioners are well-taken and credited by the Court. However, there is simply no ambiguity, in this Court's view, as to the legislature's instructions when responding to *FOIL* requests. In terms of public access, it is of little consequence that records contain unsubstantiated charges or mere allegations of misconduct. Where counseling pertains to job performance, or allegations **[*13]** relate to public duty, such records **[**11]** 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, 829 N.E.2d 266, 796 N.Y.S.2d 302 *[Ct. of Appeals, 2005]*).

"Privacy" is, of course, a subjective issue for individuals but it is not as to public employee records. Public employees have less entitlement to privacy than do non-public employees, at least where job performance is concerned. This is due to the high priority placed on accountability. Stated otherwise, where records relate to performance of public duties, no privacy right exists, It may well be true that a public employee (including a

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

police officer) and/or his collective bargaining unit or labor union, views a particular record as private or embarrassing or its disclosure as a personal safety risk but, it is nonetheless now within the ambit of disclosure. The current statutory scheme, while recognizing a privacy invasion, clearly does not deem it to be "unwarranted."

Indeed, pursuant to POL §89(2-c), the public's right of access may even extend to "technical infractions" (minor rule violations related **[*14]** solely to administrative departmental rules and not of public concern), as included within the meaning of "law enforcement disciplinary records," albeit with the agency having some discretion for redactions. Similarly, the documents sought by the pending *FOIL* requests do not fall within the exception to disclosure for materials that are "inter-agency or intra-agency," under POL §87(2)(g)(iii),

In the balance between the public's right of access and the impact of disclosure **[**12]** upon the officer, the legislature has now made clear that the latter (the impact upon the officer) must bow to the former (the public's right of access). It is unavailing as a basis to deny disclosure that an officer may not have had a full and fair opportunity to contest any misconduct charge.

Therefore, while the petitioners posit that the items sought herein are, at least in part, not disclosable due to the lack of a hearing, the new statutory scheme does not deem an officer's lack of opportunity to contest allegations, at a fair hearing, to serve as a basis to deny public disclosure. In other words, such lack of opportunity to the officer does not, standing alone, establish an unwarranted invasion of privacy. Thus, although this **[*15]** Court concurs with the petitioners that a fair determination as to the veracity of a misconduct complaint would seem to be appropriate, such course is not compatible with the legislature's clear directives.

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

Next, the Petitioners allege a denial of due process (New York Constitution, Article 1, §6) since the *Second Class Cities Law (SCCL)* §137 and the Schenectady Police Department Manual, Policy 1038, were not followed. However, the disclosure of police personnel records, albeit possessing the potential for reputational damage, does not amount to a cognizable protected interest under the federal or state constitutions, without more, such as, for example, the loss of employment. (**[**13]** *See,* Patterson v. City of Utica, 370 F.3d 322 [2d Circuit 2004]; *and* DiBlasio, M.D. v. Novello, 344 F.3d 292 [2d Circuit 2003]).[4] Here, the petitioners cannot develop a valid claim upon constitutional arguments because Pommer has not suffered a tangible loss. Moreover, it is beyond cavil that legislative acts enjoy a strong presumption of constitutionality.

This Court **[*16]** finds that the petitioners have not advanced a persuasive argument as to the governing statutes being in conflict with due process, equal protection or any other provision of the federal or state constitutions. As with their arguments sounding in the unwarranted invasion of privacy, the petitioners claims that the respondents intended compliance with the *FOIL* requests would be arbitrary and capricious, or an error of law, also fail.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Majewski v. Broadalbin-Perth Cent. School Dist, 91 NY2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 (Ct. of Appeals, 1998) quoting* Tompkins v. Hunter, 149 NY 117, 43 N.E. 532 (Ct. of Appeals, 1896). The repeal of CRL §50-a reflects the legislature's intention to alter the processing of *FOIL* requests seeking law enforcement disciplinary records from disclosure of the least possible material to the greatest permissible disclosure.

As for retroactivity, it is generally true that new statutes are presumed to apply prospectively. *General Construction Law (GCL)* §§93 *and* 94; ***[**14]** see also Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 NY3d 332, 130 N.Y.S.3d 759, 154 N.E.3d 972 (Ct. of Appeals, 2020) quoting Majewski v. Broadalbin-Perth Cent. School Dist, 91 NY2d 577, 584, 696 N.E.2d 978, 673 N.Y.S.2d 966 (Ct. of Appeals, 1998)*, thereby affording individuals an opportunity to know what the law is and to conform accordingly. *[Landgraf v. USI Film Products, et al, 511*

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[4] Such claims are often referred to as "stigma-plus claims," because they involve an injury to reputation (the "stigma") coupled with loss of a property interest (the "plus"). Stigma-plus claims require a showing of both a derogatory statement, false in nature, which injures reputation and the taking or alteration of a property interest, status or right. (*See Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 [Supreme Court of the United States, 1976])*.

U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (United States Supreme Court, 1994)). Nevertheless, **[*17]** it is also true that statutory retroactivity to matters preceding enactment is often sanctioned, particularly where, as here, strong public policy considerations serve as the foundation for the new statutory scheme.

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

Therefore, regardless whether unsubstantiated or unfounded or exonerated or dismissed, or regardless of whether not yet fully determined, or regardless of whether founded but without discipline imposed, the respondents herein cannot determine to deny the sought disclosure. A finding that Patrolman Pommer's personnel record, or any portion thereof, be withheld or redacted on the basis that its release would constitute an unwarranted invasion of personal privacy, cannot be realized by petitioners, as to do so would render the legislature's repeal of *CRL §50-a* utterly meaningless simply by the respondents theorizing **[*18]** that the record (or any portion thereof) is, in their opinion, "private." Given that an easy ability to render the new statutory scheme meaningless **[**15]** could not possibly have been the intended by the legislature, this Court is constrained to deny the petition and complaint in their entirety.

In conclusion, the last thing intended by this Court's decision herein is that it be viewed as a vilification of law enforcement officers, who, bravely dedicated to public service, are also all too often losing their lives in the line of duty. This Court appreciates petitioners position that the reputational harm which can result from the disclosure of unsubstantiated allegations, can be irreparable. It is, however, the Court's role to apply the current statutory scheme to the facts before it and, on these specific facts, to credit petitioners' interpretation would be to sub-vert *CRL §50-a's* repeal. In our current times, our state lawmakers have seen fit to require disclosure of police personnel records, upon FOIL request, even when such records reflect no more than allegations. They, presumably, did so in the name of opening the door to transparency, and having done so, it would be palpably improper for this **[*19]** Court to close it. It strikes the Court that the legislature intended not just a change in law but, rather, a change in culture. It is the Court's function to enforce the current laws in a manner that reflects that intention.

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

[16] THE COURT'S RULING**

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

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

ORDERED that, effective with the entry of this Decision by the Intervenor-Party (the NYCLU), with the Schenectady County Clerk, and service of an entered copy upon counsel for the named Petitioners and Respondents, the Temporary Restraining Order shall be automatically vacated and be of no further force or effect, whereupon Respondents shall proceed swiftly **[*20]** in complying with the pending FOIL requests to include Patrolman Pommers counseling notice, (draft) notice of potential charges, Notice of Discipline and Settlement Agreement, all of which shall be without redaction except insofar as Patrolman Pommers, and any other officer(s), home address, personal contact information (cell phone and email) and Social Security Numbers; and it is further

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

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

/s/ Mark L. Powers

HON. MARK L. POWERS

SUPREME COURT JUSTICE

Signed: December 29, 2020

at Schenectady, New York

Regular Session - June 09, 2020

NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

ALBANY, NEW YORK

June 9, 2020

11:53 a.m.

REGULAR SESSION

SENATOR BRIAN A. BENJAMIN, Acting President

ALEJANDRA N. PAULINO, ESQ., Secretary

P R O C E E D I N G S

ACTING PRESIDENT BENJAMIN: The Senate will come to order.

I ask everyone present to please

rise and recite the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

ACTING PRESIDENT BENJAMIN: In the absence of clergy, let us bow our heads in a moment of silent reflection or prayer.

(Whereupon, the assemblage respected a moment of silence.)

ACTING PRESIDENT BENJAMIN: The reading of the Journal.

THE SECRETARY: In Senate, Monday, June 8, 2020, the Senate met pursuant to adjournment. The Journal of Sunday, June 7, 2020, was read and approved. On motion, Senate adjourned.

ACTING PRESIDENT BENJAMIN: Without objection, the Journal stands approved as read.

Presentation of petitions.

Messages from the Assembly.

The Secretary will read.

THE SECRETARY: Senator LaValle

moves to discharge, from the Committee on Local Government, Assembly Bill Number 7493 and substitute it for the identical Senate Bill Number 5571, Third Reading Calendar 684.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator Thomas moves to discharge, from the Committee on Local Government, Assembly Bill Number 7011B and substitute it for the identical Senate Bill Number 5667B, Third Reading Calendar 685.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator O'Mara moves to discharge, from the Committee on Local Government, Assembly Bill Number 8222A and substitute it for the identical Senate Bill Number 6369A, Third Reading Calendar 689.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator LaValle moves to discharge, from the Committee on Local Government, Assembly Bill Number 8195 and substitute it for the identical Senate Bill Number 6379, Third Reading Calendar 690.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator Liu moves to discharge, from the Committee on Local Government, Assembly Bill Number 9094 and substitute it for the identical Senate Bill Number 7158, Third Reading Calendar 702.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator Borrello moves to discharge, from the Committee on Transportation, Assembly Bill Number 8156A and

substitute it for the identical Senate Bill Number 7281, Third Reading Calendar 703.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

THE SECRETARY: Senator Borrello moves to discharge, from the Committee on Cities, Assembly Bill Number 7648 and substitute it for the identical Senate Bill Number 7538, Third Reading Calendar 708.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

Messages from the Governor.

Reports of standing committees.

Report of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Gianaris.

SENATOR GIANARIS: Mr. President, I move to adopt the Resolution Calendar.

ACTING PRESIDENT BENJAMIN: All in favor of adopting the Resolution Calendar please signify by saying aye.

(Response of "Aye.")

ACTING PRESIDENT BENJAMIN: Opposed, nay.

(No response.)

ACTING PRESIDENT BENJAMIN: The Resolution Calendar is adopted.

Senator Gianaris.

SENATOR GIANARIS: At this time, Mr. President, we're going to take up select items off of the calendar. So can we please take up the calendar, and particularly Calendar Number 691, 749, 750 and 751.

ACTING PRESIDENT BENJAMIN: The Secretary will read.

THE SECRETARY: Calendar Number

691, Senate Print 6601B, by Senator Bailey, an act to amend the Civil Rights Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Senator Bailey to explain his vote.

SENATOR BAILEY: Thank you, Mr. President. I appreciate the time to be able to speak briefly on this important piece of legislation.

I want to thank Leader Andrea Stewart-Cousins for allowing, once again, another important bill in this package to reach the floor. And I really want to thank my Assembly

sponsor, Assemblywoman Nathalia Fernandez, for having a conversation with me about the importance of this bill.

It was related to the 2017 death in police custody of a man by the name of Andrew Kearse. He was a Bronx man, and what happened,

he sustained a heart attack while in the care of police officers in Schenectady, New York.

This has been a significantly difficult experience for the Kearse family, but today we are able to achieve some sort of a modicum of -- of something for that family, in the form of ensuring that there is a duty that, while in the care of an officer, that they have to -- that these officers are going to have to call somebody for backup if they know that immediate medical attention is required.

I think that this goes a long way in, again, securing and ensuring the public trust

between officers in our community. And I am proud to cast my vote, and I am appreciative of all of my colleagues who are supporting this legislation as well.

I vote aye, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Bailey to be recorded in the affirmative.

Announce the results.

THE SECRETARY: In relation to Calendar 691, those Senators voting in the negative are Senators Borrello and LaValle.

Ayes, 57. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 749, Senate Print 8493, by Senator Parker, an act to amend the Executive Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect on the first of April.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Senator Parker to explain his vote.

SENATOR PARKER: Thank you, Mr. President.

I rise today to explain my vote on I think a piece of legislation that is well overdue. The order of the day is transparency and accountability. Body cams provide that. We do it in New York City, we do it in multiple places across the state and across the country. It is past time that the State Police get a program to do this.

I was proud to have an opportunity

to work with the State Police and the

State Police union in order to craft this bill in a way in which it not only provides the transparency and accountability but also did not interfere with work rules.

And so this is going to be I think an important step in terms of regaining the trust of the public and making sure that both our police remain safe and our citizens have the kind of confidence that they should in their law enforcement agencies.

Thank you so much. I vote aye.

ACTING PRESIDENT BENJAMIN:

Senator Parker to be recorded in the affirmative.

Senator Akshar to explain his vote.

SENATOR AKSHAR: I want to thank the sponsor for the legislation.

I too share his passion with programs like this. Back at home I've used a good portion of my public protection dollars to afford police agencies to in fact stand these

particular programs up. I think they're beneficial to both the community as well as the members of law enforcement themselves.

Here's what I would ask the sponsor

to do. As we move forward and we roll this program out, programs like this are incredibly expensive. And it would be my hope and desire that this body, along with our friends in the Assembly, would ensure that the Division of the State Police have the appropriate funds to not only stand this program up but to sustain the program through its longevity.

Mr. President, I vote aye.

ACTING PRESIDENT BENJAMIN:

Senator Akshar to be recorded in the affirmative.

Senator Ramos to explain her vote.

SENATOR RAMOS: Yes, hi, thank you, Mr. President. I am here of course to speak in support of my bill.

Not only did we write this bill months ago thinking about there being parity amongst police officers, making sure that above-ground matches underground -- but over the last few weeks, we've seen that it has taken a pandemic for the world to realize just how egregious police brutality can be.

And unfortunately, the policing of the MTA has been no different. We saw a woman of color during the pandemic, a mother, have her

child removed, we've seen street vendors harassed in subways by police officers, we've seen a gun pulled on subway riders by a police officer -- none of which -- none for which there is footage.

And so we're learning that none of these acts of police brutality and racism -- in many instances, these acts are not all filmed. And so we need to make sure that there's footage

out there that will allow the victims of police brutality to be able to seek justice for the mistreatment of the supposed public servants that are out there to protect them.

So I want to thank all my colleagues who are supportive of this bill. It is critical that racism and acts of violence on behalf of the police are filmed, and that we continue to strive towards defunding law enforcement and thinking about actual public safety instead of defending the brass. It's time to disband the brass, and it's time to keep an eye on them in the meantime.

Thank you.

ACTING PRESIDENT BENJAMIN: Senator Ramos to be recorded in the affirmative.

Announce the results.

THE SECRETARY: In relation to

Calendar Number 749, voting in the negative:

Senator Ortt.

Ayes, 60. Nays, 1.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 750, Senate Print 8495, by Senator Benjamin, an act to amend the Executive Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 61.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 751, Senate Print 8496, by Senator Bailey, an act

to amend the Civil Rights Law and the Public Officers Law.

SENATOR GALLIVAN: Lay it aside.

ACTING PRESIDENT BENJAMIN: Lay it aside.

Senator Gianaris.

SENATOR GIANARIS: Mr. President, can we now please suspend the reading of the calendar and let's take up the one bill that was placed on the controversial calendar.

ACTING PRESIDENT BENJAMIN: The Secretary will ring the bell.

The Secretary will read.

THE SECRETARY: Calendar Number 751, Senate Print 8496, by Senator Bailey, an act to amend the Civil Rights Law and the Public Officers Law.

SENATOR GALLIVAN: Lay it aside.

ACTING PRESIDENT BENJAMIN: We're

in the controversial calendar now, so you laid it aside already. We're going --

SENATOR GALLIVAN: {Inaudible.}

ACTING PRESIDENT BENJAMIN: Yes.

SENATOR GALLIVAN: Thank you.

ACTING PRESIDENT BENJAMIN: No problem.

Senator Akshar.

SENATOR AKSHAR: Mr. President,

thank you for your indulgence. I thank the sponsor as well before we begin here.

Mr. President, through you, if the sponsor would yield for a few questions.

ACTING PRESIDENT BENJAMIN: Will the sponsor yield?

SENATOR BAILEY: I yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Would the sponsor

be so kind as to just give me an explanation of the bill.

SENATOR BAILEY: Sure. This bill would repeal Section 50-a of the Civil Rights Law, but add necessary privacy protections to protect the records of the members that were previously protected under the -- that are currently protected under Statute 50-a until the time that it is repealed from law.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Can you just elaborate a little bit on those protections that

you speak of?

SENATOR BAILEY: Sure. So there are some mandatory provisions that appear in Sections 3 and 4 of the bill. The mandatory protections in Sections 3 and 4 of the bill are mandatory redactions. And these mandatory redactions that are always redacted are home addresses, personal telephone numbers, personal cellphone numbers, personal email addresses of the officers and their families.

These -- these are conversations that when I held hearings back in October, one in the City of New York and one up in Albany, that was the number-one concern, that privacy was an issue.

And we heard the concerns of the members of law enforcement, and I share those concerns that their families and their own personal records should not be subjected to disclosure. So that's the reason why we

25 strengthen that ability in this piece of

1 legislation.

2 SENATOR AKSHAR: Mr. President,

3 through you, if the sponsor would continue to

4 yield.

5 ACTING PRESIDENT BENJAMIN: Does

6 the sponsor yield?

7 SENATOR BAILEY: I will yield.

8 ACTING PRESIDENT BENJAMIN: The

9 sponsor yields.

10 SENATOR AKSHAR: I want to talk

11 about, if we may, the current statutory framework

12 around this issue of 50-a. Through you,

13 Mr. President, could the sponsor -- could the

14 sponsor let me know how these issues are

15 currently dealt with if a member of the public or

16 a defense counsel wanted access to these records?

17 SENATOR BAILEY: That would be via

18 FOIL. Under FOIL, 50-a bars access to these

records.

SENATOR AKSHAR: Mr. President,

through you.

SENATOR BAILEY: If that case went

to court, the judge would be able to review that

in in re {ph} and issue that under only limited

circumstances.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to

yield.

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: So under the

current statutory framework, if a member of the

court wanted or needed access to a police officer

or a corrections officer, probation, parole --

needed access to that file, there is a current framework in place that would allow access to that information.

SENATOR BAILEY: Under limited circumstances.

SENATOR AKSHAR: Mr. President, through you, could the sponsor tell me what those limited circumstances are.

ACTING PRESIDENT BENJAMIN: The sponsor yields for a question?

SENATOR BAILEY: Yes, I do.

And the attorney that is representing in that matter would have to -- the

information that's being requested would have to be substantially related, which is a significantly high burden to prove under the current framework of this -- of 50-a. Which is why it's necessary to ensure that we repeal

Section 50-a.

SENATOR AKSHAR: I'm sorry, Mr. President, did the sponsor just say that the matter if --

ACTING PRESIDENT BENJAMIN: Do you want him to yield?

SENATOR AKSHAR: Yes, I do, Mr. President. Would the sponsor yield to another question?

SENATOR BAILEY: I will yield, yes.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Did the sponsor just suggest that in an effort for -- in the effort of defense counsel or an attorney making application to the court, access to that information would have to be relevant to the issue at hand, and that is a high burden to reach?

SENATOR BAILEY: That is -- that is

not what I -- that is not what I said, Senator.

The burden is significantly high.

And what happens is that -- yes, the protections are available via FOIL. But the issue with 50-a is that 50-a has consistently been used as a tool to bar the release of these disciplinary records that have been requested.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: If I was an attorney, which I'm not, and I was representing my client who was allegedly abused by a member of law enforcement and I wanted access to that

police officer's file because I believe that there was information in there that would be beneficial to my client, within the current framework is there a mechanism for me to make application to the court to get access to that information which I believe available?

SENATOR BAILEY: So the issue with the fact pattern that you've laid out is that unless you specifically know what information is contained within the disciplinary record which 50-a bars, you don't know what you're searching for, which essentially leads you down the road of a fishing expedition. So it's really contextual, Senator.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I do.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Isn't that exactly why 50-a was put into the statute, to allow fishing expeditions not to take place?

SENATOR BAILEY: Actually -- through you, Mr. President, I yield -- in 1976, Senator Frank Padavan's original legislative intent was to stop the annoying and harassment of officers. That is not the intent of the officers. Senator Padavan even went as far to go

-- he went so far as to say, in the Times Union in an article I think in 2014, that that was not the intent, that the way that the statute is being used right now has been misapplied and that he did not intend, as the original drafter of the legislation, for it to be applied in that way.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: What part of the law is 50-a in?

ACTING PRESIDENT BENJAMIN: Through you, Mr. President, it's in the Civil Rights Law.

SENATOR AKSHAR: I'm sorry, Mr. President, I didn't hear him.

SENATOR BAILEY: Through you, Mr. President, it is in the Civil Rights Law, CRL.

SENATOR AKSHAR: Mr. President, through you, would the sponsor continue to yield?

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: So it's in the Civil Rights Law, and we are giving up civil rights today by repealing 50-a?

SENATOR BAILEY: Through you, Mr. President, I am not certain how more transparency and more availability of disciplinary records would be a violation of civil rights. I'm -- I'm wondering about that, Senator, if you would be so kind as to proffer that information.

SENATOR AKSHAR: Is the Senator asking me a question?

ACTING PRESIDENT BENJAMIN: Was that a question?

SENATOR BAILEY: It was more of a rhetorical statement. But Senator Akshar is a

good colleague, and he's welcome to respond if he'd like. I know it's not necessarily the parliamentary procedures, but --

ACTING PRESIDENT BENJAMIN: Well,

we can do that. Do you want to ask -- do you want to ask Senator Akshar a question?

SENATOR BAILEY: No, I'm fine, Mr. President.

ACTING PRESIDENT BENJAMIN: Okay.

SENATOR AKSHAR: Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Well, from my perspective, the fact of the matter is is that

this law was put on the books to protect the civil rights of the people that were written about in this law in 1974.

I want to bring the sponsor's attention to Section 1 of the 14th Amendment, and I'm just going to read it in part. "No state shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

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Does the sponsor believe that those that were protected under the current statutory framework are in fact losing their due process?

SENATOR BAILEY: Through you, Mr. President, no.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: The sponsor yields.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Under your bill that we are discussing today, what due process is left for a member of law enforcement, corrections, parole, probation, fire? Where is their due process?

SENATOR BAILEY: Through you, Mr. President, the due process is contained within the disciplinary process, the disciplinary processes that are outlined by the respective agencies that these individuals are members of.

We are not changing anything based

upon -- we are not changing any part whatsoever of the disciplinary process of the folks that you

mentioned in your statement.

SENATOR AKSHAR: I'm on the bill for just a second.

ACTING PRESIDENT BENJAMIN: Senator Akshar on the bill.

SENATOR AKSHAR: The fact of the matter is we are. We are eliminating that due process. Because based on our prior conversation or prior back and forth, we have had a discussion about as currently authored, those who want access to that file, there is a framework established that allows for an attorney to have access to that information by following certain procedures.

Would the sponsor yield to a couple more questions?

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: Happily so.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: My good friend is

an attorney, is that correct?

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SENATOR BAILEY: That is correct.

SENATOR AKSHAR: Is the sponsor

aware of the case The People v. Sandoval?

SENATOR BAILEY: A Sandoval

hearing. Yes, I am, Mr. President.

SENATOR AKSHAR: So Mr. President,

through you, if the sponsor would continue to

yield.

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: The sponsor does

yield.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: In a Sandoval

hearing -- I am not an attorney, so I'm going to

ask you -- in a Sandoval hearing, what happens if the people wish to bring prior criminal acts into a current case? If I was -- if I was charged with a robbery and currently on trial and 10 years ago I committed a previous robbery, how would the people get that information into court?

SENATOR BAILEY: Based upon a conversation that we had in the Codes Committee meeting, I was reminded by our good friend

Senator Lanza that it depends on the probative value, the probative value that is weighed in every case. So it depends on context, Mr. President.

SENATOR AKSHAR: Okay, Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: The sponsor

yields.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: So in -- in that particular instance in which we are talking, the attorneys would make their arguments in relation to using specific information that was relevant to the case at hand. Is that -- is that correct?

SENATOR BAILEY: So the Senator would be correct in that limited hypothetical circumstance that he so eloquently drew up. But this bill is about transparency, and it's about more than one specific instance that you can point to. This bill is about transparency and ensuring that not only the public but victims of

police brutality have the rights to records and transparency and knowing who's policing us, Mr. President.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: The question I asked was very specific, in that if the people wished to use information about a case that they were currently prosecuting, if they wished to use past bad behavior or past convictions, there is a certain process to go through in order to get that information into the court.

The defendant in that particular case, in the robbery case in which we're speaking, that defendant has certain due process, he has due process, is that correct?

SENATOR BAILEY: In that case about a defendant's -- about a defendant in an alleged

25 robbery case, the defendant does have due

1 process.

2 But we're not talking about criminal

3 statutes here. We're talking about, as you said

4 before, the Civil Rights Law. And we're talking

5 about the repeal of Section 50-a. Which, again,

6 was devised, you know, to ensure that harassment

7 and annoyance of officers did not take place.

8 I am not certain how the due process

9 conversation -- or how the Senator could indicate

10 that due process is being taken away by the

11 removal of the statute and the strengthening of

12 the privacy -- of privacy.

13 SENATOR AKSHAR: On the bill for

14 just a moment.

15 ACTING PRESIDENT BENJAMIN:

16 Senator Akshar on the bill.

17 SENATOR AKSHAR: This is -- this

has everything to do with due process, in my humble opinion.

On one hand we're talking about the rights of a criminal defendant having certain -- having due process when it comes to bringing past behavior into the courtroom. And when we're talking about the repeal of 50-a, we're talking about removing that due process from a member of

law enforcement or a member of corrections. No longer, if a defense attorney or a member of the public sought to introduce some bad behavior, past bad behavior of a police officer, would that police officer have that due process.

So my question, if the sponsor would continue to yield --

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: -- how is the due

process associated in cases in which we described that was articulated in The People v. Sandoval any different than a member of the public or an attorney trying to get access to the personnel records of a police officer if he or she sought to bring some type of action against that police officer?

SENATOR BAILEY: Through you, Mr. President, this bill does not change the court process, as Senator Akshar mentioned. This bill again points to the issues concerning transparency in Section 50-a.

It is -- again, the repeal in this bill is intended to ensure that the public is

able to have greater transparency when seeking records. It does not change anything concerning due process, despite the assertions of the Senator.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: The sponsor yields.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Is the sponsor talking about transparency, or is he talking about access to the record?

SENATOR BAILEY: This bill -- through you, Mr. President, the repeal of Section 50-a is to achieve greater transparency. Because the original statute, again, as it was originally intended, has been misused and misinterpreted, based upon the original intent of the legislator that drafted it.

That's what this -- that's what today's bill in front of us is concerning.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Under the current framework of 50-a, does the sponsor believe that a member of law enforcement, corrections, fire, et cetera, et cetera, does in fact have some due process in terms of shining light on that file?

SENATOR BAILEY: Through you, Mr. President, the notion that the Senator has indicated that -- yes, those members have due process currently. But the burden that has to be shown sort of works in reverse.

So you have to show a higher burden

right now for those members that you spoke of without even knowing what's in the file. So it's sort of counterintuitive and, again, it goes against the original intent of the legislation that was -- that has been stated a number of times. They have due process. When 50-a is

repealed, they will still continue to have due process.

Again, the conversation is not about due process. It is about transparency, Mr. President.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Under the current framework, I as a defense attorney could say to the judge, I believe that there is something in Officer A's file, I am requesting that you review that data and see if there's anything substantial in there that is -- that has a direct correlation to the matter at hand.

Is that the sponsor's understanding of the current framework?

SENATOR BAILEY: So the judge has to review the request and issue -- and issue this prior -- even before they know a clear showing of

facts. So again, it kind of runs counterintuitive. How can -- how can you issue that beforehand before you even know what's in the record?

Again, these are the reasons why this statute has been misapplied in its current

form and the reason why we need to repeal it.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to

yield.

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: Do you believe

that the people -- I'm going back to the issue of

People v. Sandoval, bringing past criminal

behavior into the courtroom.

Do you believe that the people as

well have a very high burden to meet to bring

past criminal activity into a current trial?

SENATOR BAILEY: Again, it depends

on the probative value of the information before

it's -- it's all contextual, Mr. President.

Through you.

SENATOR AKSHAR: Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: If a prosecutor had knowledge that a police officer had some issue in his background, his or her background, whether it be lying on the stand or an assault issue or a complaint of -- whatever it may be -- do the people have an obligation to disclose that information to the defense?

SENATOR BAILEY: Through you, Mr. President, the problem is that we don't have the knowledge of what's in the file.

SENATOR AKSHAR: Let me just -- Mr. President, through you, if the sponsor would

continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: Let me just clarify my question a little bit, do a better job articulating.

You know, maybe not in the City of New York, because the boroughs are so big and -- I'm not, quite honestly, familiar with how the district attorneys' offices are set up. But nonetheless, I would suggest that district attorneys, those prosecuting cases, come to know over a period of time the police officers that they're interacting with on a daily basis.

The question is is if a prosecutor had firsthand knowledge of some issue that could

be detrimental to the case and beneficial --

detrimental to prosecuting the case and

beneficial to the defense of the defendant, are

the people -- do the people have an obligation to

turn that information over to the defense?

SENATOR BAILEY: Through you,

Mr. President, that would be discoverable

information. Anything that is germane to that --

to that -- and that would be considered to be

Brady material.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to

yield.

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: Yes,

Mr. President.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: I appreciate the sponsor, during the outset, talking about holding hearings and listening to folks. And I have said publicly in the last couple of days that I appreciated the fact that you listened and you made -- you've made some changes to this particular piece of legislation. While you and I don't agree on it, I am pleased that you have listened and come a little bit forward.

I want to talk about unsubstantiated complaints, because I know that that is an issue in which the police and corrections community have spoken about a lot.

Why -- why were no -- why did you not take it a step further and address the unsubstantiated-complaint portion of this conversation in the context of the statute that

we're currently debating?

SENATOR BAILEY: Through you,

Mr. President, the term "substantiated" or "unsubstantiated" is not a term that appears anywhere in this bill. That is a term of art that is unique to the CCRB and the NYPD.

So the notion of the word "substantiated" or "unsubstantiated" could not be added because that is an internal determination. And when it's an internal determination, we don't have the ability to weigh in on substantiated versus unsubstantiated.

SENATOR AKSHAR: Mr. President, will the sponsor continue to yield?

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Does the sponsor believe in the CCRB?

SENATOR BAILEY: Through you,

Mr. President, I believe that the CCRB exists.

SENATOR AKSHAR: Through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: The sponsor yields.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Do you believe that the CCRB is doing the people's work?

SENATOR BAILEY: Through you, Mr. President, the CCRB is charged with a difficult job, as you know as a former member of law enforcement, tasked with reviewing things in context. And that's what we hear all the time about law enforcement, how everything has to be understood in context.

So I am not a member of the CCRB, so

it would be very difficult for me to opine on the nature and their job description and work that they're doing every day.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: The sponsor is aware that New York City's very own CCRB has reported that 98 percent of the complaints that are filed against members of the NYPD have been unsubstantiated by that very body?

SENATOR BAILEY: Through you, Mr. President, that is not a statistic that I

have. The statistic that I have unsubstantiated is 19 percent, I believe. For 2019, it was 19 percent.

The 98 percent is something that has been bandied around on social media and other mediums, but I have not heard that as confirmed. Substantiated, excuse me, Mr. President, Senator.

SENATOR AKSHAR: Okay.

Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR AKSHAR: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: I just want to

make sure, because I might be a little confused on the numbers, you might be a little bit confused.

You're suggesting the numbers that you have seen from the CCRB, in the year 2019, 19 percent of the complaints against members of the NYPD have been substantiated?

SENATOR BAILEY: Through you, Mr. President, that is information from the CCRB obtained from their annual 2018 report, yes.

SENATOR AKSHAR: Thank you.

Mr. President, will the sponsor continue to yield?

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Let's go back to unsubstantiated complaints.

Again, number one, why did we not remove -- in your amended versions of this particular statute, why did we not remove

unsubstantiated complaints from information that would be turned over?

And to use your word, what probative value does an unsubstantiated complaint have?

SENATOR BAILEY: Through you, Mr. President. Senator Akshar, you would make an excellent attorney. It's never too late to go back to law school.

(Laughter.)

SENATOR BAILEY: And I'm being a hundred percent serious.

When you're talking about unsubstantiated, again, it's very difficult for us to add something that wasn't in the previous iteration. Like "unsubstantiated" or "substantiated," they don't exist in the current statute.

Furthermore, when you're talking about "substantiated" versus "unsubstantiated" in

the framework that you're discussing them, you have to think about guilty versus not guilty.

Now, not guilty doesn't mean innocent, it just means that the case could not be proven. Unsubstantiated does not mean that something didn't happen. It just means that there were circumstances around it that mean that -- that meant that it could not be proved as

substantiated.

Neither you or I are able to indicate in every case that a complaint is made whether "unsubstantiated" is something that didn't rise to a certain level. We don't know the specific facts, so it's very difficult to opine on "unsubstantiated" versus "substantiated."

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Well, everybody in this great country is innocent until proven guilty. Could we both agree on that?

SENATOR BAILEY: Through you, Mr. President, absolutely. Based on the Constitution. But it hasn't always been applied like that.

SENATOR AKSHAR: The Constitution also guarantees the right of due process -- I'm

on the bill.

ACTING PRESIDENT BENJAMIN: Senator Akshar on the bill.

SENATOR AKSHAR: The Constitution of the United States also ensures that each of us

have due process. And based on our conversations that we've been having, it is very clear to me that the member of law enforcement, fire, corrections, et cetera, et cetera, is losing their right to due process under these particular changes.

I want to -- if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Who's been the driving force behind repealing 50-a?

SENATOR BAILEY: Through you, Mr. President. In a word, everybody. A cross-section of people.

The New York Post mentioned it. Labor unions have mentioned it. The Committee on

Open Government has mentioned it. The families of individuals who have been killed by the police, they've mentioned it. Legislators have mentioned it. A lot of people have mentioned it.

So in this house, much like anything is done, we take consensus. We hold hearings. We hear from the people about what needs to be done and how we do it. And as a legislator, as Legislature, it is our duty to act on what the people want us to do.

And this is something that has been brought forth by the people. No one individual or entity has driven the bus on this, to use a metaphor. This has been cooperatively brought forth by a number of people who are frustrated with the lack of transparency.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: The sponsor is

suggesting that making an oral argument or written argument to a judge as to why he or she should have access to a record, depending on its probative value, and the judge making that determination, is in fact a lack of transparency.

SENATOR BAILEY: Through you, Mr. President. At no time during this debate did I say that. Or suggest it.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: In terms of other professions throughout the state, some of which, of course, are -- have some oversight by some state agency, how are we dealing with their personnel records?

Let me just start with the teachers. What are we doing with those in our public education system? How are we addressing

complaints about teachers?

SENATOR BAILEY: Through you, Mr. President, teachers are incredibly important. And the manner in which the records are -- that the records that can be made available may be different, but teachers are also not charged with

protecting the life and liberty of the public.

They're also not charged and have the ability to carry a firearm that can inflict serious injury or, worse, death.

So there may be a difference in the way that teachers' disciplinary records can be available, and they can still be made available. But they are not charged with the license to potentially take someone's life.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: I'm sorry, just because somebody chooses to put on a uniform and

put his or her life in jeopardy every single day by protecting the community that he or she loves, that person should be treated differently in terms of protecting their due process, protecting their files, because they choose not to educate our children, they choose to keep our community safe?

And for the record, before you answer, I too agree with you. I'm not picking on teachers; I think those in that profession are incredibly important to the people of this state.

SENATOR BAILEY: Through you, Mr. President, I would -- I would say that it's not about the uniform. I would say that it's not about treating them different. You've chosen an honorable profession prior to your life here, Senator Akshar. Those in law enforcement have an incredible duty. It's not a different treatment, it is simply a different -- it is potentially a different standard in the way that records are

applied.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: Yes.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Back to the teachers, if we may. In terms of teachers and how they deal with unsubstantiated complaints, can you kind of walk me through that? Because I asked the question and it has relevancy here because we're talking about not addressing unsubstantiated complaints as they pertain to members of law enforcement. But in the teaching profession there is a very clear delineation about what takes place in the Education Law about

unsubstantiated accusations of misconduct against teachers. What happens in that situation?

SENATOR BAILEY: Again, when we're discussing substantiated versus unsubstantiated, it is very difficult for us to prove what specifically took place in an alleged, unsubstantiated conversation.

For example, in the City of New York roughly 3,000 individuals made complaints about racial profiling. Zero were substantiated. Is it anyone's belief within the sound of my voice

that nobody out of those 3,000 people was racially profiled? Sometimes you don't exactly get what you get when -- you get what you want when you look at things from a binary lens of substantiated versus unsubstantiated, Mr. President.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to

yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: Yes.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: To my colleague, I mean, every criminal complaint against a citizen of this state is either substantiated or it is unsubstantiated, based on the facts that present. Is -- can we agree on that?

SENATOR BAILEY: So there are other categories besides substantiated and unsubstantiated. You can have founded and unfounded as well when you're relating to the NYPD.

SENATOR AKSHAR: Mr. President,

could the sponsor just clarify that a little bit?

I'm sorry, is that -- in terms of what you just said, is that a particular disposition on the book, if you will, within the NYPD in terms of a complaint, either it is founded or unfounded, it is substantiated or unsubstantiated?

SENATOR BAILEY: Yes, it's essentially saying that complaints are treated differently depending on the nature of them and the access there -- thereof.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Back to the teacher, because I didn't get an answer.

In terms of the Education Law and

the teachers, if there is an unsubstantiated complaint, is that unsubstantiated complaint expunged from the record of the teacher?

SENATOR BAILEY: Through you, Mr. President, teachers have nothing to do with Section 50-a. They have never had anything to do with Section 50-a. And we can talk about teachers, I would love to talk about teachers in the context of a different bill concerning their disciplinary records.

SENATOR AKSHAR: Okay. Mr. President, I'm sorry, and to the sponsor, I'm sorry. Mr. President, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: Does the sponsor of this piece of legislation believe that unsubstantiated complaints against members of law enforcement should be expunged from their record?

SENATOR BAILEY: Through you, Mr. President. Again, there is a difference between substantiated and unsubstantiated. I cannot tell you today that based on every single complaint, whether substantiated or

unsubstantiated, that I will be able to make a determination. Nobody can make a determination, because it is driven by context.

When we're talking about substantiated versus unsubstantiated, right, we have to think about the framework of the allegation. Sometimes unsubstantiated claims happen because people don't want to follow up.

As something that we brought up in

the Codes Committee agenda, I've had personal experiences with police where I was stopped for what I believed to be no reason, and I didn't report it. Now, there's no category, no subsection of unreported claims. But it is -- yes, it's my opinion, Senator Robach. It is definitely my opinion, without a doubt. And please don't interrupt me when I'm speaking on the floor.

Substantiated versus unsubstantiated, again, it really depends on the context, Mr. President. That's -- I would finish with that.

SENATOR AKSHAR: Mr. President, through you, would the sponsor continue to yield?

ACTING PRESIDENT BENJAMIN: Does

the sponsor yield?

SENATOR BAILEY: The sponsor will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: What about -- I'll use your word. Again, I don't know if we got clarification -- but in terms of founded or unfounded. If there was an allegation of inappropriateness by a member of the NYPD or any other police department, if that was an unfounded accusation, should that be expunged from the officer's record?

SENATOR BAILEY: Through you, Mr. President. The issue there is that it's an internal disciplinary process that we don't have any control over. So I would have no knowledge as to -- or no one would have the knowledge as to how those records would be -- how those records would be categorized or completed.

SENATOR AKSHAR: Mr. President, through you, if the sponsor will continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Do we expunge the records of criminals, those who commit criminal acts against others, those who violate the public's trust -- do we expunge their records in this state?

SENATOR BAILEY: Through you, Mr. President, we do not expunge records in New York State. Except marijuana convictions that we did last year.

SENATOR AKSHAR: Mr. President, through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: The sponsor yields.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: Is the sponsor familiar with Section 160.59 of the Criminal Procedure Law, all records to be sealed of up to two convictions if an individual hasn't

reoffended in the previous 10 years?

SENATOR BAILEY: Through you, Mr. President, the Senator said it himself, sealed. The word "expunged" does not appear in that subsection of the law.

SENATOR AKSHAR: If the sponsor will continue to yield.

ACTING PRESIDENT BENJAMIN: Will the sponsor yield?

SENATOR BAILEY: Yes.

ACTING PRESIDENT BENJAMIN: The

sponsor yields.

SENATOR AKSHAR: Would the sponsor agree that -- I don't want to go down the substantiated/unsubstantiated path anymore because I believe you feel very passionately about that. How about unfounded complaints or accusations against the police department, should they be sealed?

SENATOR BAILEY: Again, it goes to the internal disciplinary process. We don't know how they came to that determination. We don't know what information was compiled in that -- about that incident -- that alleged incident, I should say, to be fair. We don't know how it was

founded or unfounded.

That would be my reply to that, Mr. President.

SENATOR AKSHAR: Mr. President,

through you, if the sponsor would continue to yield.

ACTING PRESIDENT BENJAMIN: Does the sponsor yield?

SENATOR BAILEY: I will yield.

ACTING PRESIDENT BENJAMIN: The sponsor yields.

SENATOR AKSHAR: It seems to me that you are concerned with internal processes as much as having access to the record. Is that a fair assumption? I don't want to make assumptions.

SENATOR BAILEY: Through you, Mr. President. Unfortunately -- and I hate to disagree with my good colleague there -- that would not be an assertion -- that would not be accurate. I am simply responding to your questions.

And when you're asking me questions about internal processes that I would have no knowledge of, that's simply an answer that that

exists.

SENATOR AKSHAR: Mr. President, I thank you, and I thank the sponsor for his indulgence. You know that I appreciate you.

ACTING PRESIDENT BENJAMIN: Senator Akshar on the bill.

SENATOR AKSHAR: I did -- did I not say that? If I didn't say that, my apologies. I'm on the bill.

ACTING PRESIDENT BENJAMIN: Senator Akshar on the bill.

SENATOR AKSHAR: Mr. President, I thank you.

I thank the sponsor for his indulgence. I know that you are incredibly passionate about this issue. You and I disagree on it, and that's okay. But I do thank you for, at the very least, listening to some of the

concerns that members of law enforcement have.

Mr. President, I'm going to keep the rest of my remarks to myself until time to explain my vote. Thank you.

ACTING PRESIDENT BENJAMIN: Are there any other Senators wishing to be heard?

Seeing and hearing none, debate is

closed.

The Secretary will ring the bell.

Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Senator Gianaris to explain his vote.

SENATOR GIANARIS: Thank you, Mr. President.

Today is a historic day, and this bill is of critical importance. And I want to start by thanking so many of my colleagues who worked long and hard to get to this point, most notably Senator Bailey, who you just heard debate the bill and will hear from again, and our leader, Andrea Stewart-Cousins, who has been an historic figure in this chamber and has led us to this day.

But it doesn't just stop with the two of them. In the course of this discussion over the last several weeks and months, in talking to members of this body and members of

the Assembly who are leaders in their communities, leaders in the black communities in our state, and how every single one of them has a personal story to tell about how the lives of black people in this country are different than everyone else's when it comes to

interactions with law enforcement and with the police.

Many have been very personally affected directly, as we all saw in the news when Senator Myrie and Assemblywoman Richardson were pepper-sprayed when trying to keep the peace in a protest. Others have had their families be subject to that kind of behavior through the years. And almost all of them and all of us that have any friends who are black have heard stories of the inequity of our police forces.

Now, how did we get to this point? Because too often the police themselves -- their union leaders, their defenders -- take an adversarial approach, as if no one can do anything wrong if they're wearing a badge. And you see it any time there's an accusation, the first line of defense: Oh, it must have been something -- you know, it must have been

something else. You don't understand, you didn't see it. Until, lo and behold, everyone got cameras on their phones and body cameras on some uniforms. Then that got stripped away.

Then it must be something else.

Then it must be the demonization of the victim, which we've seen time and again, going back 20 years when Rudy Giuliani did it to Patrick Dorsimond, releasing juvenile records, as if that somehow means someone should be abused and beaten and killed.

That instinct to defend at all costs is why we have a systemic problem with law enforcement. And when all those layers get stripped away, when there is no -- when it becomes indefensible when you see some of these incidents, it comes down to, well, then, it must be that individual cop. He's a problem. He's a bad apple, is what we hear a lot.

It's fascinating to me that the bad

apple metaphor gets used in this context, because it's almost as if those that use it have lost sight of where it came from. The idea of a bad apple spoiling the bunch is that when you have a basket of apples and one of them's bad, the rot

infests the other apples in the basket.

And that's what's happened in our police in this country. Because there's not been a willingness to acknowledge the systemic problem and deal with it and say yes, there is inequity, there is injustice in law enforcement in this country, we have spoiled the whole barrel of apples and the entire system.

As we sit here today taking what should be the most basic of approaches and saying, let us know who the people with a history of problems are, so that we can work to improve the system and instill more confidence and faith in it on behalf of the public, there's resistance

even to that.

I mean, make no mistake, the repeal of 50-a that we're doing right now is critical and important, but it should be just the beginning to changing our society in a way that all people are treated equally and we have a law enforcement that's actually enforcing the laws and not doing things that should not be within its purview.

So I am proud to cast my vote in the affirmative on this bill. I thank, again,

Senator Bailey and all my colleagues who have had to live a different life than many of us. Growing up, I saw a uniform and I saw a protector. That's what I was taught. And for people of color in our country, they look at it and see a threat. And they're not wrong.

And so I'm proud of the entire

package of bills we're passing this week, and I'm most proud to cast a vote in the affirmative on this bill repealing 50-a.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Gianaris to be recorded in the affirmative.

Senator Parker to explain his vote.

SENATOR PARKER: Thank you, Mr. President.

This really isn't a time for rejoicing. I'm proud to cast my vote aye for this important bill to provide transparency and some accountability to individual police officers.

I know there's been a lot of conversation in this chamber about due process. This is not about taking away due process. This is really about shining light on the records of

some bad individuals who should be protecting our

communities but oftentimes are not. It has been almost impossible to get a prosecution of a bad police officer in this state, deservedly or not, because of lack of access to their personnel records.

This bill does a good job at striking a balance between that transparency and protecting the identity of critical information about that officer. And let me thank Senator Jamaal Bailey for his important work, and all the staff here, and of course our leader, Andrea Stewart-Cousins, for continuing to fight to make sure this important legislation gets passed today.

This is going to be really, really important. But as I said, this is no time for rejoicing. This bill has been around for over a decade. This is not a new issue. And the only reason why we're bringing it to the floor now is because the nation is burning.

And frankly, African-Americans shouldn't have to burn down the country in order to get basic civil rights and civil liberties. The right not to be killed in the middle of an

arrest should be a basic right for people who have lived in this country, and we demand it not just for African-Americans but for all people.

And so I'm glad to cast my vote aye today for something that is part of a process of bringing transparency and accountability to the police department and restoring -- or at least hoping to begin the process of restoring -- the confidence of the people of this great state to its government and to its law enforcement agencies.

I vote aye.

ACTING PRESIDENT BENJAMIN:

Senator Parker to be recorded in the affirmative.

Senator Salazar to explain her vote.

SENATOR SALAZAR: Thank you, Mr. President.

It's been eight years since Ramarley Graham, an unarmed 18-year-old black teenager, was shot in his own home by NYPD Officer Richard Haste, in the presence of Ramarley's little brother and his grandmother.

Unsurprisingly, Officer Haste never faced criminal charges for stalking Ramarley, for breaking into his home, and for killing him. And

despite the harrowing facts of this case, it was difficult to even get the NYPD to hold an internal disciplinary trial until five years later, while Officer Haste remained on the force.

It is shameful that Ramarley's family had to rely on records sparsely leaked to the press just to find out basic information about the officers who were responsible for killing Ramarley. We know that several officers

were directly involved, but even now, eight years later, at this very moment, Ramarley's family has still only been allowed to know some of those officers' names. And we know even less about whether or not those officers' records included previous violence against unarmed civilians.

Repealing Section 50-a is about giving these families answers when we know that, collectively, we have not given them justice. The case of Ramarley Graham is sadly, of course, not the only one. But even more than giving these families the ability to know who killed their children and their siblings, their fathers and mothers, we also have a responsibility to do everything we can to prevent this from happening again and again.

This bill will allow New Yorkers to finally find out whether an officer who's currently policing in our communities has racked

up complaints for using excessive force or for making illegal stops or for any other kind of misconduct. It will also indicate to us whether police departments have taken these misconduct complaints seriously in the past or whether they have ignored or dismissed them.

By repealing Section 50-a, we will make it possible to find out whether police departments have ignored repeated patterns and complaints about officers' behavior. Police departments will no longer be able to conceal whether or not they knew about previous excessive-force complaints in their too-frequent attempts to avoid responsibility.

When Officer Haste finally had to face Ramarley Graham's family in an administrative court in 2017, I was present for his disciplinary trial. I listened as the officer gave excuses for profiling Ramarley, for following him home, for breaking into his

apartment, and ultimately for taking this young man's life.

Officer Haste testified that as he watched Ramarley from a distance, he was suspicious and he chose to follow Ramarley solely because Ramarley was, quote, walking with a purpose.

I've reflected over the last few years since that trial about what those words really mean, about what his words tell us about racism in law enforcement and in our society. We live in a world in which it is sometimes treated as a crime and a risk to a young black man's life for him to walk with a purpose, for him to simply walk confidently in his own neighborhood.

It shouldn't have taken this current crisis in order to compel us as a Legislature to finally act to improve accountability and transparency. And there's still far more that we

must do. We can't afford to continue to delay change and justice. But I'm proud to finally vote in support of repealing 50-a today, and I see this as a step forward. May we all get to see the day when every person, regardless of their skin color, can walk confidently and safely in their own neighborhood.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Salazar to be recorded in the affirmative.

Senator Hoylman to explain his vote.

SENATOR HOYLMAN: Thank you, Mr. President. I rise to explain my vote.

I want to thank my colleagues for that debate; in particular, Senator Bailey. I was never so moved on this floor when Senator Bailey earlier this session discussed his great-great-great-grandmother, and the bill of

sale that he held surrounding her enslavement was one of the most powerful moments I've ever witnessed on the floor. So I want to thank Senator Bailey for sharing that and for fighting for it. I think she would be extremely proud of you, as I'm sure your entire family is.

I want to speak, Mr. President, as an LGBTQ person, because what I see through this movement is something I share as a gay man who witnessed the birth of our human rights movement at Stonewall 51 years ago in my district.

Stonewall was a riot. Stonewall was a protest. Stonewall was fighting the police. Stonewall was led by black and brown people, including Marsha P. Johnson, a black transgender

woman, and Sylvia Rivera, a black Latina woman. Both of them are representations of what we are witnessing today, that the marches have become a movement and that because of the hundreds of

thousands of people across this country -- in our districts, in the city, in the state, internationally -- we have seen civil rights move forward.

I just want to share with you, Mr. President, my office has received close to 500 telephone calls, over 15,000 emails from constituents in support of the repeal of 50-a. The volume of emails in the Senate is so high that Google has actually throttled our accounts because we were sending out so many responses.

This is a landmark moment in so many respects, a transformative movement for all of us.

I also want to say that, you know, within every age group -- we see a lot of young people out on the streets, in my district and in others, of all diversity. It's something President Obama has noted as being seminal to the success of this movement. But one of my former

colleagues tweeted that his 94-year-old aunt

wheeled her walker out to a Black Lives Matter demonstration outside of her building. That's what we're witnessing. It's intergenerational, Mr. President.

And I finally want to say that it is a privilege, it is a privilege to be here to stand with my black and brown colleagues, to have this opportunity -- which I hope my colleagues across the aisle share -- that we can respond nationally, internationally, to the needs, to the rights, to the desires, to the dreams of black and brown people by repealing 50-a today.

So I vote aye very proudly, Mr. President, and take a stand for racial justice and against police brutality.

Thank you.

ACTING PRESIDENT BENJAMIN: Senator Hoylman to be recorded in the affirmative.

Senator Savino to explain her vote.

SENATOR SAVINO: Thank you, Mr. President.

I'm going to take this off {removing mask} because I find it rather annoying to wear sometimes.

This is a monumental day. It is not

often that civil rights are born and die in this chamber. And a civil right that was born in this chamber in 1976 by a former colleague of ours, Senator Frank Padavan, is passing away here today, led by Senator Bailey -- for the right reason then, the right reason now. It's an odd thing to find yourselves at this moment.

If you look back at the history of 50-a -- I think Senator Bailey touched on it earlier -- the original intent of the law was to prevent attorneys from getting copies of personnel files of police officers to impugn

their testimony in criminal trials, to prevent them from being harassed by opportunistic attorneys. It is a law that has been misinterpreted by multiple courts and agencies over the decades, and it has led us to where we are now and has created a level of distrust and a lack of transparency that has created such a sense of distrust amongst the public and law enforcement.

And unlike some of my colleagues, I don't believe one bad cop spoils all of them. I believe that the vast majority of the members of the police departments and law enforcement across

this state are good people who get up every day, put on a uniform and go to work to make sure that I get home every night and you get home every night.

Are there bad ones there? Yes. Should they be dealt with? Absolutely. Should

they be disciplined and prosecuted? No doubt. And should we make sure that happens? Quickly, because that one bad apple can make everybody look bad.

Heaven forbid we should be judged by the worst of those who have stood in this chamber. I've been in this Senate chamber 16 years. Nine of us, since I got here, have gone to prison. I would hate to be judged by their behavior.

But we are here today doing something that the public has demanded. And I want to thank Senator Bailey, because he didn't just do a straight-up repeal, he listened. I had the opportunity to talk to him, and I know he consulted the very people who are affected by this.

And we were able to make him understand that a straight-up repeal was just not

fair, that there are things that people do -- everybody makes mistakes at work, everybody gets jammed up. There are disciplinary cases that have nothing whatsoever to do with whether or not you are a danger to the public or whether you're a decent cop. Everyone is late. Everyone calls in sick once too many times. Everyone has a bad day. Those records should not be made public. Your personal information shouldn't be made public. We should protect those things the way we do for other public employees.

He listened, he internalized that, and he put it into this law.

But we need to go further, Senator Akshar. You talked about it earlier, we spoke about it in the Codes Committee. All public employees should have the ability to have unsubstantiated cases, including disciplinary cases where they were exonerated, expunged from their record. They don't have that now. I'm

going to introduce legislation to do that. Because that should not remain in their file.

We're going to repeal 50-a, we're going to reform it today, we're going to provide the transparency that the public wants. But I

would like to say I've never been a cop, but I have been a union leader. And it disturbs me greatly to hear people say things like "Some people shouldn't have a voice in work" and "We should get rid of police unions."

And I'm going to get very emotional about that, because the day when we start saying that any worker shouldn't have the right to have a voice at work, we should strip them of their right to bargaining or collective bargaining rights or representation -- what are we saying? I don't care if you like their union, I don't care if you like their union leader. Every

worker in this country deserves collective bargaining rights. That is something that shouldn't even be subject to discussion.

I'm going to vote for this bill, Senator Bailey, because I think you've struck the right balance. But let us be careful when we start to talk about who should and shouldn't have rights in this country.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Savino to be recorded in the affirmative.

Senator Ramos to explain her vote.

SENATOR RAMOS: Yes, thank you, Mr. President, once again.

I came here to Albany to personally vote for this bill because it's just so important that we begin to lift the cap off of hundreds of years of injustice on behalf of an institution that is a direct result from slave patrols in

this country 400 years ago.

It's so unfortunate that so many black lives have been lost and that it's taken this pandemic for so many to realize how important it is that black lives matter. Black Lives Matter is the minimum. Black lives shouldn't just matter, they should be cherished, they should be celebrated, and they should be loved.

And that is true of our public policy. Because what we've seen and what I fear we'll see now that we repeal 50-a is that the NYPD as an institution, as a bureaucracy, has not been keeping us safe.

And this is why before, when we were talking about body cameras, I started to talk about defunding the NYPD. Because it's critical that we do have public safety. It's critical

that we rethink, recategorize these emergency

response systems that are needed. But there's no need for them to be centralized behind a brass that has a history of being racist, of being misogynist, of being anti-immigrant.

I myself in my district have had instances where police officers refuse to provide translation for my neighbors who don't speak English. I'm someone who's been stopped and frisked. I'm someone who actually marched just a few weekends ago in my district and was hit with a baton -- by a Latino police officer.

It just has to stop. This is not the way to keep us safe. The NYPD as an institution has not been able to do this. And it's time that we start listening to those who are closest to the pain.

So I am here proudly representing not only my black constituents, but all of my constituents, in making sure that we have a bolder vision, a bolder plan that divests from

law enforcement and invests in healthcare, in education, in transportation, and in everything a human being needs in order to thrive in this country no matter the color of their skin.

I proudly vote to repeal 50-a. I thank the bill sponsor. And let this be just a bright start for what's to come.

Thank you.

ACTING PRESIDENT BENJAMIN: Senator Ramos to be recorded in the affirmative.

Senator Harckham to explain his vote.

SENATOR HARCKHAM: Thank you, Mr. President.

I want to thank, first of all, Senator Bailey for his sponsorship of this measure; you, Mr. President, for your leadership on some of these measures, Senator Parker, Senator Myrie, and of course our leader, Senator

Andrea Stewart-Cousins, the Majority Leader, for building consensus around this package.

And we are at a stark time in our history, both in our state and in our nation, and it's up to us to now take action. And there are some who would say that this package is somehow anti-police. I would disagree. I would say this is pro-police and pro-community, because it strengthens the bonds between our police departments and the communities they serve

through increased transparency and accountability.

And I think that's why some of these measures have had broad bipartisan support, because transparency and accountability breed trust. You know, sunshine is a great disinfectant; it also makes things grow and flourish.

And this is not just a one-day or a

one-set-of-bills remedy. In order to fulfill the promise of our Constitution and our nation that everyone receive fair justice, we are making a start. This is a down payment. But there are so many other avenues of our society, from education to healthcare to housing -- as I believe you said the other day, Mr. President -- we have so much more work to be done.

But let this be a down payment on the notion that justice will no longer be denied, and justice will be fair for all. Thank you. I vote aye on this and the entire package.

Thank you.

ACTING PRESIDENT BENJAMIN: Senator Harckham to be recorded in the affirmative.

Senator Borrello to explain his

vote.

SENATOR BORRELLO: Thank you,

Mr. President.

The past two weeks have opened a wound in our nation that must demand our attention. Justice must be served for George Floyd and his family, for his shocking and unjust death.

But addressing one terrible injustice by creating the potential for many more is not the answer. The repeal of 50-a of the Civil Rights Law will heighten the already significant risk police officers face every day by opening personnel records, including reports of unsubstantiated and unfounded complaints.

The very nature of law enforcement is one that incites many vengeful perpetrators to retaliate by filing groundless complaints. Now those unfounded complaints will become fodder to discredit officers or, even worse, they may trigger anger and violence.

While any officer who abuses their position must be held accountable in a court of

law, this is not about accountability. This is reckless. Just like we saw with bail reform,

leaving the group most affected out of the conversation about how to improve the system will have unintended consequences and tragic results. The repeal of 50-a without a thoughtful dialogue and debate about the reforms will lead to disastrous results, like we saw with bail reform. It's going to make New Yorkers less safe.

This is the repeal of a civil right. Everyone deserves due process, even police officers and members of law enforcement. Where else in our nation do we allow false and unsubstantiated claims to be used against anyone? This is unjust. It's wrong. It is absolutely a violation of our Constitution. We as Americans should always allow due process, and we are innocent until proven guilty. And in other

situations in this chamber, we've had that exact discussion. So this is hypocritical at best.

I am voting no. I am standing with those who serve us every day and risk their lives.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Borrello to be recorded in the negative.

Senator Mayer to explain her vote.

SENATOR MAYOR: Thank you, Mr. President. I want to explain my vote.

And thank Senator Bailey and our leader, Senator Andrea Stewart-Cousins, for bringing this bill to the floor.

Today we are taking a bold and important first step toward reform in our system of policing, a step we must take to begin to rebuild the trust between law enforcement and the black and brown New Yorkers they are pledged to

serve.

As someone who has worked closely with my local police departments as well as police and other law enforcement unions statewide, this was not an easy decision. Nevertheless, it is the right decision.

For years I thought the incremental changes that I supported within the law enforcement community were practical reforms to address the problem. Like so many others, I thought encouraging diversity in police ranks, community policing, stronger communication between police officials and minority leadership, and enhanced training and tougher leadership that required accountability would limit the targeting

of people of color and in some cases the terrible loss of life.

I was wrong. We need action to change the institutional forces that sadly have

brought us to this day. We cannot have our New York neighbors, constituents and others justifiably afraid they will be pulled over in their cars, accosted on the street, arrested, abused, or in some cases killed. We need change now.

I have decided Section 50-a of the Civil Rights Law, adopted over 40 years ago, can no longer be the standard for the release of disciplinary records of officers. Rather, law enforcement officers, like so many other public officials, must be accountable to the public in order for trust to be restored.

While maybe well-intentioned so many years ago, the statute no longer protects the public or balances the public's interest against the privacy concerns that have been used to defend it. The Court of Appeals as recently as 2018, in NYCLU vs. New York Police Department, again interpreted the law so broadly as to

fundamentally bar all disclosure of prior police

disciplinary records.

The exception in the law which theoretically allows disclosure is really no exception at all. In reality, under 50-a no one in the public can see an officer's prior disciplinary record under any circumstances.

The bill we adopt today which grants additional personal privacy to law enforcement from some of the disclosure provisions of the FOIL law, is a fair adjustment. It protects law enforcement from unwarranted personal disclosures and allows technical infractions to be withheld from the public record.

This week I spoke with a distinguished judge advocate general, or JAG officer, in my district who struggled to find answers after the death of George Floyd. She thoughtfully reminded me the military sees these

issues quite differently. While clearly imperfect, in the military there's an expectation that all officers are held to a higher standard: They have an affirmative duty to speak up and stop unlawful behavior, and the disclosure of information about prior incidents is actually necessary to ensure fundamental trust in the

military system of justice.

We should take this comparison to heart as we move to change the laws that have contributed, unfortunately but justifiably, to a fundamental distrust in our law enforcement system. This is a moment of national reckoning that makes me optimistic and determined at the same time -- optimistic because Americans of all colors, faiths and ages are forcing us to look reality in the eye and acknowledge our system must change to confront and end racism in all its forms.

However, it is a moment of challenge that only determined action can address. Peaceful and loud demonstrations in the streets of my communities and yours -- in New Rochelle, White Plains, Yonkers, Harrison, Mamaroneck, Bedford, Bronxville, Tuckahoe, Port Chester and elsewhere -- are good: Demonstrations protected under the First Amendment, demonstrations in my communities protected by the police. However, they're not enough. They must lead to real reform. We cannot wait for incremental change and continue to rely on the prior innocent belief that simply the good officers would outweigh and

outpower the bad.

Demonstrations need to lead to meaningful reform. Sometimes change is uncomfortable. Sometimes change is not easy. Sometimes change comes with risk, even political

risk. However, it is our responsibility as elected officials to make this change.

The bill I vote for today and the others that are part of this package will be an important step toward this change. These bills will not harm the tens of thousands of professional, compassionate and responsible officers I have supported who have nothing to fear and with whom I will continue to stand. However, it will change the culture of secrecy, the patterns of illegality that have been allowed to fester, and the legalized denial of accountability that have held us back for too long.

In the process, we will move our state toward a more just state for every New Yorker -- those whose skin is darker than mine, but those who are equally entitled to our system of justice for all.

I proudly vote aye.

ACTING PRESIDENT BENJAMIN: Senator Mayer to be recorded in the affirmative.

Senator Krueger to explain her vote.

SENATOR KRUEGER: Thank you, Mr. President.

I want to speak on all of the bills just at one time, because we are clearly all having a broad discussion here today.

I also want to recognize and thank my members who have taken the lead on most of the bills that are passing today, most of whom are of color. Because in fact what we are talking about is needing change to ensure that in a country that prides itself on saying we have equal rights for all, that we make sure that we have laws that protect us all equally and respect us all equally.

And clearly, for anyone who has not been in a coma recently, we understand that

literally the country has stood up, taken to the streets, taken a knee, and said enough is enough, we need to address institutional racism throughout our society.

But perhaps most relevant, because of the danger and the harm being done, is making

sure we are clear that the laws that we write as legislators and get implemented through our police departments and our courts are implemented in a way that is colorblind, even though clearly none of us are colorblind and we have not addressed core racism in our society.

Over the last weeks I have never seen as many emails, calls, and texts from people within my own district, a disproportionately Caucasian district, begging me to support these bills, demanding me to come back to Albany to make sure that these bills get passed.

I've never seen the engagement, in

the 18 years I've been in the Senate, on the streets -- not only of my entire city, but specifically the people in my district taking to the streets in my district in a peaceful and organized way. This incredible response makes me more proud than ever to represent my community, because my community understands these reforms are decades past due and they are demanding justice disproportionately for people who don't live in my community.

And though these bills represent progress, they only go a small way towards

righting the wrongs our current system inflicts on African-American people and other people of color on a daily basis in our society. Our housing policies, our public health policies, our education policies, our environmental policies all create the conditions that perpetuate widespread segregation in our country, our state,

and our City of New York.

That segregation has a direct human cost for individuals and communities of color. We see it clear as day in the disparity of deaths caused by COVID-19 in these communities. Going forward, we must continually recommit ourselves to addressing the structural, systemic racism that results in significantly diminished outcomes for people of color in education, healthcare, employment, the criminal justice system, and on many other fronts.

Let me be very clear. These pieces of legislation are not an attack on police officers or any police department. Police officers, like elected officials, are public servants. Elected officials, because we have been given the power to make laws and to allocate public funds, should be held to a higher standard

than other citizens. I have always fundamentally

believed that since I took this job as an elected official. After all, nobody forced us to take this job.

Similarly with 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.

That's the goal of all the bills we are passing today and yesterday and perhaps tomorrow. The vast majority of police officers and those who support them should welcome efforts to root out the so-called bad apples before they spoil the whole barrel, because we all need a civil society that we can live in in peace, where we can respect each other, where legitimate protest is allowed and encouraged. I repeat, encouraged.

We need a court system that recognizes habeas corpus, which right now

apparently we have a few problems with as well in this state and with a few judges who don't seem to understand the right to arraignment and habeas corpus. We all need to do better.

So I am very proud, despite the controversy some seem to believe come with these bills, I am very proud to be part of a history that will reflect my support for this legislation, my vote for this legislation, my vote for this entire package.

Again, I want to thank the lead sponsors for their incredible work, and I want to thank Andrea Stewart-Cousins, our leader in the Senate, because I'm quite sure these bills would not be passing today or have ever hit the floor of the Senate if we did not have a leader named Andrea Stewart-Cousins.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN:

Senator Krueger to be recorded in the affirmative.

Senator Gallivan to explain his vote.

SENATOR GALLIVAN: Thank you, Mr. President.

Many in the chamber know my background. I was a New York State trooper and the sheriff of Erie County and very proud to have served as a law enforcement officer and with two

extremely professional law enforcement agencies who worked hard each and every day to ensure professional and ethical law enforcement and to ensure that those that crossed the line within their ranks were held accountable.

It's my experience that the overwhelming amount of police officers and police agencies across the country are honest, decent

public servants who work hard each and every day to keep our communities safe. We need to look no further than the police statistics up until last year -- or the crime statistics were at record lows. And certainly the police officers didn't do it by themselves, they did it in conjunction with the community. And the best communities, the best police agencies, the best likelihood of success is no doubt where the police and community work together and trust each other.

There is no honest, decent police chief, there is no honest, decent police officer who does not want to make sure that the bad cops are held accountable. The question, of course, is how best do we do that. We don't do it by taking the civil rights away from individuals, in this case police officers.

We now, by repealing 50-a of the Civil Rights Law, we put New York State's law as

it relates to police disciplinary records on par with Minnesota, which allows for full public accessibility to police disciplinary records. We look at what took place in Minnesota -- and I don't even want to say the police officer's name. He was a disgrace to everybody. It was reprehensible what took place. He should be held accountable, and no doubt he will.

We know now, because it's been publicized worldwide, that that officer had, if I'm not mistaken, 18 complaints of misconduct against him. The Civil Rights Law -- or the lack of our Civil Rights Law here or that lack of the equivalent over there had nothing to do with the lack of accountability of that officer. The Minneapolis Police Department and its administration failed everybody, city hall over there failed everybody by not holding that police officer accountable and allowing him to be out there and those ultimate events to take place.

We've talked, we talked in committee -- we had an hour 45 minute Codes Committee that really was among the best

discussions that I heard in my time here. Clearly there's points of disagreement amongst the members here, but I think we share many common goals in trying to right wrongs and ensure a system is in place to ensure accountability.

I have a problem, though, where we allow unfounded and unsubstantiated complaints to be used against any individual. We hear debate, we hear people often talking about the police wrongly accusing a citizen of something. This is no different. A wrongful accusation is a wrongful accusation, and it shouldn't be allowed to be used against anybody. It opens the door to impugning a good police officer's reputation, hurting his career, hurting his family. Even more importantly, it has the potential to

jeopardize cases and hurt our community.

A wrongful accusation is wrong for everybody, and allowing it I think flies in the face of common justice for all. I'll be voting in the negative. Thank you.

ACTING PRESIDENT BENJAMIN: Senator Gallivan to be recorded in the negative.

Senator Akshar to explain his vote.

SENATOR AKSHAR: Mr. President,

thank you very much.

Allow me to thank once again the sponsor of the legislation for the back and forth. I said it earlier, Senator Bailey, I respect you. We happen to disagree from time to time on issues. But I take solace in the fact knowing that you and I, as two grown men from different parts of this great state, can have reasonable discussions about issues that affect all New Yorkers.

You know, I want to just come back to something that my colleague from Queens said earlier in making a statement about bad apples. You know, Senator Gianaris, I hope and pray to God that you don't truly believe that one bad cop can spoil or has spoiled an entire profession. Because, you know, there are more than 65,000 cops in this great state, more than 800,000 cops across this great nation, and 99.5 percent of them are good. Does the police department, sheriff's offices, NYPD -- is there room for improvement? There certainly is.

Today I guess is a historic day if you're supporting this piece of legislation. I happen to think it's a sad day for those in

law enforcement, in corrections, the fire department, parole and probation, because I think we've very clearly said that, based on the language of the statute, that you no longer have

due process, and you no longer have your civil rights purely because of the uniform that you choose to wear.

The 15 years that I spent in law enforcement were a great 15 years, and it really was the best job that I've had in my 41 years on this earth. I would say this. I think that it is incredibly important for all of us to recognize, no matter where we come from, that systematic racism, systematic injustices and inequities, they do in fact exist. They do in fact need to be addressed. But those inequities, those injustices, that racism, it's not born in the police department. It's not born in the NYPD or a precinct or a police station. It is born in communities like Binghamton, like Buffalo, like Astoria, like Jackson Heights, all throughout this great state, all throughout this great nation.

I've said this many times, it is my

belief that we are not going to legislate our way

into a fairer, less unjust community. The only way that we do that is by having a willingness as people, as different people -- as white people, brown people, black people -- to have a willingness to admit that yes, those inequities and those injustices exist, not one profession is responsible for that, but that we must in fact sit at a table and work to improve our communities and do away with those injustices, that racism, and those inequities.

You know, if we want to help the police, if we want to make the police more accountable and make sure they're trained appropriately, let's not defund the police. That's not the appropriate answer.

As a matter of fact, we should be in fact funding programs like the crisis intervention training, crisis intervention

funding for members of law enforcement, so maybe they have the things that they need to not use deadly physical force in certain situations. I'm sad to report this year there is zero money for that program. In 2017 we funded that program at a million and a half dollars.

Psychological exams are not

mandatory when you hire a member of law enforcement. Maybe we should have a discussion about that. I come from an organization that was accredited by the Division of Criminal Justice Services. Not every organization is accredited. In that program you're required to fulfill 109 very specific standards to make your agency the best it can possibly be, follow best practices, follow very important policies.

Maybe those are some of the conversations we should have about moving

forward. I for one want my colleague, the sponsor of this bill, and everybody else who sits on the other side of the aisle to know that I am fully prepared, despite what you all may think because of my previous employ, to in fact sit at a table and have those meaningful conversations about how we move this community forward. Because the facts are the facts. If the Bronx does well, Binghamton does well. If Queens does well, Binghamton does well. And I think that's what's important for all of us.

Mr. President, as I said earlier, I'm not going to support this bill, I'll be voting no, but I in fact thank the sponsor.

ACTING PRESIDENT BENJAMIN: Senator Akshar to be recorded in the negative.

Senator Sepúlveda to explain his vote.

SENATOR SEPÚLVEDA: Thank you,

Mr. President, for allowing me to explain my vote.

First of all, I want to thank Senator Bailey for a very thoughtful bill. He listened to many different factions throughout the state. So if anybody wants to accuse him of not bringing anyone into the discussion, I think my colleagues, Senator Akshar and many, can tell you that Senator Bailey is very thoughtful and considerate on many points of view. And I want to thank him for that.

When I was a first-year law student, one of the first things that my law teacher, one of the first statements that he made in my first year of law school at Hofstra University was that sunlight is the best disinfectant. Now, what did he mean by that? He means let's have transparency.

Transparency is what takes care of a lot of these issues that we have between the

police and the community. And I daresay that those good actors, police officers that we respect -- and the notion that members on this side of the aisle believe that all police officers are corrupt or engage in abusive behavior is just flat wrong. I think most of us believe that a majority of them get up every day and do their job, respect the law, put their lives at risk, and do the right thing.

But where the problem arises for those that don't do the right thing, those that abuse communities of color, those that treat people that I represent like third-class citizens, the reality is that they have a shield. And that has been a systemic problem in this state for many, many years.

No one is taking away a police officer's civil rights. I'd say to some degree that is a smoke screen, with all due respect to

my colleagues on the other side. No one is saying you cannot have a disciplinary hearing within the department anymore because of some inappropriate behavior or bad behavior, as they call it, as a police officer.

Now, let me tell you something about

these disciplinary hearings. See, as a young lawyer coming out of law school, actually my first job was with a firm that represented the PBA. And I participated in some of these disciplinary hearings. And the best way to describe them is that they're a kangaroo court. Because the hearing examiner is hired by the commissioner and by the department, and the department can find you -- can find whether the complaint was validated or not at will.

In fact, I remember during one of these hearings that I attended having a bathroom break and hearing the hearing examiner speaking

to the police department representative about how they were going to deal and rule on an issue.

So this concept that a police officer has a disciplinary hearing, whether that should be divulged if it's unfounded or not founded, again is not just not an accurate measure of the policeman's behavior, of the outcome of those hearings. It is really an accurate measure of how the department and the hearing examiner wants to find at the end of the day for the police officer. And I can tell that it's equally unfair to the police officer.

So if you want to talk about not releasing unfounded disciplinary actions, then let's talk about having an independent individual have these hearings when police officers are subjected to disciplinary proceedings. Let's not have it within the department, let's have it outside of the department. Let's pass bill where

we create a new department that will essentially investigate and rule on these disciplinary hearings. Make it an independent person. Then that argument has some validity.

Look at the big picture here. When you peel the onion of what the opponents of this law -- and it's not a complete repeal -- what they're doing, no matter how you peel this onion, is they're trying to create a barrier, a shield to protect bad actors. And what that does is it does a disservice to those men and women in law enforcement who are doing the right thing on a daily basis.

Now, some individuals in this chamber, some have said that 5 percent of -- or 99 percent of police officers are good actors. I think that number may be somewhat high. But I invite any one of you to come and walk the

streets of my neighborhood and see the interaction between the police department and the citizens. Experience what I have experienced when I'm told, when I walk into a wealthier neighborhood and I'm told -- me, a sitting State Senator -- that I don't look like I belong in that neighborhood. Or I experienced, at a stoplight, police officers jumping out of a vehicle asking seven or eight kids -- 15-, 16-, 17-year-olds -- to go up against a wall and let me see your I.D. When we all know that in order to request an I.D., there has to be -- someone may be committing a crime or about to commit a crime.

But these kids, six or seven 15- or 16-year-olds lined up against a wall and asked for their I.D., asked for their addresses, asked for their names -- things that are unconstitutional and things that happen every single day in the community that I represent.

So while they may be 5 percent of

bad actors, that 5 percent has done extreme damage to the relationship between the police department and our communities. They have brought pain and hurt to the communities that I

represent. They have brought destruction to the communities that I represent.

It is a humiliating experience, a humiliating experience when an adult, a black or Latino, predominantly male, is pushed up against a wall, is asked to kneel down and put his hands behind his back for reasons that are completely unjustified. It is a humiliating experience when a 12-, 13-, 14-year-old black or Latino male or female is put in a police car and questioned for no reason whatsoever to justify that process.

And what happens is that when that 14- or 15- or 16-year-old grows up, their experience with the police department will essentially guide how they

deal with the police department for the rest of their lives.

It is humiliating. It was humiliating to me as an 18-year-old when I got arrested because the police officer didn't like the way I looked at him. Now, fortunately, I try to be open and don't take the position that I hate police officers because of that experience. I believe that that police officer was an idiot, and I believe ultimately he was removed from the force. At least I hope he was. But these are

the experiences that black and brown men and women have to deal with on a daily basis.

So don't tell me that it's a small majority. It may be a small majority of police officers that are not acting correctly, but it's a huge impact in the communities of color. And these sets of bills that we'll be voting on today and we voted on yesterday -- and 50-a will not

remove any civil rights of any police officer. They still have their hearings. They still have procedural protections. It's not a violation of any provision of the United States Constitution, not a single one.

And it's interesting how people who are now talking about due process, when it came to us reforming our criminal justice system, due process was an afterthought.

So let's be fair. Let's not be hypocrites. Let's do what's right for future generations. Let's do what's right so that the children that I represent, my poor black and brown individuals in my community, when they grow up, they say, "I want to grow up to be a police officer, and not "One of the things that I have to make sure is that I don't get shot, that I

don't get abused by a police officer." That is not the kind of dialogue that I want to have with

my son.

And the way to do that is by opening up information. This bill does not release any personal information of a police officer. Personal information will be protected. What this bill does is it would hold those police officers accountable for bad behavior. And the argument against it just doesn't hold water. The argument that any criminal attorney can get all these bad acts and introduce them into the record is completely untenable, because even the worst of judges will not allow this evidence to come into a case if it's not germane to a particular issue.

You know, this is not a proceeding, now there won't be proceedings where anything that a police officer does will now be brought into a trial. That is just not the way our trial systems work.

So let's do what's right. Let us

vote today in a way so that future generations will look up to the police, and my community and my children and the children in my district will

all one day want to become police officers.

I vote in the affirmative.

ACTING PRESIDENT BENJAMIN: Senator Sepúlveda to be recorded in the affirmative.

Senator Liu to explain his vote.

SENATOR LIU: Thank you, Mr. President.

Finally, finally we are repealing Section 50-a. I want to thank Senator Bailey for his incredible leadership in making this happen.

And this repeal is necessary. It's necessary to bring justice for the families of so many New Yorkers who have had their lives taken at the hands of police officers. But it is also important beyond that kind of accountability to remove this shield that has allowed impunity on

the part of not all police officers, but some police officers, to think that their behavior is not something that they would be held accountable for, ever. It is important that we repeal 50-a.

I'm so proud to have marched alongside my constituents in Bayside, Queens, Whitestone, College Point, Douglaston, Little Neck, so many of the neighborhoods that I proudly represent -- receiving thousands and

thousands of emails, telephone calls, messages from people demanding that this unjust section of New York State law is repealed once and for all.

And as I marched alongside them and had discussions with them, it was "Black Lives Matter." Now, I'm not black, but to me and so many of my constituents, (raising voice) Black Lives Matter. Black Lives Matter. But even when we're walking the streets or having conversations on Zoom, there are some people who scream out car

windows as they're passing by: "All lives matter." Or sometimes they whisper it: "But all lives matter."

And I have to constantly remind people, and I will remind some of my constituents right now, that it's important to think about why you're saying "all lives matter." People say every person that I have heard say "all lives matter" has appeared to me as if they have bristled at hearing the phrase "Black Lives Matter." They don't like hearing that, so they say "all lives matter."

Well, why do we say "Black Lives Matter"? Because it's always a black life, it's always a black life that gets taken by law

enforcement, by cops who not only not uphold their responsibility, but they are breaking the law themselves. They need to be held accountable

for that. It's always a black life -- unarmed, subdued already, and their life is still taken. That's why we say "Black Lives Matter."

You all know about our colleagues Assemblymember Diana Richardson and Senator Zellnor Myrie. They weren't even out protesting. They were out among protesters to try to ensure peace and to prevent any kind of misunderstandings or confrontations that might take place in the heat of the moment. And yet they, along with a group of other protestors where nothing violent was going on, nothing untoward was going on, they were seized by police officers and pepper-sprayed to the point of blindness and pain for hours, and corralled into a police van until the two of them were recognized by a police chief. At which point the police chief instructed the officers to let the two of them go.

Senator Myrie doesn't talk about that, about himself. He talks about the dozens

of other people who were cuffed and maced -- or

not maced, but pepper-sprayed at the same time he was. But they didn't get recognized as being a Senator or Assemblymember. They stayed in the truck. They were probably processed, and if not for the moment that we're in now, and what some of the statements of the district attorneys have suggested, they probably would have been processed with some kind of record that would stay with them for potentially the rest of their lives, disabling them from getting a job or housing or other opportunities that you and I take for granted.

And why were Senator Myrie and Assemblymember Richardson taken along with that entire group? Why Senator Zellnor Myrie -- if you know him, the last person who would ever be singled out by police officers. If you know his

history, his temperament, his intelligence, nobody would ever take him out. But Senator Myrie is guilty of something. He's guilty of an American crime, and that American crime is being born black. That's why he was treated the way he was before he was recognized by a police chief.

So we need to really reckon with ourselves and understand why it is the phrase

"Black Lives Matter" has been chanted millions of times over the last couple of weeks. And indeed it hasn't been people of color out there protesting, marching in the streets. Some people say, Oh, it's been a pretty diverse crowd. Come on. What you mean is it's been a lot of white people. In fact, at all the marches that I've been in, and I've been to a lot of them, it appears the majority of marchers are white.

And so, you know, look, I'm not a sociologist, I'm not a psychoanalyst, but I know

this is a point, a time in history, a moment in history where we have to take advantage of this to make serious changes, serious changes recognizing that repealing 50-a and the several other bills that we are passing this week are just the tip of the iceberg. Because it is not about just assuring and demanding accountability on the part of individual officers. There are some people who just should never have been cops. But I will say the vast majority of officers are in it for the right reasons and do the right thing.

But it is not just about individual accountability. We have to step back and take a

look at the system that has evolved over time. Why is it that the homeless and people who are in need of social services have huge interactions with the police department? Why is it that in New York City it's members of the NYPD who are

patrolling the hallways? Not just high schools, but middle schools and elementary schools. Pre-Ks.

We need to understand, acknowledge that too much of our society has become a police state. We need to reprioritize. It's not just about shifting some dollars from the NYPD to community organizations and programs. We need to make a wholesale evaluation of where our values really lie, get back to the origins of the police department -- not just the funding, but the constitution themselves of the police departments. This is a moment in time when we have to reevaluate all of those.

Yes, restore individual accountability by repealing 50-a and enacting the other measures before us this week. But we need to take a much deeper dive into what our society is all about. At the end of the day it should not be a situation where you have numerous

encounters with the police department or law enforcement. In fact, one should be able to live a life without ever having any encounter with law enforcement or the police department.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator Liu to be recorded in the affirmative.

Senator Jackson to explain his vote.

SENATOR JACKSON: Thank you, Mr. President and my colleagues.

I rise today to speak in favor of Section 50-a. I have prepared testimony, and I made some additional notes. But first I would like to thank the Majority Leader, Andrea Stewart-Cousins, for her leadership during these tough times that we all are going through.

It's important to know -- and I've mentioned this before -- in the history of New York State we have the first woman to ever be

elected the Majority Leader of the New York State Senate. That's history. In addition, she happens to be the first woman of color in the history of the State of New York in order to serve as the Majority Leader.

I turn to my colleague Jamaal

Bailey. And let me thank you for your leadership on this particular bill. You know I have called you specifically about this and the discussions that we had about it. Thank you for your leadership. This bill is clearly passing today.

So here we are in the New York State Senate chambers right around the same time, when this hearing started, where George Floyd is being buried and his funeral is in Houston, Texas.

I'm going to throw out some names, to mention some names to all of you. You may recognize some; you may not for others. Akai Gurley. Allan Feliz. Amadou Diallo. Anthony

Baez. Antonio Williams. Carlos Lopez, Jr.

Clifford Glover. Delrawn Small. Eric Garner.

Jayson Tirado. Kadeem Torres. Kawaski Trawick.

Kimani Gray. Mohamed Bah. Noel Polanco.

Ramarley Graham. Shaheed Vassell. Sean Bell.

Shantel Davis.

These are the names of some of the

black and brown people killed at the hands of

police in New York City -- names that have come

rushing back to us after the killing of

Breonna Taylor and George Floyd. These police

killings have awakened us once more in New York

City and around the world. And as you know,

New York City is the epicenter of the COVID-19

pandemic. A huge swath of our community -- black

people, brown people, Asian people, white

people -- have come together to demand change to

our racist system. And in fact, John Liu

discussed it, we mentioned it earlier: Many of those individuals that are rallying with signs that say "Black Lives Matter" and many other things that the signs are saying, are young white individuals. They care about their brothers and sisters of the human race.

So Jumaane Williams, the Public Advocate of the City of New York, Corey Johnson, the Speaker of the City Council of New York, Scott Stringer, the City Comptroller of the City of New York -- three out of the four highest elected officials in the City of New York -- we took a knee at 43rd Street and Times Square for 8 minutes and 47 seconds, the same amount of time that we watched on video George Floyd being killed.

And let me tell you, if you've never taken a knee for 8 minutes and 47 seconds, it's a long time. Just like when people say, oh --

because I've run a New York City marathon --

that's 26 miles. And I say no, no, no, 26.2.

Don't forget that .2, especially when you run 26.

But also Luis Sepúlveda talked about

stop, question and frisk with respect to his

testimony here today. I cochaired the New York

City Council's Black, Latino and Asian Caucus for

eight years. We filed an amicus brief in the

lawsuits. And I say to you that this was a major

issue in New York City, people being stopped and

thrown up against the wall and being mistreated

and abused. It was a major issue, and we won on

behalf of all of the people. And people said,

oh, crime is going to go up. Well, crime didn't

go up. Crime went down. Different perceptions.

So we're not going to legislate our

way out of systemic racism. The legislation

we're passing right now is about addressing one

of the many symptoms of that racism, in my

opinion, police brutality. We have an obligation

that the laws we pass look out for the people of our state and bring respect and dignity to everyone, and that's what we're doing.

The bills we're voting on today, especially repealing 50-a, should have been done

a long time ago under previous leadership in the New York State Senate. We have heard loud and clear from our communities that these bills must be passed. And like my colleagues, we've received hundreds of phone calls, emails and texts about this particular matter.

The Black, Puerto Rican, Hispanic and Asian Caucus of the New York State Legislature, 63 members strong, held a virtual press conference last week around the entire state, from Long Island to Buffalo, to Harlem, to Albany, Rochester, Buffalo. And its saying was: Enough is enough, black lives matter, repeal 50-a.

This past Sunday my office put together a march and rally where we wound up at the Riverbank State Park. About 2500 constituents marched with us to demand an end to police brutality and to say loudly the need for police transparency and accountability.

For all those families who have lost loved ones to police brutality, for our black and brown communities across New York State and across the country, for my constituents in the 31st Senatorial District who demand change, for

myself as a black man and for my black grandsons, Esa and Imira in Virginia, I'm proud to vote yes on this bill today.

And I say to all of my colleagues: As-salamu alaykum. You may say, what does that mean? Peace go with everyone.

Thank you, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator

Jackson to be recorded in the affirmative.

Senator Montgomery to explain her vote.

SENATOR MONTGOMERY: Thank you, Mr. President.

This certainly is a very, very special and historical moment for me because, for once, I'm going to be very happy and excited to cast my vote yes to all of the criminal justice bills that we have had before us and that we have before us at this moment, including 50-a.

As you know and everyone knows me for, voting no on every bill practically that came before us that did anything to extend or increase the sentencing or the time that anyone spends in prison or increases the number of crimes that we consider or the number of actions,

activities that we consider to be crimes, increasing the penalties, and on and on.

And why was I consistently voting no? Because I understood that those bills, however well-intentioned, to whatever extent we thought we were helping people, we were actually casting a net to include more and more people in the criminal justice system, which already was totally unfair and would capture more and more, especially young people of color. So I have historically voted no.

But today and this week and these last few weeks, I must say I am especially pleased that we have -- this is a new time for us. We have a new Majority Leader. I am so grateful for her leadership. We have a staff that has worked with us to help fashion the legislation that we have been able to pass. I have my colleagues. I have enjoyed and appreciated the debate. I was just so thrilled with Senator Bailey debating Akshar. I thought he was wonderful. Thank you, Senator.

And let me just say to the people of America, thank you for bringing us to this point and saying in no uncertain terms that none of us

can breathe if a few of us can't breathe.

And I will say lastly that I've been to court with young people, I've been to school with young people. I have witnessed such pain and anguish in parents whose children were caught up in the system, either killed or even if they were just in the system sometimes, parents lose their children and can't find them when they've been arrested. So it's a very painful thing to live with.

And the last conversation that I had with my son, who is now an avid cyclist -- even though he's a young adult, he's my baby. And I said to him, "Be careful about the neighborhoods that you ride your bicycle in, because you're in danger if you go into the wrong neighborhood."

So I feel this as a mother, I feel this as a legislator, and I feel this as a person in America who has lived with a system where every day you're in fear that your brother, your son, your husband is going to not come home.

So thank you, Mr. President. I vote aye.

ACTING PRESIDENT BENJAMIN: Senator Montgomery to be recorded in the

affirmative.

Senator Myrie to explain his vote.

SENATOR MYRIE: Thank you, Mr. President.

And before I start, let me just note that today is my mom's birthday. And so, Mommy, happy birthday. I love you. Sorry that I cannot be with you in person, and I hope that you understand why I have to be here today.

Mr. President, we have heard from some folks that our grievances against police brutality and our attempts to rid it out of our police departments are us taking advantage of a political moment. Some people have said that it isn't a real grievance, that this is not happening here in New York. You are taking advantage of what's happening around the country, and you're only doing it now.

So if I may direct our collective attention to the year 1942 -- that's 44 years before I was born -- where Palmer Anderson, an unarmed black man, was killed by the New York Police Department. In 1946, four years later, Charles Ferguson, killed at the hands of law enforcement in Freeport, New York.

The very next year, in 1947, an unarmed black small-business owner assaulted within inches of his life by law enforcement. No

serious consequences for the officers involved.

In 1950, Jeff Harrod shot in the chest, directly in the heart, at the hands of law enforcement. No serious consequences for those police officers.

In 1952, a young man by the name of Jacob Jackson, beaten nearly to death by the New York Police Department. No serious consequences for those police officers.

We skip ahead to 1964. We're still 22 years before I was born. A teenager, 15 years old, Jimmy Mitchell, killed at the hands of the New York Police Department. No serious consequences for those law enforcement officers.

In fact, there was unrest in the city after Jimmy was killed, much like what we are seeing today. People took to the streets. And even those who were peacefully protesting were met with the same brutality. In 1964, Thessalonia, shot in the back while walking away from the New York Police

Department. In 1964, Barbara Baxter, while peacefully protesting, shot in the thigh.

We fast forward 20 years; we're now in 1984, two years before I was born. A young black man, Michael Stewart, killed at the hands of law enforcement. That same year, a senior citizen -- while she was being evicted -- Eleanor Bumpurs, killed at the hands of the New York Police Department.

In 1994 -- I'm eight years old now -- Anthony Baez threw a football, hit the wrong police car, he is choked to death at the hands of the New York Police Department.

The next year, 1995, Anthony Rosario and Hilton Vega shot to death by the New York Police Department. Unarmed.

In 1997, Kevin Acevedo, shot in the back while running away from the New York Police Department. He was unarmed, and he was killed.

The rest of my teenage years and into my adulthood, I saw unarmed person being brutalized after unarmed person being brutalized: Abner Louima, Amadou Diallo, Trayvon Martin, Breonna Taylor, Sandra Bland, Eric Garner, George Floyd.

So 11 days ago, when I put on a neon green T-shirt with my name and title on the back,

I walked to Barclays Center not just as a State Senator, but as a black man who has grown up in this country and has seen brutality have no consequence for my people. And what I was met with was not open arms. Instead, I was pushed, I was shoved, I was hit in the back, pepper-sprayed and handcuffed.

So you're right, this is the moment. We are tired. There has been no consequence for the brutality against our people. And to this day I don't know if the officer that sprayed me

and my colleague in the Assembly has a history of excessive use of force.

That is what this bill is about. It is about the history. We have seen brutality go unanswered. This isn't an attack; this is accountability. This isn't targeting; this is transparency. This isn't anti-police; this is pro-people.

Listen to the New Yorkers who have taken to the streets. Listen to what they are saying. My life matters. Black lives matter. Repealing 50-a and the other reforms that this majority will pass hopefully will send the message that we mean that when we say it.

Senator Bailey, this isn't just a story of tragedy, but one of triumph. Because while brutality is in the soil and DNA of our country, so is hope. And only in this country can a black boy from the Bronx grow up to chair

the Codes Committee and pass what we are passing today. Only in this country can I be pepper-sprayed on a Friday and be the policymaker on a Tuesday. It isn't just a tragedy, it is a triumph.

So what we do today is of course historic. But I'm voting aye not because it's historic, I'm voting aye for all of the families who have lost their loved ones to police brutality. I am voting aye for the thousands of New Yorkers that have taken to the streets and have said enough is enough. I am voting aye because it is the right thing to do.

Senator Bailey, thank you for your leadership. Madam Leader, thank you for your leadership. And to my colleagues, thank you for your support.

I'll be voting in the affirmative, Mr. President.

ACTING PRESIDENT BENJAMIN: Senator

Myrie to be recorded in the affirmative.

Senator Bailey to explain his vote.

SENATOR BAILEY: Thank you, Mr. President.

It's been quite a day. It's been quite a couple of weeks. It's been quite a 37 years for me as a black man on this planet.

I'm going to correct something for the record. Senator Borrello mentioned that there wasn't discussion. We held hearings -- and I think Senator Akshar spoke to that, and I think Senator Gallivan spoke to that as well. Senator Flanagan reached out. Senator Lanza reached out. We had discussion about these things. And just because we don't agree on the subject matter doesn't mean that the conversations don't happen. Let's be very clear about that.

And we talk about the vast majority of people, the vast majority of officers are

inherently good. Without a doubt. The vast majority of people are inherently good, but we still have a penal code, Mr. President. That is in the event that people commit bad acts against one another.

I'll redirect to my original

comments. And I want to thank Senator Akshar for a spirited debate and thoughtful conversation, despite differing on the subject matter of what we discussed today.

I want to thank Leader Andrea Stewart-Cousins for not just being a trailblazer, but being someone who listens. Allowing me to be the chair of the Codes Committee. Your leadership in such a tumultuous time, Madam Leader, is greatly appreciated.

My brother Senator Myrie was pepper-sprayed on a Friday, and you called me on

Saturday morning. The Book of Matthew says: Ask and you shall receive. Seek and you will find. That's Verses 7 and 8. I asked, we received, and now we're going to find justice in this state.

I want to thank Shontell Smith because one day Shontell called me when I was on Gun Hill Road -- I'll never forget where I was, I was about to get a haircut, when barbers were open -- and she said that "Because Senator Squadron is leaving, you should be the ranking member on the Codes Committee."

And I bristled for many reasons, one of them being what Senator Montgomery mentioned,

that in the last couple of years it was penalty-enhancers day by day. And I don't subscribe to that theory of legislating, and it was tough. But Shontell said: "Stick in there. Because if we get the majority, you could become the chair of the Codes Committee, and you'd be

quite a good one."

So I want to thank myself for listening to Shontell, and I want to thank Shontell for talking me into this.

Senator Montgomery. We mentioned it earlier in session, Velmanetting. Every person, not just person of color, owes you a debt of gratitude for your fearlessness and leadership.

To Nadia and Ken and Chris, Dorothy and Noel, for your incredible work and preparation, I thank you.

Thank you to Assemblymember Danny O'Donnell for championing this bill and allowing me to carry it in this house.

And to my mentor, my brother, Assembly Speaker Carl Heastie, for always standing up for what's right, staking your speakership to the reformation of a broken system.

And to the caucus. Senator Jackson mentioned it, it bears repeating, that we held a series of press conferences throughout the state last week to stand in solidarity and indicate that we just want the right change.

There is a sense of frustration in the air that many of us have, especially those of us who are people of color, specifically black people. George Floyd said he couldn't breathe. They didn't listen. This goes beyond Mr. Floyd. It goes to the devaluation of lives of black men that wears on us like the current does on the coast, day by day.

That knee on Mr. Floyd's neck was a wake-up call for America. And while that murder didn't happen in New York, the actions of police in that case and many cases before that have led to a renewed call by the public for what many legislators like myself and many folks in the community have been saying for quite some time:

We need policing reform. That doesn't mean that we're anti-police. I just want to make sure we specifically delineate that and make that clear for the record. It just means that we needed to change a few things but people weren't listening

before, Mr. President.

This is about transparency, not a desire to remove tools from officers for policing, which is an incredibly difficult job. It's frustrating to have to couch our language like that all the time. It should be understood that we understand and respect police. But every time, time and again, it seems like we have to say it. So I'll say it again. We respect the police. But we need to be respected by the police.

I want to trust the police. I want my kids to trust the police. And Senator Gianaris brought it up that, you know, bad apples

spoiling a bunch. But I'll take it a step further than that. If I'm going to the supermarket and I see a bad apple time after time after time -- forget about spoiling that bunch, I'm not buying apples anymore.

That's the public trust argument. That's what we're getting to the heart of, Mr. President. So that people can trust those who police them. Dylann Roof gets Burger King, but George Floyd gets death? Armed protestors at the Capitol get nothing, but Amadou Diallo, with

a wallet in his hand, gets 41?

Now, I remember in law school we spoke about a case, The People v. Du, which spoke about the killing of young Latasha Harlins in Los Angeles for allegedly attempting to steal a bottle of orange juice. She was going to pay, Mr. President, but that didn't come out until the facts and until the videotape and the witnesses

clearly said that this was a clear homicide.

Voluntary manslaughter, maximum prison sentence of 16 years. But the judge in that case? Four hundred hours of community service, five years of probation and a $500 fine. No jail time.

Now, I remember being in law school thinking about the holding or the main idea of this case, and they're talking about sentencing. And I'm sitting there like, hold on. You're talking about sentencing and we're talking about the devaluation of black life in America.

Now, Latasha Harlins was mentioned by Tupac Shakur in many songs, but I'll reference his song I Wonder If Heaven Got a Ghetto. "Here on earth, tell me what's a black life worth? A bottle of juice is no excuse, the truth hurts."

It hurts when you feel devalued,

Mr. President. It's felt like that for a long time with interactions between black people and the police. Now, every time when I left the house when I was younger, no matter how jovial the conversation prior with my dad, he would turn immediately serious and he said, "Be safe." Maybe because I wasn't a parent, maybe because I just didn't understand what the world was like, but that "be safe" was more than just don't trip outside, it was a reminder that as a black man in America you may be facing targets from multiple places. It's the talk that our fathers had with us as black men.

Now, I don't think you can imagine the frustration, the confusion that I had to feel as a parent, elected official, and as a black man when my daughter asked me: "Dad, why is that police officer hurting that man? I thought police officers protected people."

And I explained, you know, "Police officers do. That was a bad incident." My

daughter is only five, so she doesn't know the series of bad incidents that have happened to us. Therein lies the frustration.

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Many of us had have a feeling of that could be me. What you learn as a black man in America is that nothing insulates you from this. They say: Stay out of trouble. Go to law school. Be a state senator. Be polite. Mind your manners. Identify yourself. But that doesn't matter. That's the frustration.

So I can tell you about being 12 years old and being asked, "Why were you loitering at a bus stop?" I want you think about that, loitering at a bus stop, Mr. President. When you come back from the orthodontist and you have your braces tightened and you're thrown in a police van because you fit the description, when you're pulled over for -- or you're told that

you're being pulled over for driving an expensive car when you're driving a 1984 GMC Jimmy, or when weapons are drawn on you by an officer who identifies themselves after the fact, and you've never been arrested.

We spoke about unsubstantiated and substantiated. I'll talk to you again about unreported. When things happen to you, Mr. President, and you don't feel enough faith and confidence in the system, you're not going to

report them because you feel like it won't do a thing.

So thank God for video. Ahmaud Arbery and George Floyd. In both cases, again, it could have very easily been us. Success doesn't matter. NBA guard Sterling Brown, in Milwaukee -- a gun pulled on him, he was tased and electrocuted. Thabo Sefolosha, another NBA player -- hit with a baton, thrown on the floor,

and eventually broke the lower part of his leg and missed a part of the season, eventually settled with the NYPD. James Blake, world-famous tennis player, standing in front of his hotel, waiting to go to the U.S. Open, and he was tackled by an officer, despite cooperating.

Now, Audre Lorde said your silence won't protect you -- and your success doesn't either. Now you understand why Colin Kaepernick took a knee to silently protest injustice. And now when we protest silently, it seems to try to be used against us. So to Colin, I understand. I'm even wearing your sneakers today, Colin.

There's beauty in the struggle, ugliness in the success. NFL apologized when they said that black lives matter, but let's make

sure that they matter even more and get Brother Colin back on the field if that's what he wants.

As we lay Mr. George Floyd to rest

today, we have to ask who stood up strong in the face of such adversity and never wavered. The reality that George Floyd said -- yes, he said he couldn't breathe, but his last words? He called out for his mother. Now, for gravity's sake, I want you to realize that Mr. Floyd's mother had predeceased him. Mr. Floyd's mother was not alive at the time when he was fighting for his life. But even taking his last breath, he sought comfort from his mom.

So to the mothers of the movement and their family members who pleaded with us as a Legislature -- press conferences, marches calls, everything under the sun -- if my daughters scrape their knees, I'm apoplectic, I run for the neosporin. I could not imagine having my children killed and being that strong. So to Gwen Carr and Valerie Bell, Constance Malcolm and more, I'm in debt to you for permitting me the opportunity to learn from you and learn your

strength and resolve.

To Constance Malcolm, a constituent

of my mine, that Saturday morning at Community Board 12 after your son was taken from us far too early, your strength and resolve was something that I studied back then and it's something I appreciate now.

There are countless names that we read off, almost like a Who's Who of souls lost well before their time. Eric Garner. Sean Bell. Ramarley Graham. Sandra Bland. Breonna Taylor, who was an EMT on the front lines fighting for us with COVID-19, even she wasn't immune to this. Tamir Rice. Philando Castile. Walter Scott. Alton Sterling. Terence Crutcher. Michael Brown. Danroy Henry. Andrew Kearse. Freddie Gray. Amadou Diallo. Anthony Baez. Eleanor Bumpurs. Delrawn Small. Oscar Grant. Laquan McDonald. Botham Jean. Tony McDade. And so

many more.

Now the silver lining on this incredibly dark cloud is that the sun is finally starting to shine on injustice. It's starting to make people question what has been said for so long, and maybe it was the perfect storm of Amy Cooper plus quarantine plus George Floyd. Maybe it's the unmistakable -- in my opinion,

undisputable -- video evidence that we saw a live murder on TV, but it's done something to the consciences of America. It's created more of a willingness to listen, to share and to care.

Emotional conversations have happened in living rooms, dining rooms, boardrooms, and Zooms throughout the country. That includes our conference. Many conversations fraught with raw emotion and pain, the pain of a wound that not only never heals, but it's a wound that you couldn't even seek treatment for,

Mr. President.

So to my colleagues, many of you who are standing in positions that may be uncomfortable, I appreciate your vote on this important, critical and personal issue. I thank you for listening to me and other colleagues who impressed upon you the importance of this. More importantly, I thank you for your willingness to send a strong message that black lives do matter.

And to Senator Myrie, the courage that he's shown while wearing a shirt with his name on it, to be pepper-sprayed while peacefully demonstrating, and to have the strength and resolve to not only continue to advocate but

advocate even stronger, I salute you. The reality is that right before he went to go protest, he sent me a text message saying "Looks like things might be going awry. I'm going to go

over there and see if I can help folks out."

Help.

There's a lot of gravity that comes with this position, Mr. President, and all of us feel the heavy weight. But I don't know if there could be a more meaningful piece of legislation to me and this body, because it's way more than just policy. It is a time not only to correct what we thought and knew to be a flaw in the state law, but to correct misconceptions that many of us have carried for too long for things that we can never experience.

To the advocates who pushed and prodded for this day, protesters, and anyone that ever lifted a finger to text, tweet, or exercise your First Amendment rights, I thank you. Anyone who ever used their voice to uplift the downtrodden, to listen to someone who felt silenced, I appreciate you. I encourage you not only to speak up today but all the days thereafter, because the greatest thing about

democracy is dissent.

As I close, I'm not sure of a prouder moment, again, that I could have as a member of this body. George Floyd is being laid to rest today. And his daughter Gianna said that "Daddy changed the world." Now, Gianna, you may not know me, but you're right. George Floyd changed the world. He changed this state.

So to George, happy Father's Day in heaven in a couple of weeks, Brother Floyd. Thank you for stirring the soul and consciousness of America. Black Lives Matter.

I vote aye, Mr. President.

ACTING PRESIDENT BENJAMIN:

Senator Bailey to be recorded in the affirmative.

Announce the results.

THE SECRETARY: In relation to Calendar Number 751, those Senators voting in the

negative are Senators Akshar, Amedore, Borrello, Boyle, Flanagan, Funke, Gallivan, Griffo, Helming, Jacobs, Jordan, Lanza, LaValle, Little, O'Mara, Ortt, Ranzenhofer, Ritchie, Robach, Serino, Seward and Tedisco.

Ayes, 40. Nays, 22.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

Senator Gianaris, that completes the reading of the controversial calendar.

SENATOR GIANARIS: Mr. President, can we now return to the reading of the noncontroversial calendar, please.

ACTING PRESIDENT BENJAMIN: The Secretary will read.

THE SECRETARY: Calendar Number 441, Senate Print 4670, by Senator Kaplan, an act in relation to authorizing the assessor of the County of Nassau to accept, from Lubavitch of

Old Westbury, an application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar 441, those Senators voting in the

negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 457, Senate Print 6873, by Senator Ritchie, an

act to authorize the Towns of Lorraine and Worth in Jefferson County to elect a single town justice to preside in the town courts of such towns.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 531, Senate Print 6383A, by Senator Benjamin, an act to amend the Alcoholic Beverage Control Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 556, Senate Print 6715, by Senator Little. An act to amend the Executive Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 576, Senate Print 7846, by Senator Harckham, an act to amend the Labor Law and the Public Service Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 4. This act shall take effect on the 90th day after it shall have become a law.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 674, Senate Print 59, by Senator Robach, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This

1900

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 680, Senate Print 3856, by Senator Lanza, an act to amend the State Law, the Highway Law and the Administrative Code of the City of New York.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 9. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

681, Senate Print 3860, by Senator Lanza, an act to amend the Vehicle and Traffic Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 682, Senate Print 4334B, by Senator Metzger, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This

act shall take effect on the 30th day after it shall have become a law.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 683, Senate Print 4701A, by Senator Brooks, an act in relation to permitting Roosevelt Fire District to file an application for a retroactive real property tax exemption.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar 683, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number 684, Assembly Print Number 7493, substituted earlier by Assemblymember Thiele, an act in relation to the designation of the East Hampton Volunteer Ocean Rescue and Auxiliary Squad.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 685, Assembly Print Number 7011B, substituted earlier by Assemblymember Darling, an act to authorize the assessor of the County of Nassau to accept an application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 685, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

There is a substitution at the desk.

The Secretary will read.

THE SECRETARY: Senator Skoufis moves to discharge, from the Committee on Rules, Assembly Bill Number 7821 and substitute it for the identical Senate Bill 5948, Third Reading Calendar 686.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

The Secretary will read.

THE SECRETARY: Calendar Number

1905

686, Assembly Print Number 7821, by Assemblymember Zebrowski, an act authorizing the Commissioner of General Services to transfer and convey certain unappropriated state land to Rockland Recovery Homes, Inc.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 687, Senate Print 5993, by Senator Serino, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 689, Assembly Print Number 8222A, substituted earlier by Assemblymember Palmesano, an act to

amend the Village Law and the Public Officers Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

690, Assembly Print Number 8195, substituted earlier by Assemblymember Thiele, an act to amend the Town Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 692, Senate Print 6611, by Senator Brooks, an act relating to authorizing the Town of Hempstead to be able to grant the Roosevelt Fire District of Roosevelt a property tax exemption.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: In relation to

Calendar Number 692, those Senators voting in the

negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number

694, Senate Print 7867, by Senator Metzger, an

act to amend Chapter 262 of the Laws of 2005.

ACTING PRESIDENT BENJAMIN: There

is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 694, those Senators voting in the

negative are Senators Akshar, Amedore, Borrello, Boyle, Flanagan, Funke, Gaughran, Griffo, Jacobs, Jordan, Martinez, O'Mara, Ranzenhofer, Ritchie, Robach, Serino, Seward, Skoufis and Tedisco.

Ayes, 43. Nays, 19.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 695, Senate Print 6768A, by Senator Akshar, an act to amend the Village Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 696, Senate Print 6823, by Senator Gallivan, an act to amend the Highway Law.

1910

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 697, Senate Print 6854, by Senator Little, an act to amend the Executive Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 698, Senate Print 6915, by Senator Flanagan, an act to authorize the town of Smithtown to extend the boundaries of the St. James Fire District to include the Village of Head of the Harbor.

ACTING PRESIDENT BENJAMIN: There is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 699, Senate Print 7012, by Senator Ranzenhofer, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 700, Senate Print 7069A, by Senator Kaminsky, an act to authorize the assessor of the County of

Nassau to accept a retroactive application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to

Calendar Number 700, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 701, Senate Print 7070, by Senator Kaminsky, an

act to authorize the assessor of the City of Long Beach in the County of Nassau to accept a retroactive application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 701, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 702, Assembly Print Number 9094, substituted earlier by Assemblymember Rosenthal, an act to amend Chapter 667 of the Laws of 1868.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 703, Assembly Print Number 8156A, substituted earlier by Assemblymember Byrnes, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

1915

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 704, Senate Print 7282A, by Senator Borrello, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 705, Senate Print 7295, by Senator Addabbo, an act to amend the Environmental Conservation Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 706, Senate Print 7359, by Senator Stewart-Cousins, an act authorizing Beth El Synagogue Center to file an application for retroactive real property tax exemption.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 706, voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 707, Senate Print 7360, by Senator Breslin, an act in relation to authorizing the assessor of the City of Albany to accept from the Koinonia Primary Care, Inc., an application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 707, those Senators voting in the

negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 708, Assembly Print Number 7648, substituted earlier by Assemblymember Goodell, an act to amend the General City Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 709, Senate Print 7574, by Senator Martinez, an act in relation to creating the Davis Park Fire Department Benevolent Association.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 8. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number 710, Senate Print 7579, by Senator Borrello, an act to authorize the Towns of Mina and French Creek in Chautauqua County to elect a single town justice to preside in the town courts of such towns.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 711, Senate Print 7586A, by Senator Thomas, an act in relation to permitting Uniondale Land Trust to file an application for certain real property tax exemptions.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 711, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

712, Senate Print 7714, by Senator Seward, an act relating to the dissolution of the Village of Groton Industrial Development Agency and the disposition of the assets thereof.

ACTING PRESIDENT BENJAMIN: There is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

713, Senate Print 7729, by Senator Borrello, an act to amend the Town Law and the Public Officers Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 714, Senate Print 7749, by Senator Akshar, an act to authorize the Town of Union in the County of Broome to convey to New York State Electric & Gas

an easement.

ACTING PRESIDENT BENJAMIN: There is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number 715, Senate Print 7750, by Senator Jacobs, an act to amend the Town Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 716, Senate Print 7790, by Senator Amedore, an act to amend the Public Officers Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 717, Senate Print 7794, by Senator Harckham, an act to amend the Village Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 718, Senate Print 7857, by Senator Gaughran, an act to amend the Vehicle and Traffic Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 4. This act shall take effect on the 180th day after it shall have become a law.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

719, Senate Print 7880B, by Senator Breslin, an act prohibiting the incineration of aqueous film-forming foam.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 720, Senate Print 7897B, by Senator Metzger, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 722, Senate Print 7923, by Senator Serino, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number

723, Senate Print 7953, by Senator Thomas, an act

in relation to authorizing the Town of Hempstead

to grant Southern Tier Environments for Living,

Inc., a property tax exemption.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: In relation to Calendar 723, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 724, Senate Print 7973, by Senator LaValle, an act to amend Chapter 238 of the Laws of 1963.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 725, Senate Print 7999, by Senator May, an act to amend the Judiciary Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

1929

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 725, voting in the negative: Senator Tedisco.

Ayes, 61. Nays, 1.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 726, Senate Print 8019, by Senator Boyle, an act in relation to authorizing the Good Samaritan Hospital Medical Center to file an application for real property tax exemption.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

1930

THE SECRETARY: In relation to Calendar 726, those Senators voting in the

negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 727, Senate Print 8027A, by Senator Kaminsky, an act to authorize the assessor of the Town of Hempstead, County of Nassau, to accept from Mercy Medical Center an application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to

Calendar Number 727, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

1931

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 728, Senate Print 8054, by Senator Persaud, an act to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number 729, Senate Print 8068B, by Senator Kaminsky, an act to authorize the assessor of the County of Nassau to accept a retroactive application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 729, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 730, Senate Print 8075, by Senator Harckham, an act to amend the Real Property Tax Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect January 1, 2021.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to

Calendar 730, those Senators voting in the negative are Senators Akshar, Amedore, Borrello, Funke, Gallivan, Griffo, Helming, Jacobs, Jordan, Lanza, O'Mara, Ortt, Ranzenhofer, Ritchie,

Robach, Seward and Tedisco.

Ayes, 45. Nays, 17.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 731, Senate Print 8087B, by Senator Helming, an act to amend the Alcoholic Beverage Control Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number

732, Senate Print 8093, by Senator Martinez, an

act to amend the Town Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 733, Senate Print 8136, by Senator Gaughran, an act in relation to authorizing the assessor of the Town of Huntington, County of Suffolk.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

1935

Announce the results.

THE SECRETARY: In relation to Calendar Number 733, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 735, Senate Print 8204, by Senator Harckham, an act to amend the Real Property Tax Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 735, those Senators voting in the negative are Senators O'Mara, Ortt and Serino.

Ayes, 59. Nays, 3.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 736, Senate Print 8225, by Senator Montgomery, an act to amend the Alcoholic Beverage Control Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 736, voting in the negative: Senator Skoufis.

Ayes, 61. Nays, 1.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 737, Senate Print 8285, by Senator Brooks, an act to amend the Nassau County Civil Divisions Act.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 738, Senate Print 8299, by Senator Jordan, an act to amend the Public Officers Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 739, Senate Print 8344A, by Senator O'Mara, an

act authorizing the alienation of certain reforested lands in the County of Yates.

SENATOR GIANARIS: Lay it aside for the day.

ACTING PRESIDENT BENJAMIN: The bill will be laid aside for the day.

THE SECRETARY: Calendar Number 741, Senate Print 8350B, by Senator Thomas, an act in relation to authorizing the Nassau County assessor to accept an application from NGIP, Inc., for a real property tax exemption.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 741, those Senators voting in the negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number 742, Senate Print 8378, by Senator Jacobs, an act to amend the General City Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

Calendar Number 743 is high and will be laid aside for the day.

THE SECRETARY: Calendar Number 744, Senate Print 8484, by Senator Metzger, an act to amend the Alcoholic Beverage Control Law.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Announce the results.

THE SECRETARY: In relation to Calendar Number 744, voting in the negative: Senator Skoufis.

Ayes, 61. Nays, 1.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 745, Senate Print 8485, by Senator Montgomery, an act authorizing the Commissioner of General Services to sell certain land to TCH Holdings, LLC.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

THE SECRETARY: Calendar Number 746, Senate Print 8489, by Senator Kaminsky, an act in relation to authorizing the assessor of the County of Nassau to accept from the Eglise Baptiste Etolie Du Matin an application for exemption from real property taxes.

ACTING PRESIDENT BENJAMIN: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: In relation to

Calendar Number 746, those Senators voting in the

negative are Senators Akshar and O'Mara.

Ayes, 60. Nays, 2.

ACTING PRESIDENT BENJAMIN: The

bill is passed.

THE SECRETARY: Calendar Number

747, Senate Print 8491, by Senator Bailey, an act

to amend the Highway Law.

ACTING PRESIDENT BENJAMIN: Read

the last section.

THE SECRETARY: Section 3. This

act shall take effect immediately.

ACTING PRESIDENT BENJAMIN: Call

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN:

Announce the results.

THE SECRETARY: Ayes, 62.

ACTING PRESIDENT BENJAMIN: The bill is passed.

Calendar 752 is high and will be laid aside for the day.

Senator Gianaris, that completes the reading of today's calendar.

SENATOR GIANARIS: Mr. President, can we please return to motions and resolutions.

On page 30, I offer the following amendments to Calendar Number 570, Senate Bill 6052B, and ask that said bill retain its place on Third Reading Calendar.

ACTING PRESIDENT BENJAMIN: The

amendments are received, and the bill shall retain its place on the Third Reading Calendar.

SENATOR GIANARIS: Is there any further business at the desk?

ACTING PRESIDENT BENJAMIN: There is no further business at the desk.

SENATOR GIANARIS: I move to adjourn until tomorrow, Wednesday, June 10th, at 11:00 a.m.

ACTING PRESIDENT BENJAMIN: On motion, the Senate stands adjourned until Wednesday, June 10th, at 11:00 a.m.

(Whereupon, at 3:02 p.m., the Senate adjourned.)

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COMMITTEE ON OPEN GOVERNMENT
STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001
TELEPHONE: (518) 474-2518
FAX: (518) 474-1927
WWW.DOS.NY.GOV/COOG/

December 2020

2020 REPORT TO THE GOVERNOR AND STATE LEGISLATURE

Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
- Louis D. Brandeis

NEW YORK STATE OF OPPORTUNITY. | Committee on Open Government

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INTRODUCTION & SUMMARY

"Sunlight is the best disinfectant." Those words, expressed by Judge Louis Brandeis more than a century ago, serve as the foundation of our open government laws, the Freedom of Information Law (FOIL), the Personal Privacy Protection Law (PPPL) and the Open Meetings Law (OML). In these turbulent times the public's trust and confidence in government make those words more important than ever.

Created as part of the original version of FOIL in 1974, the Committee on Open Government is one of few agencies of its kind in the United States. Although every state has enacted open records and open meetings laws, in most jurisdictions members of the public who have questions or difficulties have no one to call. In New York, the Committee responds to thousands of inquiries annually, provides training and makes an immense amount of useful material available through its website. Through this annual report, the Committee offers recommendations to the Governor and the State Legislature designed to improve open government laws and to enhance the public's right to information.

Along with the rest of the world, the Committee found its operations and interests significantly affected by the dramatic events of 2020. A global pandemic, civil protests and a contentious election, among other developments, all brought open government issues to the forefront, presenting both challenges and opportunities. By necessity, governmental operations moved from their customary in-person formats with established protocols to "virtual" formats that raised new substantive, procedural and technical issues. In the area of law enforcement oversight, long simmering tensions between privacy and disclosure exploded, bringing about the repeal of Civil Rights Law § 50-a – a step long advocated by this Committee.

The current crisis also served to highlight some of the shortcomings in our current methods for allowing public access to government records. Advocacy organizations have written to the Committee to underscore their frustration with the FOIL process as it currently exists. They have referenced anecdotal accounts where FOIL requests were met with "massive delays and endless wrangling," a problem that they noted predates the current health crisis but has been exacerbated by it.

The Committee believes that this is an issue that warrants the gathering of facts and data so that informed decisions may be made regarding the necessity of reform.

New York State entities now receive over 250,000 FOIL requests annually, many by businesses seeking information to compete and to innovate. Yet the State and local agency resources required to respond to requests are not unlimited. Additional delay caused by the pandemic thus underscored a very real need to reassess our current laws and practices, to consider ways that information technology and proactive disclosure could make government at every level more open and accountable.

The unusual year that will soon pass did indeed bring to light both challenges and opportunities with the laws over which this Committee has responsibility – there are important open government lessons to be learned from developments this year. We urge the Governor and the Legislature to investigate the successes and shortcomings of the ways technology was harnessed to preserve public access to meetings and to explore new technologies and new transparency rules to improve efficiency and reduce the cost of providing access to information essential for our democracy to function and New York's economy to flourish. The time is ripe for a reassessment of open government in New York.

This annual report to the Governor and the State Legislature includes the following:

- a summary of 2020 legislative amendments to the Freedom of Information Law, including a discussion of the new provisions associated with the repeal of Civil Rights Law § 50-a and the introduction of new provisions concerning lawsuits brought by commercial entities seeking to block disclosure;
- a discussion of temporary modifications to laws during the COVID pandemic to leverage technology, including the Open Meetings Law, effectuated by Executive Order;
- a discussion of the Committee's support for certain legislative action, including proposed statutory amendments and additions to the Open Meetings Law and Freedom of Information Law which would require certain entities to make meetings more accessible and to proactively disclose some frequently-requested records;
- a discussion of the Committee's support for other legislative proposals that have featured in the Committee's previous reports, including the use of cameras in courtrooms and the expansion of the coverage of the Freedom of Information Law to additional governmental entities and the Legislature;
- a summary of significant 2020 court decisions; and
- data reflecting the services provided by the Committee.

2020 LEGISLATIVE AMENDMENTS TO FOIL

A. Amendments to FOIL Enacted with the Repeal of § 50-a of the Civil Rights Law

On June 12, 2020, Governor Andrew M. Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law § 50-a and amending the Freedom of Information Law (FOIL) to add certain provisions relating to law enforcement disciplinary records. These provisions direct that certain "law enforcement agency" records concerning employee discipline which formerly were not subject to disclosure pursuant to FOIL are now subject to FOIL. The repeal or amendment of the statutory exemption formerly covering law enforcement disciplinary records was the primary legislative recommendation in several of the Committee's prior annual reports. Briefly stated, pursuant to these amendments, law enforcement disciplinary records which had formerly enjoyed a blanket statutory exemption under Civil Rights Law § 50-a and, correspondingly, FOIL § 87(2)(a), are no longer statutorily exempt and must be analyzed pursuant to FOIL § 87(2)(b)-(q) to determine rights of access.

Following is a discussion of the new provisions and early issues we have encountered since passage of Chapter 96.

1. New "definitions":

The law now defines "law enforcement agency" in a new § 86(8) as:

> a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local

> probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

The law now defines "law enforcement disciplinary record" in a new § 86(6) as:

> any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
> (a) the complaints, allegations, and charges against an employee;
> (b) the name of the employee complained of or charged;
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
> (d) the disposition of any disciplinary proceeding; and
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

The law now defines "law enforcement disciplinary proceeding" in a new § 86(7) as "the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency."

Finally, the law now defines a "technical infraction" within the records of a law enforcement agency employee as:

> a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

2. New provisions concerning specific rights of access to newly-available records:

Under the amended law, if a FOIL request is made for "law enforcement disciplinary records," § 87(4-a) provides that certain aspects of the records *must* be redacted prior to disclosure and § 87(4-b) states that certain aspects of the records *may* be redacted before disclosure.

New § 87(4-a) provides:

> A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

New § 87(4-b) provides:

> A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

3. New instructions relating to the specific information which shall or may be redacted (or withheld) from law enforcement disciplinary records prior to disclosure:

New § 89(2-b) provides that:

> For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:
> (a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation; (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal email addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment; (c) any social security numbers; or (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

Finally, new § 89(2-c) provides that:

> For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical

> infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

It is not surprising that there have been few reported decisions from the courts relating to these very new provisions of law (the one recent written decision of which we are aware is discussed below) as requesters and agencies are working though the FOIL process with respect to this newly-covered record type. However, since the enactment of these amendments to FOIL, we have seen several themes arise in correspondence with and inquiries to the Committee, which are discussed below.

1. Are former employees covered by the new amendments?

The Committee received multiple inquiries concerning the application of the new amendments to the former employees of law enforcement agencies, and, in the absence of decisional law or legislative history explaining the intention of the new statute, the Committee advised that the new amendments do apply to former employees.

The language added to FOIL by Chapter 96 of the Laws of 2020 replaces the confidentiality provisions of Civil Rights Law § 50-a. In a 2013 decision by the Appellate Division, Third Department, the court rejected a FOIL requester's contention that the protections offered by § 50-a could not be applied to the personnel records of former officers. The court concluded that "whether a document constitutes a personnel record under Civil Rights Law § 50-a does not hinge on whether the officer to whom it relates is a current or former employee of the agency maintaining the record." *Hearst Corp. v. New York State Police*, 109 A.D.3d 32, 35 (3d Dep't 2013). In other words, the protections of § 50-a applied to former employees as well as current employees. In our view, it follows that FOIL, and the provisions added to FOIL by the same statute that repealed § 50-a, would apply to all law enforcement disciplinary records maintained by a law enforcement agency, just as § 50-a did, regardless of the current employment status of the subject individual.

Assuming, *arguendo*, that a court were to determine that the definition of law enforcement disciplinary records does not apply to records of or relating to former employees, as we believe it does, the presumption of access to those records still stands. Section 50-a of the Civil Rights Law has been repealed and no longer applies to any category of records. Accordingly, the records of a former law enforcement employee are either subject to the *new* provisions of FOIL or the provisions of FOIL *otherwise applicable to government records*. A request for disciplinary records relating to a former police officer must therefore still be reviewed in the same manner that a request for disciplinary records of any other public employee is reviewed.

2. Are records created before June 12, 2020, covered?

Another question that has arisen with respect to the FOIL amendments is whether they "have retroactive effect" such that they apply to records maintained by the agency that were created prior to the June 12, 2020, enactment of the new law. In our opinion, this question is not one of retroactivity but rather of consistent FOIL application to records maintained by an agency. In general, it has long been understood by courts and the Committee that FOIL renders records "maintained by an agency," regardless of creation date, subject to disclosure. In other words, the question is not whether the

amendments to FOIL concerning the disclosure of law enforcement disciplinary records have retroactive effect, but rather whether records dating before June 12, 2020, are maintained by the agency at the time of a FOIL request. If such records exist, it is our opinion that FOIL directs that for a request for those records, the agency is required to analyze whether each such record must be disclosed pursuant to FOIL or may be withheld pursuant to one of the exemptions appearing in §§ 87(2)(a)-(q) of the Law.

3. What about unsubstantiated, pending or dismissed charges or complaints?

Perhaps the most contentious question we have been asked is whether the new provisions of FOIL continue to offer a blanket exemption for records reflecting "unsubstantiated complaints" made against law enforcement agency employees. There has never been specific language in FOIL addressing "unsubstantiated complaints," either before or since amendment this year. Moreover, there is nothing in the legislative history of the amendments reflecting an intention to specifically deal with unsubstantiated complaints as separate and distinct from any other category of law enforcement agency record. Rather, it appears that FOIL continues to require that "records" be made available unless they are exempt pursuant to one of the provisions of §§ 87(2)(a)-(q) of the Law.

Law enforcement agencies appear to accept that, since the repeal of § 50-a, FOIL requires that they make substantiated complaints available, subject to a review for specific rights of access. However, many law enforcement agencies have questioned whether there continues to be a blanket exemption protecting from disclosure *unsubstantiated* complaints as a distinct category of records.

By July 2020, the Committee had received multiple inquiries on this precise question and no court had ruled on it. On July 27, 2020, the Committee issued an opinion advising that there is no longer a blanket exemption for any law enforcement agency records since the repeal of Civil Rights Law § 50-a. Rather, the Committee advised that, in the absence of judicial precedent or legislative direction, FOIL does not require a law enforcement agency to disclose "unsubstantiated and unfounded complaints against an officer" *where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy* pursuant to FOIL § 87(2)(b) (or is otherwise exempt pursuant to one of the delineated exemptions in FOIL). Our conclusion was that, in light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must now be reviewed in the same manner as a request for disciplinary records of any other public employee long has been.

In October 2020, the New York State Supreme Court in Erie County upheld the validity of the new FOIL amendments against a challenge by a Buffalo police union seeking an injunction against the release of unsubstantiated complaints of police misconduct made against its members. The court's ruling was consistent with the Committee's July advice. The Court, in refusing to enjoin the release of the records, held that such records were no longer protected by the blanket exemption for all police disciplinary records contained in the repealed Civil Rights Law § 50-a. The court found, however, that while there is no longer a statutory exemption for unsubstantiated (or any other type of) complaints, the provisions of FOIL do apply to such records and, accordingly, made it clear that its "rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the exemptions set forth in the Public Officers Law, including § 87(2)(b)." *Buffalo Police Benevolent Association, Inc. v Brown*, ___N.Y.S.3d___, 2020 WL 6039110, at *4, 2020 N.Y. Slip Op. 20257 (Supr. Ct. Erie Co. October 9, 2020).

Because the amendments are so new and no court has yet to formally address any of the substantive provisions thereof, the Committee believes it is premature to offer suggestions for any possible additional changes or clarifications in this report. However, the Committee will continue to monitor inquiries, court decisions and other developments and may offer such suggestions in its reports in the coming years.

B. Amendments to FOIL Dealing with Lawsuits by Commercial Entities to Block Disclosure

FOIL includes unique provisions concerning the treatment of records that a commercial enterprise is required to submit to a state agency pursuant to law or regulation. They are intended to provide a procedural framework for consideration of the so-called "trade secret" exception to rights of access.

Section 87(2)(d) of FOIL permits an agency to withhold records to the extent that they:

> are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise . . .

Under § 89(5) of FOIL, a commercial enterprise that is required to submit records to a state agency may, at the time of submission, identify those portions of the records that it believes would fall within the scope of the exception. If the agency accepts the commercial enterprise's contention, those aspects of the records are kept confidential. If and when a request for the records is made under FOIL, the agency is obliged to contact the enterprise to indicate that a request has been made and to enable the enterprise to explain why it continues to believe that disclosure would cause substantial injury to its competitive position. If the agency agrees with the enterprise's claim, the person requesting the records has the right to appeal the denial of access. If the determination to deny access is sustained, the applicant for the records may seek judicial review, in which case the agency bears the burden of proof. However, if the agency does not agree that disclosure would cause substantial injury to the enterprise's competitive position, the enterprise may appeal. If that appeal is denied, the enterprise has fifteen days to initiate a judicial proceeding to block disclosure. In such a case, the enterprise has the burden of proof.

Because the commercial enterprise has the right to initiate a judicial proceeding to block disclosure, the result is often a delay in disclosure. Since the issuance of our last annual report on December 20, 2019, Governor Cuomo signed into law Chapter 707 of the Laws of 2019, which includes language intended to resolve this problem of delay and expedite this process:

> Section 1. Paragraph (d) of subdivision 5 of section 89 of the public officers law, as amended by chapter 339 of the laws of 2004, is amended to read as follows:
>
> (d) <u>(i)</u> A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision. <u>The proceeding shall be given preference and shall be brought</u>

on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days.
(ii) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.
(iii) An appeal taken from an order of the court requiring disclosure:
(A) shall be given preference; and
(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application by any party to the proceeding; and
(C) shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within sixty days after the date of the notice of appeal, unless consent of further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

LEVERAGING TECHNOLOGY TO ENHANCE TRANSPARENCY DURING THE COVID PANDEMIC

In 2020, due to restrictions and limitations required to combat the COVID-19 pandemic, many governmental organizations have had to rethink how they interact with the public. In response, Governor Andrew M. Cuomo temporarily modified or suspended aspects of some laws designed to ensure continued transparency during the global health emergency. The Committee views the steps taken to promote openness in the face of the pandemic as an important learning opportunity: a chance to see if new technologies leveraged during this emergency can transform open government, contribute to improved efficiency and save money.

On March 12, 2020, Governor Cuomo, in response to a disaster emergency declared pursuant to New York State Executive Law § 28, issued Executive Order 202.1 suspending certain aspects of the Open Meetings Law (the "OML") relating to in-person attendance (the "Order"). The Order provides, in relevant part:

> Suspension of law allowing the attendance of meetings telephonically or other similar service:
>
> Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.

Many public bodies subject to the requirements of the OML have contacted the Committee since March seeking advice on how best to comply with these temporary changes to the Law. Some common themes have emerged, and below we discuss how the Committee has addressed these inquiries (both formally by the issuance of opinions and informally in response to telephone or other requests):

1. What is a transcript? Are minutes still required?

The Order imposes a new, temporary, "transcription" requirement on public bodies. Many smaller public bodies without access to sophisticated technology or a large staff have inquired about the specifics of this new requirement. The Committee has advised that this new temporary requirement calls for a "word for word" transcript of a meeting held remotely, but that such transcript need not be prepared by a professional transcription service. Rather, the transcript can be made from the recording of the meeting that is also required by the Order. Moreover, the Committee has learned that many of the free remote meeting platforms in use by public bodies contain a free "transcript" function that prepares an acceptable transcript from its recording of the meeting.

2. Can a public body limit attendance in the online platform?

The fundamental premise of the OML is that any person who is interested in the deliberations of a public body may be present to view and listen to such deliberations as they occur. The Order is consistent with that fundamental premise. The Committee has advised that any meeting that occurs "remotely by conference call or similar service" pursuant to the Order must be available to anyone who wishes to tune in. The Committee has consistently opined that a public body may not artificially limit attendance at its meetings – to do so would not be consistent with the requirements of the OML.

3. Can a public body combine in-person and remote attendance?

Some public bodies may be ready to re-commence essential meetings "in person." However, such meetings must comply not only with the requirements of the OML but also with the Governor's executive orders and other guidance concerning limitations on physical gatherings. Accordingly, any meeting of a public body covered by the provisions of the OML must permit any member of the public who wishes to attend in person to attend but must also comply with the Governor's orders and any guidance or regulation promulgated by the Governor's administration or the New York State Department of Health.

The Committee has advised that if a public body can reasonably anticipate that any persons who may wish to physically attend a meeting governed by the provisions of the OML cannot be safely physically accommodated in the proposed meeting location pursuant to legal and regulatory restrictions, that public body is required to simulcast to the public, by either video or audio means, the proceedings of the meeting as they are occurring so that all members of the public who wish to "attend" may do so safely.

4. Can a public body convene a quorum of remote members?

In the Committee's view, the plain language of the Order temporarily suspends the requirement that otherwise exists pursuant to the provisions of the OML and General Construction Law that members of the Board be physically convened or convened by videoconferencing in order to achieve a quorum and conduct the public business of the Board.

5. Do members of public bodies participating remotely have to disclose their locations?

The Order may fairly be read to temporarily suspend the OML requirement that notice of the meeting include the physical location of each Board member who is participating by telephone or similar means.

Governor Cuomo made these temporary revisions to requirements of the OML to address an emergency, but that emergency has afforded an opportunity to experiment with new technologies and new approaches to government transparency. New York's courts, both state and federal, have also responded to the COVID crisis by using communications technologies in new and innovative ways. While the Committee has only anecdotal evidence of the impact of these measures, there are substantial indications that new communications technologies can allow governmental bodies to conduct their business in new ways that are more transparent, more efficient and more effective.

For example, retaining the ability for public bodies to regularly conduct open meetings using audio-visual platforms where all officials are visible to each other and the public can fully observe what transpires, can make it easier to attain a quorum and facilitate greater public engagement and allows the easy recording of a visual transcript for future use. This technology promotes efficiency by reducing travel times and wait times for both the participants and the public and may reduce the carbon impact of the meeting by eliminating travel that would otherwise be required. In areas of the state where the technology for members of the public who wish to view a meeting remotely from their homes does not yet reliably exist, public bodies can continue to make provisions for live locations for the public to safely gather to view the meeting.

The potential benefits from new communications technologies seem equally promising in other forums where the costs associated with in-person appearances and wait times might be substantially reduced. Some states are farther forward in seeking to exploit the benefits of technology to make government more transparent and efficient. In Texas, for example, some courts conduct business with the litigants and the judge connected online, while public proceedings are live streamed for public observation online. This has reportedly improved both access to and the quality of justice, particularly among lower income and disadvantaged individuals for whom the need to travel to a courtroom can often impose insurmountable childcare, job-related or other economic burdens.

The Committee recognizes that expanded use of new technologies will raise many questions concerning data security, archiving and storage, capacity, and other issues. However, it is imperative that access to government records and meetings be enhanced through the utilization of resources available in the digital age, and the potential for greater transparency, improved efficiency and cost savings seem tangible and significant and we believe this potential should be studied. In that connection, we encourage the Legislature and the Governor to embark on a comprehensive review of the impact of COVID-related temporary measures concerning transparency and access and investigate ways other states are utilizing new technologies to advance open government. Such an undertaking is a necessary first step if New York is to enhance government openness in ways that might increase transparency while decreasing costs, both for governmental entities and for those who live in and do business here. The Committee stands ready to assist such an effort in any way that would be useful.

2020 COURT DECISIONS OF NOTE

Forsyth v. City of Rochester, 185 A.D.3d 1499 (4th Dep't 2020)
Fourth Department held that City could not charge petitioner fee for costs associated with its review or redaction of body-worn camera footage requested by petitioner.

Gannett Satellite Info. Network, LLC v. New York State Thruway Auth., 181 A.D.3d 1072 (3d Dep't 2020)
Third Department upheld trial court's decision dismissing petition as moot and denying the award of attorney's fees. Court held that petitioner did not establish that Thruway Authority either lacked reasonable basis for denying access to requested records or failed to respond to FOIL request within statutory time, as required to recover counsel fees in its FOIL action. Court opined that even though Authority adjusted its anticipated response date several times over nine-month period (in writing before expiration of previously set anticipated date), its actions were consistent with law by it providing written acknowledgment that it had received petitioner's FOIL request within five business days of receipt of request and by providing a statement of approximate date by which it would respond.

Meola v. Doe, 131 N.Y.S.3d 846 (Supr. Ct. Putnam Co. 2020)
Court affirmed opinion of the Committee that a complainant's identity can be withheld in response to a FOIL request on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Court opined that the complainant's identity is considered irrelevant to the substance of the complaint and how such complaint was processed by the government agency.

LEGISLATIVE RECOMMENDATIONS

A. Additional Proactive Disclosure Will Increase Public Access to Government Records

One of the most frequent complaints to the Committee relates to the unavailability of "public records" on an agency's or public body's website. Since FOIL was first enacted, advances in technology have enhanced the ability to gain access to and widely disseminate public information. The Committee continues to support governmental efforts toward proactive disclosure such as those discussed herein as an efficient means of facilitating quicker and easier public access to public records.

An example of a larger scale effort to render public records of substantial public interest more easily accessible to the public, in 2019, Senator Skoufis and Assemblymember Buchwald introduced bills which would require agencies and the houses of the state legislature to proactively publish on their websites "records or portions of records that are available to the public pursuant to [FOIL], and which, in consideration of their nature, content or subject matter, are determined by the agency to be of substantial interest to the public." S1630-B/A0121-A. The proposed legislation would impose these requirements only when the agency "has the ability to do so" and also states that "[g]uidance on creating records in accessible formats and ensuring their continuing accessibility shall be available from the office [of information] technology [services] and state archives." After being passed by the Senate, the bill failed to advance in the Assembly. It was placed on the Senate Floor Calendar again in 2020.

While the Committee commends and generally supports the intention of these bills, we note that there could be significant financial implications to the affected governmental bodies associated with compliance with the requirements thereof. Further, the proposed bill expressly leaves to governmental discretion the determination of which records are of interest to the public and should therefore be proactively disclosed. The Committee believes that these issues could cause disputes between members of the public and government entities that could give rise to unintended delays to access to records. Such disputes could severely undercut the intended benefits of these bills.

Examples of more targeted and practical approaches to facilitate ease of access to public records are more likely to avoid dispute and hasten public access to government records. For example, open government advocates have recommended legislation requiring agencies to maintain on their websites a virtual "reading room" of records that are frequently requested. Proactive publication of a record that is frequently requested would save members of the public the necessity of making their own requests and provide instant access to the desired record. The Committee believes that mandating the public posting of frequently, or even already, requested records introduces few logistical or financial obstacles to such bodies.

Another example of a practical approach to facilitate access to frequently-sought public records would be a requirement to proactively post on the relevant municipal websites, if such websites are maintained by the municipality, the annual Financial Disclosure Forms of local government elected officials. The intent of such a requirement would be to mirror the requirement that already exists for state government elected officials. The Committee does not believe that such a requirement would impose undue obligations on localities maintaining a website, and may reduce FOIL volume for such municipalities.

Several bills have been introduced in the Legislature during the current session that involve the proactive disclosure of specific government records. Assemblymember Paulin has introduced several targeted bills increasing proactive disclosure of identified government records.

In A10983A, Assemblymember Paulin seeks to amend § 103(e) of the OML to add a requirement that records subject to that provision be made available to the public at least twenty-four hours prior to the open meeting and to remove the "to the extent practicable" language therein. The bill has been referred to the Assembly Governmental Operations Committee. Section 103(e) of the OML would read:

> Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, [~~to the extent practicable as determined by the agency or the department,~~] **at least twenty-four hours** prior to [~~or at~~] the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website [~~to the extent practicable as determined by the agency or the department,~~ **at least twenty-four hours** prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

A10983A would also amend §103(f) of the OML to require all public bodies, not just public bodies associated with State agencies and authorities, which maintain a website and utilize a high-speed internet connection, to stream open meetings in real time and post the recordings on their websites, and maintain such recordings for five years. Section 103(f) of the OML would read:

> Open meetings of [~~an agency or authority~~] **a public body** shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the [~~agency or authority~~] **public body** maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on **or available through** such website in real-time, and **video recordings of such open meetings shall be** posted on such website within **five business days of the meeting** and for a reasonable time after the meeting **and such recordings shall be maintained for a period of not less than five years**. ~~For purposes of this subdivision, the term "authority" shall mean a public authority or public benefit corporation created by or existing under any state law, at least one of whose members is appointed by the governor (including any subsidiaries of such public authority or public benefit corporation), other than an interstate or international authority or public benefit corporation.~~

The Committee supports the intention of A10983A and believes that these amendments may be appropriate and encourages the legislature to study and evaluate whether these changes may impose unanticipated burdens on public bodies. In addition, the Committee notes that the proposed five year retention period for posted meeting recordings is considerably longer than the four-month period currently required by the otherwise applicable record retention and disposition schedules established by the New York State Archives for State and local governments. The Committee would therefore recommend consulting with the New York State Archives to understand the possible ramifications of this alteration before passage.

Assemblymember Paulin has also proposed an amendment to § 106(3) of the OML to add a requirement that public bodies that maintain a regularly updated website and utilize a high-speed internet connection post their minutes to their websites – rather than simply having them available upon request as is already required – within two weeks of a meeting. Pursuant to the bill, A11142, § 106(3) would provide:

> Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two [~~hereof~~] **of this section** shall be available to the public within one week from the date of the executive session. **If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high-speed internet connection, such minutes shall be posted on the website within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two of this section shall be available to the public within one week from the date of the executive session.**

The Committee supports the intention of A11142 and believes that adding a requirement to post minutes within the time that they are already statutorily required to be available to the public presents no logistical or financial obstacles to bodies that maintain a regularly updated website and utilize a high-speed internet connection. The Committee notes that entities whose minutes will still be in draft form at the time of the posting requirement may choose to identify such fact by placing the word "draft" on such minutes before posting them.

B. Clarify FOIL to More Strictly Define the Period for Providing Requested Records

In 2019, Senator Harckham and Assemblymember Buchwald introduced bills (S6608A/A0119A) that would clarify the required response periods for FOIL requests. While the Committee has opined that a series of extensions providing progressively later dates certain by which an agency will respond to a FOIL request is not consistent with the intent of FOIL, New York courts have not agreed with this opinion. These bills would address this issue (and some of the other technical concerns the Committee has raised relating to compliance with FOIL). This bill would clarify the intent of the legislature for FOIL requesters and governmental entities subject to FOIL by more strictly defining the time in which an agency is required to respond to FOIL request. A portion of § 89(3)(a) would be amended to read:

> If [~~an agency determines to grant a request in whole or in part, and if~~] circumstances prevent **an agency from notifying the person requesting**

the record or records of the agency's determination regarding the rights of access and disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to [~~grant the request~~] **do so** within twenty business days and a date certain within a reasonable period, depending on the circumstances, when [~~the request will be granted in whole or in part~~] **a determination regarding disclosure will be rendered**.

The bill would also amend FOIL to clarify the following:

1. There are two provisions of FOIL that state that an unwarranted invasion of personal privacy includes the disclosure of a list of names and addresses if a list would be used for solicitation or fund-raising purposes. Because the language involves personal privacy, the Committee has long advised that the ability to deny access pertains to a list of natural persons and their residential addresses. The exception does not apply to a list of vendors or others engaged in a business or professional activity.

2. Section 89(3)(a) of FOIL states, in part, that "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity . . . ." The term "prepare" should be replaced by "create." The principle is that FOIL pertains to existing records and does not require that an agency create new records to respond to a request. The term "prepare" has been interpreted far more broadly than intended. For example, some agencies have considered the conversion of a record from one format to another or the process of redaction to be included in the "preparation" of a record. The use of the term "create" more accurately reflects the intent of the statute.

The bill passed the Assembly in 2019 and again in 2020 but has yet to advance in the Senate.

C. Transparency is Enhanced by the Reasonable Use of Cameras in Courtrooms

While several judges have determined that the statutory ban on the use of cameras is unconstitutional, legislation remains necessary to ensure that court proceedings are meaningfully open to the public. The Committee reaffirms its support for the concept, subject to reasonable restrictions considerate to the needs of witnesses.

As former Chief Judge Lippman expressed, "[t]he public has a right to observe the critical work that our courts do each and every day to see how our laws are being interpreted, how our rights are being adjudicated and how criminals are being punished, as well as how our taxpayer dollars are being spent."

A bill proposed in the Senate and Assembly and referred to the Judiciary Committee (S5039/ A4216) would allow the Chief Judge of the Court of Appeals or his or her designee to authorize an experimental program in which presiding trial judges, in their discretion, would permit audio-visual coverage of civil and criminal court proceedings, including trials. The bill was referred to the Senate and Assembly

Judiciary Committees in 2019 but failed to advance. It was referred again to the same committees in 2020.

D. Government Created Entities Should Be Subject to FOIL

An entity created by a government agency or a subsidiary or affiliate of a government agency is, in reality, an extension of the government. The records of such an entity should fall within the coverage of FOIL.

FOIL applies to agency records. To ensure that the records of entities created by government are subject to FOIL, the definition of "agency" in FOIL § 86(3) should be amended to mean:

> any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, as well as entities created by an agency or that are governed by a board of directors or similar body a majority of which is designated by one or more state or local government officials, except the judiciary or the state legislature.

While profit or not-for-profit corporations would not, in most instances, be subject to FOIL because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of FOIL. *See Buffalo News v. Buffalo Enterprise Development Corp.,* 84 N.Y.2d 488 (1994); *Hearst Corporation v Research Foundation of the State of New York*, 24 Misc.3d 611 (2012).

We emphasize that the receipt of government funding or entering into contractual relationships with a government agency would not transform a private entity into a government agency. Rather, the Committee's proposal is limited to those entities which, despite their corporate status, are subsidiaries or affiliates of a government agency.

In 2019, Senator Skoufis and Assemblymember Schimminger introduced a bill (S5263/A2399) to amend FOIL consistent with the above proposal. However, the bill failed to advance beyond the Senate Rules Committee and Assembly Governmental Operations Committee. The bill was again referred to committees in 2020.

E. Bring JCOPE within the coverage of FOIL and the Open Meetings Law

Currently, the Joint Commission on Public Ethics (JCOPE) is exempt from FOIL and the OML. JCOPE and its predecessor, the Commission on Public Integrity, were created to offer guidance and opinions to public officers and employees concerning ethics and conflicts of interest, and to investigate possible breaches of law relating to statutes that contain standards concerning ethical conduct. In addition, elected state officials and policy making employees are required to submit detailed financial disclosure statements to JCOPE.

Every municipal ethics body is required to comply with FOIL and the OML, and those laws do not create a hindrance to their operations. On the contrary, the exceptions to rights of access provide those bodies with the flexibility necessary to function effectively. Moreover, the balance inherent in those laws serves to enhance the public's confidence in government.

An area of particular criticism that should be corrected involves a basic element of government accountability: knowing how our government officials vote on issues. A requirement of FOIL since its enactment in 1974, § 87(3)(a) is an obligation that agencies maintain records indicating the manner in which its members cast their votes. Because FOIL does not apply to JCOPE, the public has no way of knowing whether or how its members vote on matters that come before the Commission. The absence of accountability of that nature breeds mistrust and clearly warrants the change that we seek.

In 2019, the Senate and Assembly introduced a bill (S0594/A1282) proposing a Constitutional Amendment to replace JCOPE and the Legislative Ethics Commission with a single, independent, enforcement agency (similar to the Commission on Judicial Conduct established in Article VI of the State Constitution) to deter corruption in the legislative and executive branches of state government. Under this bill, the agency would be subject to FOIL and OML. The bill was referred to the Office of the Attorney General for an opinion in 2020 and that opinion was shared with the Assembly Judiciary Committee. The bill has yet to advance beyond that committee.

F. Clarify Civil Rights Law § 50-b to Protect Privacy of Victims of Sex Offenses, Not that of Defendants

Section 50-b of the Civil Rights Law states that a record that identifies or tends to identify the victims of sex offenses cannot be disclosed, even if redactions would preclude identification of a victim. Subdivision (1) of that statute provides:

> The identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, or an offense involving the alleged transmission of the human immuno-deficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.

Due to the breadth and vagueness of the language quoted above, public officials have been reluctant to disclose any information concerning sex offenses for fear of the consequence set forth § 50-c of Civil Rights Law discussed below. The Committee recommends that the second sentence of § 50-b be amended to state that: "No <u>portion of any</u> report, paper . . . which identifies such a victim shall be available for public inspection."

Section 50-c of the Civil Rights Law states that:

> Private right of action. If the identity of the victim of a sex offense defined in subdivision one of section fifty-b of this article is disclosed in violation of such section, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

This section refers to any disclosure made in violation of § 50-b, whether the disclosure is intentional or inadvertent, or made after the victim's identity has been disclosed by other means. There should be standards that specify the circumstances under which a disclosure permits the initiation of litigation to recover damages, and we recommend that § 50-c be amended as follows:

> Private right of action. If the identity of the victim of an offense is disclosed in violation of section fifty-b of this article and has not otherwise been publicly disclosed, such victim [any person injured by such disclosure] may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

In 2019, Senator Lanza introduced a bill (S0413/No Same As) to amend §§ 50-b and 50-c consistent with the above proposals but the bill failed to advance beyond the Senate Codes Committee. In addition, Senator Skoufis and Assemblymember Englebright introduced bills (S5496/A3939) which would, among other things, amend § 50-b as proposed by the Committee. S5496/A3939 was passed by both houses of the legislature but was vetoed by the Governor in December 2019. The veto message stated, in part, that law enforcement agencies and district attorneys had expressed concern that "the identity of a victim and other identifying case information could be released, thereby causing a victim's traumas to be prolonged or relived." The Governor stated, however, that he "support[s] the overarching goal of this legislation to encourage transparency in government and pledge to work with the Legislature to further these efforts."

G. The Disclosure of 911 Records Should Be Governed By FOIL

Currently records of 911 calls are, in most instances, confidential, even when it is in the public's interest to disclose. E911 is the term used to describe an "enhanced" 911 emergency system. Using that system, the recipient of the emergency call has the ability to know the phone number used to make the call and the location from which the call was made. Section 308(4) of County Law prohibits the disclosure of records of E911 calls. The law states:

> Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and

> shall not be utilized for any commercial purpose other than the provision of emergency services.

The Committee recommends that § 308(4) of the County Law be repealed. By bringing records of E911 calls within the coverage of FOIL, they can be made available by law enforcement officials when disclosure would enhance their functions, to the individuals who made the calls, and to the public in instances in which there is no valid basis for denying access. When there are good reasons for denying access – *i.e*., to prevent unwarranted invasions of personal privacy, to protect victims of or witnesses to crimes, to preclude interference with a law enforcement investigation – FOIL already clearly provides grounds for withholding the records.[1]

A proposal to repeal County Law § 308(4) was introduced by Senator Hoylman and Assemblymember Abinanti (S1097 /A1579) in 2019 and referred to the Senate and Assembly Local Governments Committees in 2019 but failed to advance. It was referred again to the same committees in 2020.

H. Amend FOIL to Create a Presumption of Access to Records of the State Legislature

To promote accountability, transparency, and trust, the Committee urges that FOIL be amended to require the State Legislature to meet standards of accountability and disclosure in a manner analogous to those maintained by state and local agencies.

Legislators have expressed concern that expanding the scope of FOIL would require disclosure of communications from constituents that relate to intimate or personal details of the constituent's life. It is our opinion that the Legislature would have authority to withhold such communications on the ground that disclosure would constitute an unwarranted invasion of personal privacy. To confirm the existence of protection of those records, § 89(2)(b), which includes a series of examples of unwarranted invasions of personal privacy, could be amended to include reference to communications of a personal nature between legislators and their constituents.

The bill introduced in the Senate and the Assembly proposing a constitutional amendment to replace JCOPE also proposed making the State Legislature subject to FOIL in the same manner as the executive branch. Senator Krueger also introduced a bill (S3940) in 2019 which would do the same. The bill was referred to the Senate Committee on Investigations & Government Operations in 2019 but failed to advance. It was referred again to the same committee in 2020.

[1] County Law does not apply to New York City, which has for years granted or denied access to records of all 911 calls as appropriate pursuant to FOIL.

SERVICES RENDERED BY THE COMMITTEE

1712 TELEPHONE INQUIRIES
1679 RESPONSES TO WRITTEN INQUIRIES
44 FORMAL ADVISORY OPINIONS
23 PRESENTATIONS
4 MEDIA INTERVIEWS
THOUSANDS OF CORRESPONDENTS ADDRESSED
THOUSANDS OF RADIO AND WEBINAR LISTENERS

Committee staff are responsible for providing legal advice and guidance in response to verbal and written inquiries concerning New York's Freedom of Information, Open Meetings, and Personal Privacy Protection Laws from representatives of the government, public, and news media. In that connection, on a yearly basis Committee staff track, log and respond to thousands of phone and written inquiries, prepare hundreds of formal and informal legal advisory opinions, and provide open government laws training to dozens of interested groups. For purposes of the data presented in this report, the Committee's reporting year is November 1, 2019, through October 31, 2020.

2020 has been, for everyone, an unprecedented year about which no one can make reliable assumptions and with which no other year may compare – and perhaps differences in the provision of services might be explained by the circumstances presented this year. However, notwithstanding the pendency of a global pandemic that has changed virtually everything about how our constituencies interact with each other and with government, the small staff at the Committee have been able to continue to provide normal service levels to our correspondents. Staff have made every effort to provide needed services consistent with public health advice and state and local directives, guidance and regulation. In fact, Committee staff responded to 100% of the inquiries received and have been able to conduct training or present on open government issues whenever requested.

During the past year, the Committee responded to over 1,700 telephone inquiries, over 1,600 requests for guidance answered by email or U.S. mail and responded to 44 requests for formal advisory opinions regarding FOIL, the OML and Personal Privacy Protection Law (PPPL). In addition, staff gave 23 presentations for government and news media organizations, on campus and in public forums, training and educating approximately 2,000 people concerning public access to government information and meetings. Further, staff participated in four wide-ranging media interviews. We are grateful that many entities are now broadcasting, webcasting and/or recording our presentations, thereby making them available to others.

A. Online Access

Since its creation in 1974, the Committee's staff has prepared more than 25,000 written advisory opinions in response to inquiries regarding New York's open government laws. The opinions prepared since early 1993 that have educational or precedential value are available online through searchable indices.

In addition to the text of open government statutes and the advisory opinions, the Committee's website also includes:

- Model forms for email requests and responses
http://www.dos.ny.gov/coog/emailrequest.html;
http://www.dos.ny.gov/coog/emailresponse.html

- Regulations promulgated by the Committee (21 NYCRR Part 1401)
http://www.dos.ny.gov/coog/regscoog.html

- "Your Right to Know," a guide to FOIL and OML that includes sample letters of request and appeal, as well as links to a variety of additional material.
http://www.dos.ny.gov/coog/Right_to_know.html

- "You Should Know," which describes the Personal Privacy Protection Law
http://www.dos.ny.gov/coog/shldno1.html

- Responses to "FAQs" (frequently asked questions)
http://www.dos.ny.gov/coog/freedomfaq.html;
http://www.dos.ny.gov/coog/openmeetinglawfaq.html

- "News" that describes matters of broad public interest and significant developments in legislation or judicial decisions
http://www.dos.ny.gov/coog/news.html

B. Telephone Assistance

This year, Committee staff answered approximately 1,712 telephone inquiries, the majority of which pertained to FOIL. However, this year, a larger proportion than normal pertained to the Open Meetings Law.

C. Informal Advisory Opinions and Written Inquiry Responses

This past year, the Committee issued 1,679 informal advisory opinions and written inquiry responses by email and postal mail regarding FOIL, OML and the PPPL. Based on the data captured, the majority of the requests concern issues related to FOIL.

D. Formal Advisory Opinions

Committee staff is conscientious about providing guidance as efficiently as possible, including links to online advisory opinions when appropriate. When a written response from staff contained a substantive opinion with legal analysis, it was recorded as an advisory opinion as before.

Committee staff prepared 44 formal advisory opinions in response to requests from across New York. As is true in years past, the majority of the opinions pertained to FOIL.

E. Presentations

An important aspect of the Committee's work involves efforts to educate by means of seminars, workshops, radio and television interview programs, and various public presentations. During the reporting year, staff gave 23 presentations to organizations and entities identified below by interest group. Although the number of individual presentations was lower than in past years due to restrictions on in-person gatherings, we estimate that close to 2,000 individuals received contemporaneous training and education through those events, and countless additional individuals benefitted from recordings of these programs posted on entity websites and materials posted on the Committee website.

Organizations:

Association of School Business Officials New York
Association of Towns, Training for Newly Elected Officials (Albany)
Association of Towns, Training for Newly Elected Officials (Rochester)
City of Auburn/Cayuga County Law Enforcement FOIL Training
Empire State Fellows' Leadership and Learning Session
International Center of the Capital Region, Armenian Parliament Delegation
Judicial Institute CLE Recording
New York Coalition for Open Government OML webinar
New York State Teachers Centers
New York Conference of Mayors Fall Training School (FOIL)
New York Conference of Mayors Fall Training School (OML)
NYS Association of Counties
NYS Association of Municipal Purchasing Officers
NYS Conservation District Employee Association Water Quality Symposium
NYS School Board Association Annual Convention
New York State Association of Counties webinar regarding Executive Order 202.1
New York State Bar Association webinar regarding Executive Order 202.1
New York State Bar Association State and Local Government Section CLE
Patterns for Progress webinar regarding Executive Order 202.1
Planning Board Association webinar regarding Executive Order 202.1
Rockland County FOIL Officers FOIL Training
Southern Tier Regional Planning Institute
State Senator Brad Hoylman and Manhattan Borough President Gale Brewer webinar regarding Executive Order 202.1

Media Interviews (as opposed to responses to specific inquiries about FOIL, OML or PPPL):

Glens Falls Post Star
New York Public Radio/Gothamist
Gannett/USA Today
Cortland Standard

McKinney's Consolidated Laws of New York Annotated
Statutes (Refs & Annos)
Chapter 5. Retroactive Operation

McKinney's Statutes § 54

§ 54. Remedial statutes and curative acts

Currentness

a. Remedial statutes

Remedial statutes constitute an exception to the general rule that statutes are not to be given a retroactive operation, but only to the extent that they do not impair vested rights.

COMMENT

As a general rule, remedial statutes constitute an exception to the general rule that statutes are not to be given a retroactive operation, [13] since they are to be liberally construed to spread their beneficial results as widely as possible; [14] and the retroactive application of such statutes is constitutional. [15] In this respect, remedial statutes are those designed to correct imperfections in the prior law, or which provide a remedy for a wrong where none previously existed. [16] Thus it is said that the requirement of express words in order to authorize a retroactive construction of a statute is not to be applied to remedial legislation where vested or constitutional rights are not involved. [17]

Every statute pertaining to a remedy is retroactive in that it operates upon all pending actions unless they are expressly excepted, [18] but this does not apply to a statute whereby a new right is established even though it be remedial. [19] Similarly stated, in the absence of language indicating a contrary legislative intent, a remedial statute is ordinarily applied to procedural steps in pending actions, and is given retrospective effect in so far as the statute provides a change in the form of a remedy or provides a new remedy for an existing wrong. [20] There is a presumption, at least in the absence of any contrary indication, that the Legislature intended changes in the form of remedies to be applicable to proceedings thereafter instituted for the redress of wrongs already done. [21]

The Legislature may not, however, under guise of a remedial act, provide a particular remedy that will impair property rights vested before its passage; [22] nor may it put again in jeopardy rights and property established by judgments already obtained; [23] but a vested right is not disturbed by giving effect to a new remedy by appeal in pending proceeding. [24]

Various statutes have been held to be remedial, and therefore properly made retroactive, [25] such as a statute providing that in a stockholders' derivative action plaintiff must be a stockholder at time of transaction, [26] a statute providing that it shall not be deemed to deny injunctive relief to a convict for improper treatment where such constitutes a violation of his constitutional rights, [27<] a statute legitimating the offspring of marriages otherwise void, [28] or a statute authorizing the taking of depositions. [29] Likewise, an act in relation to fraud in assessments for local improvements, authorizing the vacation of certain assessments, has been applied to those made before the passage of the act, [30] and

a statute authorizing a mechanic's lien has been held to include within its scope building contracts entered into before the statute became a law. [31] Similarly an act in reference to the accounting of supervisors, authorizing an action to be brought in the name of the town against a supervisor who has neglected to account, etc., has been construed to extend to cases which arose before the approval of the act. [32]

ANNOTATIONS

13. Claim of Altha Busch v. Austin Co., 1971, 37 A.D.2d 648, 322 N.Y.S.2d 416.

Knapp v. Consolidated Rail Corp., 1997, 171 Misc.2d 597, 655 N.Y.S.2d 732.

465 Greenwich Street Associates, Inc. v. Schmidt, 1982, 116 Misc.2d 62, 455 N.Y.S.2d 83.

Burke v. New York State Bd. of Parole, 1980, 103 Misc.2d 615, 426 N.Y.S.2d 429.

Luisi v. Department of Fire, 1979, 101 Misc.2d 529, 421 N.Y.S.2d 338.

Verley v. Trudeau, 1975, 84 Misc.2d 58, 375 N.Y.S.2d 265.

Gordon & Gordon v. Madavin, Ltd., 1981, 83 Misc.2d 570, 441 N.Y.S.2d 148.

Shielcrawt v. Moffett, 1945, 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

Cahill v. Wissner, 1918, 183 App.Div. 659, 170 N.Y. 1000.

Davidoff v. Chipornoi, 1929, 101 Misc. 291, 166 N.Y.S. 996.

Warner's Cafeteria v. John F. Trommer, Inc., 1933, 267 N.Y.S. 805, 149 Misc. 613; Town of Harrison v. Sunny Ridge Builders, 1937, 8 N.Y.S.2d 632, 170 Misc. 161 (statutes, except those dealing with remedial procedure, are to be construed as prospective only unless there is clear legislative expression that they shall be retroactive).

Carder Realty Corp. v. State, 1940, 260 App.Div. 459, 23 N.Y.S.2d 395.

Hayman v. Morris, 1942, 37 N.Y.S.2d 884, judgment settled on other grounds 179 Misc. 265, 38 N.Y.S.2d 782.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78, affirmed 268 App.Div. 352, 51 N.Y.S.2d 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

In re Lott, 1944, 49 N.Y.S.2d 134.

Coane v. American Distilling Co., 1944, 182 Misc. 926, 49 N.Y.S.2d 838.

Marcomo Stevedoring Corp. v. Nathanson, 1951, 202 Misc. 154, 108 N.Y.S.2d 789.

McK. Statutes cited in Mlodozeniec v. Worthington Corp., 1959, 9 A.D.2d 21, 189 N.Y.S.2d 468, 471, affirmed 8 N.Y.S.2d 918, 204 N.Y.S.2d 163, certiorari denied 81 S.Ct. 356, 364 U.S. 628, 5 L.Ed.2d 363.

In re Robinson's Claim, 1960, 11 A.D.2d 374, 207 N.Y.S.2d 297.

Protnicki v. New York State Dept. of Civil Service, 1961, 28 Misc.2d 1022, 220 N.Y.S.2d 698, reversed on other grounds 8 A.D.2d 859, 236 N.Y.S.2d 423.

McK. Statutes cited in Kaplan v. Kaplan, 1968, 56 Misc.2d 860, 290 N.Y.S.2d 345, 347.

Shapiro v. Shapiro, 1969, 59 Misc.2d 412, 298 N.Y.S.2d 785, 792.

Marcelin v. Scott, 1969, 304 N.Y.S.2d 299, 301.

Condemnation

Remedial statutes pertaining to condemnation proceedings by city of New York apply to pending proceedings, and facts which counsel for city could not theretofore present to court may now be presented in pending proceeding. In re Union Turnpike, City of New York, 1935, 154 Misc. 455, 278 N.Y.S. 412, affirmed 243 A.D. 811, 278 N.Y.S. 430, affirmed In re Union Turnpike in Borough of Queens, City of New York, 268 N.Y. 681, 198 N.E. 556.

Change in form

Generally, statutes are to be construed as prospective, except where statute changes form of remedies as distinguished from substance. Micamold Radio Corporation v. Beedie, 1934, 156 Misc. 390, 282 N.Y.S. 77; Hollenbach v. Born, 1924, 238 N.Y. 34, 143 N.E. 782.

New remedy

No retroactive effect may be attributed to statute granting a new remedy where no remedy existed before, in absence of express words or necessary implication requiring such interpretation. Western New York & P. Ry. Co. v. City of Buffalo, 1941, 176 Misc. 350, 27 N.Y.S.2d 249.

14. In re Deitch's Estate, 1981, 106 Misc.2d 690, 435 N.Y.S.2d 244.

Application of City of New York Spuyten Duyvil Shorefront Park, 1972, 71 Misc.2d 1019, 337 N.Y.S.2d 753.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78, affirmed 268 App.Div. 352, 51 N.Y.S.2d 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

For other cases see § 321, post.

15. Application of City of New York Spuyten Duyvil Shorefront Park, 1972, 71 Misc.2d 1019, 337 N.Y.S.2d 753.

Himmel v. Chase Manhattan Bank, 1965, 47 Misc.2d 93, 262 N.Y.S.2d 515.

16. Application of City of New York Spuyten Duyvil Shorefront Park, 1972, 71 Misc.2d 1019, 337 N.Y.S.2d 753.

17. Brown v. Ellis, 1989, 145 Misc.2d 1085, 548 N.Y.S.2d 841, affirmed 150 Misc.2d 375, 575 N.Y.S.2d 622.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78, affirmed 268 App.Div. 352, 51 N.Y. 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

For other cases see § 35, ante.

Changes of procedure

Remedial statutes, which form an exception to general rule that statutes are to be construed prospectively, are those which involve changes of procedure, of form of remedy, or which provide new remedy for an existing wrong. Shapiro v. Shapiro, 1969, 59 Misc.2d 412, 298 N.Y.S.2d 785.

17. Estate of Re v. Kornstein Veisz & Wexler, 1997, 958 F.Supp. 907.

Wargo v. Longo, 1976, 85 Misc.2d 898, 380 N.Y.S.2d 1009.

Burch v. Newbury, 10 N.Y. 374.

Jacobus v. Colgate, 1916, 217 N.Y. 235, 111 N.E. 837.

Fetes v. Volmer, 1891, 11 N.Y.S. 552.

Matter of Hoople, 1904, 93 A.D. 486, 87 N.Y.S. 842, reversed on other grounds 179 N.Y. 308, 72 N.E. 229.

People ex rel. Gabriel v. Warden of New York County Penitentiary, Wards Island, 1919, 109 Misc. 248, 178 N.Y.S. 595.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78, affirmed 268 A.D. 352, 51 N.Y.S.2d 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

McK. Statutes cited in Yoli v. Yoli, 1967, 55 Misc.2d 416, 285 N.Y.S.2d 470, 473.

18. Rubenstein v. Devoe, 1975, 84 Misc.2d 477, 376 N.Y.S.2d 843.

Kugel v. Telsey, 1937, 250 A.D. 638, 295 N.Y.S. 148.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78, affirmed 268 A.D. 352, 51 N.Y.S. 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

Application of Fleetwood Acres, 1945, 186 Misc. 299, 62 N.Y.S.2d 669, affirmed 270 A.D. 1050, 63 N.Y.S.2d 238, appeal denied 271 A.D. 754, 64 N.Y.S.2d 910.

19. Luisi v. Department of Fire, 1979, 101 Misc.2d 529, 421 N.Y.S.2d 338.

Jacobus v. Colgate, 1916, 217 N.Y. 235, 111 N.E. 837.

Shielcrawt v. Moffett, 1945, 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

Carder Realty Corporation v. State, 1940, 260 A.D. 459, 23 N.Y.S.2d 395.

Wilner Friends Credit Ass'n v. Scheffres, 1941, 175 Misc. 909, 25 N.Y.S.2d 664.

Western New York & P. Ry. Co. v. City of Buffalo, 1941, 176 Misc. 350, 27 N.Y.S.2d 249.

Wilson v. Wilson, 1943, 45 N.Y.S.2d 733.

McK. Statutes quoted in Shielcrawt v. Moffett, 1944, 49 N.Y.S.2d 64, 78 affirmed 268 A.D. 352, 51 N.Y.S.2d 188, reversed on other grounds 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

Armstrong v. Germain, 1950, 98 N.Y.S.2d 946.

In re Karnbach's Estate, 1955, 208 Misc. 693, 144 N.Y.S.2d 872.

Dobler v. Kaplan, 1961, 29 Misc.2d 294, 220 N.Y.S.2d 701, reversed on other grounds 15 N.Y.2d 606, 255 N.Y.S.2d 481, 203 N.E.2d 799.

McK. Statutes cited in Shapiro v. Shapiro, 1969, 59 Misc.2d 412, 298 N.Y.S.2d 785, 792.

Presumption

Where effect of statute is to create a right of action which did not previously exist, it is presumed that statute was intended to have only a prospective application. Gleason v. Gleason, 1969, 32 A.D.2d 402, 302 N.Y.S.2d 857.

Supplementary proceedings

Proceedings supplementary to judgment are proceedings of a remedial nature, and statute relating to them may be given retroactive application unless statute supplies remedy where none previously existed. Gotham Nat. Bank of New York v. Strunsky, 1937, 162 Misc. 673, 293 N.Y.S. 961.

New right

Statutes should generally be construed as prospective only, even if remedial, where a new right is established. Lewittes & Sons v. Perlow, 1936, 254 A.D. 94, 3 N.Y.S.2d 916.

20. Primoff v. Duell, 1976, 85 Misc.2d 1047, 381 N.Y.S.2d 947.

City of Corning v. Corning Police Dept., etc., 1974, 81 Misc.2d 294, 366 N.Y.S.2d 241.

Shielcrawt v. Moffett, 1945, 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, motion denied 294 N.Y. 840, 62 N.E.2d 392.

21. Kaplan v. Kaplan, 1969, 31 A.D.2d 247, 297 N.Y.S.2d 881.

22. In re Estate of Cohen, 1971, 68 Misc.2d 445, 326 N.Y.S.2d 595.

People ex rel. Reibman v. Warden of County Jail at Salem, 1934, 242 App.Div. 282, 275 N.Y.S. 59.

23. Feiber Realty Corporation v. Abel, 1922, 265 N.Y. 94, 191 N.E. 847.

24. Havens v. Dodge, 1927, 221 App.Div. 475, 224 N.Y.S. 193, affirmed 250 N.Y. 617, 166 N.E. 346.

25. Jackson ex dem. v. Lervey, 5 Cow. 397 (statute authorizing marriage of slaves).

Sale of property

Statute providing that, where the ownership of realty is divided into one or more possessory and one or more future interests, the owner of any interest in such realty may apply to the Supreme Court for an order directing sale of property is "remedial" and "procedural." In re Gaffers' Estate, 1889, 254 A.D. 448, 5 N.Y.S.2d 671.

26. Coane v. American Distilling Co., 1944, 182 Misc. 926, 49 N.Y.S.2d 838.

27. Marcelin v. Scott, 1969, 33 A.D.2d 588, 304 N.Y.S.2d 299.

28. Brower v. Bowers, 1 Abb.Ct.App.Dec. 214, 9 Leg.Obs. 196.

29. Marine Trust Co. v. Nuway Devices, 1923, 204 App.Div. 752, 198 N.Y.S. 715.

30. Matter of Beams, 17 How.Prac. 459.

31. Sullivan v. Brewster, 1 E. D. Smith 681, 8 How.Prac. 207.

Miller v. Moore, 1 E. D. Smith 739.

Hauptman v. Catlin, 3 E. D. Smith 666, 4 Abb.Prac. 472, affirmed 20 N.Y. 247.

See Donaldson v. O'Connor, 1 E. D. Smith 695; Miller v. Moore, 1 E. D. Smith, 739, 12 Leg.Obs. 53 (holding that Mechanic's Lien Law of 1851 did not apply to work done before it went into effect, though it was construed to apply to contracts previously made).

32. Town of Guilford v. Cooley, 58 N.Y. 116.

b. Curative statutes

Curative acts, or statutes designed to remedy specific defects in proceedings already prosecuted may have a valid retroactive operation, although they may not cure a jurisdictional defect or effectively defeat vested rights.

COMMENT

In addition to remedial statutes, which constitute an exception to the general rule against retroactive operation,[33] there is another group of statutes which are always retroactive, and which pertain to past events exclusively. They are curative acts, or statutes designed to remedy specific defects in proceedings already prosecuted.[34] The permissibility of a curative act is unquestioned within the restrictions that have grown up in constitutional practice.[35] These restrictions are that they can not cure a jurisdictional defect,[36] or be effective if they purport to defeat vested rights.[37]

Generally speaking, the Legislature may ratify anything that it might have authorized originally,[38] and it possesses the power to retroactively validate a procedure which involves only irregularities in the mode or manner of performing some act.[39] Hence it frequently enacts that certain proceedings for the collection of taxes are valid, despite irregularities in the procedure for the levy of the tax or the sale of the property for the enforcement thereof.[40] Similarly it may pass a law to cure defects or irregularities in a municipal subscription to a public improvement,[41] or in the publication of public advertisements, notices, and proceedings.[42]

It is to be observed, however, that such corrections are in order only if the detail is one which the Legislature might have dispensed with in the first instance, [43] and where the defect is jurisdictional, any subsequent attempt to cure it would be void. [44] Thus, if a tax assessment is invalid, the subsequent proceedings for the sale of the land for the non-payment of the tax are void, and cannot be cured by a retroactive enactment of the legislature. [45] Similarly a tax sale may not be validated where there was no notice of sale or of the right to redeem. [46]

A curative act may not operate to transfer property from one person to another; [47] to validate the election of an officer under an unconstitutional law; [48] to ratify the invalid acts of municipal officers; [49] or to validate traffic regulations improperly promulgated. [50] Occasionally technical errors in past proceedings will be deemed corrected by implication. Thus a defect in the organization of a corporation would be considered remedied by a subsequent legislative recognition of the company as a legal corporate entity; [51] but ratification of prior unlawful acts, whether by the legislature or by individuals, is a matter of intention and should be made to appear, since sound policy requires that legislative ratification of what was previously unlawful should be found in plain language, and not left to uncertain implication and doubtful inferences. [52]

ANNOTATIONS

33. See ante this section, subdivision a.

34. Garal Wholesalers, Ltd. v. Miller Brewing Co., 2002, 193 Misc.2d 630, 751 N.Y.S.2d 679.

Town of Coeymans v. Malphrus, 1979, 100 Misc.2d 589, 419 N.Y.S.2d 833, appeal dismissed 76 A.D.2d 1002, 429 N.Y.S.2d 291.

New York & L.I.R. Co. v. O'Brien, 1907, 121 App.Div. 819, 106 N.Y.S. 909, affirmed 192 N.Y. 558, 85 N.E. 1113; Barry v. Crandall, 1920, 180 N.Y.S. 183.

35. London v. Wagner, 1959, 22 Misc.2d 360, 195 N.Y.S.2d 550, affirmed 13 A.D.2d 479, 214 N.Y.S.2d 647, affirmed 11 N.Y.2d 762, 227 N.Y.S.2d 13, 181 N.E.2d 759.

36. London v. Wagner, 1959, 22 Misc.2d 360, 195 N.Y.S.2d 550, affirmed 13 A.D.2d 479, 214 N.Y.S.2d 647, affirmed 11 N.Y.2d 762, 227 N.Y.S.2d 13, 181 N.E.2d 759.

37. London v. Wagner, 1959, 22 Misc.2d 360, 195 N.Y.S.2d 550, affirmed 13 A.D.2d 479, 214 N.Y.S.2d 647, affirmed 11 N.Y.2d 762, 227 N.Y.S.2d 13, 181 N.E.2d 759.

38. People ex rel. Pells v. Board of Supervisors of Ulster County, 65 N.Y. 300.

Cromwell v. MacLean, 1891, 123 N.Y. 474, 25 N.E. 932.

Smith v. City of Buffalo, 1899, 159 N.Y. 427, 54 N.E. 62.

City of Rochester v. Fourteenth Ward, etc., Association, 1905, 183 N.Y. 23, 75 N.E. 692.

People ex rel. American Exchange National Bank v. Purdy, 1909, 196 N.Y. 270, 89 N.E. 838.

Overton v. City of New York, 1918, 223 N.Y. 199, 119 N.E. 408.

Turner v. Boyce, 1895, 11 Misc. 502, 33 N.Y.S. 433.

Matter of Rochester Trust, etc., Co., 1904, 42 Misc. 581, 87 N.Y.S. 628.

Pardee v. Rayfield, 1920, 192 App.Div. 5, 182 N.Y.S. 3, appeal granted 193 App.Div. 970, 184 N.Y.S. 940, affirmed 230 N.Y. 543, 130 N.E. 886.

Mabie v. Fuller, 1928, 132 Misc. 632, 230 N.Y.S. 448.

Ravensdale Holding Co. v. Village of Hastings on Hudson, 1935, 156 Misc. 777, 281 N.Y.S. 913.

City of Syracuse v. Murray, 1942, 179 Misc. 244, 38 N.Y.S.2d 465, appeal dismissed 42 N.Y.S.2d 576.

Griffin v. City of Syracuse, 1942, 179 Misc. 250, 38 N.Y.S.2d 476, affirmed 266 App.Div. 1055, 45 N.Y.S.2d 724, appeal denied 267 App.Div. 854, 47 N.Y.S.2d 292.

State moneys

Statute as amended, relating to payment of state school funds apportioned for particular year, is valid, even though, in applying to money appropriated and paid prior to the amendment, the amendment be looked upon as retroactive, since the amendment is curative, relates to the handling of state moneys. Barry v. Crandall, 1920, 180 N.Y.S. 183.

Appropriation and bond issue

Resolutions and acts of municipal authorities authorizing appropriation and bond issue for bridge and vehicular tunnels, determining that improvements were revenue producing and fixing tolls, held valid, in view of legislative ratification. Robia Holding Corporation v. Walker, 1931, 230 A.D. 666, 246 N.Y.S. 210, affirmed 257 N.Y. 431, 178 N.E. 747.

39. City of Syracuse v. Murray, 1942, 179 Misc. 244, 38 N.Y.S.2d 465, appeal dismissed 42 N.Y.S.2d 576.

Griffin v. City of Syracuse, 1942, 179 Misc. 250, 38 N.Y.S.2d 476, affirmed 266 App.Div. 1055, 45 N.Y.S.2d 724, appeal denied 267 App.Div. 854, 47 N.Y.S.2d 292.

Cure of defects

Retrospective laws which cure defects in proceedings otherwise fair are not unconstitutional. Railroad Co-op. Building & Loan Ass'n v. Boston Bldg. Estates, 1933, 149 Misc. 349, 267 N.Y.S. 204.

40. People ex rel. American Exchange Nat. Bank v. Purdy, 1909, 196 N.Y. 270, 89 N.E. 838.

Turner v. Boyce, 1895, 11 Misc. 502, 33 N.Y.S. 433, 67 N.Y.St.R. 281.

Correction of inadvertent repeal

Where the Legislature has inadvertently repealed an exemption from certain taxes, it has power by a retrospective act to correct the repeal, in such wise as to relieve the taxpayer from taxes assessed between the date of the repeal and the passage of the act restoring the exemption. Matter of Rochester Trust, etc., Co., 1904, 42 Misc. 581, 87 N.Y.S. 628.

41. People ex rel. Albany & Susquehanna R. Co. v. Mitchell, 35 N.Y. 551.

Town of Duanesburgh v. Jenkins, 57 N.Y. 177.

42. People ex rel. Collins v. Spicer, 1885, 99 N.Y. 225, 1 N.E. 680.

William E. Hedley, Inc., v. Loomis, 1922, 116 Misc. 605, 191 N.Y.S. 250.

43. County Securities v. Palmer, 1938, 3 N.Y.S.2d 382, affirmed 7 N.Y.S.2d 491, 255 App.Div. 791, affirmed 280 N.Y. 723, 21 N.E.2d 214.

44. Rosenberg v. Rosenberg, 1984, 126 Misc.2d 194, 481 N.Y.S.2d 617.

Cromwell v. MacLean, 1891, 123 N.Y. 474, 25 N.E. 932.

Joslyn v. Rockwell, 1891, 128 N.Y. 334, 28 N.E. 604.

People ex rel. American Exchange National Bank v. Purdy, 1909, 196 N.Y. 270, 89 N.E. 838.

Turner v. Boyce, 1895, 11 Misc. 502, 33 N.Y.S. 433.

City of Rochester v. Farrar, 1904, 44 Misc. 394, 89 N.Y.S. 1035.

People ex rel. Bingham v. State Water Supply Commission, 1911, 70 Misc. 265, 126 N.Y.S. 637, reversed on other grounds 153 App.Div. 587. 138 N.Y.S. 746, affirmed 209 N.Y. 299, 103 N.E. 162.

Defects held jurisdictional

Defect that occupied lands were assessed as nonresident lands, which invalidated sale for taxes was jurisdictional. People v. Faxon, 1920, 111 Misc. 699, 182 N.Y.S. 242.

Where statute provided that a railroad company should be given opportunity to be heard relative to material to be used in improving street space between and adjacent to tracks of company, failure to afford such an opportunity was not mere irregularity cured by statute. City of Yonkers v. Yonkers R. Co., 1938, 6 N.Y.S.2d 519, 169 Misc. 102, affirmed 13 N.Y.S.2d 957, 257 A.D. 964, reargument denied 14 N.Y.S.2d 995, 257 A.D. 1074, affirmed 282 N.Y. 783, 27 N.E.2d 200.

45. Cromwell v. MacLean, 1891, 123 N.Y. 474, 25 N.E. 932.

City of Rochester v. Farrar, 1904, 44 Misc. 394, 89 N.Y.S. 1035.

Duplicate assessment

Where there was a duplicate assessment of land to the owner and also to one S., and the owner paid his taxes, the assessment in the name of S. and the sale therefor were void, and tax title derived therefrom was not validated by statute. Dodd v. Boenig, 1921, 114 Misc. 144, 186 N.Y.S. 116, affirmed 198 A.D. 1007, 190 N.Y.S. 922; Stehl v. Boenig, 1921, 198 A.D. 1007, 190 N.Y.S. 508.

Recording of tax deed

Where a tax deed is void, no record can increase its efficacy, nor can it be made valid by an act of the Legislature, providing that after it is on record two years it shall be conclusive evidence of its own validity. Ostrander v. Bell, 1922, 199 A.D. 304, 192 N.Y.S. 262, affirmed 138 N.E. 449, 234 N.Y. 567.

46. People v. Prime, 1922, 199 App.Div. 272, 191 N.Y.S. 643.

Ravensdale Holding Co. v. Village of Hastings on Hudson, 1935, 156 Misc. 777, 281 N.Y.S. 913.

Recording

Statute making tax deeds recorded for two years conclusive evidence of regularity of sale and prior proceedings, does not cure failure to give occupant notice to redeem. People v. Durey, 1926, 126 Misc. 642, 214 N.Y.S. 418.

47. Ostrander v. Bell, 1922, 199 App.Div. 304, 192 N.Y.S. 262, affirmed 234 N.Y. 567, 138 N.E. 449.

Recording

Statute providing that conveyances under tax sales, after having been recorded for two years, shall six months after the act takes effect be conclusive evidence that the sales and all prior proceedings were regular, held by itself not to take effect as a curative act so as to pass title from the true owners to the state. People v. Ladew, 1924, 237 N.Y. 413, 143 N.E. 238.

County seal

Law designed to cure omission of the county seal on a tax warrant, could not transfer title to the purchaser at tax sale by taking away rights already vested. People ex rel. Boenig v. Hegeman, 1916, 172 A.D. 94, 157 N.Y.S. 1054, reversed on other grounds 220 N.Y. 118, 115 N.E. 447.

48. People ex rel. Ferguson v. Vroman, 1917, 101 Misc. 233, 166 N.Y.S. 923, affirmed 180 App.Div. 914, 168 N.Y.S. 1124, reversed without opinion 222 N.Y. 586, 118 N.E. 1074.

49. City of Syracuse v. Snow, 1924, 123 Misc. 568, 205 N.Y.S. 785.

50. People v. Shoen, 1932, 142 Misc. 788, 256 N.Y.S. 390.

People v. Hall, 1938, 165 Misc. 129.

51. White v. Coventry, 29 Barb. 305.

Black River, etc., R. Co. v. Barnard, 31 Barb. 258, affirmed 25 N.Y. 208.

52. Cox v. City of New York, 1886, 103 N.Y. 519, 9 N.E. 48.

McKinney's Statutes § 54, NY STAT § 54
Current through L.2022, chapters 1 to 599. Some statute sections may be more current, see credits for details.

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