SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

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I. PRELIMINARY STATEMENT

Following the 2020 repeal of Section 50-a of the Civil Rights Law (the "Repeal"), the New York Civil Liberties Union (the "NYCLU") made a Freedom of Information Law ("FOIL") request (the "Request" or "Requests") for disciplinary and other police records maintained by the Yonkers Police Department ("YPD"). YPD produced some records in response but withheld certain information in defiance of post-Repeal FOIL: it (1) refused to produce "unsubstantiated" disciplinary records, documents leading to the issuance of a notice of discipline, and investigatory documents following civilian complaints (the "Withheld Disciplinary Records"); (2) redacted officers' names, ranks, and duty stations ("Occupational Data"); and (3) refused to even search for records created prior to 2011. The NYCLU appealed these issues to the City of Yonkers ("Yonkers," and with YPD, "Respondents"), but Yonkers denied the appeal. Having exhausted its administrative remedies, the NYCLU now challenges Respondents' determination on these issues.

Respondents' arguments for withholding the Withheld Disciplinary Records and redacting Occupational Data are precluded by binding Appellate Division case law. The First and Fourth Departments have squarely rejected Respondents' position (*see NYCLU v City of Syracuse*, 210 AD3d 1401 [4th Dept 2022]; *NYCLU v NYC Dept. of Corr.*, 213 AD3d 530 [1st Dept 2023]) and trial courts in this Department and throughout the state have acknowledged that they are thus bound to order the production of "unsubstantiated" complaint records in precisely the same procedural posture as the parties in this matter. (*See e.g. McDevitt v Suffolk County*, 78 Misc 3d 1239[A], 2023 NY Slip Op 50486[U] [Sup Ct, Suffolk County 2023], citing *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984].) This Court is similarly bound.

While the Court's analysis can end there, a substantive review of Respondents' arguments yields the same result because they explicitly run counter to the plain text of post-Repeal FOIL

and its legislative history. Indeed, both make clear that the New York Legislature (the "Legislature") intended the disclosure of such information, primarily to grant the public insight into the accountability processes in place at their local law enforcement agencies. And longstanding case law confirms that Respondents' claimed statutory exemptions—the "unwarranted invasion of privacy" and "intra-agency" exemptions—cannot justify the categorical exclusion of these records from disclosure.

Finally, YPD fails to justify its refusal to produce records from before 2011. Rather than engage in a good-faith effort to locate and disclose pre-2011 records, YPD summarily argues that such an effort would be too burdensome. But courts routinely reject the excuses YPD advances here. As such, and as set forth in more detail below, the NYCLU respectfully requests that the Court order YPD to comply with its obligations under FOIL.

II. FACTUAL BACKGROUND

As part of its statewide police misconduct transparency campaign, the NYCLU submitted its Request to YPD for the disclosure of certain disciplinary and other police records on September 15, 2020. (Ex. 3.[1]) On November 23, 2020, YPD confirmed receipt of the Request and noted that it had already produced some documents in response to a 2018 FOIL request from the NYCLU. (Ex. 4.) It further conveyed that Respondents were "in the process" of responding to the Request and would "meet their obligations under applicable laws." (*Id.* at 2.) The NYCLU responded on December 23, 2020, noting that the 2018 production did not constitute a substantial portion of the records the Request sought and requesting a substantive response. (Ex. 5.)

On January 18, 2021, YPD substantively responded, agreeing to produce records responsive to certain requests and asserting several objections. (Ex. 6.) Notably, YPD did not

[1] All exhibits referenced are attached to the Affirmation of Aaron Marks.

deny any requests at this stage, nor did it offer any final determination in correspondence over the next two months. (Ex. 7; Ex. 8.)

YPD made its first production on January 19, 2021 and continued to make rolling productions throughout the latter half of 2021. In June 2022—six months since YPD's last production—the NYCLU wrote to YPD to confirm that it still had not issued an official denial and to inquire when rolling productions would resume. (Ex. 9.) YPD responded that it had completed production for most of the Request, but it did not issue a final denial and, indeed, made two additional productions in June 2022 and early November 2022. (Ex. 10.) As the production of documents had slowed substantially, the NYCLU reached out again in late November. (Ex. 11.)

In December 2022, YPD confirmed that it would produce no additional documents responsive to certain requests that remained in dispute. (Ex. 12 at 1–2, 8–9, 11–12, 13–14, 17–18.) The parties later confirmed that they had reached an impasse, and YPD issued a final denial on January 3, 2023. (Ex. 13.) On February 2, 2023, the NYCLU timely filed its administrative appeal to YPD's partial denial with Yonkers's Corporation Counsel. (Ex. 14.) Yonkers denied the appeal on February 16, 2023. (Ex. 15.[2]) The NYCLU now files its timely Article 78 proceeding.

III. ARGUMENT

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

[2] The next day, Yonkers informed the NYCLU to disregard the first footnote in the denial, which asserted that the NYCLU's appeal may have been untimely, noting that it had received correspondence from YPD's counsel regarding that issue. (Ex. 16.)

"narrowly interpreted" statutory exemptions apply. (*M. Farbman & Sons, Inc. v New York City Health and Hosps. Corp.*, 62 NY2d 75, 79–80 [1984].) "[T]he standard of review is whether the denial of the FOIL request was affected by an error of law . . . [and] review is limited to the grounds invoked by the agency in its determination." (*Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020] (citations and internal quotations omitted).) Here, as set forth below, Respondents' denial of the NYCLU's administrative appeal was affected by an error of law.

A. FOIL Does Not Permit the YPD's Blanket Withholding of Every Part of Every Withheld Disciplinary Record.

YPD refuses as a blanket matter to produce (1) disciplinary records where "no discipline was imposed" on an officer and (2) "internal reports that precede initiation of a disciplinary proceeding." (Ex. 12 at 8–9.) YPD claims that two FOIL exemptions—(1) the Intra-Agency Exemption, Public Officers Law ("POL") § 87 [2] [g] and (2) the Unwarranted Invasion of Privacy Exemption, POL § 87 [2] [b]—justify its refusal. But binding Appellate Division precedent precludes YPD's argument, and the Court's analysis can end there. Further, YPD's position has no basis in the law: the text and legislative history of post-Repeal FOIL support the NYCLU's legal right to receive the Withheld Disciplinary Records, and neither of YPD's claimed exemptions apply.

1. <u>YPD's Exemption Arguments Have Been Rejected by Controlling Precedent to Which This Court is Bound.</u>

YPD asserts that the Privacy and Intra-Agency Exemptions justify its categorical withholding of the records. But the Fourth Department rejected both arguments in its binding *NYCLU v. Syracuse* decision. As multiple trial courts have since noted, without conflicting precedent from this Department, this Court is bound to follow *Syracuse* and order the production of the Withheld Disciplinary Records.

First, the *Syracuse* court explicitly rejected the argument "that the personal privacy exemption under [POL] § 87 (2) (b) allows respondents to categorically withhold [records of unsubstantiated and open complaints]." (*Syracuse*, 210 AD3d at 1404.) To the contrary, "the personal privacy exemption 'does not . . . categorically exempt . . . documents from disclosure'. . . even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct." (*Id*. (citations omitted).) Therefore, "[i]n order to invoke the personal privacy exemption . . . respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a[n] . . . unsubstantiated complaint . . . can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner." (*Id.* (citation omitted).) In *New York City Department of Correction* (213 AD3d at 531), the First Department adopted the *Syracuse* court's reasoning, came to the same conclusion, and issued the same order.

Second, the *Syracuse* court similarly held that the "intra-agency" exemption under POL § 87 [2] [g] cannot justify the "categorical" withholding of "law enforcement disciplinary records." (210 AD3d at 1406.) Accordingly, the agency was required "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 redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof," with any such redactions or withholdings "documented in a manner that allows for review by a court." (*Id.* at 1407.)

Without conflicting precedent from this Department, this Court is bound to follow those Appellate Division decisions cited above (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984]), as similarly situated courts have recognized. (*See McDevitt v. Suffolk County*, 78 Misc 3d 1239[A], 2023 NY Slip Op 50486[U] [Sup Ct, Suffolk County 2023]; *NYP Holdings, Inc. v New York City Police Dept.*, 77 Misc 3d 1211[A], 2022 NY Slip Op 51191[U], *4 [Sup Ct, NY County 2022] ["Aside from the fact that it is binding on this Court, the [*Syracuse*] decision employs a straightforward application of the law."]; *PBA of the NY State Troopers v. Hochul*, Index No. 907274-21 [Sup Ct, Albany County, Nov. 23, 2022] [same].)

For these reasons, the Court's analysis can end here regarding YPD's claimed exemptions, and it can simply order Respondents to, as the *Syracuse* court ordered, withdraw its categorical withholdings and "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 redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof," with any such redactions or withholdings "documented in a manner that allows for review by a court."

2. <u>The Binding Precedent is Consistent with FOIL's Statutory Text, Legislative History, and Longstanding Application of Relevant Case Law.</u>

a. The Statutory Text of FOIL Compels Production of the Withheld Disciplinary Records.

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature." (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] (internal quotes omitted).) "[T]he plain language of the statute . . . is the clearest indicator of legislative intent." (*T-Mobile Ne., LLC v DeBellis*, 32 NY3d 594, 607 [2018].) YPD's decision to

categorically deny the Withheld Disciplinary Records contradicts the plain language of post-Repeal FOIL.

Post-Repeal FOIL mandates that an agency "responding to a request for law enforcement disciplinary records" must redact certain items "prior to disclosing such record." (POL § 87 [4-a].) "Law enforcement disciplinary records" are "any record[s] 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.

(POL § 86 [6] (emphasis added).) Finally, a "law enforcement disciplinary proceeding" includes "***the commencement of any investigation*** and any subsequent hearing or disciplinary action conducted by a law enforcement agency." (*Id.* § 86 [7] (emphasis added).)

In summary, with these amendments, FOIL now includes:

1. An explicit requirement to produce "[l]aw enforcement disciplinary records" with the appropriate redactions (POL § 87 [4-a]);
2. A definition of "law enforcement disciplinary records" that includes "complaints, allegations and charges" against an officer, their name, the disposition of any disciplinary proceeding, with any associated "final written opinion or memorandum," with the catch-all of "***any record*** created ***in furtherance of a law enforcement disciplinary proceeding***" (POL § 86 [6] (emphasis added)); and

3. A definition of "law enforcement disciplinary proceeding" that includes the "***commencement*** of any investigation," and any subsequent hearing or disciplinary action (*Id.* § 86 [7] (emphasis added).)

As such, an agency must produce a complaint made against an officer that led to an investigation, *even if* it was deemed "unsubstantiated" or did not result in disciplinary action. Such a complaint, regardless of outcome, constitutes a "law enforcement disciplinary record," created in furtherance of a "law enforcement disciplinary proceeding" under FOIL, which an agency is required to produce. Indeed, the agency must produce ***any record*** created in furtherance of such a proceeding, including the "final written opinion or memorandum supporting the disposition," even if that disposition is unsubstantiated.

YPD contends that FOIL excludes from disclosure records where no discipline was imposed (Ex. 12 at 9–10), but this interpretation runs counter to FOIL's plain language. Nowhere does the statute exempt records from disclosure simply because they did not result in disciplinary action. To the contrary, the Legislature specifically chose to include records related to the "disposition" of ***any*** disciplinary proceeding—it did not limit those records to only cases where discipline was imposed, as in the very next statutory provision (*see* POL § 86 [6] [e]). YPD's reading creates an inconsistency in the statute and should be rejected. (*See Suarez v Williams*, 26 NY3d 440, 451 [2015] ["[C]ourts should not interpret a statute in a manner that would render it meaningless."].)

YPD further posits that "[i]nternal reports that precede initiation of a disciplinary proceeding" fall outside of FOIL's definition of law enforcement disciplinary records that must be produced (Ex. 12 at 9–10) because a disciplinary proceeding starts with a "notice of discipline." (Ex. 17 at 3.) Per YPD's reading, there must be a complaint, allegations, *and charges* against an

officer *before* a disciplinary proceeding has even commenced. But YPD's view of the law makes no logical sense and directly contradicts the text of FOIL. Under FOIL, a "law enforcement disciplinary proceeding" begins with the "commencement of any investigation" (POL § 86 [7]), *not* a "notice of discipline." Again, YPD's reading of the law leads to a result that conflicts with the language in the FOIL statute.

The same reasoning extends to YPD's denial of investigative reports regarding civilian complaints. (Ex. 12 at 19.) The commencement of an investigation begins the proceeding. Reports created pursuant to that investigation are an integral part of the proceeding and must be produced. To interpret FOIL otherwise by excluding documents that reflect the commencement of an investigation would undermine the intent and language of the FOIL. YPD's interpretation of post-Repeal FOIL—upheld on administrative appeal—runs counter to the statute's plain language and must be set aside as "an error of law."

b. The Legislative History of the Repeal Confirms That the Withheld Disciplinary Records Must Be Produced.

The legislative history of the Repeal also makes clear that the amended FOIL cannot be read to permit YPD's categorical withholding. Since it was enacted in 1976, Section 50-a has blocked release of police disciplinary records that would otherwise have been disclosed. (*See e.g. Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 20 [1st Dept 2017] [noting that each Judicial Department found civilian complaints against officers to fall within pre-Repeal Section 50-a's statutory exemption].)

On June 12, 2020, the Legislature repealed Section 50-a expressly to allow public access to police records—and disciplinary records in particular—to address transparency and accountability concerns, given that the public had little insight into whether internal police disciplinary processes effectively responded to unjustified use of force against civilians. (Ex. 2 at

9.) (Mem. of Senator Jamaal Bailey: "Police-involved killings by law enforcement officials who have had histories of misconduct complaints . . . have increased the need to make these records more accessible . . . . The broad prohibition on disclosure created by § 50-a is therefore unnecessary, and can be repealed as contrary to public policy.").

Importantly, the Repeal did not stop with simply undoing Section 50-a, it also amended the text of the statute itself and added a series of provisions that made clear FOIL extends to *all* disciplinary records, regardless of the results they describe. (2020 NY Session Laws 780–81.) *See supra* § III.A.2.a. The debate in the Legislature centered around exactly the question presented here—whether records of disciplinary proceedings in which agencies did not impose discipline (whether "unsubstantiated," "unfounded," "exonerated," or simply uninvestigated) would also be subject to disclosure. Supporters and detractors of the legislation alike agreed that the statute as passed would require the disclosure of such records. (*See, e.g.*, Ex. 2 at 87.)

The Legislature was also concerned by a deeply disturbing pattern in which complaints raised by persons of color were disproportionately found to be unsubstantiated. (*See id.* at 236 ["MR. O'DONNELL: The last two years there were 4,000 complaints at the CCRB alleging racial profiling. Do you know how many have been substantiated? Zero. Zero. Which means to me very clearly that the process, whatever that may be, is fatally flawed. Because they may not have all happened, but I absolutely refuse to believe that none of them did."].)

These stated concerns confirm that the Repeal sought not only to publicly disclose names of officers who had been disciplined, but also to provide the public with the information necessary to review the disciplinary process itself, relying on transparency to root out potentially inadequate disciplinary processes. The history of the Repeal is clear: the Legislature intended all disciplinary

records—regardless of disposition and including any underlying reports—be subject to release, with (at most) narrow targeted redactions.[3]

c. The Intra-Agency Exemption Does Not Apply.

YPD claims that FOIL's Intra-Agency Exemption, which allows an agency to deny access to certain "intra-agency" records, justifies its refusal to produce the Withheld Disciplinary Records. (POL § 87 [2] [g].) An agency cannot claim the exemption applies without establishing which part of a record, if any, falls within its protection (*see NYCLU v City of Syracuse*, 210 AD3d 1401 [4th Dept 2022]) or wholly withhold records subject to the exemption, rather than producing them with protected parts redacted. YPD's invocation of the Intra-Agency Exemption fails on all counts.

First, New York courts agree that factual disciplinary records "do not fall within the exception to disclosure for materials that are 'inter-agency or intra-agency.'" (*Schenectady PBA v City of Schenectady*, 2020 NY Slip Op 34346[U], *5 [Sup Ct, Schenectady County 2020].) In *Walls v City of New York*, the court considered a plaintiff's discovery request for various "misconduct summaries" of defendant officers and held that the "deliberative process privilege does not preclude the disclosure of documents concerning [internal] investigations." (502 F Supp 3d 686, 698 [EDNY 2020] (collecting cases).) Because the defendant officers failed to show that the information sought "contain[ed] anything beyond factual recitations about the misconduct complaints," the court required production of the records. (*Id.*) Here too, the Withheld Disciplinary Records almost certainly contain factual data[4] reflecting witness statements and other

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

[4] "Factual data . . . simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]; *see also Pasek v NYS Dept. of Health*, 151 AD3d 1250, 1253 [3d Dept

facts about the conduct of the officer in question, all of which are subject to disclosure—and YPD has yet to show otherwise.

Second, per the Appellate Division's holding in *Syracuse*, YPD must establish how, and to what extent, a record falls under the Intra-Agency Exception. But even though they first invoked the exemption in *January 2021* (Ex. 18), Respondents have still "failed to meet their burden of establishing that the exemption applies." (210 AD3d at 1406, quoting *Matter of Gedan v Town of Mamaroneck [NY]*, 170 AD3d 833, 834 [2d Dept 2019].) Indeed, they have continuously failed to establish whether disciplinary records concerning "open claims of [Y]PD officer misconduct 'fall[] wholly or only partially within that exemption'" (*id.*) and thus cannot rely on the exemption here.

Third, even if YPD properly relied on the Intra-Agency Exemption to redact *some portion* of the material at issue, it cannot fully withhold the Withheld Disciplinary Records. The exemption is meant to protect only "communications exchanged for discussion purposes not constituting final policy decisions." (*Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993].) It explicitly does not apply to, among other things, "factual" data or "final agency policy or determinations." (POL § 87 [2] [g]; *see also Gould*, 89 NY2d at 276 ["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"].) So, to the extent the Withheld Disciplinary Records contain any factual information—and they certainly do—YPD must produce them with only the information actually protected by the Intra-Agency Exemption redacted.

2017] (parts of "investigation report" containing "summary" of complaint and "facts referring to hospital records with no obvious connection to quality assurance goals" did not fall within exemption).)

d. Production of the Withheld Disciplinary Records Would Not Constitute Unwarranted Invasion of Privacy.

YPD also bases its denial of the Withheld Disciplinary Records in part on FOIL's "unwarranted invasion of personal privacy" exemption. (POL § 87 [2] [b].) YPD's reliance on this exemption to issue a wholesale denial fails on multiple grounds: (1) controlling appellate precedent, *supra* Section III.A.1; (2) the text and legislative history of the Repeal; (3) YPD's failure to satisfy the balancing test necessary to withhold public records for privacy; and (4) YPD's failure to provide a particularized and specific explanation for its refusal to produce the Withheld Disciplinary Records.

i. The Text and Legislative History Preclude a Categorical Denial of the Withheld Disciplinary Records.

As discussed above, both the text of FOIL and its legislative history evince an intent by the Legislature to make police records broadly available. *Supra* §§ III.A.2.a, III.A.2.b. To address the possibility that these records may contain sensitive information, however, the Legislature added a detailed scheme *mandating* the redaction of sensitive information within disciplinary records, such as officers' addresses, phone numbers, and medical histories (POL § 89 [2-b]) and *permitting* the redaction of "technical infractions" (POL § 89 [2-c]). Notably absent from this scheme are carve-outs for complaints deemed "unsubstantiated" or that otherwise do not result in discipline. Instead, those complaints are built into the very *definition* of a law enforcement disciplinary record. (*See* POL § 86 [6].) Accordingly, YPD's position—that it may deny access to every part of every record associated with "unsubstantiated" complaints—could not possibly prevail without rendering the Legislature's language meaningless. YPD could justifiably redact specific material that would, on a case-by-case basis, otherwise constitute an unwarranted invasion of privacy under the exemption. But the law cannot be read to permit YPD's blanket withholding here.

ii. YPD's Position Fails to Properly Balance the Public's Interest against the Limited Privacy Interests.

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

Here, the public interest in the Withheld Disciplinary Records clearly outweighs any privacy interests at stake. As discussed above, FOIL already protects certain categories of information from disclosure that "if disclosed[,] would constitute an unwarranted invasion of personal privacy." (POL § 87 [2] [b].) Beyond that, other sensitive material from such records may be redacted as an "unwarranted invasion of personal privacy" on a case-by-case basis—though an agency "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure" pursuant to the privacy exemption. (*Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011].)

Indeed, courts across the state have found that, for public employees, the "release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy." (*Mulgrew v Bd. of Educ. of the City Sch. Dist. of the City of New York*, 31 Misc 3d 296, 302 [Sup Ct, NY County], *affd* 87 AD3d 506 [1st

Dept 2011]; *see also Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 498 [1st Dept 2013] ("There is no statutory blanket [privacy] exemption for investigative records, even where the allegations of misconduct are . . . not substantiated"); *Matter of Faulkner v Del Giacco*, 139 Misc 2d 790, 794 [Sup Ct, Albany County 1988] (finding "no basis to support the claim that releasing the names of guards accused of inappropriate behavior is an unwarranted invasion of their personal privacy").)

Here, not only does YPD fail to articulate any "particularized and specific justifications" for withholding the records, *infra* Section III.A.2.d.iii., it also fails to address the large swaths of withheld material that could not plausibly implicate anyone's privacy interests. For example, material within the Withheld Disciplinary Records showing the number of allegations, their dispositions, the general categories of alleged misconduct, and the length of the investigative process does not implicate any officer's privacy.

More generally, the balance between privacy and public interest in misconduct complaints overwhelmingly tilts in favor of disclosure. The public interest in the disclosure of material from complaints that—for whatever reason—did not result in discipline was articulated by the sponsors of the Repeal: disclosure is the only means by which the public can scrutinize the operation of the disciplinary system *as a whole*. This is especially crucial as officers often police themselves, deciding (particularly at the initial stages) whether a complaint is substantiated or unfounded. For these reasons, FOIL does not permit YPD's categorical denial of access to the Withheld Disciplinary Records.

iii. YPD Has Failed to Provide a Particularized and Specific Justification for Denying Access.

YPD has provided no information, much less "particularized and specific" information, to justify its categorical withholding of every portion of every misconduct complaint that did not

result in discipline. (Ex. 12 at 7–8.) The burden rests on the agency seeking to withhold documents to establish that the disclosure of the requested records constitutes an unwarranted invasion of personal privacy. (POL §§ 87 [2] [b]; 89 [4] [b].) "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." (*Matter of Empire Ctr. for Pub. Policy v New York City Police Pension Fund*, 65 Misc 3d 636, 640 [Sup Ct, NY County 2019].)

YPD's explanation is merely a citation to the statutory exemption and a recitation of its text: that disclosure would constitute an "unwarranted invasion of personal privacy." This kind of conclusory assertion is a far cry from the "particularized and specific justification for denying access" that FOIL requires. (*Matter of Capital Newspapers v Burns*, 67 NY2d 562, 566 [1986].) YPD has done precisely what the Court of Appeals has held insufficient: merely recited "sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld." (*Church of Scientology of New York v State of New York*, 46 NY2d 906, 907–08 [1979].) Therefore, YPD's invocation of the exemption fails.

B. The NYCLU Is Entitled to the Improperly Redacted Occupational Data.

To date, YPD has produced many documents with the Occupational Data of officers—such as their names, ranks, and duty stations—redacted.[5] YPD contends that it may also redact this Occupational Data from the Withheld Disciplinary Records, should they be produced. But withholding the Occupational Data in either instance is inconsistent with FOIL, and YPD fails to meet its burden of proof by providing a particularized and specific justification for either of its claimed exemptions as required by FOIL. (*Union Carbide*, 189 AD3d at 1809.)

[5] YPD does not explicitly object to the disclosure of the rank and duty station of officers. (*See* Ex. 12.) However, the NYCLU contends that even if YPD formally objected to producing such information, it would have no valid basis to do so.

1. Occupational Data Is Not Subject to the Intra-Agency Exemption.

YPD claims that the Intra-Agency Exemption allows it to redact Occupational Data from the Withheld Disciplinary Records, (Ex. 12 at 2). But the names, ranks, and duty stations of police officers constitute precisely the kind of objective factual data excluded from the Intra-Agency Exemption. *See supra* Section III.A.2.c. Indeed, post-Repeal FOIL itself explicitly provides that officer names[6] are a part of law enforcement disciplinary records. (POL § 86 [6] [b].) YPD's position leads to another illogical result: FOIL would require the production of law enforcement disciplinary records, define such records to include officer names, but then protect officer names from disclosure by the Intra-Agency Exception. This interpretation must be rejected.

2. Disclosure of the Occupational Data Would Not Constitute an Unwarranted Invasion of Privacy.

a. *Routine Records*

YPD contends that it may redact the Occupational Data of officers from reports that memorialize routine police work, such as an officer's use of force or a traffic stop search, "on the basis of privacy." (Ex. 12 at 13; *See* Ex. 19 (Use of Force Report); Ex. 20 (Stop and Search Report).) But there is no exemption simply for "privacy." Rather, FOIL only provides an exemption for "unwarranted invasions of personal privacy." And YPD has not offered any particularized or specific justification that would properly invoke such an exemption, other than the conclusory statement that it redacted the Occupational Data "on the basis of privacy." (Ex. 12.) Indeed, no reasonable explanation exists for why the disclosure of records involving public police work would cause any unwarranted invasion of privacy.

[6] While FOIL does not explicitly include the ranks and duty stations of officers as information that must be produced as a part of enforcement disciplinary records, POL § 86 [6], the Legislature clearly intended the public to have a means of identifying officers acting within the scope of that role. *See supra* Section III.A.2.b.

b. *Withheld Disciplinary Records*

Similarly, disclosing Occupational Data in the Withheld Disciplinary Records is not an unwarranted invasion of privacy. The Requests seek the names, ranks, and duty stations of officers who are the subject of the Withheld Disciplinary Records to assist the public's understanding of discipline within YPD: officer names will allow the public to determine if certain officers repeatedly face discipline, and their ranks and duty stations will reveal whether discipline is imposed consistently across YPD.

YPD's decision to withhold this information fails on three separate grounds. ***First***, the NYCLU's request for names, ranks, and duty stations—without any other identifying information—renders YPD's reliance on *Bell v. City of New York* inapposite. In *Bell*, the court was concerned that "releasing the names of personnel, ***together with*** their correlating appointment years, specific commands, and residential zip codes, could be dangerous because it would provide sufficient information for individuals to perform internet searches and discover the home addresses of those NYPD personnel." (2022 NY Slip Op 32854[U], *2 [Sup Ct, NY County 2022] (emphasis added).) But here, the NYCLU seeks rank and duty station information, which is notably more generalized than the specific commands and residential zip codes in *Bell* and cannot be reverse-engineered to reveal sensitive data.

Second, YPD's citation to COOG advisory opinions ("AOs") also fails to justify the redaction of Occupational Data. FOIL AOs 19775, 19785, and 19805 are advisory opinions that fail to consider the relevant arguments *for* producing officers' names. Further, the Court of Appeals has held that COOG's advisory opinions are not "binding . . . nor entitled to greater deference in an article 78 proceeding than is the construction of the agency." (*Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994] (internal quotation omitted).)

Lastly, YPD's own policies are at odds with its decision to withhold Occupational Data. YPD officers are directed to: (1) "[i]dentify themselves by name, rank and shield numbers when asked," Ex. 21 at 2 [YPD Policy & Procedural Manuel 120-01]); (2) wear their shield and name tag on their outermost garment (subject to limited exceptions), Ex. 22 at 6 [YPD Policy & Procedural Manual 120-19]); and (3) clearly identify themselves when conducting field interviews, Ex. 23 at 3 [YPD Policy & Procedural Manual 150-4]). YPD's officer policies and protocols with respect to identifying oneself in public when *actually conducting police work* are commendable—but at odds with YPD's current position that it may withhold the identity of its officers on paper. Far from constituting an unwarranted invasion of privacy, releasing the Occupational Data would be consistent with YPD's stated policies.

C. The NYCLU Is Entitled to Pre-2011 Documents.

Though the Request seeks records from January 1, 2000 onward (Ex. 3 at 2), YPD has refused to even look for documents created before 2011. (Ex. 12 at 2.[7]) YPD objects to the timeframe on four grounds: the documents (1) are not available in its IA Pro data system and are in paper format; (2) are often scattered and located at various precincts; (3) are not readily identifiable; and (4) with respect to much of the Internal Affairs Division's paper records, were apparently destroyed in a flood.[8] (Ex. 12 at 2.) None of these reasons excuse YPD's obligations under FOIL.

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[7] In earlier correspondence, YPD indicated that it would produce documents "commencing on January 1, 2010," would supplement "prior productions (that) did not include 2010," and search for "Internal Affairs records for pre-2010 non-technical disciplinary actions." (Ex. 17 at 3.) Insofar as YPD clearly believes it is in possession of documents from January 1, 2010 and onwards, it must produce them.

[8] YPD claims that even if such records do exist, it "is unreasonable and beyond the YPD's resources" to produce them. (Ex. 12 at 2.) FOIL expressly forbids this type of objection. (*See* POL § 89 [3] [a].) If YPD believes that it is incapable of economically accessing documents created in the early 2000s, it must articulate and itemize the costs it would incur, rather than simply refusing to produce the documents because of search costs. (*But cf.* POL § 87 [1] [c] [iv] (excluding from the calculable costs "search time or administrative costs").)

First, the fact that the pre-2011 records are in paper format does not excuse YPD's FOIL obligations, as courts reject bare assertions of undue burden in this context. (*New York Comm. for Occupational Safety and Health v. Bloomberg*, 72 AD3d 153, 162 [1st Dept 2010] [noting that "naked allegations of burdensomeness are normally insufficient to evade the broad disclosure provisions of FOIL" where the agency asserted that looking through hard-copy records "would be a time-consuming effort"] (internal citations and quotations omitted).) YPD cannot rely on a similarly bare assertion of burden here.

Second, YPD's excuse that the pre-2011 records are "often scattered about the various precincts" (Ex. 12 at 2) is equally unavailing, as courts nevertheless require the collection of existing records. In *Jewish Press, Inc. v. New York City Dept. of Educ.*, the respondent claimed that it "would be burdensome for it to conduct a search of the personnel files at each of its 1,700 schools to produce the requested records." (183 AD3d 731, 733 [2d Dept 2020].) The Second Department reversed the dismissal of the Article 78 proceeding and noted that POL § 89 [3] [a] "provides that the '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 . . . .'" (*Id.*) Accordingly, that the records are not all kept in a single, centralized repository does not excuse YPD's obligations under FOIL.

Third, the mere fact that pre-2011 documents are "not readily identifiable" (Ex. 12 at 2) does not excuse their withholding. YPD's cited authority is inapposite. In *Aron Law, PLLC v. New York City Dept. of Educ.*, respondent denied the FOIL request on the grounds that the records sought were not "reasonably described." (192 AD3d 552, 552 [1st Dept], *lv denied* 37 NY3d 907 [2021].) Here, YPD has not asserted that the requested records are not "reasonably described," but instead argues that it would be unduly burdensome to locate pre-2011 records. YPD has

"conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request." (*Jewish Press*, 183 AD3d at 733.[9]) Tellingly, YPD has already produced records from *after* 2011 in response to many of the Requests, without any objection as to clarity, and cannot rely on such a claim here.

Fourth, in its December 20, 2022 letter, YPD asserts that "much of the Internal Affairs Division's paper records were destroyed when the basement of IAD's building flooded with six feet of water as a result of the storms on September 2, 2021. To the extent the documents were destroyed, they obviously cannot be produced. But YPD has only summarily asserted that such records were destroyed and has not detailed the scope of its search and loss of documents, which is inconsistent with its obligations under FOIL. (*See NYP Holdings, Inc. v New York City Police Dept.*, 77 Misc 3d 1211[A], 2022 NY Slip Op 51191[U], *3 [Sup Ct, NY County 2022] (rejecting respondent's claim of undue burden where there was "no indication that the NYPD conducted a search for some of the records at issue and identified a substantial number of records that could justify a burdensome argument"); *cf. Whitfield v Moriello*, 71 AD3d 415, 416 [1st Dept 2010] (noting that respondent had discharged FOIL obligations after submitting affidavits from two officers who searched for responsive records where boxes of records had been destroyed in a flood).)

[9] While support exists for the denial of a FOIL request "at least with respect to (paper) files—when they are not 'indexed in a manner that would enable the identification and location of documents'" (*Reclaim the Records v. New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020], *lv denied* 36 NY3d 910 [2021], quoting *Matter of Pflaum v. Grattan*, 116 AD3d 1103, 1104 [3d Dept 2014])—that support exists in the context of FOIL's requirement that records be reasonably described, not due to any claimed burden.

Accordingly, YPD should submit an affidavit detailing the extent of the lost records and the search performed before it elected not to produce a single record from before 2011. Otherwise, YPD has articulated no valid basis for withholding pre-2011 records and must produce them.

D. The NYCLU Is Entitled to Reasonable Attorneys' Fees and Costs.

Because Respondents have refused to provide the Withheld Disciplinary Records, the Occupational Data, and the pre-2011 records, and have done so in violation of FOIL and in derogation of the Repeal, the NYCLU is entitled to attorneys' fees and costs. Courts must assess attorneys' fees and costs in favor of a party that "substantially prevail[s]" in its Article 78 petition against an agency, upon finding that the agency had "no reasonable basis for denying access" to the records in dispute. (*See* POL § 89 [4] [c] [ii].) An award of fees and costs is warranted where a government agency "seek[s] to broaden" a well-established FOIL exemption without a reasonable basis for doing so. (*See Rauh v. De Blasio*, 161 AD3d 120, 126 [1st Dept 2018].) Indeed, attempts to withhold documents that should be public under FOIL "run counter to the public's interest in transparency and the ability to participate on important issues of municipal governance." An award of attorneys' fees and costs serves to combat such behavior. (*Id.*)

Here, Respondents have ignored the text and legislative history of the Repeal, acted contrary to well-reasoned opinions in the Appellate Division and lower courts, improperly invoked a privacy exemption against the strong public interest in the disclosure of the requested records, and overall have failed to provide a particularized and specific justification for withholding records responsive to the Requests. Because Respondents' determinations were without a reasonable basis, the NYCLU requests that the Court grant an award of costs and fees.

IV. CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that the Court order Respondents to (1) produce the Withheld Disciplinary Records; (2) produce records with

unredacted Occupational Data; (3) produce pre-2011 documents; and (4) pay reasonable attorneys' fees and costs associated with this litigation.

Dated: June 16, 2023
New York, New York

Respectfully submitted,

/s/ Aaron H. Marks, P.C.

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Aaron H. Marks, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 6,982 words, excluding the words in the parts exempted by § 202.8-b (b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: June 16, 2023
New York, New York

/s/ Aaron H. Marks, P.C.
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