

**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 _____

**VERIFIED ARTICLE 78
PETITION**

Petitioner, the New York Civil Liberties Union (the “NYCLU”), by and through their attorneys, Kirkland & Ellis, LLP, as and for their Verified Petition (the “Petition”), alleges as follows:

PRELIMINARY STATEMENT

1. Following the New York State Legislature’s 2020 repeal of section 50-a of the Civil Rights Law and its amendment of the Freedom of Information Law (“FOIL”) to define the “law enforcement disciplinary records” subject to presumptive disclosure, the New York Civil Liberties Union (the “NYCLU”) made a FOIL request for disciplinary and other police records maintained by the Yonkers Police Department (“YPD”). In response, YPD produced a limited number of records but categorically refused to produce (1) disciplinary records it deemed “unsubstantiated,” (2) documents leading to the issuance of a notice of discipline, and (3) investigatory documents following civilian complaints (the “Withheld Disciplinary Records”). Further, even though YPD produced certain records where discipline was imposed, it over-redacted these records without permissible justification, including improperly redacting officers’ names, ranks, and duty stations

(“Occupational Data”). Finally, YPD refused to search for or produce documents created prior to 2011. The NYCLU appealed these issues to the City of Yonkers (“Yonkers,” and with YPD, “Respondents”), but Yonkers denied the appeal. The NYCLU now challenges these denials.

2. This petition presents three questions: (1) can YPD rely on the Intra-Agency Exemption and the Unwarranted Invasion of Privacy Exemption¹ to categorically withhold every part of every “unsubstantiated” disciplinary record, document leading to the issuance of a notice of discipline, and investigatory document following civilian complaints; (2) can YPD redact Occupational Data without providing particularized and specific justifications for the claimed exemptions; and (3) can YPD categorically refuse to search for and produce documents created before 2011? New York law is clear that the answer to all three of these questions is “no,” and the NYCLU asks this Court to compel Respondents to: (1) produce the Withheld Disciplinary Records, with only the redactions permitted by the FOIL; (2) revise the excessively redacted records it has produced to redact only information that is exempted under FOIL and provide sufficient justifications for those redactions or submit those records for *in camera* review; and (3) search for and produce documents created before 2011. The NYCLU also asks this Court to compel Respondents to pay reasonable attorneys’ fees and costs associated with this litigation.

3. On September 15, 2020, following the repeal of Section 50-a of the Civil Rights Law (the “Repeal”), the NYCLU submitted a FOIL request (the “Request”) to the Freedom of Information Officer at YPD for certain disciplinary and other police records of Yonkers Police Department officers. YPD confirmed receipt of the Request on November 23, 2020, and conveyed that it was “in the process” of responding to the Request. YPD made its first production on January

¹ See Public Officers Law (“POL”) §§ 87 [2] [g] and [b], respectively (allowing agencies to deny access to portions of certain “intra-agency” records and portions of documents whose disclosure would constitute an unwarranted invasion of personal privacy).

19, 2021, and continued to make rolling productions throughout the latter half of 2021. YPD later made two additional productions in June and early November 2022.

4. In December 2022, YPD informed the NYCLU that it would not produce the Withheld Disciplinary Records. The amended FOIL requires the production of exactly these records subject to limited redactions.

5. Additionally, instead of making only the limited redactions permitted by FOIL, YPD produced documents that contained pervasive unexplained redactions of Occupational Data. YPD did not produce a redaction log or any written justification that would explain the rationale for these redactions. YPD's excessive redactions and failure to even attempt to justify those redactions is another violation of YPD's FOIL obligations.

6. Finally, YPD categorically refused to search for and produce documents created before 2011, referencing a change in its data system that year as well as a flood in 2021 that allegedly destroyed much of the Internal Affairs Division's paper records. YPD articulated no valid basis for withholding records created before 2011 and has not affirmed that it performed a diligent search for such records and that none could be found. Nor did YPD submit an affidavit detailing the extent of the lost records and the extent of the search it performed before electing not to produce a single pre-2011 record.

7. YPD issued a final denial on January 3, 2023. The NYCLU filed a timely administrative appeal to Yonkers through its FOIL Appeal Officer, but Yonkers denied the appeal on February 16, 2023. YPD's denials of the NYCLU's FOIL requests and subsequent appeals violate both the spirit and the letter of the Public Officer's Law ("POL").

8. The NYCLU has exhausted all available administrative remedies and requires judicial relief to compel YPD to comply with its legal obligations under FOIL. It now files this

Verified Petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), asking this Court to compel Respondents to: (1) produce the Withheld Disciplinary Records subject to only the narrow redactions permitted by FOIL; (2) reproduce records with unredacted Occupational Data; and (3) search for and produce records created before 2011. The NYCLU also asks this Court to compel Respondents to pay reasonable attorneys’ fees and costs associated with this litigation. The disclosure of these records is critical to informing the public of disciplinary and other police records maintained by YPD.

VENUE

9. Pursuant to CPLR 7804 (b) and 506 (b), venue in this proceeding lies in Westchester County, the judicial district in which Respondents took the action challenged here, and where the offices of Respondents are located.

PARTIES

10. Petitioner the NYCLU is a not-for-profit corporation that seeks to defend civil rights and civil liberties of individuals who have experienced injustice and to promote transparency in government. For almost seventy years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

11. Respondent Yonkers is a public agency subject to the requirements of the Freedom of Information Law, POL § 84 et seq.

12. Respondent YPD is a public agency subject to the requirements of the Freedom of Information Law, POL § 84 et seq.

FACTUAL BACKGROUND

I. STATUTORY FRAMEWORK

13. In New York State, the repeal of Section 50-a was a watershed moment, intended to effect “not just a change in law but, rather, a change in [the] culture.” (*Schenectady Police Benevolent Assn. v City of Schenectady*, 2020 NY Slip Op 34346[U], *6 [Sup Ct, Schenectady County 2020].)

14. Prior to the repeal, Section 50-a posed a substantial obstacle to transparency in the conduct of law enforcement in the State of New York. The law categorically excluded from disclosure under FOIL police “personnel records used to evaluate performance toward continued employment or promotion” that were otherwise presumptively public. (*See* Civil Rights Law § 50-a [1] [repealed June 12, 2020].) A true and correct copy of the bill jacket for the enactment of Section 50-a is attached as **Exhibit 1 to Aaron Marks’ Affidavit in Support of Petitioner’s Verified Article 78 Petition.**

15. When it was first enacted in 1976, the New York Legislature (the “Legislature”) intended Section 50-a to be read narrowly. But its scope quickly expanded, with police departments and unions utilizing the provision to shield the conduct of law enforcement personnel from public scrutiny and civilian oversight.

16. Nationwide protests following the murder of George Floyd in Minnesota encouraged lawmakers to reexamine the public’s interest in enhanced law enforcement transparency and accountability. The Legislature responded to this renewed interest and debated the repeal of Section 50-a. A true and correct copy of the bill jacket for the repeal of Section 50-a is attached as **Exhibit 2 to Aaron Marks’ Affidavit in Support of Petitioner’s Verified Article 78 Petition.** On June 12, 2020, the Legislature fully repealed Section 50-a and simultaneously amended FOIL to include several new provisions that subjected “law enforcement disciplinary

records” to presumptive disclosure and set forth a detailed redaction scheme that permitted targeted redactions for privacy in the law enforcement records now subject to disclosure.

17. Despite the Legislature’s unambiguous command for police transparency, Respondents continue to categorically withhold from the public crucial information regarding YPD’s officers’ conduct.

II. THE NYCLU’S FOIL REQUEST TO YPD

18. On September 15, 2020, following the repeal of Section 50-a, the NYCLU submitted a FOIL request to YPD seeking certain disciplinary and other police records. A true and correct copy of the Request is attached as **Exhibit 3 to Aaron Marks’ Affidavit in Support of Petitioner’s Verified Article 78 Petition.**

19. Having exhausted its administrative remedies, the NYCLU files this Petition pursuant to Article 78 of New York’s Civil Practice Law & Rules seeking (1) production of the Withheld Disciplinary Records subject to only the narrow redactions permitted by FOIL; (2) reproduction of records with unredacted Occupational Data; and (3) production of records created before 2011. The NYCLU also asks this Court to compel Respondents to pay reasonable attorneys’ fees and costs associated with this litigation.

CAUSE OF ACTION **(Article 78)**

20. Petitioner repeats and realleges paragraphs 1 through 19 hereof, as if fully set forth herein.

21. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

22. Petitioner has a clear right to the production of the records withheld in their entirety, including the pre-2011 documents, regardless of disposition and subject to only the narrow

redactions permitted by FOIL. Petitioner also has a clear right to records with unredacted Occupational Data.

23. Absent a basis in law or fact to withhold records, Respondents' obligations under FOIL to respond to a FOIL request for records reasonably described, respond to a FOIL administrative appeal, and produce documents are mandatory, not discretionary.

24. There is no basis in law or fact on which Respondents can refuse to produce the records at issue in this Petition. Similarly, there is no basis in law or fact for the improper redactions applied by Respondents.

25. Petitioner exhausted its administrative remedies with Respondents as required by POL § 89 (4) (a) when it appealed Respondents' partial denial of Petitioner's Request, received a denial of the appeal, and did not receive the records it requested as required by POL § 89 (4) (b).

26. Petitioner has no other remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner seeks judgment:

(i) Pursuant to CPLR 7806, directing Respondents to comply with their duty under FOIL and produce any disciplinary records they have fully withheld that are responsive to the Petitioner's FOIL request dated September 15, 2020, regardless of the disposition of those records, with only the narrow redactions permitted by FOIL;

(ii) Directing Respondents to reproduce redacted records that were previously produced in response to the Petitioner's FOIL request dated September 15, 2020, with only the narrow redactions permitted by FOIL, including a written explanation or a redaction log setting forth the particularized and specific justification for each redaction, or, in the alternative, conduct an *in camera* review of the redacted information;

(iii) Directing Respondents to produce records created before 2011, or, in the alternative, submit an affidavit detailing the extent of the lost pre-2011 records and affirming that they performed a diligent search for such records and that none could be found.

(iv) Awarding reasonable attorneys' fees and litigation costs to Petitioner pursuant to POL § 89; and

(v) Granting such other relief as the Court deems just and proper.

DATED: June 16, 2023
New York, New York

Respectfully submitted,

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

Aaron H. Marks, P.C.
Aulden Burcher-DuPont
Yaffa A. Meeran
Eli Yampel
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: 212-446-4800
Facsimile: 212-446-4900
aaron.marks@kirkland.com
aulden.burcher-dupont@kirkland.com
yaffa.meeran@kirkland.com
eli.yampel@kirkland.com

Robert Hodgson
Lisa Laplace
THE NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
rhodgson@nyclu.org
llaplace@nyclu.org

Attorneys for Petitioner

