SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

v.

NEW YORK STATE POLICE,

Respondent.

INDEX NO: _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

On April 19, 2023, the New York Civil Liberties Union (the "NYCLU") submitted a request (the "Request") under the Freedom of Information Law ("FOIL") for an unredacted copy of a Spreadsheet (the "Spreadsheet") listing basic information about complaints against members of the New York State Police ("NYSP" or "Respondent"). Respondent had previously disclosed a version of the Spreadsheet, but only after redacting all officer names associated with complaints it did not substantiate. The sole dispute at issue here is whether FOIL's narrow privacy exemption justifies this blanket redaction—it does not.

FOIL requires that Respondent produce the unredacted Spreadsheet because the plain text of the statute mandates the disclosure of "complaints" and "allegations" against officers, including "the name of the [officer] complained of," regardless of whether the complaint was substantiated (*see* N.Y. Pub. Off. L. § 86[6][a]-[b]). The legislative history of the statute and court decisions across the state confirm that officer names in complaint records are presumptively subject to disclosure, regardless of the disposition of an investigation.

Respondent's only purported justification for its categorical redaction of officer names—the privacy exemption—fails, because it requires a much more specific showing of an unwarranted invasion of <u>personal</u> privacy than NYSP can identify. Here, the Spreadsheet lists only general information about officers' alleged <u>public</u> conduct: case numbers, categories of allegations, dispositions, and disciplinary action taken. This is factual information that other departments have routinely made public. FOIL's narrow personal privacy exemption does not and cannot reach—as a blanket matter—every officer name associated with such general and non-personal information. In addition, the public interest in disclosure here far outweighs any de minimis privacy interest that might be implicated. The unredacted Spreadsheet is of immense public significance because it would, for example, shed light on patterns of alleged officer misconduct

and facilitate systemic analyses of NYSP's investigation practices that are hindered by the widespread redactions that currently obscure the data. For these reasons and those discussed below, Respondent must produce an unredacted copy of the Spreadsheet.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

I. THE REPEAL OF SECTION 50-A AND AMENDMENT OF FOIL

From its enactment in 1976 until its repeal, Civil Rights Law Section 50-a ("Section 50-a") served as the greatest obstacle to transparency regarding the conduct of police officers in New York. Although Section 50-a, which generally shielded police disciplinary records from public disclosure, was intended to be applied narrowly and sparingly, it rapidly expanded in scope and application. Indeed, according to a report from the Department of State Committee on Open Government, by 2014, Section 50-a had "been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer" (*see* ROBERT J. FREEMAN ET AL., ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 3, State of N.Y., Dep't of State, Comm. On Open Gov't, at 3 [2014]).

However, a consensus grew in New York that Section 50-a impeded police accountability and racial justice. Amid the nationwide reckoning following the deaths of George Floyd, Breonna Taylor, and others, the societal frustration with police secrecy, and the public demand for increased transparency, legislators enacted the #Repeal50a Bill (S8496/A10611), which was signed on June 12, 2020. The #Repeal50a Bill and corresponding amendments to FOIL made "complaints" and "allegations" against police officers subject to public disclosure, as well as "the name of the [officer] complained of" (*see* N.Y. Pub. Off. L. § 86[6][a]-[b]).

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

The NYCLU submitted a request to Respondent on September 15, 2020 (the "Initial Request"), seeking a variety of police records—many of which had previously been shielded from the public by Section 50-a—related to NYSP's accountability systems (*see* Exhibit B).[1] Respondent disclosed some records responsive to the Initial Request, and on January 20, 2022, Respondent produced the redacted Spreadsheet (*see* Exhibit C).

The Spreadsheet contains basic information regarding investigations of misconduct involving NYSP members, including case numbers, categories of allegations, dispositions, disciplinary action taken, and officer names associated with the investigations (*see id.*). Respondent redacted all officer names from the Spreadsheet associated with complaints it did not substantiate (*see id.*). Respondent claimed that it redacted the officer names "to prevent an unwarranted invasion of personal privacy of those concerned" (*see* Exhibit D).

On July 1, 2022, the NYCLU filed an article 78 petition seeking an order compelling disclosure of certain records sought in the Initial Request, including the unredacted Spreadsheet (*see* Exhibit E). On April 14, 2023, the Albany County Supreme Court granted portions of the NYCLU's petition but denied the portion "seeking an order compelling disclosure of [the] unredacted spreadsheet," reasoning that "[t]he issue of whether the names of officers involved in 'unsubstantiated complaints' were properly redacted in the spreadsheet . . . is not ripe for decision," because the NYCLU's "[Initial] [R]equest did not ask for the names of officers" (*see* Exhibit F).[2]

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[1] All Exhibits referenced in this memorandum are attached to the Affirmation of Margaret Babad filed on October 5, 2023.

[2] In this prior article 78 proceeding, both Parties briefed the issue of whether Respondent may redact the names of all officers on the Spreadsheet associated with complaints it did not substantiate (*see* NYSCEF Doc. Nos. 3, 54, 56, 66).

III. THE NYCLU SUBMITTED THE PRESENT FOIL REQUEST SEEKING THE UNREDACTED SPREADSHEET

In response to the Court's decision holding that the issue of redactions to the Spreadsheet was not ripe because an unredacted version of the spreadsheet had never been requested, the NYCLU submitted the present Request explicitly seeking all officer names in the unredacted Spreadsheet (*see* Exhibit G). The next day, on April 20, 2023, Respondent acknowledged receipt of the Request and stated that "[a] determination as to whether [the] request is granted or denied will be reached by or before October 12, 2023," nearly six months later (*see* Exhibit H).

On April 28, 2023, the NYCLU submitted an administrative appeal, arguing that Respondent extending itself nearly six months to provide a basic response to the Request—which seeks a single record that is readily available to Respondent and that it has already analyzed for exempt information—"is not reasonable and constitutes a constructive denial" (*see* Exhibit I).

On May 17, 2023, Respondent denied the Request for an unredacted copy of the Spreadsheet, claiming as a blanket matter that disclosure of "the names of those public employees who were accused of misconduct, and the allegations were determined to be unfounded or unsubstantiated, would constitute an unwarranted invasion of their personal privacy" (*see* Exhibit J). On May 25, 2023, the NYCLU submitted an administrative appeal regarding Respondent's denial of the Request, noting that Respondent "cannot meet its burden to establish that the personal privacy exemption applies" (*see* Exhibit K). On June 8, 2023, Respondent denied the NYCLU's appeal (*see* Exhibit L).

Having filed an administrative appeal based on Respondent's denial of the Request, and receiving Respondent's subsequent denial of that appeal, the NYCLU has exhausted its administrative remedies and now files this article 78 petition seeking production of an unredacted copy of the Spreadsheet.

ARGUMENT

I. THE NYCLU IS ENTITLED TO BRING THIS ACTION

The NYCLU has exhausted its administrative remedies and is entitled to bring this action. Respondent's June 8, 2023 email denying the NYCLU's administrative appeal entitles the NYCLU to initiate this action in state court (*see* N.Y. Pub. Off. L. § 89[4][b] ["[A] person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules."]).

II. THE NYCLU IS ENTITLED TO THE REQUESTED UNREDACTED SPREADSHEET

All officer names on the Spreadsheet are presumptively subject to public disclosure. The question is whether FOIL's narrow personal privacy exemption justifies the blanket redaction of every officer name on the Spreadsheet that is associated with complaints Respondent decided not to substantiate. The express language of FOIL and its underlying purpose, as well as the significant public interest in disclosure, dictate that the answer is no.

A. The Express Language of FOIL and Its Underlying Purpose Require That Respondent Disclose Officer Names.

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

Accordingly, NYSP's denial here cannot be squared with the statute. Any rule that would permit NYSP's blanket withholding of the "name of the employee complained of" (as opposed to "charged") would render the legislature's language meaningless. And because courts may not "interpret a statute in a manner that would render it meaningless" (*Suarez v Williams*, 26 NY3d 440, 451 [2015]), NYSP's argument must fail (*see also People v Viviani*, 36 NY3d 564, 582 [2021] ["An attempt by this court to so limit the statute would . . . be tantamount to wholesale revision of the Legislature's enactment, rather than prudent judicial construction"]). Particularly in light of the fact that the legislature *did* single out other material that is part of a "law enforcement disciplinary record" that *must* or *may* be redacted—including addresses, phone numbers, and medical information, but *not* including officer names (POL §§ 89[2-b], 89[2-c])—there is no reasonable reading of the amended FOIL statute that permits NYSP's categorical withholding of officer names.

The legislative history confirms that officer names in complaint records are to be disclosed, regardless of disposition (*see, e.g.*, Exhibit A, N.Y. Assembly, Floor Debate, 243rd N.Y. Leg., Reg. Sess. at 60-61 [June 9, 2020] ["Q: . . . [T]he items that will be disclosed . . . is essentially any complaint . . . [i]t makes no distinction regarding substantiated or unsubstantiated? MR. O'DONNELL: . . . [W]e don't distinguish between those two things in this law."], 98 [when asked whether information about "unsubstantiated cases" is "discoverable . . . the public can see it, right? MR. O'DONNELL: The public will have access to it through the FOIL process. . ."], 133 [describing the bill as "providing a form of transparency in terms of being able to get unsubstantiated claims"]). Legislators repeatedly emphasized that a key benefit of amending the statute would be allowing the public to understand how and why complaints end up *not* being substantiated (*see id.* at 98 [noting that, of 4,000 CCRB complaints alleging racial profiling, "zero"

were substantiated], 100 ["Now they're unsubstantiated, but isn't it relevant that there is a pattern here?"]).

Indeed, the specific issue of officer names came up repeatedly in the amended statute's legislative history, and opponents of the bill explicitly highlighted that "[t]his legislation is going to release unsubstantiated, unfounded complaints" that will identify "an officer's name" (*id.* at 243; *see also id.* at 64 [objecting that the statute would make public "information to show that this police officer was—was complained of, although it is unsubstantiated, didn't happen"]). Proponents of the bill, in turn, explained why making such information public is so important (*see id.* at 100-01 [explaining the value in knowing "[i]f an officer has 30 cases that are unsubstantiated complaints" or "if a person works in a predominantly white neighborhood and the only complaints they get are from African-Americans"]), while emphasizing that such public disclosure permits people with different perspectives to have an informed discussion about what conclusions should be drawn from the records released (*id.* ["The point is that this raw data is relevant . . . we don't obligate anybody to form any conclusions based on this raw data."]).

B. FOIL's Narrow Privacy Exemption Does Not Justify Respondent's Blanket Redaction of Officer Names.

Even if the statute's plain text did not preclude NYSP's position here—and it does—Respondent cannot meet its burden to demonstrate that a statutory exemption justifies its blanket withholding (*see Gould v New York City Police Dept.*, 89 NY2d 267, 274-75 [1996] [stating that "the burden rest[s] on the agency to demonstrate that the requested material indeed qualifies for exemption"]). The only justification Respondent offers for categorically redacting officer names is the personal privacy exemption, N.Y. Pub. Off. L. § 87(2)(b), which permits the redaction of material that "would constitute an unwarranted invasion of personal privacy" (*see* N.Y. Pub. Off.

L. § 87[2][b]).[3] The Court of Appeals has made clear that this exemption is to be narrowly interpreted (*see Washington Post Co. v New York State Ins Dept.*, 61 NY2d 557, 564 [1984] [holding that "FOIL is generally liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government."]).

Because officer names in complaint records do not fall under any of the eight categories specifically enumerated in N.Y. Pub. Off. L. § 87(2)(b), Respondent has the burden to demonstrate that disclosing *any* name redacted on the Spreadsheet, as a *per se* matter, "would be offensive and objectionable to a reasonable [person] of ordinary sensibilities" (*see Beyah v Goord*, 309 AD2d 1049, 1050 [3d Dept 2003]), *and* that the privacy interests outweigh the public interest in disclosure (*see Matter of Dobranski v Houper*, 154 AD2d 736, 737 [3d Dept 1989]; *see also Matter of Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d 129, 134-35 [3d Dept 2021] [stating that agencies asserting the personal privacy exemption must show that the privacy interests outweigh the public interest in disclosure]). Respondent cannot demonstrate either, and it certainly cannot do so as a categorical matter as to every redacted name on its Spreadsheet.[4]

Here, as an initial matter, the privacy interests at issue are very limited because the Spreadsheet only lists—alongside an officer's name—the case number, category of allegations, disposition, and disciplinary action taken, if any (*see* Exhibit C). Disclosing officer names in relation to this general information is not "offensive and objectionable," since it is limited to basic factual information confirming that an investigation occurred. There is nothing preventing a

[3] POL § 87(2)(b) refers to eight categories that are *per se* unwarranted invasions of personal privacy, none of which are at issue here (*see* N.Y. Pub. Off. L. § 89[2]).

[4] To the extent NYSP identifies *specific* officer names that may be redacted pursuant to section 89(2-c)'s language regarding "technical infractions," or an otherwise unique circumstance implicating a particular officer's privacy under section 87(2)(b), the NYCLU does not object to such redactions if properly justified. The NYCLU's objection is to NYSP's invocation of the privacy exemption as a categorical bar to all officer names associated with any complaint where NYSP did not itself substantiate the complaint.

complainant from publicly revealing exactly this information, and nothing preventing an officer from speaking publicly about why they believe an "unsubstantiated" disposition should reflect *well* on them, not poorly. This basic factual information is not private, is not offensive, and is not objectionable.

Additionally, for this material, the public interest in disclosure far outweighs any privacy interests. To start, courts recognize that "[p]ublic employees have less entitlement to privacy than do non-public employees . . . due to the high priority placed on accountability" (*Police Benev. Ass'n v City of Schenectady PBA*, 2020 WL 7978093 at *5 [Sup Ct, Schenectady County Dec. 29, 2020] [ordering release of "unsubstantiated" disciplinary records associated with named police officer]). This is true of public employees generally, but particularly true for law enforcement personnel, since they are now the only group of public employees affirmatively named in the FOIL statute, with their disciplinary records specifically singled out to ensure disclosure (*see id*. at *5 ["It may well be true that a public employee (including a police officer) . . . views a particular record as private or embarrassing . . . but, it is nonetheless now within the ambit of disclosure" under "[t]he current statutory scheme"]; *see also* POL § 86[6] [singling out "law enforcement disciplinary records" for a detailed disclosure scheme]).

Here, full access to a complete, minimally-redacted version of the Spreadsheet is of great public interest. As New York courts acknowledge, "the underlying purpose of FOIL [is] to promote transparency in governmental operations so that the process of governmental decision-making is on public display and governmental actions can be more readily scrutinized" (*Matter of Suhr*, 193 AD3d at 135). Public scrutiny of the "governmental decision-making" reflected in NYSP's records is greatly hindered by widespread redactions that prevent analysis into patterns of unsubstantiated or unfounded complaints—systemic issues are obscured when you cannot connect

complaints or investigations that were related to one another, and it is impossible to determine if there are meaningful patterns in the redacted information that bear further investigation.

Indeed, the legislators who amended the FOIL in 2020 explicitly noted the public's strong interest in knowing if there are officers against whom large numbers of complaints—substantiated or not—were lodged. (*See* Sponsor Memorandum, #Repeal50a Bill [S8496/A10611] at 4 [stating the importance of the public's ability to access "records of complaints or findings of law enforcement misconduct" and "histories of misconduct complaints"]). They repeatedly referenced the large number of complaints that go "unsubstantiated" (*see* NY Assembly Floor Debate at 98, 100 [June 9, 2020] ["[T]hroughout history, crimes against people of color have been unsubstantiated."]), highlighted the unique importance of transparency around police records (*see id.* at 99 ["And when somebody has the power to take a human life, I believe there should be more light shining on that person and what he does."]), and emphasized how the amended law would permit the public to discover "[i]f an officer has 30 cases that are unsubstantiated" (*id.* at 100).

Many other courts that have considered the issue have agreed that the personal privacy exemption does not shield officer names from the public eye merely because the complaint against that officer resulted in an unsubstantiated disposition; as a result, the information NYSP seeks to shield here is already public in multiple large jurisdictions around New York State. Most notably, in *Uniformed Fire Officers Assn. v de Blasio* (846 Fed Appx 25, 30 [2d Cir 2021]), the Second Circuit affirmed a decision permitting the release of tens of thousands of NYPD officer names associated with both "substantiated" and "unsubstantiated" complaints, squarely rejecting the police union's argument that "officer privacy" should prevent disclosure. (*See also* NYCLU, *CCRB Complaint Database*, https://www.nyclu.org/en/campaigns/nypd-misconduct-database [searchable database of basic information regarding over 300,000 NYPD complaint records]).

And in Buffalo, after a court held that the release of "unsubstantiated" police misconduct investigation records is "specifically authorized by statute" (*Buffalo Police Benevolent Ass'n, Inc. v Brown*, 69 Misc 3d 998, 1004 (Sup Ct, Erie County 2020)), the Buffalo Police Department similarly released records regarding over 1,000 misconduct investigations, naming hundreds of BPD officers regardless of the disposition of the investigation (*see* NYSCEF Doc. No. 30, Order in *NYCLU v Buffalo*, Index No. 805097/2021 [Sup Ct, Erie County]).

Other courts have similarly ordered the release of records identifying the subjects of "unsubstantiated" complaints in light of the clear mandate of the amended FOIL and longstanding FOIL law. In *NYP Holdings, Inc. v NYPD* (77 Misc 3d 1211(A), at *2), the court ordered the production of full disciplinary files for "144 named police officers." (*See also NYCLU v New York City Dep't of Correction*, 2022 WL 1156208, at *1-*2 [Sup Ct, NY County Apr. 19, 2022] [ordering the production of "all columns" of a DOC disciplinary database, including the "name . . . of the Agency employee], *aff'd* 213 AD3d 530 [2023];[5] *Schenectady*, 2020 WL 7978093 at *6 [releasing "unsubstantiated" records associated with named officer]; *Rickner PLLC v City of New*

[5] The First Department's affirmation in *NYCLU v New York City Dep't of Correction* approvingly cited the Fourth Department's decision in *NYCLU v Syracuse* (210 AD3d 1401, 1405 [4th Dept 2022]) when it discussed the possibility that certain redactions associated with "identifying details" could be considered (*see* 213 AD3d at 531). The context of this citation makes clear that the controlling law cited does not endorse the blanket redaction of officer names. In discussing the interplay of section 87(2)(b)'s privacy exemption with a separate provision of FOIL, section 89(2)(c)(i), the *Syracuse* court noted that an agency is barred from invoking section 87(2)(b) unless it has considered whether "identifying details" might be deleted pursuant to section 89(2)(c)(i) in order to anonymize a record that would otherwise constitute an "unwarranted invasion of personal privacy" (210 AD3d at 1404). The court did not hold that redacting identifying details would be appropriate as a blanket matter, and instead it explicitly required that each "unsubstantiated" disciplinary record at issue be reviewed and that any proposed redaction be based on "a particularized and specific justification" (*see id.* at 1407). Accordingly, on this issue, the *Syracuse* and *NYC Department of Correction* cases stand only for the unremarkable proposition that removal of identifying details must be considered as an alternative to full withholding when a specific record *otherwise* would constitute an unwarranted invasion of privacy—not that the production of any officer name is a *de facto* unwarranted invasion of privacy. As discussed above, such a sweeping rule has never been the law under FOIL.

York, 2022 WL 1664298, at *2 [Sup Ct, NY County May 25, 2022] [same].) This Court should do the same.

CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that the Court order Respondent to produce the unredacted Spreadsheet.

Dated: October 5, 2023
New York, New York

Respectfully submitted,

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Jamie L. Wine, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 3663 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word processing system used to prepare this document.

Dated: October 5, 2023
New York, New York

/s/Jamie L. Wine
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