New York County Clerk's Index No. 160232-2016

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

Justine Luongo, Attorney-In-Charge, Criminal Defense Practice, The Legal Aid Society,

Petitioner-Appellant,

– against –

Records Access Appeals Officer, New York Police Department

Respondent.

RECORD ON APPEAL

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Counsel for Respondent	*Counsel for Petitioner-Appellant*	*Of Counsel for Petitioner-Appellant*

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STATEMENT PURSUANT TO CPLR 5531

1. The index number in the court below is 160232/2016.

2. The full names of the original parties are as stated in the caption above. There have been no changes in the parties.

3. This proceeding was commenced in the Supreme Court, New York County.

4. This proceeding was commenced by service of a Notice of Petition, on December 6, 2016. Issue was joined by the service of Respondent Records Access Appeals Officer, New York Police Department's Verified Answer on March 15, 2017.

5. Petitioner-Appellant initiated an Article 78 Petition seeking an order directing the New York Police Department to produce certain documents containing NYPD internal bulletins, called "Personnel Orders", in compliance with Public Officers Law §§ 86-90, or the Freedom of Information Law, from 2011 to present.

6. This appeal is from the Decision and Order of the Honorable Joan B. Lobis, Supreme Court, New York County, entered

on June 1, 2017.

7. This appeal is taken on a fully reproduced record.

NOTICE OF APPEAL OF PETITIONER-APPELLANT, JUSTINE LUONGO,
DATED JUNE 30, 2017
(pp. 3–5)

REPRODUCED FOLLOWING

4

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

Justine Luongo, Attorney-In-Charge,
Criminal Defense Practice,
The Legal Aid Society,

Petitioner,

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

NOTICE OF APPEAL

Index No. 160232/2016
IAS Part 6
(Lobis, J.)

PLEASE TAKE NOTICE that Petitioner Justine Luongo, Attorney-In-Charge, Criminal Defense Practice, The Legal Aid Society, hereby appeals to the Appellate Division, First Department from the Decision and Order of the Supreme Court of the State of New York, County of New York (Lobis, J.), dated May 24, 2017, and entered and filed in the Office of the Clerk of New York County on June 1, 2017, denying Petitioner's Article 78 Petition seeking an order directing Respondent, the Record Access Appeals Officer, New York Police Department ("NYPD") to produce requested documents containing NYPD administrative summaries in compliance with Public Officers Law §§ 86-90, or the Freedom of Information Law (the "Final Judgment"). Notice of Entry was served on June 2, 2017. This appeal is taken from each and every part of the Final Judgment as well as from the whole thereof.

Dated: New York, New York
June 30, 2017

Respectfully submitted,

THE LEGAL AID SOCIETY

By: _____

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Counsel for Petitioner

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Counsel for Respondent

PETITIONER-APPELLANT'S PRE-ARGUMENT STATEMENT, DATED JUNE 30, 2017
(pp. 6–11)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Justine Luongo, Attorney-In-Charge,
Criminal Defense Practice,
The Legal Aid Society,

Petitioner,

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

PRE-ARGUMENT STATEMENT

N.Y. County Index No. 160232/2016
IAS Part 6
(Lobis, J.)

Pursuant to Rule 600.17(b) of the Rules of the Supreme Court of the State of New York, Appellate Division, First Department, Petitioner Justine Luongo, Attorney-In-Charge, Criminal Defense Practice, The Legal Aid Society, respectfully submits this pre-argument statement:

1. The title of the action is as set forth in the caption above.

2. The full names of the original parties are as stated in the caption above.

3. The names, addresses and telephone numbers of counsel for Petitioner-Appellant are:

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Counsel for Petitioner

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Of Counsel for Petitioner

4. The name, address and telephone number of counsel for Respondent-Appellee is:

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5. The appeal is taken from the Supreme Court, County of New York, IAS Part 6 (Honorable Joan B. Lobis) (the "IAS Court").

6. Nature and object of the cause of action: Petitioner-Appellant initiated an Article 78 Petition seeking an order directing the New York Police Department ("NYPD") to produce certain documents containing NYPD internal bulletins, called "Personnel Orders" (the "Orders"), in compliance with Public Officers Law §§ 86-90, or the Freedom of Information Law ("FOIL"), from 2011 to present.

7. Result reached below: The IAS Court issued a Decision and Order dated May 24, 2017, entered and filed in the Office of the Clerk of New York County on June 1, 2017, notice of entry of which was served on June 2, 2017, denying Petitioner's Article 78 Petition (the "Final Judgment"). A copy of the

Notice of Entry and Order is attached hereto as Exhibit A.

8. Grounds for appeal: Petitioner-Appellant seeks an order reversing the Final Judgment on the following grounds:

a. First, the IAS court should have concluded that the Orders, which are summaries listing employment updates and outcomes of officer disciplinary proceedings do not fall within the "personnel records" exemption to FOIL created by Civil Rights Law § 50-a ("Section 50-a"). Respondent did not even argue that the Orders are in fact "used to evaluate [officer] performance toward continued employment or promotion," let alone present any information demonstrating this to be the case, as is required for a document to qualify as a personnel record under Section 50-a.

b. Second, The IAS court should have concluded that, even if the Orders were personnel records pursuant to Section 50-a, they should be released because the NYPD did not demonstrate that nondisclosure was necessary to effectuate the purpose of Section 50-a. In order to prevent the disclosure of the Orders pursuant to FOIL, the NYPD was required to meet its burden of demonstrating a substantial and realistic possibility that the Orders will be used abusively against officers. It did not do so here. In fact, the Orders had been made public for over 40 years, and the NYPD could not identify even one incident of abuse over that time period.

c. Third, the IAS court should have concluded that Respondent erred as a matter of law in determining that Section 50-a prohibited it from producing the Orders and should have instructed Respondent to reconsider Petitioner's request

based on a correct construction of Section 50-a. Respondent's denial of the Petition was based on the incorrect legal determination that because Section 50-a applied to the requested Orders, Respondent was prohibited from releasing the Orders. This is not the law. Even where documents plainly fall within the scope of Section 50-a, the law is clear that Section 50-a in no way restricts an agency from voluntarily using or publishing the documents. And as Petitioner demonstrated—and as this Court recently articulated in *Luongo v. Records Access Officer, Civilian Complaint Review Board*, No. 100250/15, 2017 WL 1173617 (1st Dep't Mar. 30, 2017)—"nothing in the Freedom of Information Law . . . restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions." Respondent and the IAS court cited no authority to the contrary, and the IAS court merely acknowledged the issue but then provided no analysis of it in its decision.

Dated: New York, New York
June 30, 2017

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By: _____

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Counsel for Respondent

DECISION AND ORDER, DATED MAY 24, 2017
(pp. 12–19)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

In the Matter of JUSTINE CUONGO

Petitioner,

- v -

Records Access Appeals Officer
NYC PD

Respondent.

INDEX NO. 160232/2016

MOTION DATE

MOTION SEQ. 001

The following papers were read on this Article 78 petition.

NYSCEF

	PAPERS NUMBERED
Notice of Petition/ Order to Show Cause – Affidavits – Exhibits	
Answering Affidavits – Exhibits	
Replying Affidavits	1-35

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: May 24, 2017
~~, 2016~~

JOAN B. LOBIS, *J.S.C.*

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:....MOTION IS ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

In the matter of the Application of

JUSTINE LUONGO, Attorney In-Chief, Criminal Defense Practice, The Legal Aid Society,

Petitioner,

Index No. 160232/2016

-against-

Decision and Order

RECORDS ACCESS APPEALS OFFICER, New York City Police Department

Respondent.

----------X

JOAN B. LOBIS, J.S.C.:

Petitioner brings this article 78 proceeding seeking an order directing the New York City Police Department (NYPD) to produce documents containing NYPD administrative summaries. The NYPD posted this information publicly for approximately forty years in compliance with Public Officers Law Sections 86-90, the Freedom of Information Law (FOIL). Respondent opposes the petition, arguing that New York State Civil Rights Law Section 50-a (50-a) bars requests for the documents. For the reasons set forth below, the petition is denied.

On May 9, 2016, Legal Aid filed a FOIL request for all "Personnel Orders" such as those that are hung outside the ante-room of the Deputy Commissioner of Public Information from January 1, 2011 to the present. The Orders contain summaries of employment updates for both officers and civilian employees of the NYPD, including transfers, promotions, retirements, and disciplinary dispositions. On May 27, 2016 the NYPD denied Legal Aid's request. Respondent

stated the decision was based on Public Officers Law Section 87(2)(e), which protects records "compiled for law enforcement purposes," and on 87(2)(a), which pertains to personnel records that are exempt from FOIL disclosure under Civil Rights Law Section 50-a. It also noted it would no longer make personnel orders available to the press going forward, regardless of its past policy of public disclosure. On June 8, 2016, Legal Aid appealed and NYPD reaffirmed its denial.

Petitioner argues that the Orders are not personnel records under the plain text or legislative purpose of 50-a. She states FOIL must be interpreted to grant the public maximum access to government records and therefore exceptions must be narrowly interpreted. She alleges that the orders in question are merely summaries listing employment updates and outcomes of officer disciplinary proceedings that are not contained in the officers' files. Because the disciplinary hearings themselves do not constitute personnel records, she asserts, summaries of their outcomes cannot be protected. If respondent bars limited summary information of police officer disciplinary dispositions from release, nearly all information regarding police discipline will be barred. To qualify for exemption under 50-a, she argues, the NYPD must show that the Orders are used to evaluate performance toward continued employment or promotion. She states that the NYPD's position is contrary to the legislative intent in enacting 50-a "to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action." Further, as the NYPD made this information available for so many years, she contends that it cannot now change its interpretation of the law without explaining why its prior interpretation was incorrect.

Even if the Orders are personnel records, petitioner states, they should still be released unless respondent demonstrates that nondisclosure is necessary to prevent a substantial and realistic potential use of information in the records in litigation to degrade, embarrass, harass, or impeach the integrity of police officers. She argues that respondents have not demonstrated the information was used this way during the decades it was available to the public. Finally, she argues that NYPD denied her request based on the false legal premise that 50-a imposes an affirmative obligation to keep records secret.

In its answer, respondent argues that the Orders the very sort of records that the Court of Appeals found the legislature intended to keep confidential under 50-a. It states that whether a document qualifies as a personnel record depends upon its nature not its physical location. Respondent states that the records at issue in this case pertain to misconduct or rules violations and by their nature carry a substantial potential for embarrassing, harassing, or impeaching use and thus fall squarely within the broad rule of confidentiality established by 50-a. Accordingly, respondent contends, it has borne its burden of demonstrating that the Personnel Orders are exempt from disclosure under FOIL. Additionally, respondent argues that the requested records are not subject to disclosure because petitioner has neither joined the officers who are the subjects of the personnel orders as necessary parties to this proceeding nor provided them the requisite notice that their records are being sought.

On March 21, 2017 the Court heard oral argument on the case and marked the petition fully submitted. On March 30, 2017 the First Department rendered a decision in Luongo v. Records Access Officer, Civilian Complaint Review Board, No. 100250/15, 2017 WL 1173617

(1st Dep't Mar. 30, 2017) (Luongo I). Luongo I involved an appeal from Justice Alice Schlesinger's determination that petitioner was entitled to summaries of Civilian Complaint Review Board (CCRB) records in connection with a police officer's involvement in Eric Garner's arrest and death. Justice Schlesinger found that information as to "whether the CCRB substantiated complaints against [the officer] and if so, whether there were any related administrative proceedings and those outcomes, if any" did not constitute personnel records. She held that even if the summaries were personnel records, they could be disclosed without posing the risk of harassment to the officer that 50-a aimed to prevent. The First Department reversed, holding that the summary of records constituted protected personnel records, that prior disclosure of the records did not dictate disclosure, that the prior release of results of disciplinary actions did not dictate disclosure, and that non-disclosure was warranted to protect the officer's safety. This Court gave the parties in the instant action until April 7, 2017 to submit additional memorandums in response to that decision.

Petitioner points out that the Court in Luongo I clearly states that 50-a does not restrict an agency from granting access to records within any of the statutory exceptions. Therefore, she states, contention that 50-a prohibits them from providing the requested orders is error of law. Additionally, she argues, Luongo I establishes that respondent must show how the orders impact the promotion or retention of officers before they are considered personnel records. She argues that, unlike in Luongo I, there is no finding that the records in question here are actually used in officer promotion. Petitioner distinguishes her request here from the summary of records from Luongo I. Further, petitioner states that in Luongo I there was considerable evidence to support a substantial potential that the information would be used in an abusive manner. Petitioner reiterates

that the summaries she requests have been published for decades and respondent does not identify any incidents of abuse. She states that the First Department relies heavily on the separate FOIL exemption in Public Officers Law Section 87(2)(f), which permits an agency to deny access to records that, if disclosed, would endanger the life or safety of any person.

Respondent argues that Luongo I and another case decided by the First Department on the same day, New York Civil Liberties Union v. New York City Police Dep't, No. 102436/2012, 2017 N.Y. App. Div. LEXIS 2448 (1st Dep't March 30, 2017), support its position that the records are exempt from disclosure under 50-a. It states that all of petitioner's arguments were rejected by the First Department. It contends that the question is not whether respondent could voluntarily disclose the personnel orders, and that 50-a specifically states that personnel records can only be disclosure by court order or with the express written consent of the officer.

As respondent points out, the First Department explicitly rejected petitioner's arguments that respondent has waived nondisclosure under 50-a by making the information available in the past. Though there are some factual distinctions between this case and Luongo I, I am constrained by the First Department's holding to deny the petition. Like documents in Luongo I, the administrative summaries listing disciplinary dispositions "are clearly of significance to superiors in evaluating police officers' performance." Luongo I at 6. Contrary to petitioner's contention that respondent failed to demonstrate a substantial potential for the records to be used to harass officers if disclosed, the First Department found that by its nature this information carries the potential for exploitation. Further, contrary to petitioner's argument, respondent must

demonstrate a possibility rather than a past history of endangerment. Id. at 8. The Court has considered the remainder of the parties' arguments and they do not change the outcome.

Therefore, it is

ORDERED that the petition is denied.

Dated: May 24, 2017

ENTER:

JOAN B. LOBIS, J.S.C.

NOTICE OF CPLR ART. 78 PETITION, DATED DECEMBER 6, 2016
(pp. 20–22)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

Application of Justine Luongo, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,	
Petitioner	NOTICE OF CPLR ART. 78 PETITION Index No.
- against-	
Records Access Appeals Officer, New York Police Department Respondent.	

PLEASE TAKE NOTICE, that upon the annexed verified Petition, the affirmation of Cynthia H. Conti-Cook, Esq., and the attached exhibits, the undersigned will make application before this Court at 60 Centre Street, NY 10007 on the 12th day of January, 2017 at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order and judgment pursuant to CPLR Art. 78,

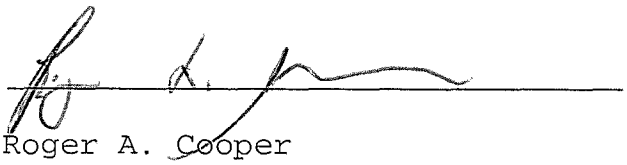
i) directing the New York Police Department(NYPD) to produce the Personnel Orders for the years January 1, 2011 to the present, and

ii) awarding attorneys' fees associated with bringing this action. Public Officers Law § 86-90.

Dated: December 6, 2016
New York, New York

Respectfully Submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: 

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VERIFIED CPLR ART. 78 PETITION, DATED DECEMBER 6, 2016
(pp. 23–48)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

Application of Justine Luongo, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,	
Petitioner	VERIFIED CPLR ART. 78 PETITION Index No.
- against-	
Records Access Appeals Officer, New York Police Department Respondent.	

CYNTHIA H. CONTI-COOK, an attorney associated with The Legal Aid Society, affirms on information and belief, the sources of which are the appended documents:

PRELIMINARY STATEMENT

1. This is a Petition for an order pursuant to C.P.L.R. Art. 78, directing the New York Police Department ("NYPD") to produce requested documents containing NYPD administrative summaries, in compliance with Public Officers Law § 86-90, or the Freedom of Information Law ("FOIL").

VENUE

2. Venue is proper in New York County, which is the NYPD's principal place of business, and the place where the adverse agency determination was made. C.P.L.R. § 506(b).

PARTIES

3. Petitioner Justine Luongo is the Attorney-in-Chief of the Criminal Defense Practice, Legal Aid Society.

4. The Records Access Appeal Officer is the appointed officer of the NYPD FOIL Unit who determines FOIL-availability of records produced by or for the NYPD.

ADMINISTRATIVE PROCEEDINGS

5. Petitioner has requested access to files containing NYPD administrative summaries that were posted publically by the NYPD for 40 years prior to this request.

6. On May 9, 2016, The Legal Aid Society ("Legal Aid"), submitted a request under Article 6 of the Public Officers Law to the NYPD's FOIL Unit. *See* Ex. A, Letter from Cynthia Conti-Cook to NYPD Records Access Officer, dated May 9, 2016 (the "FOIL Request"). On behalf of her organization, Ms. Conti-Cook requested that the NYPD furnish all "Personnel Orders" (the "Orders") from January 1, 2011 to the present. *Id.* On May 18, 2016, Legal Aid received a message from the NYPD, acknowledging Ms. Conti-Cook's FOIL request. *See* Ex. B, Letter from Richard Mantellino to Cynthia Conti-Cook, dated May 18, 2016.

7. The Orders Legal Aid seeks contain NYPD administrative summaries listing employment updates for both officers and civilian employees such as transfers, promotions, retirements, and disciplinary dispositions. *See* Ex. C, Affirmation of

Katherine R. Lynch, dated Dec. 6, 2016; Ex. D, Photographs of Personnel Orders taken by Katherine R. Lynch on December 2, 2016 ("Order Photographs"). The disciplinary dispositions in particular briefly summarize the factual basis for disciplinary proceedings against police officers as well as the outcomes of such proceedings, including official charges and penalties, if any. *See* Rocco Parascandola and Graham Rayman, *Exclusive: NYPD Suddenly Stops Sharing Records On Cop Discipline In Move Watchdogs Slam As Anti-Transparency*, New York Daily News, Aug. 24, 2016, http://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145. These disciplinary proceedings may be initiated by the NYPD or by the Civilian Complaint Review Board ("CCRB"), and all final disciplinary decisions are made by the Police Commissioner. *See* N.Y. City Charter § 434 (authority to discipline is held by the Police Commissioner); CCRB, *Frequently Asked Questions*, http://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page (last visited Nov. 29, 2016).

8. Many of the proceedings that are ultimately reflected in the Orders are already public. For example, the CCRB routinely prosecutes members of the NYPD in front of an administrative law judge, known as a Deputy Commissioner of Trials, at a trial room at NYPD headquarters. *See* CCRB, *APU Trials*, https://www1.nyc.gov/site/ccrb/prosecution/apu-trials.page (last

visited Nov. 29, 2016). These trials are open to the public. *Id*. After the Police Commissioner makes the ultimate determination of discipline, the summary of the charge and the penalty are published along with any dispositions the NYPD has made for other officers in a list summary entitled "Personnel Orders." *See* Ex. D, Order Photographs.

9. For at least 40 years, the NYPD routinely made these Orders publicly available to reporters by posting them on a clipboard at the Deputy Commissioner of Public Information's ("DCPI") office at NYPD headquarters. *See* Parascandola and Rayman, *supra*. This was not the only place where the records were made available, however. They have also been available at the New York City Hall Library, including orders dated as recently as April 2016.[1] *See* Ex. D, Order Photographs.

10. Despite the NYPD's longtime disclosure of these records, on May 27, 2016, the NYPD denied Legal Aid's request for the records. *See* Ex. E, Letter from Richard Mantellino to Cynthia Conti-Cook, dated May 27, 2016 (the "FOIL Denial"). The NYPD stated that it had made this decision on the basis of Public Officers Law § 87(2)(e), intended to protect records "compiled for law enforcement purposes," as well as Public Officers Law § 87(2)(a), which pertains to personnel records that are exempt

[1] Because the Orders posted outside the DCPI office have since been taken down, *see* Parascandola and Rayman, *supra*, Petitioner could not confirm that the contents of the Orders posted by the DCPI were identical to those of the Orders still available at the City Hall Library.

from FOIL disclosure under Civil Rights Law § 50-a ("Section 50-a"). *Id.* The NYPD further noted that it would no longer make these orders available to the press going forward, regardless of its past policy of public disclosure. *Id.*

11. On June 8, 2016, Legal Aid appealed to the NYPD Records Access Appeals Officer, requesting that the agency reconsider its denial. *See* Ex. F, Letter from Cynthia Conti-Cook to Jonathan David, dated June 8, 2016 (the "FOIL Appeal"). Legal Aid noted that it was merely seeking access to information that had already been provided to reporters for years and that, under FOIL, all government documents, including police records, are presumptively available for "public inspection and copying." *Id.*

12. In response, the NYPD reaffirmed its denial of the request, stating that the requested Orders contained references to "disciplinary charges" against police officers, and thus were barred from disclosure as personnel records pursuant to Section 50-a. *See* Ex. G, Letter from Jonathan David to Cynthia Conti-Cook, dated August 8, 2016 (the "FOIL Appeal Denial").

13. The FOIL Appeal Denial also confirmed that the requested Orders had been previously made available at the office of the DCPI at NYPD Headquarters at One Police Plaza and that members of the press had access to this information. *Id.*

Notwithstanding this long-time practice of disclosure, in response to this FOIL request, the NYPD decided that it would no

longer publicize the Orders. *Id.* Apparently unaware of the availability of over 40 years of Orders in the City Hall Library, Mr. David stated that "[t]here is no precedent for the type of disclosure that [Legal Aid] request[s]—copies of all Personnel Orders issued over the course of 5 years." *Id.* 14. The timing of the NYPD's abrupt reversal is more than a little suspicious. It comes at a time of increased public demand for police accountability, especially for the officers who caused the deaths of Ramarley Graham in 2012 and Eric Garner in 2014. And the public's increasing interest in the requested information is stronger and more justified than ever. In the past year, there have been public demonstrations calling for the NYPD to fire Officer Richard Haste, who shot Ramarley Graham, as well as Officer Daniel Pantaleo, who choked Eric Garner. *See, e.g.*, Chauncey Alcorn and Larry McShane, *Eric Garner's Mother Leads Brooklyn March Against Police Brutality With Al Sharpton On Eve Of His Death Anniversary*, New York Daily News, July 16, 2016, http://www.nydailynews.com/new-york/al-sharpton-eric-garner-widow-esaw-lead-brooklyn-march-article-1.2714068; Sameer Rao, *Ramarley Graham's Family, Activists Demand Accountability With #23Days4Ramarley Campaign*, Color Lines, Apr. 26, 2016, http://www.colorlines.com/articles/ramarley-grahams-family-activists-demand-accountability-23days4ramarley-campaign.

15. Administrative remedies have been exhausted. A C.P.L.R. Article 78 proceeding will lie to obtain review of the agency's denial of this FOIL application. Public Officers Law § 89(4)(a)(b).

ARGUMENT

THE ORDERS ARE NOT "PERSONNEL RECORDS" UNDER THE PLAIN TEXT OR LEGISLATIVE PURPOSE OF SECTION 50-A

16. The Orders, which are summaries listing employment updates and outcomes of officer disciplinary proceedings, do not meet the "personnel records" exemption to FOIL created by Section 50-a.

17. FOIL provides the people of New York a "means to access governmental records, to assure accountability and to thwart secrecy," by ensuring that "[a]ll records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant." *Matter of Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994) (internal citation and quotations omitted). Therefore, "consistent with these laudable goals," the Court of Appeals "has firmly held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Id.*

18. Because FOIL serves vital public interests, the burden is upon the government to demonstrate that the requested

information falls "squarely within" the exemption. *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 158-59 (1999). "[T]he standard of review on a CPLR article 78 proceeding challenging an agency's denial of a FOIL request is much more stringent than the lenient standard generally applicable to CPLR article 78 review of agency actions. A court is to presume that all records are open, and it must construe the statutory exemptions narrowly." *Matter of Berger v. N.Y.C. Dep't of Health & Mental Hygiene*, 137 A.D.3d 904, 906 (2d Dep't 2016), *leave to appeal denied,* 27 N.Y.3d 910 (2016). And to invoke Section 50-a, under this standard, an agency cannot "with[old] all of the requested records on the basis of a blanket invocation of Civil Rights Law § 50-a" but must "offer[] a specific basis for the claimed exemption." *Matter of Hearst Corp. v. N.Y. State Police*, 966 N.Y.S.2d 557, 560 (3d Dep't 2013). Further, "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed." *Matter of Dilworth v. Westchester Cty. Dept. of Corr.,* 93 A.D.3d 722, 724 (2d Dep't 2012).

19. Section 50-a, as relevant here, protects "personnel records" of police officers from compelled disclosure. Civil Rights Law § 50-a. The statute provides no definition for personnel records, but does require that to qualify, the records

must be "used to evaluate performance toward continued employment or promotion." *Id.* In this regard, it is firmly established that the focus is not merely on the nature of the information in the document, but also upon the actual use of that document in evaluating officers. As explained by the New York Court of Appeals, "whether a document qualifies as a personnel record under Civil Rights Law § 50-a(1) depends upon its nature *and its use* in evaluating an officer's performance." *Matter of Prisoners' Legal Servs. of N.Y. v. N.Y. State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 32 (1988) ("*Prisoners' Legal*")(emphasis added).

20. The NYPD cannot satisfy this standard and demonstrate that the Orders are personnel records. The NYPD has not provided any explanation or evidence to show how the Orders are actually used in the evaluation of officers' performance or for promotion or retention purposes. *Cf. Dilworth,* 93 A.D.3d at 724 (holding that conclusory assertions are insufficient to support a FOIL denial; actual evidence is needed). Nor can it; certainly, neither the pages of the administrative updates, nor the summary lists of officers receiving disciplinary charges, are duplicated in individual officers' files. The NYPD's failure to meet this burden is sufficient in itself to justify ordering disclosure. *Matter of Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 15 N.Y.3d 759, 761 (2010) (ordering disclosure of

records where city's conclusory affidavit failed to meet burden of showing records were used to evaluate performance and thus fell squarely within the statute). But even looking at the actual Orders——which include compilations of purely factual employment information about multiple officers and civilian employees, including lists of the outcomes of officer disciplinary proceedings——there is no reason to believe that someone evaluating an officer for promotion would look to these compilations of information. Rather, they would look at more detailed, officer- and incident-specific information kept separately in that officer's own personnel file. *See* Ex. H, Advisory Opinion from Committee on Open Government ("Advisory Opinion"). By contrast, *Prisoners' Legal*——in which the Court of Appeals found information to be "personnel records"——involved detailed records of the allegations and investigations against prison guards that the court found did serve the function of personnel records. *Prisoners' Legal*, 73 N.Y.2d at 32.

21. The NYPD's position is also contrary to the legislative intent. The requested Orders do not fall within the "narrowly specific" set of documents that the legislature intended to protect with Section 50-a. *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562 (1986). The purpose of the statute is "to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context

of a civil or criminal action." *Id.* (internal citation and quotation marks omitted). Statements in the legislative history confirm that the bill was targeted at preventing "the indiscriminate perusal of police officers' personnel records by defense counsel in cases wherein the police officer is a witness," because "such records often contain raw, unverified information derogatory of the subject police officer, such as letters of complaint from members of the public." *See* Ex. I, Mem. Of Roger Hayes, State of New York Division of Criminal Justice Services, Bill Jacket L. 1976, Chapter 413.

22. The information requested here is nothing of this sort. Nowhere do the Orders disclose the kind of underlying details or unsupported allegations behind civilian complaints that courts have found to be within the scope of the law. *See, e.g., Prisoners' Legal*, 73 N.Y.2d 26. Rather, these documents merely contain facts about decisions made by the Police Commissioner, often following a publicly-held hearing.

23. The NYPD's apparent interpretation of "personnel records" to cover not only records actually used in promotion and retention decisions, but all *information* that is in any way potentially related to such decisions, would turn a narrow law originally designed to protect police officers from harassment *in court* into a near-total bar on public access to any information whatsoever about officer misconduct. Nothing short

of crystal-clear statutory language can justify such a restriction on public access to information, and the legislature did not so clearly exempt all such information when it passed Section 50-a.

24. Indeed, courts have held that the disciplinary hearings themselves do not constitute personnel records. *Matter of Doe v. City of Schenectady*, 84 A.D.3d 1455, 1459 (3rd Dep't 2011)("Simply put, Civil Rights Law § 50-a neither speaks of, nor was intended to, prohibit public police disciplinary hearings."). If the hearings themselves do not constitute personnel records, it cannot possibly be the case that summaries of the outcomes of these proceedings, reflecting the same public information, are protected personnel records.

25. That the Orders are not personnel records is further demonstrated by the NYPD's own prior conduct in making this information available for at least the last 40 years. It did so by posting them in the office of the NYPD Deputy Commissioner of Public Information, where they were available to the press, and by providing over 40 years' worth of the Orders at the City Hall Library for archiving. Former Commissioner Ray Kelly even admitted that he also wanted to remove media access to these summaries but his lawyers advised him that would be unlawful. *See* Rocco Parascandola and Graham Rayman, *Fmr. Police Commissioner Raymond Kelly likes Bill Bratton's decision to keep*

NYPD disciplinary records secret, New York Daily News, Aug. 27, 2016, http://www.nydailynews.com/news/politics/raymond-kelly-agrees-bill-bratton-decision-nypd-secrecy-article-1.2768433; Ex. G, Foil Appeal Denial; Ex. C, Affirmation of Katherine R. Lynch.

26. Where an agency has relied upon a particular interpretation, it cannot change that interpretation without providing an explanation as to why its prior interpretation was incorrect and should be reversed if it does so. *See Matter of Charles A. Field Delivery Serv., Inc. v. Roberts*, 66 N.Y.2d 516, 519-20 (1985). The FOIL Appeal Denial, however, does not explain why the NYPD suddenly changed its interpretation after 40 years of publishing the records; indeed, the only plausible cause of this policy change appears to be the FOIL Request itself, and no doubt the heightened public scrutiny of police conduct following the death of Ramarley Graham, Eric Garner and others at the hands of the police.

27. Furthermore, other government agencies also disagree as to whether the requested documents are personnel records. First, to this day, the City Hall Library, operated by the New York City Department of Records, has multiple books containing decades' worth of these reports which are reviewable by any member of the public upon request, from as long ago as 1972 and as recently as April 2016. *See* Ex. C, Affirmation of Katherine R. Lynch; Ex. D, Order Photographs. Second, Governor Cuomo has

publicly expressed his disagreement with the NYPD's interpretation of Section 50-a. *See* Joseph Stepansky and Thomas Tracy, *Cuomo calls out de Blasio over NYPD disciplinary record secrecy*, New York Daily News, Sept. 10, 2016, http://www.nydailynews.com/new-york/cuomo-calls-de-blasio-nypd-disciplinary-record-secrecy-article-1.2786843.

28. Third, the Committee On Open Government, a state-operated committee, has expressly considered the Orders and is of the opinion that they do not constitute personnel records under Section 50-a. The Committee notes in an advisory opinion that, unlike here, personnel records typically relate to a single individual and are often found within a file or group of files focusing on that individual. Furthermore, the Committee observes that the Orders in question do not appear to be used to actually evaluate the performance of officers. Ex. H, Advisory Opinion. The Committee further notes that the public display of these documents for over 40 years weighs heavily against the claim that they can be withheld under FOIL, and in the Committee's view, the department should therefore make these Orders available to petitioner and the public. *Id.*

29. In sum, because the Orders fall outside both the plain text requirements for "personnel records" and in practice are not the kind of documents the legislature intended to protect——as shown by the NYPD's publication of these documents for decades——this

Court should find that the Orders are not exempt from disclosure because they are not personnel records pursuant to Section 50-a.

EVEN IF THE COURT DETERMINES THAT THE ORDERS ARE PERSONNEL RECORDS, THEY SHOULD BE RELEASED BECAUSE THE NYPD HAS NOT AND CANNOT DEMONSTRATE THAT NONDISCLOSURE IS NECESSARY TO EFFECTUATE THE PURPOSES OF SECTION 50-A

30. Even if the Orders are personnel records under Section 50-a, the Court should still order that they be released. The Court of Appeals has recognized that the "comprehensive statutory exemption [of Section 50-a] must be tempered when it interacts with the competing legislative policy of open government through broad public access to governmental agency records embodied in the FOIL legislation." *Daily Gazette*, 93 N.Y.2d at 145.

31. The NYPD may refuse to disclose documents that are personnel records *only if* it meets its burden of showing that nondisclosure is "necessary to effectuate the purposes of Civil Rights Law § 50-a—to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of [police] officer[s]." *Id.* at 157-58. This, in turn, requires the NYPD to show "a substantial and realistic potential of the requested material for the abusive use against the officer or firefighter." *Id.* at 159. A remote probability of abusive use is insufficient to meet the burden for nondisclosure because "[t]he potential for abuse through

FOIL is in a sense a price of open government, and should not be invoked to undermine the statute." *Matter of M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 82 (1984).

32. In keeping with the legislative intent of Section 50-a, courts have distinguished between FOIL requests for unfettered access to all sensitive data within personnel records, and requests for limited access to "neutral" information such as factual summaries that have a "remote" potential for abuse, *Prisoners' Legal*, 73 N.Y.2d at 33——and requests for the latter information have been routinely granted. In contrast to *Prisoners' Legal*, 73 N.Y.2d at 33, where detailed allegations of inmate complaints against prison guards were protected from disclosure, in *Capital Newspapers*, 67 N.Y.2d at 567, the Court of Appeals permitted release of a summary tabulation of an officer's sick leave time. *See also Matter of Cook v. Nassau Cty. Police Dep't*, 110 A.D.3d 718, 20 (2d Dep't 2013) (denying release of entire internal investigation report but affirming release of a partially redacted "Citizen Complaint Summary" included within the report).

33. Similarly, in *Matter of Luongo v. Records Access Officer*, 49 Misc.3d 708 (Sup. Ct. N.Y. Cty. 2015), the Supreme Court carefully considered the aforementioned precedents in determining whether to grant a FOIL request for access to CCRB

records relating to substantiated complaints against NYPD Officer Daniel Pantaleo, who was involved in the widely-publicized death of Eric Garner in 2014. The court permitted the release of the records, concluding that because the petitioners sought "limited records" and only "substantiated complaints," the case was most analogous to *Capital Newspapers*. *Id.* at 718.

34. The NYPD has not and cannot show that the Orders have any serious potential to "degrade, embarrass, harass or impeach the integrity" of the officers. *Daily Gazette*, 93 N.Y.2d at 158. The Orders contain purely factual descriptions of the dispositions of actual disciplinary actions brought against officers, following a public hearing and ultimately decided by the Police Commissioner. Petitioner does not seek access to the sensitive details underlying the disciplinary dispositions that are contained in individual officers' personnel files. Thus, in contrast to the more detailed records that courts have found do have an unacceptable potential for abuse, *see Prisoners' Legal*, 73 N.Y.2d at 33-34*; Daily Gazette,* 93 N.Y.2d at 159, the Orders reflecting merely the disposition of a disciplinary case against an officer, without any specific details about the conduct underlying that disciplinary case, could not be used as a basis to harass or impeach an officer in court. *See People v. Smith*, 27 N.Y.3d 652, 661-62 (2016) (affirming exclusion of the

existence of a lawsuit against an officer in part because it lacked sufficient verified detail to tie it to the officer's conduct in the case before the court). Such documents therefore do not pose a realistic possibility of improper use against the officers listed in them.

35. Furthermore, the NYPD cannot plausibly assert that publication of the personnel orders would create a "substantial and realistic potential" for "abusive use" when it has in fact been publicly posting the records on a clipboard outside the Deputy Commissioner of Public Information's office for at least *40 years* without apparent issue, and where many of these Orders continue to be available in the City Hall Library. *See* Ex. C, Affirmation of Katherine R. Lynch. Given this long history of public disclosure, the NYPD must be able to point to specific circumstances in which information in a personnel order has been used abusively against officers in order to justify nondisclosure, but the NYPD has given no explanation whatsoever of how these records are prone to improper use, instead issuing a conclusory blanket denial of the FOIL Request. *See* Ex. E, FOIL Denial; Ex. G, FOIL Appeal Denial. Without concrete evidence showing that these already-public records are routinely used to harass officers, the Court should conclude that they have "remote or no such potential use" and therefore "fall

outside the scope of the statute." *Daily Gazette*, 93 N.Y.2d at 158 (quoting *Capital Newspapers*, 73 N.Y.2d at 33).

36. If, as asserted by the NYPD, limited summary information of police officer disciplinary dispositions is barred from release pursuant to Section 50-a, than nearly *all* information regarding police discipline in *any* form is barred from public disclosure. But that is not the law. The legislature has made clear in FOIL that the "government is the public's business," and "[a]ccess to [government] information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." Public Officers Law § 84.

37. Citizens have a right to know how the NYPD's police disciplinary system is functioning. If officers with a history of excessive force are not being adequately disciplined, that would necessarily inform ongoing public conversation regarding pertinent and systematic problems within the City's internal and civilian police oversight, accountability, and disciplinary systems--issues that the legislature has emphatically declared are "the public's business." *Id.* Indeed, the information is particularly critical at this time in light of the recent series of widely publicized deaths caused by police officers across the country, including the deaths of Ramarley Graham and Eric Garner in New York City. It cannot be the legislature's intent that

such basic routine information be protected from public disclosure.

THE NYPD MAY LAWFULLY RELEASE THE REPORTS ON A VOLUNTARY BASIS EVEN IF THE REPORTS ARE PERSONNEL RECORDS

38. Whether or not the NYPD is correct that the Orders are personnel records, the Court should still rule that the NYPD's basis for the denial of Petitioner's FOIL request was legally in error. *See Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 928 N.Y.S.2d 701, 702–03 (2011) (the question for evaluating an appeal of a denial of a FOIL request is whether "respondents' determination was affected by an error of law." (internal quotations and citations omitted)).

39. In response to Petitioner's FOIL request, the NYPD asserted that it is legally obligated to deny Petitioner's request, as "Civil Rights Law (CRL) Section 50-a bars disclosure of records," and "CRL 50-a is designed to protect individual officer's privacy rights and cannot be waived by any action of the NYPD." Ex. G, FOIL Appeal Denial. In addition, Mayor de Blasio has publicly stated that he believes the NYPD should release this information, but is prohibited from doing so under Section 50-a. *See* Greg B. Smith and Kenneth Lovett, *De Blasio Calls on Albany to Nix Law that Hides NYPD Officers' Disciplinary Records; Cop Unions Protest*, New York Daily News, Sept. 1, 2016, http://www.nydailynews.com/new-york/de-blasio-

albany-nix-law-hiding-nypd-disciplinary-records-article-1.2774161. As he explained: "I believe we should change the state law and make these records public. . . . The current state law that we have to honor—that does not allow for transparency." *Id.* Thus, the FOIL Request Denial as well as the Mayor's own public assessment of the situation is based on the legal conclusion that Section 50-a prohibits the NYPD from releasing the Orders.

40. This is an incorrect application of Section 50-a. New York courts have established that "the use of [personnel records] by a governmental entity, in furtherance of its official functions, is unrelated to the purpose of Civil Rights Law § 50-a." *Poughkeepsie Police Benevolent Ass'n, Inc. v. City of Poughkeepsie*, 184 A.D.2d 501, 501 (2d Dep't 1992); *see also Reale v. Kiepper*, 204 A.D.2d 72, 73 (1st Dep't 1994). No court has held that Section 50-a imposes any affirmative obligation on a state agency to keep records secret when that agency has an interest in publishing such records. Indeed, multiple decisions have concluded just the opposite, permitting agencies to publish personnel records over the objections of police officers, and affirmed that officers have no private right of action to enforce Section 50-a. *Poughkeepsie*, 184 A.D.2d at 501 (holding that a police department was entitled to share documents concerning police discipline with the public, even if they were

personnel records); *Schenectady*, 84 A.D.3d at 1457 (rejecting a challenge to public disciplinary hearings under Section 50-a and noting individual police officers possess no private right of action under Section 50-a); *Reale*, 204 A.D.2d at 72 (holding that the NYC Transit department could publish disciplinary information about NYC transit officers in departmental bulletins). Section 50-a exists to protect officers from private plaintiffs, not to gag government agencies from disclosing information they judge to be in the public interest. *Poughkeepsie*, 184 A.D.2d at 501.

41. In short, even if the Orders are personnel records under Section 50-a, the NYPD is *permitted* either to disclose or withhold them. Section 50-a, however, does not prevent the NYPD from using these records as it deems necessary to the effective operations of the police department. *See Poughkeepsie*, 184 A.D.2d at 501.

42. The Court should therefore rule that the NYPD erred in its determination that it is *prohibited* from disclosing these records in response to the FOIL Request or otherwise sharing them with the public at its discretion, as Section 50-a creates no enforceable duty upon the NYPD to maintain secrecy over officer discipline and permits a police department to use its own information as it sees fit. Such a ruling would be in the interest of Petitioner, the NYPD, and the general public, as it

would enable the NYPD to release the Orders, which are of clear public interest, and which both the NYPD and the Mayor state they wish they could release——and, contrary to their positions, they are in fact legally permitted to release.

CONCLUSION

43. The Court should grant Petitioner's request for copies of the Orders from 2011 to present. The Orders requested by Petitioner are not personnel records, as they are not in fact used for promotion or retention decisions. Even if they are, however, the NYPD has not shown that they have the potential to degrade, embarrass, harass or impeach the officers in question (as shown by NYPD's past publication of these documents). In any event, the Court should hold that the NYPD erred in its refusal of Petitioner's FOIL request because it incorrectly determined that it was incapable of granting the request.

WHEREFORE this Petition should be granted.

Respectfully Submitted,

THE LEGAL AID SOCIETY

By: _____

Cynthia H. Conti-Cook
The Legal Aid Society
199 Water St. 6th Floor
New York, NY 10038
(212) 577-3265

Counsel for Petitioner

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: _____

Roger A. Cooper
Thomas J. Moloney
Benjamin C. Shartsis
Katherine R. Lynch
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Of Counsel for Petitioner

VERIFICATION

CYNTHIA H. CONTI-COOK, an attorney duly admitted to practice before the courts of this state, and associated with The Legal Aid Society, hereby affirms: I wrote the foregoing Petition and swear it is true upon information and belief, the source of which is the appended documents provided by Petitioner.

Dated: New York, New York

December 6, 2016

CYNTHIA H. CONTI-COOK
The Legal Aid Society
199 Water St. 6th Floor
New York, N.Y. 10038
(212) 577-3265

EXHIBIT A – ANNEXED TO THE VERIFIED PETITION
Letter from Cynthia Conti-Cook to NYPD Records Access Officer, dated May 9, 2016
(pp. 49–51)

REPRODUCED FOLLOWING

EXHIBIT A

THE LEGAL AID SOCIETY

Criminal Practice Special Litigation Unit
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New York, NY 10038
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Direct Dial: (212) 577-3265
Direct Fax: (646) 449-6786
E-mail: CConti-Cook@legal-aid.org

May 9, 2016

Records Access Officer
NYPD - FOIL Unit
One Police Plaza, Rm 110-C
New York, NY 10038

Re: FOIL Request for Personnel Orders

Dear Records Officer:

This letter constitutes a request under the New York Freedom of Information Law ("FOIL") under Article 6 of the Public Officers Law. Please produce "Personnel Orders" such as those that are hung outside the ante-room of DCPI for the years January 1, 2011 to the present.

Requested Response:

Please furnish these records to the following address: Cynthia H. Conti-Cook, Legal Aid Society, Criminal Defense Practice, Special Litigation Unit, 199 Water Street, 6th Floor, New York, NY 10038. You many also email it to cconti-cook@legal-aid.org. Pursuant to N.Y. Pub. Off. Law §89(3)(a), I expect a response within the five (5) day statutory time limit. If this Request is denied in whole or in part, I respectfully ask that all deletions are justified by reference to specific exemptions of the FOIL. If the materials responsive to this request require redaction, please include an index of the redactions with a basis for each redaction. If you have any questions in processing this request, please feel free contact me at the number or address below.

Best regards,

Cynthia Conti-Cook
Staff Attorney, Special Litigation Unit

EXHIBIT B – ANNEXED TO THE VERIFIED PETITION
Letter from Richard Mantellino to Cynthia Conti-Cook, dated May 18, 2016
(pp. 52– 54)

REPRODUCED FOLLOWING

EXHIBIT B

POLICE DEPARTMENT
LEGAL BUREAU
F.O.I.L Unit, Room 110C
One Police Plaza
New York, NY 10038

05/18/16

Ms. Cynthia Conti-Cook
The Legal Aid Society
199 Water Street
New York, NY 10038

FOIL Req #: 2016-PL-5238
Your File #:
Re: Personnel Orders

Dear Sir or Madam:

This is in response to your letter dated 05/09/16, which was received by this office on 05/11/16, in which you requested access to certain records under the New York State Freedom of Information Law (FOIL).

Your request has been assigned to Police Officer Halk (646-610-6430) of this office. Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued, within ninety business days of this letter.

This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

Very truly yours,

Richard Mantellino
Lieutenant
Records Access Officer

EXHIBIT C – ANNEXED TO THE VERIFIED PETITION
Affirmation of Katherine R. Lynch, dated December 6, 2016 (pp. 55–59)

REPRODUCED FOLLOWING

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

Application of Justine Luongo, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,	
Petitioner	AFFIRMATION IN SUPPORT OF VERIFIED CPLR ART. 78 PETITION Index No.
- against-	
Records Access Appeals Officer, New York Police Department Respondent.	

I, KATHERINE R. LYNCH, an attorney admitted to practice in the courts of this State, affirm under penalty of perjury the following pursuant to C.P.L.R. § 2106:

1. I am an associate at Cleary Gottlieb Steen & Hamilton LLP, which is co-counsel to Petitioner The Legal Aid Society in this matter.

2. This Affirmation is submitted in support of Petitioner's Article 78 Proceeding to compel the New York Police Department ("NYPD") to produce requested documents containing NYPD Personnel Orders (the "Orders"), in compliance with Public Officers Law § 86-90, or the Freedom of Information Law.

3. On December 2, 2016, I visited the City Hall Library, located at 31 Chambers Street, Room 112, New York, NY 10007, and requested access to NYPD Personnel Orders.

4. I was granted access to the Personnel Orders on request without any special authorization, as a member of the public.

5. I requested access to the oldest and the most recent Personnel Orders available at the City Hall Library.

6. The oldest Personnel Orders available begin on January 5, 1972.

7. The most recent Personnel Orders available end on April 7, 2016.

8. Library staff informed me that the remainder of the Personnel Orders from prior to April 2016 were also available to review, but that they did not expect to receive any records from April 2016 onwards.

9. Library staff gave me permission to photograph the Personnel Orders and offered to make the Personnel Orders available for copying.

10. Attached as Exhibit D to this Article 78 Petition are true and accurate copies of photographs that I took of the Personnel Orders available at the City Hall Library, with permission from the library staff.

I hereby affirm under penalties of perjury that the within Affirmation is true and correct to the best of my knowledge.

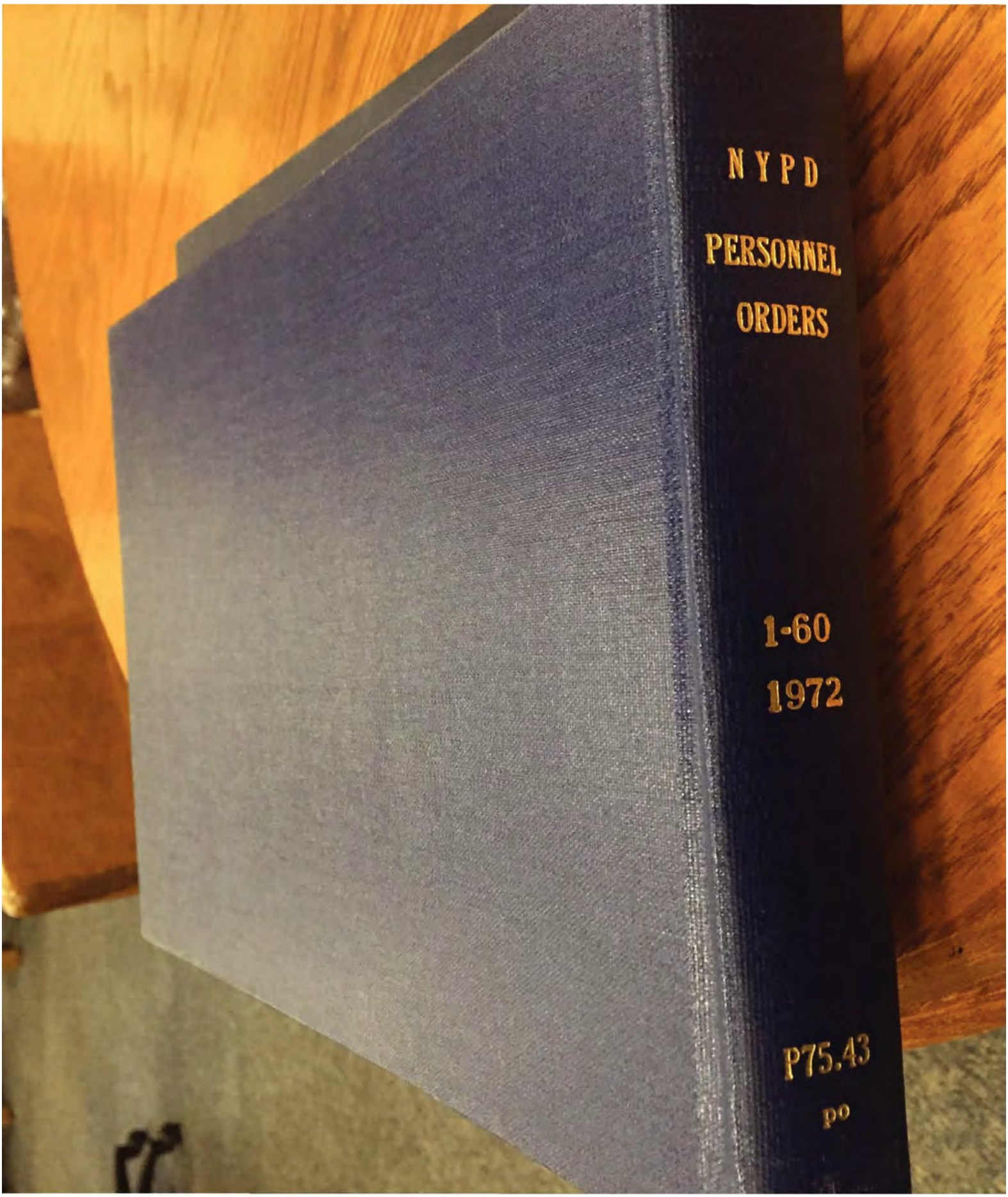
Dated: New York, New York
December 6, 2016

Katherine R. Lynch

EXHIBIT D – ANNEXED TO THE VERIFIED PETITION
Photographs of Personnel Orders taken by Katherine R. Lynch on December 2, 2016
(pp. 60–68)

REPRODUCED FOLLOWING

EXHIBIT D


NYPD
PERSONNEL
ORDERS
1-60
1972
P75.43
po

POLICE DEPARTMENT
CITY OF NEW YORK

Personnel Order No. 1 January 5, 1972

1. Following TRANSFERS and ASSIGNMENTS are ordered:

DEPUTY CHIEF INSPECTOR

To take effect 1200 December 31, 1971

John Guido, 820735, S.S. [redacted], from Public Morals Division to Personnel Bureau.

DEPUTY INSPECTOR

To take effect 0800 January 10, 1972

William Stoller, 822071, S.S. [redacted], from 19th Precinct to Patrol Bureau.

CAPTAINS

To take effect 0800 January 3, 1972

From Commands indicated to Commands specified:

	Soc.Sec.#	From Com'd.	To Com'd.
Matthew J. Neary	823186	P.A.	108 Pct.
John A. Langan	831799	108 Pct.	P.B.M.N.

To take effect 0001 October 20, 1971

Gerald Corin, 864656, S.S. [redacted], from Office of Deputy Commissioner, Youth Program to Youth Aid Division.

To take effect 0800 January 10, 1972

Daniel J. McGowan, 823960, S.S. [redacted], from Public Morals Division to 19th Precinct.

LIEUTENANTS

To take effect 0800 January 3, 1972

	Soc.Sec.#	From Com'd.	To Com'd.
Harry J. Perkins, Jr.	833114	Hcy. 4	110 Pct.
James F. King	830000	109 Pct.	T.P.F.
Joseph Santino	828338	110 "	109 Pct.

To take effect 0800 January 7, 1972

Joseph J. Bauer, 843776, S.S. [redacted], from Tactical Patrol Force to Patrol Bureau.

P.O. 1

POLICE DEPARTMENT
CITY OF NEW YORK

Personnel Order No. 55 March 2, 1972

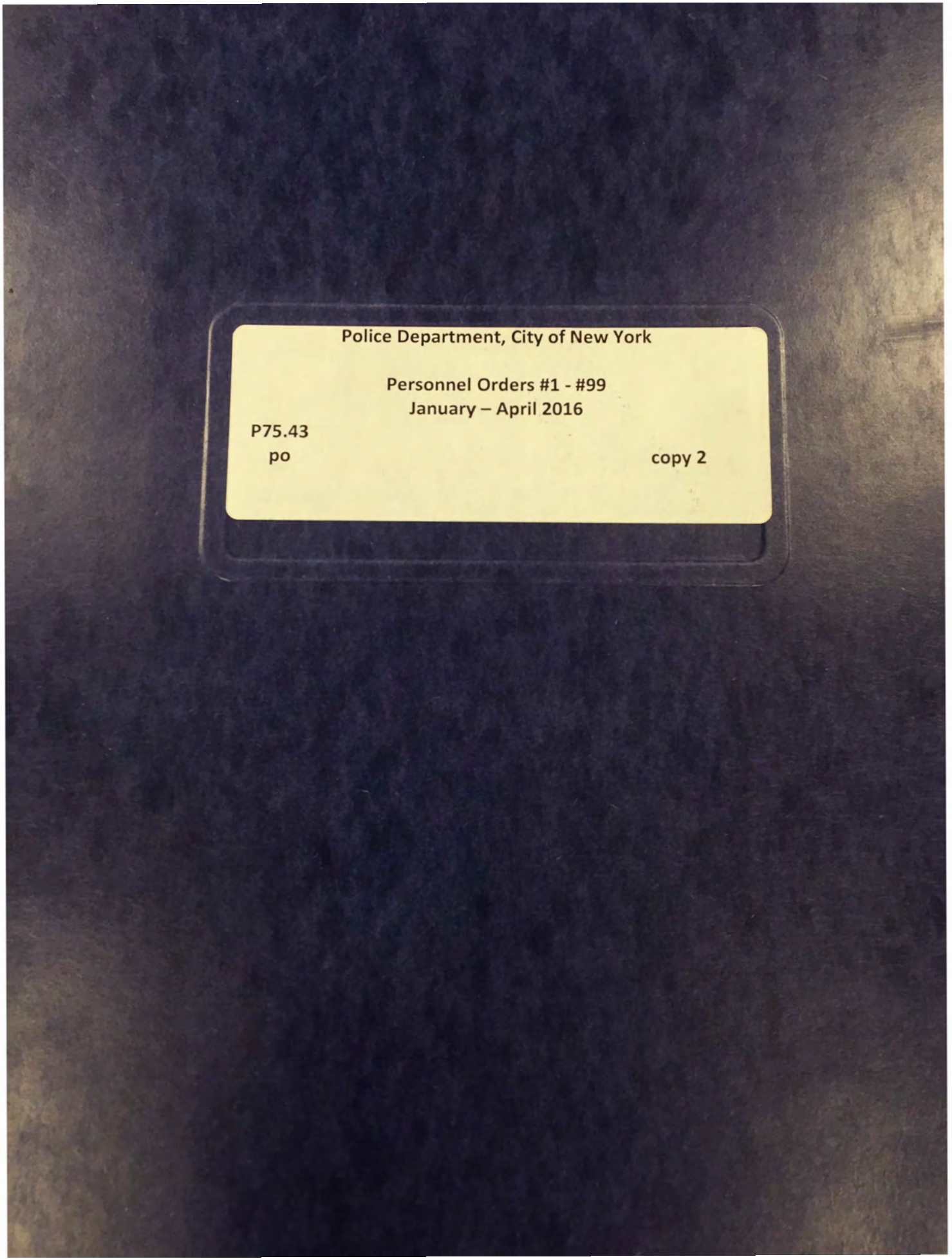
Disposition Of Disciplinary Proceedings

Detectives

Case No.	Name	Shield	Present Command	Charges Pref. By	Date Of Charges
45774	Francis C. Donohue	2931	Auto.Sqd.	OCDIU	9-30-71
3 days vacation, Tax [redacted]					
45972	James Rodgers	2434	68 Sqd.	OCDIU	12-13-71
Reprimand, Tax [redacted]					
45580	James M. Stevens	1838	1 DD Rob.	CIIED	9-7-71
Complaint Dismissed, Tax [redacted]					

Patrolmen

44539	George E. Greader Sr.	7791	48 Pct.	45 Pct.	12-21-70
30 days pay, and to be placed on probation one (1) year. Tax [redacted] SS [redacted], to be relieved of duty for the 30 days of pay.					
45302	Brian F. Hogan	16060	13 Pct.	13 Pct.	7-19-71
30 days pay, and to be relieved of duty for that period of time. To be placed on probation for one (1) year. Tax [redacted] SS [redacted]					
45312	Roland Williams	23143	23 Pct.	4 Div.	7-29-71
15 days pay, and to be relieved of duty for that period of time. Tax [redacted] SS [redacted]					
45483	Salvatore Fragapane	21849	61 Pct.	CCRB	8-2-71
5 days pay, and to be relieved of duty for that period of time. Tax [redacted] SS [redacted]					
44100	David Levy	27405	72 Pct.	CCRB	12-11-70
15 days pay, and to be relieved of duty for that period of time. To be placed on probation for one (1) year. Tax [redacted], SS [redacted]					
40560	Timothy J. Murphy	6094	48 Pct.	1 DCO	10-24-68
30 days pay, and to be relieved of duty for that period of time. To be placed on probation for one (1) year. Tax [redacted] SS [redacted]					
44257	James D. Spaulding	30625	19 Pct.	105 Pct.	1-29-71
5 days vacation, (Spec. #3 Dismissed) Tax [redacted]					
44011	Joseph E. McAndrew	17770	9 Pct.	CCRB	11-17-70
5 days vacation, Tax [redacted]					
44261	Robert Maisto	20421	88 Pct.	61 Pct.	1-27-71
4 days vacation, Tax [redacted]					
45478	Richard DiRosa	26652	79 Pct.	CCRB	7-27-71
3 days vacation, Tax [redacted] (Spec. #3 Not Guilty)					
44082	Robert Maisto	20421	88 Pct.	61 Pct.	11-28-70
3 days vacation, Tax [redacted]					


Police Department, City of New York
Personnel Orders #1 - #99
January – April 2016
P75.43
po
copy 2

AG 320 – 10 TRANSFERS (Cont'd.):

Effective 0001, February 25, 2016
DETECTIVE INVESTIGATOR

		From	To
Stefania Polanscak	924734	Vice Enf.	VE Major Case Team (496O03)

POLICE OFFICER

Peter J. Bouchez	934523	67 Pct.	P.B.Bk.So.

Effective 0001, February 26, 2016

Min N. Liang	936954	67 Pct.	PBBS SU ECT (186P13)
*Donna M. Farrell	930126	Taxi Sqd.	Bx.Robb.Sqd.

*Note: Investigative Assignment continued.

3- TEMPORARY ASSIGNMENT from 0001, February 25, 2016 to 2400, May 24, 2016:

POLICE OFFICER

		From	To
James K. Holder	951823	67 Pct.	PBBS SU ALU (186P12)

4- LEAVE OF ABSENCE, WITHOUT PAY and transferred to the Military & Extended Leave Desk:

DETECTIVE INVESTIGATOR

		Com'd.	From	To
Anthony P. D'Esposito	940085	73 Det.Sqd.	0001, 2/23/16	2400, 2/22/17

5- PLACED ON MODIFIED ASSIGNMENT:

Effective 1730, February 23, 2016
PROBATIONARY CAPTAIN

		Com'd.
Scott J. Forster	940153	71 Precinct

6- MODIFIED ASSIGNMENT DISCONTINUED:

Effective 0900, February 24, 2016
POLICE OFFICER

		Com'd.
Andrei Torres	943880	102 Pct.

Note: T/A to Police Service Area 9 (809V03) discontinued 2400, February 24, 2016. Restricted Duty continued.

DISPOSITION OF DISCIPLINARY PROCEEDINGS:

	RANK	NAME	TAX NO.	PRESENT COMMAND	COMMAND PREF'D CHARGES	DATE OF CHARGES
-9698	CAPT	DANIEL SOSNOWIK	[redacted]	LDRSHP. TRNG.SECT.	IAB	05/28/2013

:IFICATION/DISPOSITION
HILE OFF-DUTY WAS WRONGFULLY INVOLVED IN A PHYSICAL ALTERCATION WITH PERSON KNOWN TO THE DEPARTMENT. **GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
eiture of twelve (12) pre-trial suspension days already served.

-10036	PO	ANDREW SCHMITT	[redacted]	BK.CT. SECT.	CCRB/APU	07/26/2013

:IFICATION/DISPOSITION
ID WRONGFULLY USE FORCE AGAINST A PERSON KNOWN TO THE DEPARTMENT. **NOT GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
ondent found Not Guilty.

-9972	PO	BRIAN DEBOER	[redacted]	70 PCT.	CCRB/APU	07/17/2013

:IFICATION/DISPOSITION
ID WRONGFULLY USE FORCE AGAINST A PERSON KNOWN TO THE DEPARTMENT. **GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
eiture of five (5) vacation days.

-6184	PO	DERRICK HARDY	[redacted]	ID SECT.	IAB	03/28/2012

:IFICATION/DISPOSITION
ID FAIL TO ASSIST ANOTHER OFFICER DURING AN ATTEMPT TO MAKE A LAWFUL ARREST. **GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
eiture of ten (10) vacation days.

-8139	SGT	ANDREW DORSETT	[redacted]	PSA 3	QAD	02/14/2013

:IFICATIONS/DISPOSITIONS
ID WRONGFULLY CAUSE FALSE ENTRIES TO BE MADE IN DEPARTMENT RECORDS BY MISCLASSIFYING A CRIME. **NOT GUILTY**
ID FAIL TO REFER A COMPLAINT TO THE DETECTIVE SQUAD FOR FURTHER INVESTIGATION. **NOT GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
ondent found Not Guilty.

-9865	DT3	PAUL ORTIZ	[redacted]	NBBN	CCRB/APU	11/13/2013

:IFICATIONS/DISPOSITIONS
ID ABUSE HIS AUTHORITY IN THAT HE STOPPED A PERSON KNOWN TO THE DEPARTMENT. **GUILTY**
ID ABUSE HIS AUTHORITY IN THAT HE SEARCHED A PERSON KNOWN TO THE DEPARTMENT ITH OUT SUFFICIENT LEGAL AUTHORITY. **GUILTY**
ID WRONGFULLY USE FORCE AGAINST A PERSON KNOWN TO THE DEPARTMENT. **NOT GUILTY**

LTY: **DATE OF DISPOSITION: 03/27/2015**
eiture of five (5) vacation days.

DISPOSITION OF DISCIPLINARY PROCEEDINGS:

CASE	RANK	NAME	TAX NO.	PRESENT COMMAND	COMMAND PREF'D CHARGES	DATE OF CHARGES
2013-9297	PAA	CURLINE BROWN	[redacted]	M.E.L.D.	IAB	05/02/2013

SPECIFICATIONS/DISPOSITIONS

1. WHILE OFF-DUTY, DID KNOWINGLY AND UNLAWFULLY POSSESS A CONTROLLED SUBSTANCE. **FILED**
2. WHILE OFF-DUTY, FAILED TO IMMEDIATELY NOTIFY HER ARRESTING OFFICER THAT SHE WAS A MEMBER OF THE NEW YORK CITY POLICE DEPARTMENT. **FILED**
3. SAID POLICE ADMINISTRATIVE AIDE, WITHOUT AUTHORITY OR POLICE NECESSITY, DID POSSESS A CONTROLLED SUBSTANCE. **GUILTY**
4. DID ENGAGE IN CONDUCT PREJUDICIAL TO THE GOOD ORDER, EFFICIENCY, OR DISCIPLINE OF THE DEPARTMENT, IN THAT SAID POLICE ADMINISTRATIVE AIDE, WITHOUT AUTHORITY OR POLICE NECESSITY, DID INGEST A CONTROLLED SUBSTANCE. **GUILTY**
5. HAVING CHANGED HER RESIDENCE, FAILED AND NEGLECTED TO NOTIFY HER COMMANDING OFFICER BY SUBMITTING CHANGE OF RESIDENCE FORM, AS REQUIRED. **GUILTY**

PENALTY: **DATE OF DISPOSITION: 02/26/2015**
Respondent is dismissed from the New York City Police Department.

2014-12443	PCT	CHINA HARVELL	[redacted]	COMM.SECT.	IAB	09/23/2014

SPECIFICATION/DISPOSITION

1. SAID POLICE COMMUNICATIONS TECHNICIAN DID DEMONSTRATE HER UNFITNESS FOR SERVICE WITH THE DEPARTMENT IN THAT SHE WAS EXCESSIVELY ABSENT, REPORTING SICK ON NINETEEN (19) OCCASIONS FOR A TOTAL OF NINETY-TWO (92) DAYS, AND SUCH ABSENCES PREVENTED HER FROM PERFORMING HER ASSIGNED DUTIES ON A REGULAR BASIS. **GUILTY**

PENALTY: **DATE OF DISPOSITION: 03/02/2015**
Forfeiture of thirty (30) suspension days. Dismissal from the New York City Police Department; however, judgment is suspended and respondent will be placed on Dismissal Probation for a period of one (1) year.

2012-7987	PAA	JULIETTE ASHE	[redacted]	MELD	IAB	02/05/2013

SPECIFICATIONS/DISPOSITIONS

1. DID ENGAGE IN CONDUCT PREJUDICIAL TO THE GOOD ORDER, EFFICIENCY OR DISCIPLINE OF THE DEPARTMENT, IN THAT SHE MADE A DISPARAGING REMARK TO HER SUPERVISOR. **GUILTY**
2. DID FAIL AND NEGLECT TO PROPERLY SAFEGUARD THE NEW YORK CITY POLICE IDENTIFICATION CARD ISSUED TO HER, IN THAT SHE REPORTED TO HER COMMAND THAT SHE LOST HER IDENTIFICATION CARD, BUT NOT IN A TIMELY MANNER. **GUILTY**
3. DURING THE COURSE OF A CONVERSATION WITH HER SUPERVISOR, POLICE ADMINISTRATIVE AIDE DID WALK AWAY AND STATED "WHAT ARE YOU GOING TO DO, GIVE ME A C.D., GO AHEAD GIVE ME A C.D." **GUILTY**

PENALTY: **DATE OF DISPOSITION: 03/02/2015**
Forfeiture of five (5) vacation days to be deducted one (1) day per month.

EXHIBIT E – ANNEXED TO THE VERIFIED PETITION
Letter from Richard Mantellino to Cynthia Conti-Cook, dated May 27, 2016 (pp. 69–71)

REPRODUCED FOLLOWING

EXHIBIT E

POLICE DEPARTMENT
LEGAL BUREAU
F.O.I.L Unit, Room 110C
One Police Plaza
New York, NY 10038

05/27/16

Ms. Cynthia Conti-Cook
The Legal Aid Society
199 Water Street
New York, NY 10038

FOIL Req #: 2016-PL-5238
Your File #:
Re: Personnel Orders

Dear Sir or Madam:

This is in response to your letter dated 05/09/16, which was received by this office on 05/11/16, in which you requested access to certain records under the New York State Freedom of Information Law (FOIL).

In regard to the documents(s) which you requested, I must deny access to these records on the basis of Public Officers Law Section 87(2)(e) and Public Officers Law 87(2)(a), in that such records consist of Police Officer's personnel records and are therefore exempt from disclosure under the provisions of Civil Rights Law Section 50-a.

You may appeal this decision or any portion thereof. Such an appeal must be made in writing within thirty (30) days of the date of this letter and must be forwarded to: Jonathan David, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, NY 10038. Please include copies of the FOIL request and this letter with your appeal.

Very truly yours,

Richard Mantellino
Lieutenant
Records Access Officer

EXHIBIT F – ANNEXED TO THE VERIFIED PETITION
Letter from Cynthia Conti-Cook to Jonathan David, dated June 8, 2016 (pp. 72–75)

REPRODUCED FOLLOWING

EXHIBIT F

THE LEGAL AID SOCIETY

Criminal Practice Special Litigation Unit
199 Water Street
New York, NY 10038
T 212/577-3398
www.legal-aid.org

Direct Dial: (212) 577-3265
Direct Fax: (646) 449-6786
E-mail: CConti-Cook@legal-aid.org

Blaine (Fin) V. Fogg
President

Seymour W. James, Jr.
Attorney-in-Chief

Justine M. Luongo
Attorney-in-Charge
Criminal Practice

William Gibney
Director
Special Litigation Unit

June 8, 2016

Jonathan David
Records Access Appeals Officer
New York City Police Department
One Police Plaza, Room 1406
New York, NY 10038

Re: 2016PL5238

Dear Mr. David:

I write to appeal Lieutenant Richard Mantellino's May 27, 2016 (received June 6, 2016) denial of my request for production of "Personnel Orders," such as those that are on display for the benefit of the press outside the ante-room of DCPI, for the years January 1, 2011 to the present.

The basis of the denial was that, "such records consist of Police Officer's personnel records and are therefore exempt from disclosure under the provisions of Civil Rights Law Section 50-a." However, reporters confirm that the NYPD regularly publishes and posts personnel records for public inspection by the media.[1]

"[T]he burden of proof rests solely with the [agency] to justify the denial of access to the requested records." Grabell v. New York City Police Dep't, 47 Misc. 3d 203, 208, 996 N.Y.S.2d 893, 899 (Sup. Ct. 2014) quoting Data Tree, LLC, 9 N.Y.3d at 463, 849 N.Y.S.2d 489, 880 N.E.2d 10. In fact, "[b]lanket exemptions are considered inimical to FOIL's policy of open government. Even if the NYPD is able to establish that some material in the requested records is exempt, it does not follow that the document is entirely exempt from

[1] Weiss, Murray, "It Took NYPD a Year to Reveal it Punished Eric Garner Officer in Prior Case," DNA INFO, April 4, 2016, https://www.dnainfo.com/new-york/20160404/st-george/it-took-nypd-year-reveal-it-punished-eric-garner-officer-prior-case and Sit, Ryan, "Daniel Pantaleo – cop who dodged charges in Eric Garner's death – disciplined by NYPD for bogus stop-and-frisk," THE DAILY NEWS, April 4, 2016, http://www.nydailynews.com/new-york/suspected-eric-garner-death-disciplined-nypd-article-1.2588015.

disclosure." *New York Civil Liberties Union v. New York City Police Dep't,* 74 A.D.3d 632, 902 N.Y.S.2d 356 (Sup. Ct. 2011). See also Matter of Gould, 89 N.Y.2d at 275, 653 N.Y.S.2d 54, 675 N.E.2d 808; Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v. Mills, Inc., 18 N.Y.3d 42, 45–46, 935 N.Y.S.2d 279, 958 N.E.2d 1194 (2011); Data Tree, LLC, 9 N.Y.3d at 464, 849 N.Y.S.2d 489, 880 N.E.2d 10.

My request does not ask for confidential information, only access to information that has already been provided to reporters for years. All government documents, including police records, are presumptively available for "public inspection and copying" and therefore should be made available as requested. Quoting Data Tree, LLC, 9 N.Y.3d at 454, 849 N.Y.S.2d 489, 880 N.E.2d 10.

Regards,

Cynthia Conti-Cook
Staff Attorney

CC: Committee on Open Government

Enclosures

EXHIBIT G – ANNEXED TO THE VERIFIED PETITION
Letter from Jonathan David to Cynthia Conti-Cook, dated August 8, 2016
(pp. 76–79)

REPRODUCED FOLLOWING

EXHIBIT G

The City of New York

POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038

August 8, 2016

Cynthia Conti-Cook, Staff Attorney
The Legal Aid Society
199 Water Street
New York, New York 10038

RE: FREEDOM OF INFORMATION LAW REQUEST: LBF # 16PL5238

Dear Ms. Conti-Cook:

This is in further response to your letter dated June 8, 2016, appealing the determination of the Records Access Officer (RAO), dated May 27, 2016, of your request, dated May 9, 2016, pursuant to the Freedom of Information (FOIL), for Personnel Orders from January 1, 2011 to the present.

Your appeal is denied. The requested Personnel Orders contain references to internal NYPD investigations of alleged misconduct by police officers, including the name of the accused officer, a description specifying the internal disciplinary charges against the officer, and the disposition of those disciplinary charges. Civil Rights Law (CRL) Section 50-a bars disclosure of records containing information related to evaluation of the performance of a police officer in connection with continued employment or promotion of a police officer. Since the requested Personnel Orders include such information, they are barred from disclosure pursuant to CRL Section 50-a, and, therefore, are exempt from disclosure under FOIL pursuant to Public Officers Law (POL) Section 87(2)(a), which exempts records from disclosure under FOIL when disclosure is prohibited by statute.

As you note, Personnel Orders have in the past been hung on a wall of a room inside the office of the NYPD Deputy Commissioner of Public Information (DCPI) at NYPD Headquarters at One Police Plaza. As a result of your having brought to my attention, and therefore, to the attention of the NYPD Legal Bureau, that members of the press have access to that room, the clipboard containing the Personnel Orders has been removed.

Any access that may have occurred would have been limited because the press was not permitted to copy NYPD records. Thus, there is no precedent for the type of disclosure that you request – copies of all Personnel Orders issued over the course of 5 years. In addition, the protections of NYPD personnel records afforded by CRL 50-a(1) is designed to protect individual officer's privacy rights and cannot be waived by any action of the NYPD. Accordingly, the CRL bars FOIL disclosure of the records sought.

Other exemptions under FOIL also may apply.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Sincerely,

Jonathan David
Records Access Appeals Officer

c: Committee on Open Government

EXHIBIT H – ANNEXED TO THE VERIFIED PETITION
Advisory Opinion from Committee on Open Government
(pp. 80–84)

REPRODUCED FOLLOWING

EXHIBIT H

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/

July 5, 2016

Ms. Cynthia Conti-Cook
Staff Attorney
Criminal Practice Special Litigation Unit
199 Water Street
New York, New York 10038

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Ms. Conti-Cook:

We have received your correspondence in which you seek an advisory opinion relating to a request for certain records of the New York City Police Department.

The records sought are "personnel orders" that briefly indicate outcomes of disciplinary hearings involving the conduct of police officers and that have "been publicly posted on a clipboard outside the Deputy Commissioner of Public Information's office for years." You added that "reporters confirm that the NYPD regularly publishes and posts personnel records for public inspection by the media", and that you are not seeking "confidential information", but rather information that has already been provided to reporters for years." The Department's records access officer denied access, citing §87(2)(e) of the Freedom of Information Law (FOIL) and §87(2)(a), "in that such records consist of Police Officer's personnel records and therefore are exempt under the provisions of Civil Rights Law Section 50-a."

In this regard, I offer the following comments.

First, as a general matter, FOIL is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (l) of the law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:
"To ensure maximum access to government records, 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)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception different from that cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...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)."

The first exception cited in the denial of your request pertains to records "compiled for law enforcement purposes". As I understand the nature of the records sought, they are prepared largely for administrative purposes and not for any law enforcement purpose. Even if they could be characterized having been compiled for a law enforcement purpose, due in part to the absence of substantial detail, it does not appear that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise. Because the orders list determinations involving misconduct, it is difficult to envision how disclosure could interfere with a law enforcement investigation or judicial proceeding, deprive an officer of a fair trial or impartial adjudication, identify a confidential source, or reveal other than routine investigative techniques or procedures.

In short, it does not appear that §87(2)(e) may justifiably be asserted as a basis for denying access. Again, the state's highest court has held that exceptions to rights of access must be narrowly construed. Reliance on the cited provision involves an expansive and improper reliance interpretation of FOIL.

The other exception cited by the Department relates to §87(2)(a) of FOIL, which pertains to records that are "specifically exempted from disclosure by state or federal statute", and which is coupled with §50-a of the Civil Rights Law. Section 50-a, as you are aware, pertains to personnel records concerning police officers that are "used to evaluate performance toward

continued employment or promotion". The issue involves whether the kind of document at issue can be characterized as a personnel record, and if so, whether it is used to evaluate performance toward continued employment or promotion.

In my experience, personnel records typically relate to a single individual and may involve or include a variety of attributes or items concerning his or her employment. Often they are found within a file or similar grouping of records focusing on a particular employee. The record in question, which is, according to your letter, posted in a clipboard in a location where it may be seen not only by employees of the Department, but also by members of the news media, might not be described as a personnel record as that term is generally used or understood. Further, it is questionable whether the record posted for others to see is in fact "used to evaluate performance". Other records, those generally found within a personnel file that include details regarding one's employment, such as an employee evaluation, a performance review or an analysis of the employee's functions in relation to a particular event would likely be among those subject to the limitation concerning access or disclosure envisioned by §50-a of the Civil Rights Law. A list that briefly describes the outcomes of hearings appears to be distant from a personnel record that is used to evaluate performance toward the continued employment or promotion of a specific police officer.

Finally, by permitting members of the news media, as well as Department employees, to freely view the records sought, in my view, constitutes a waiver of the Department's ability to deny your request. The news media serves essentially as the eyes and ears of the public, and a disclosure to the news media is, therefore, the equivalent of disclosure to the general public. Significant, too, in my opinion, is the apparent rejection of the application of §50-a of the Civil Rights Law by the Department on its own initiative. When that statute applies, it creates a prohibition regarding disclosure and confers confidentiality. By posting the record sought where it may be seen by many suggests that the Department does not consider the record to constitute a personnel record used to evaluate performance toward continued employment or promotion or that it is confidential.

In a related vein, for some forty years, a basic principle associated with FOIL is that when a record is accessible to one, it is accessible to any person, without regard to a person's status or interest [see e.g., Burke v. Yudelson, 51 AD2d 673 (1976)]. Again, if the record sought can be or has been seen by members of the news media, I believe that it must be made available to you and the public generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Jonathan David
Lt. Richard Mantellino

EXHIBIT I – ANNEXED TO THE VERIFIED PETITION
Memorandum of Roger Hayes, State of New York Division of Criminal Justice Services, Bill Jacket L. 1976, Chapter 413
(pp. 85–88)

REPRODUCED FOLLOWING

EXHIBIT I

Memorandum

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

TO: Judah Gribetz

FROM: Roger Hayes

DATE: June 16, 1976

RE: Ten-Day Bill S. 7635-B

Purpose

To add a new section 50-a to the Civil Rights Law restricting the accessibility of the personnel records of police officers.

Discussion

It is our understanding that this bill is directed at purported abuses involving the indiscriminate perusal of police officers' personnel records by defense counsel in cases wherein the police officer is a witness. It is claimed that many judges issue subpoenas for these records in pro forma fashion upon application by defense counsel.

Personnel records often contain raw, unverified information derogatory of the subject police officer, such as letters of complaint from members of the public. In the hands of some defense counsel the data is so used as to prejudice the officer in contexts irrelevant to the guilt or innocence of the defendant. If all judges carefully considered defense counsels' requests before issuing subpoenas for these records, this legislation would not be necessary. But, it is asserted, far too many judges routinely and without due consideration issue the subpoenas.

The bill proposes a procedure which, in effect, forces a judge to focus on each such request and substitutes a requirement for a court order in place of a subpoena. It would be virtually impossible to prove, one way or the other, whether the criticism of current practice inherent in this bill is merited or not. The bill, however, imposes no onerous burden either on the courts or on defense counsel. In those instances where examination of a police officer's personnel records are warranted, subdivisions 2 and 3 of the proposed section provide a reasonable procedure for doing so.

It should be noted that subdivision 4 provides the necessary exceptions that would obviate this statute being used to frustrate the legitimate and necessary reviews of personnel records by governmental agencies in the performance of their respective duties.

Recommendation

Approval.

RESPONDENT'S VERIFIED ANSWER, DATED MARCH 13, 2017
(pp. 89–103)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

----------x

Application of Justine Luongo, Attorney-In-Chief, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,

Petitioner,

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

VERIFIED ANSWER

Index No. 160232/2016
IAS Part 6
(Lobis, J.)

---------- x

Respondent Records Access Appeals Officer, New York Police Department ("NYPD" or "Respondent"), by its attorney, Zachary W. Carter, Corporation Counsel of the City of New York, in answer to the Verified Petition (hereinafter, the "Petition"), respectfully alleges as follows:

1. Denies the allegations set forth in Paragraph "1" of the Petition, except admits that Petitioner purports to proceed as stated therein.

2. Denies the allegations set forth in Paragraph "2" of the Petition, except admits that NYPD's principal place of business is located in New York County, admits that Petitioner purports to lay venue as stated therein, and respectfully refers the Court to the statutory provision cited therein for a complete and accurate statement of its contents.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph "3" of the Petition.

4. Denies the allegations set forth in Paragraph "4" of the Petition, except admits that NYPD has a Records Access Appeals Officer, whose duties include reviewing Freedom of Information Law requests.

5. Denies the allegations set forth in Paragraph "5" of the Petition.

6. Denies the allegations set forth in Paragraph "6" of the Petition, except admits that Cynthia Conti-Cook submitted a letter dated May 9, 2016 (hereinafter, the "FOIL Request") to the Records Access Officer of the NYPD, requesting records pursuant to New York's Freedom of Information Law ("FOIL"), Public Officers Law §§ 84-90, admits that by letter dated May 18, 2016 (hereinafter, the "Acknowledgment Letter"), the Records Access Officer acknowledged receipt of the FOIL Request, and respectfully refers the Court to the foregoing letters for a complete and accurate statement of their contents. (Copies of the FOIL Request and Acknowledgement Letter are annexed to the Petition as Exhibits "A" and "B," respectively.)

7. Denies the allegations set forth in Paragraph "7" of the Petition, respectfully refers the Court to the provision of the New York City Charter and the newspaper article referenced therein for a complete and accurate statement of their contents, and affirmatively states that the requested NYPD Personnel Orders contain information on alleged misconduct of police officers and disciplinary actions relating thereto, including, inter alia: (1) the name and precinct of the accused officer; (2) a description specifying the offense for which the officer was charged; and (3) the resulting disciplinary disposition.

8. Denies the allegations set forth in Paragraph "8" of the Petition and respectfully refers the Court to Chapter 15, Subchapter A, of Title 38 of the Rules of the City of New York, entitled "Disciplinary Proceedings Against Civilian and Uniform Members Before the Deputy Commissioner of Trials," for a complete and accurate description of the rules governing adjudication of disciplinary proceedings before the Deputy Commissioner of Trials.

9. Denies the allegations set forth in Paragraph "9" of the Petition, except admits that that Personnel Orders have, in the past, hung on a wall of a room inside the office of

the NYPD Deputy Commissioner of Public Information ("DCPI") at NYPD Headquarters at One Police Plaza and that the New York City Municipal Library (also known as the "City Hall Library") has previously collected Personnel Orders, the most recent of which, upon information and belief, is dated April 7, 2016, and affirmatively states that Personnel Orders are no longer posted in the DCPI's office or provided to the Municipal Library.

10. Denies the allegations set forth in Paragraph "10" of the Petition, except admits that by letter dated May 27, 2016 (hereinafter, the "FOIL Determination"), NYPD's Records Access Officer denied Petitioner's FOIL Request, affirmatively states that Personnel Orders are no longer posted in the DCPI's office, and respectfully refers the Court to the FOIL Determination for a complete and accurate statement of its contents. (A copy of the FOIL Determination is annexed to the Petition as Exhibit "E.")

11. Denies the allegations set forth in Paragraph "11" of the Petition, except admits that by letter dated June 28, 2016 (hereinafter, the "FOIL Appeal"), Ms. Conti-Cook appealed the FOIL Determination to NYPD's Records Access Appeals Officer, and respectfully refers the Court to the FOIL Appeal for a complete and accurate statement of its contents. (A copy of the FOIL Appeal is annexed to the Petition as Exhibit "F.")

12. Denies the allegations set forth in Paragraph "12" of the Petition, except admits that by letter dated August 8, 2016, NYPD's Records Access Appeals Officer denied the FOIL Appeal (hereinafter, the "FOIL Appeal Decision"), and respectfully refers the Court to the FOIL Appeal Decision for a complete and accurate statement of its contents. (A copy of the FOIL Appeal Decision is annexed to the Petition as Exhibit "G.")

13. Denies the allegations set forth in Paragraph "13" of the Petition and respectfully refers the Court to the FOIL Appeal Decision referenced therein for a complete and accurate statement of its contents.

14. Denies the allegations set forth in Paragraph "14" of the Petition.

15. Denies the allegations set forth in Paragraph "15" of the Petition and respectfully refers the Court to the statutory provision cited therein for a complete and accurate statement of its contents.

16. Denies the allegations set forth in Paragraph "16" of the Petition.

17. Denies the allegations set forth in Paragraph "17" of the Petition and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents.

18. Denies the allegations set forth in Paragraph "18" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

19. Denies the allegations set forth in paragraph "19" of the Petition and respectfully refers the Court to the statute and cases cited therein for a complete and accurate statement of their contents.

20. Denies the allegations set forth in Paragraph "20" of the Petition, respectfully refers the Court to the advisory opinion and cases cited therein for a complete and accurate statement of their contents, and affirmatively state that Committee on Open Government advisory opinions are not binding on this Court and "carry such weight as results from the strength of the reasoning and analysis they contain, but no more." See John P. v. Whalen, 54 N.Y.2d 89, 96 (1981).

21. Denies the allegations set forth in Paragraph "21" of the Petition and respectfully refers the Court to the memorandum and cases cited therein for a complete and accurate statement of their contents.

22. Denies the allegations set forth in Paragraph "22" of the Petition.

23. Denies the allegations set forth in Paragraph "23" of the Petition.

24. Denies the allegations set forth in Paragraph "24" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

25. Denies the allegations set forth in Paragraph "25" of the Petition, except admits that that Personnel Orders have, in the past, hung on a wall of a room inside the office of the DCPI at NYPD Headquarters at One Police Plaza, and affirmatively states that this practice has ceased.

26. Denies the allegations set forth in Paragraph "26" of the Petition and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents.

27. Denies the allegations set forth in Paragraph "27" of the Petition, except admits that the New York City Municipal Library has previously collected Personnel Orders, the most recent of which, upon information and belief, is dated April 7, 2016, and affirmatively states that Personnel Orders are no longer posted in the DCPI's office or provided to the Municipal Library.

28. Denies the allegations set forth in Paragraph "28" of the Petition, respectfully refers the Court to the advisory opinion cited therein for a complete and accurate statement of its contents, and affirmatively state that Committee on Open Government advisory

opinions are not binding on this Court and "carry such weight as results from the strength of the reasoning and analysis they contain, but no more." See John P. v. Whalen, 54 N.Y.2d 89, 96 (1981).

29. Denies the allegations set forth in Paragraph "29" of the Petition.

30. Denies the allegations set forth in Paragraph "30" of the Petition and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents.

31. Denies the allegations set forth in Paragraph "31" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

32. Denies the allegations set forth in Paragraph "32" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

33. Denies the allegations set forth in Paragraph "33" of the Petition, respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents, and affirmatively states that the decision in Luongo v. Records Access Officer, Civilian Complaint Review Board, 49 Misc. 3d 708 (Sup. Ct. N.Y. Cnty. 2015), has been appealed and is pending a decision from the Appellate Division, First Department.

34. Denies the allegations set forth in Paragraph "34" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

35. Denies the allegations set forth in Paragraph "35" of the Petition and respectfully refers the Court to the FOIL Determination, the FOIL Appeal Decision, and the case cited therein for a complete and accurate statement of their contents.

36. Denies the allegations set forth in Paragraph "36" of the Petition, and respectfully refers the Court to the statutory provision cited therein for a complete and accurate statement of its contents.

37. Denies the allegations set forth in Paragraph "37" of the Petition.

38. Denies the allegations set forth in Paragraph "38" of the Petition and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents.

39. Denies the allegations set forth in Paragraph "39" of the Petition, and respectfully refers the Court to the FOIL Appeal Decision cited therein for a complete and accurate statement of its contents.

40. Denies the allegations set forth in Paragraph "40" of the Petition and respectfully refers the Court to the cases cited therein for a complete and accurate statement of their contents.

41. Denies the allegations set forth in Paragraph "41" of the Petition and respectfully refers the Court to the case cited therein for a complete and accurate statement of its contents.

42. Denies the allegations set forth in Paragraph "42" of the Petition.

43. Denies the allegations set forth in Paragraph "43" of the Petition.

AFFIRMATIVE STATEMENT OF FACTS

44. In this proceeding, brought pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law §§ 84-90, Petitioner challenges a denial by the NYPD of her request for records and seeks an order and judgment directing the NYPD to produce over five years' worth of NYPD Personnel Orders. However, these records—which contain information pertaining to police officer misconduct and disciplinary actions relating thereto—are exempt from disclosure pursuant to Section 50-a of the New York State Civil Rights Law ("CRL"). Moreover, Petitioner has failed to obtain the express written consent of the officers whose records are being sought, and has neither provide these officers the requisite notice or joined them as necessary parties to this proceeding, as required before any decision is made to strip them of their CRL § 50-a protections. See CRL §§ 50-a(2), (3); CPLR 1001.

The Administrative Proceedings

45. By letter dated May 9, 2016, Petitioner sought all NYPD Personnel Orders for the years January 1, 2011 to May 9, 2016, the date of her FOIL request. See Petitioner's FOIL Request, Exhibit "A" to the Petition.

46. By letter dated May 18, 2016, the Records Access Officer acknowledged receipt of the FOIL Request. See Acknowledgement Letter, Exhibit "B" to the Petition.

47. By letter dated May 27, 2016, NYPD's Records Access Officer denied the request, advising Petitioner that the records sought consist of police officer personnel records and are therefore exempt from disclosure pursuant to Public Officers Law § 87(2)(a) and CRL § 50-a. See FOIL Decision, Exhibit "E" to the Petition.[1]

[1] The FOIL Determination also cited Public Officers Law § 87(2)(e), which exempts from disclosure certain records compiled for law enforcement purposes. However, that exception is not being invoked by Respondent in this proceeding.

48. By letter dated June 28, 2016, Petitioner appealed the FOIL Determination to NYPD's Records Access Appeals Officer. See FOIL Appeal, Exhibit "F" to the Petition.

49. By letter dated August 8, 2016, the Records Access Appeals Officer denied Petitioner's appeal, advising Petitioner that because the requested Personnel Orders—which contain information pertaining to alleged misconduct of police officers and disciplinary action relating thereto—fall within the ambit of personnel records protected by CRL § 50-a, they are exempt from disclosure. See FOIL Appeal Decision, Exhibit "G" to the Petition. As noted by the Records Access Appeals Officer, the information contained in the Personnel Orders includes, inter alia: (1) the name and precinct of the accused officer; (2) a description specifying the offense for which the officer was charged; and (3) the resulting disciplinary disposition of those charges. Id.

50. In the FOIL Appeal Decision, the Records Access Appeals Officer further advised Petitioner that the confidentiality of CRL § 50-a is designed to protect the individual police officer and therefore cannot be waived by any action of the NYPD. Id.

51. Thereafter, Petitioner commenced this proceeding under Article 78 of the CPLR to compel disclosure of the requested records.

NYPD Properly Denied Petitioner's FOIL Request

52. As fully set forth in the accompanying memorandum of law, NYPD properly denied Petitioner's FOIL request under Public Officers Law § 87(2)(a) because the requested records—which contain information pertaining to officer misconduct or rules violations, and disciplinary action relating thereto—fall squarely within the ambit of the CRL's prohibition on disclosure of police personnel records. See CRL § 50-a(1).

53. Civil Rights Law § 50-a mandates that "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency . . . shall be considered confidential." CRL § 50-a(1). The Court of Appeals has twice confirmed that records "pertaining to misconduct or rules violations" of officers, like those requested here, "are the very sort of record . . . intended to be kept confidential" by CRL § 50-a. Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 159 (1999) (quoting Matter of Prisoners' Legal Servs. v. N.Y.S. Dep't of Corr. Servs., 73 N.Y.2d 26, 31 (1988)).

54. Covered personnel records of a police officer are "not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order." CRL § 50-a(1). Absent such express written consent, Section 50-a's mandatory procedures for obtaining court-ordered disclosure of covered personnel records require that all affected officers be given an "opportunity to be heard" prior to the court ordering even in camera review of the records. CRL § 50-a(2), (3). Moreover, police officers are "necessary parties" to FOIL litigation seeking their personnel records. See id.; CPLR 1001.

55. However, here, Petitioner has failed to obtain the express written consent of the police officers named in the requested Personnel Orders, and has neither provided these officers the requisite notice that their records are being sought nor joined them as necessary parties.

56. Accordingly, as the requested Personnel Orders are core personnel records covered by CRL § 50-a, and Petitioner has failed to either join, or provide notice to, the officers named therein, the Petition should be dismissed.

FIRST AFFIRMATIVE DEFENSE

57. The NYPD's determination to deny disclosure of the Personnel Orders requested by Petitioner was a proper determination made in accordance with Public Officers Laws § 87(2)(a) and Civil Rights Law § 50-a, and was not affected by any error of law.

SECOND AFFIRMATIVE DEFENSE

58. The officers who are the subjects of the requested Personnel Orders are necessary parties to this proceeding and are required to be given an opportunity to be heard. Petitioner has failed to join these officers as necessary parties and has failed to provide them with the requisite notice that their records are being sought.

THIRD AFFIRMATIVE DEFENSE

59. The request for attorneys' fees is premature (and unwarranted) in that it requires a judicial finding that Petitioner is a substantially prevailing party and that the agency did not have a reasonable basis for its denial of Petitioner's FOIL request.

WHEREFORE, Respondent respectfully requests that the Petition be denied in its entirety, that Petitioner's requests for relief be denied in all respects, and that Respondent be granted such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 13, 2017

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By: s/ Omar Tuffaha
Omar Tuffaha
Assistant Corporation Counsel

To: Cynthia H. Conti-Cook, Esq.
The Legal Aid Society
Counsel for Petitioner

Roger A. Cooper, Esq.
Cleary Gottlieb Steen & Hamilton LLP
Of Counsel for Petitioner

(*Via NYSCEF*)

VERIFICATION

STATE OF NEW YORK)
:SS
COUNTY OF NEW YORK)

LORI HERNANDEZ, being duly sworn, states that she is an attorney in the Legal Bureau of the Police Department of the City of New York; that the reason why this VERIFICATION is not made by the Respondent is that your deponent has been duly designated by the Police Commissioner of the Police Department of the City of New York, pursuant to Section 1101, subdivision (a) of the New York City Charter, to act on said Commissioner's behalf for the purposes of verifying the pleadings herein; that she has read the foregoing VERIFIED ANSWER filed in the Supreme Court of the State of New York, County of New York, and knows the contents thereof to be true, except as to the matters therein alleged upon information and belief and as to those matters, she believes them to be true, that the source of this information and the basis for her belief are the records of the New York City Police Department and from statements made to her by certain officers or agents of the New York City Police Department.

LORI HERNANDEZ

Sworn to before me this
13 day of March, 2017

EILEEN G. FLAHERTY
Notary Public, State of New York
No. 02FL6075185
Qualified in Kings County
Commission Expires Nov. 8, 2018

Luongo v. Records Access Appeals Officer, NYPD
Index No. 160232/2016

Index No. 160232/2016 (IAS Part 6) (Lobis, J.)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM

Application of Justine Luongo, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,

Petitioner,

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

VERIFIED ANSWER

ZACHARY W. CARTER
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Of Counsel: Omar Tuffaha
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Email: otuffaha@law.nyc.gov

Matter No.: 2016-050982

Due and timely service is hereby admitted.

New York, N.Y. ....., *20…..*

..... , *Esq.*

Attorney for .....

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER, DATED MARCH 14, 2017
(pp. 104–23)

REPRODUCED FOLLOWING

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Index No. 160232/2016 (IAS Part 6) (Lobis, J.)

SUPREME COURT OF THE STATE OF NEW YORK
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-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER

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Application of Justine Luongo, Attorney-In-Chief, Attorney-In-Chief, Criminal Defense Practice, The Legal Aid Society,

Petitioner,

Index No. 160232/2016
IAS Part 6
(Lobis, J.)

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

---------- x

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED ANSWER

PRELIMINARY STATEMENT

Petitioner Justine Luongo, Attorney-in-Chief of Legal Aid's Criminal Defense Practice ("Petitioner"), brings this Article 78 proceeding challenging a determination of the New York City Police Department ("NYPD" or "Respondent") to deny her Freedom of Information Law ("FOIL") request for NYPD records. Specifically, in her FOIL request, Petitioner sought over five years' worth of NYPD "Personnel Orders," which contain information on alleged misconduct of police officers and disciplinary actions relating thereto, including, inter alia: (1) the name and precinct of the accused officer; (2) a description specifying the offense for which the officer was charged; and (3) the resulting disciplinary disposition. Petitioner's request was denied on the basis that these records are exempt from disclosure pursuant to Section 50-a of the New York State Civil Rights Law ("CRL").

As discussed more fully below, the New York Court of Appeals has held that records pertaining to police officer misconduct or rules violations, and disciplinary actions taken

thereon, are precisely the type of record the Legislature intended to protect, and that CRL § 50-a bars FOIL requests for such documents. Accordingly, in rejecting Petitioner's request for these records, the NYPD was acting in full accordance with FOIL and CRL § 50-a, and its determination must be upheld. Additionally, the police officers who are the subjects of the Personnel Orders are necessary parties to this litigation and are entitled to an opportunity to be heard before any decision is made to strip them of their protections under CRL § 50-a. Thus, the Petition must be dismissed on the additional ground that Petitioner has failed to join the officers as necessary parties or provide them the requisite notice that their records are being sought herein.

STATUTORY BACKGROUND:
SECTION 50-A OF THE CIVIL RIGHTS LAW

In 1976, the State Legislature enacted Civil Rights Law ("CRL") § 50-a, limiting disclosure of police personnel records—including civilian complaints, disciplinary proceedings, and resulting reprimands—in order to protect police officers from the potential use of those records to embarrass or harass them. The statute mandates that "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency . . . shall be considered confidential." CRL § 50-a(1). Such records are "not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order." Id.

Section 50-a permits a court order allowing disclosure of such records to be obtained only in the context of an ongoing litigation to which the records are relevant and material. The statute requires that the judge in the litigation in which a litigant seeks to use the records (1) give all interested parties (including the officer who is the subject of the records) an opportunity to be heard, (2) determine whether the requestor has made a "clear showing of facts

sufficient to warrant the judge to request records for review," and, if so, (3) review the records in camera before making available to the requesting litigant any records that are "relevant and material in the action before him." CRL § 50-a(2), (3).[1] In keeping with the structure and purpose of § 50-a, any such production is generally subject to a protective order limiting disclosure to the parties and attorneys in the pending case.

STATEMENT OF FACTS

By letter dated May 9, 2016 (hereinafter, the "FOIL Request"), Petitioner submitted a request to NYPD, pursuant to New York's Freedom of Information Law ("FOIL"), Public Officers Law ("POL") §§ 84-90, seeking all "Personnel Orders" from January 1, 2011 to May 9, 2016, the date of the FOIL Request. See FOIL Request, Ex. A to the Petition. By letter dated May 27, 2016 (hereinafter, the "FOIL Determination"), NYPD's Records Access Officer denied the request, advising Petitioner that the records sought consist of police officer personnel records and are therefore exempt from disclosure pursuant to POL § 87(2)(a) and CRL § 50-a. See FOIL Determination, Exhibit "E" to the Petition. Petitioner appealed that determination to NYPD's Records Access Appeals Officer by letter dated June 28, 2016 (hereinafter, the "FOIL Appeal"). See FOIL Appeal, Exhibit "F" to the Petition.

By letter dated August 8, 2016 (hereinafter, the "FOIL Appeal Determination"), the Records Access Appeals Officer denied the appeal, advising Petitioner that the requested Personnel Orders—which contain information pertaining to police officer misconduct and disciplinary actions relating thereto, including, inter alia: (1) the name and precinct of the accused officer; (2) a description specifying the offense for which the officer was charged; and (3) the resulting disciplinary disposition of those charges—fall within the ambit of personnel

[1] Section 50-a(4) also permits disclosure of covered records to other government agencies that require access to carry out their governmental functions.

records protected by Civil Rights Law §50-a, and therefore are exempt from disclosure. See FOIL Appeal Decision, Exhibit "G" to the Petition. In the FOIL Appeal Decision, the Records Access Appeals Officer further advised Petitioner that the confidentiality of CRL § 50-a is designed to protect the individual police officer and therefore cannot be waived by any action of the NYPD. Id.

Thereafter, Petitioner filed this Article 78 petition against the NYPD to compel disclosure of the requested records

ARGUMENT

POINT I

CIVIL RIGHTS LAW § 50-A PROHIBITS FOIL DISCLOSURE OF THE NYPD RECORDS AT ISSUE IN THIS CASE

A. The Requested Records Are Core Police Personnel Records Shielded by CRL § 50-a.

Whenever a government agency withholds records requested under FOIL, it bears the burden of demonstrating the records "fall[] squarely within" a FOIL exemption. Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 159 (1999). Here, NYPD properly denied Petitioner's FOIL request because the Personnel Orders at issue are police officer personnel records covered by CRL § 50-a, and thus "fall squarely within" the FOIL exemption permitting an agency to "deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute." POL § 87(2)(a). Indeed, the Personnel Orders sought by Petitioner are quintessential CRL § 50-a records.

The Court of Appeals has twice confirmed that records "pertaining to misconduct or rules violations," like the Personnel Orders here, are "the very sort of record" which the Legislature "intended to be kept confidential" by CRL § 50-a. Daily Gazette, 93 N.Y.2d at 159;

Matter of Prisoners' Legal Servs. v. N.Y.S. Dep't of Corr. Servs., 73 N.Y.2d 26, 31 (1988). In Prisoners' Legal Services, the Court held that "inmate grievances against State correction officers and the administrative decisions relating thereto" are paradigmatic personnel records covered by CRL § 50-a. 73 N.Y.2d at 29, 31. Likewise, in Daily Gazette, the Court held that the identities of and disciplinary actions taken against eighteen police officers involved in an instance of misconduct were core CRL § 50-a personnel records.

As the Court in Daily Gazette explained, the Legislature was aware, and intended that CRL § 50-a would insulate records of complaints and the resulting disciplinary outcomes from FOIL disclosure. 93 N.Y.2d at 154-55. A State Division of Budget memorandum to the Governor, at the time, noted that "complaints, disciplinary proceedings or reprimands filed against [police officers]" were the intended target of the bill that became CRL § 50-a. Id. at 155 (emphasis supplied by the Court). The bill's purpose was to "prevent the use of personnel records as a device for harassing or embarrassing" police officers, and complaint and disciplinary records were understood to be inherently ripe with the potential for such use. Prisoners' Legal Servs., 73 N.Y.2d at 32; Daily Gazette, 93 N.Y.2d at 159; see also, e.g., Matter of Columbia-Greene Beauty Sch., Inc. v. City of Albany, 121 A.D.3d 1369, 1371 (3d Dep't 2014) (complaints "regarding officer's professional conduct while working as a police officer and disciplinary measures that were taken thereon . . . clearly fall within the purview of 'personnel records'" under CRL 50-a); Matter of McGee v Johnson, 86 A.D.3d 647, 647 (2d Dep't 2011) (CRL § 50-a covers final determination of civilian complaint against police officers), lv. denied, 19 N.Y.3d 804 (2012); Matter of Gannett Co. v. James, 86 A.D.2d 744, 745 (4th Dep't 1982) (complaints about police officers and "documents reflecting the final disposition of civil service hearings concerning . . . Police Department personnel" are clearly personnel records used to evaluate

performance of purposes of determining continued employment or promotion). Accordingly, the requested Personnel Orders—which describe the charges against officers, state whether or not the officer was found guilty of those charges, and set forth the discipline imposed—are core personnel records covered by CRL § 50-a.

Petitioner's argument that the Personnel Orders are not "personnel records" because they are not physically "duplicated in individual officers' files," see Petition ¶ 20, is unavailing. Indeed, in Prisoners' Legal Services, which Petitioner cites in purported support of her argument, the Court of Appeals rejected this construction of CRL § 50-a. There, the petitioner argued that the records at issue were not "personnel records" because they were "not actually maintained as part of officers' employment records or their personnel files." See Prisoners' Legal Servs., 73 N.Y.2d at 32. However, contrary to the petitioner's argument, the Court held that the "applicability of the statute 'cannot be determined simply on the basis of where the information is stored,'" and stressed that "whether a document qualifies as a personnel record under Civil Rights Law § 50-a(1) depends upon its nature and its use in evaluating an officer's performance—not its physical location or its particular custodian." Id. (quoting Capital Newspapers Div. of Hearst Corp. v. Burns, 109 A.D.2d 92, 95 (3d Dep't 1985), aff'd 67 N.Y.2d 562 (1986)). The Court rejected the petitioner's opposite construction as "inimical to the very statutory purpose of preventing the use of personnel records as a device for a harassing or embarrassing police and correction officers." Id. The requested records, the Court observed, could be put to such use "regardless of where they are kept." Id.

Here, it cannot seriously be contested that the information contained in the requested Personnel Orders pertaining to officer misconduct and disciplinary action would be used to evaluate officers' performance toward continued employment or promotion. See e.g.,

Prisoners' Legal Servs., 73 N.Y. 2d at 32 (records of complaints of misconduct or rules violations against an officer "held to be of significance to a superior in considering continued employment or promotion"), aff'g, 138 A.D.2d 712 (2d Dep't 1988); Matter of Gannett Co. v. James, 108 Misc. 2d 862, 865 (Sup. Ct. Monroe Cnty. 1981) ("[b]y their very nature," documents relating to the alleged misconduct of a police offer, "constitute police 'personnel records, used to evaluate performance toward continued employment or promotion,' within the meaning of section 50-a of the Civil Rights Law"), aff'd, 86 A.D.2d 744 (4th Dep't 1982), lv. denied, 56 N.Y.2d 502 (1982). Thus, regardless of where the requested records are kept, the information contained therein can be used to harass or embarrass officers.

Moreover, contrary to Petitioner's contentions, the fact that NYPD disciplinary trials in cases prosecuted by the Civilian Complaint Review Board are open to the public does not remove the Personnel Orders from CRL § 50-a's purview. As an initial matter, as Petitioner notes, the Personnel Orders contain information pertaining not only to alleged misconduct prosecuted by CCRB but also misconduct falling outside CCRB's jurisdiction, which is investigated by NYPD internally. See Petition ¶¶ 7-8. Regardless, that the above-referenced disciplinary trials are open neither changes the nature of the Personnel Orders as core personnel records, nor the statute's clear proscription against disclosure.

A state statute has required open police disciplinary hearings in many cities since 1910, yet there is no indication that the Legislature believed that requirement posed any conflict when it enacted CRL § 50-a in 1976. See Second Class Cities Law § 137. Nor is there any reason to suspect the Legislature intended to introduce an arbitrary distinction between the protections afforded to officers in cities with open disciplinary hearings versus those in cities with closed ones. Cf. Prisoners' Legal Servs., 73 N.Y.2d at 33 (rejecting any distinction between

State and local correction officers under § 50-a). Notably, NYPD disciplinary trials have been open to the public since at least 1991, but Supreme Court justices regularly apply CRL § 50-a to requests for police disciplinary records in criminal and civil litigation. In short, whether a disciplinary trial is open to the public and whether records pertaining to officer misconduct and disciplinary determinations are confidential are separate questions, governed by separate laws and regulations, and implicating separate policy considerations.

Finally, the analysis as to whether the requested records constitute personnel records covered by CRL § 50-a is unaffected by the fact that the NYPD previously posted Personnel Orders in a room inside the office of the NYPD Deputy Commissioner of Public Information at NYPD Headquarters or provided them to the Municipal Library—practices that the NYPD has ceased. It is well-established that "estoppel may not be applied to preclude a . . . municipal agency from discharging its statutory responsibility." City of New York v. City Civil Serv. Comm'n, 60 N.Y.2d 436, 449 (1983). Moreover, in the context of CRL § 50-a, as the First Department has held, "[t]he confidentiality of the statute is designed to protect the police officer, not the Department, and therefore should not be deemed automatically waived" by the NYPD's prior failure to assert it." Matter of Molloy v. NYPD, 50 A.D.3d 98, 100 (1st Dep't 2008).

B. By Their Nature, Records Pertaining to Misconduct or Rules Violations—Like Those at Issue in This Case—Carry a Potential for Embarrassing, Harassing, or Impeaching Use.

In the context of FOIL's requirement that an agency demonstrate that all withheld records "fall[] squarely within" an exemption, the Court of Appeals has held that, in addition to showing that the record is "used to evaluate performance toward continued employment or promotion"—CRL § 50-a's sole express criterion for coverage—the agency must also "demonstrate a substantial and realistic potential" for the abusive use of the record against the officer. Daily Gazette, 93 N.Y.2d at 157-59. But the Court of Appeals has also made clear that

this criterion is satisfied when the request seeks records "pertaining to misconduct or rules violations" that have long been recognized to be "the very sort of record which . . . was intended to be kept confidential." Id. at 159; see also Prisoners' Legal Servs., 73 N.Y.2d at 31. By their nature, such records carry a potential for embarrassing, harassing, or abusive use; no additional, officer-specific showing is required. Daily Gazette, 93 N.Y.2d at 159

Thus, in Daily Gazette, the Court of Appeals found that a mere description of the subject of the FOIL request—"records of the disciplinary action taken against 18 police officers, including their identities and individual punishments"—sufficient to demonstrate the documents' potential to harass, noting that such documents obviously "pertain[ed] to misconduct or rules violations." Id. at 159. The Court distinguished records "pertaining to misconduct or rules violations," from records that have no potential for abusive use, such as the tabulation of a single officer's absences during a particular month at issue in Capital Newspapers Div. of Hears Corp. v. Burns, 67 N.Y.2d 562 (1986). As the Court noted, the tabulation of absences in Capital Newspapers was found not to implicate CRL § 50-a's policy concerns because "the information was neutral and did not contain any invidious implications capable facially of harassment or degradation." Daily Gazette, 93 N.Y.2d at 158. In contrast, "the subject of petitioners' request [in Daily Gazette] itself demonstrates the risk of its use to embarrass or humiliate the officers involved." Id.

Similarly, in Prisoners' Legal Services, a case involving prisoner grievances and the related administrative decisions, the Court observed generally that "documents pertaining to misconduct or rules violations by correction officers . . . could well be used in various ways against the officers." 73 N.Y.2d at 31. The Court did not require any further showing on the point, as it was self-evident that these were the "very sort of record" intended to be protected. Id.

It is no different in this case. The FOIL request seeks documents that "pertain[] to misconduct and rules violations," and the potential for this information to be used to embarrass, harass, or impeach is obvious.

Moreover, Petitioner's contention that the Personnel Orders could not be used to harass or impeach an officer because they "reflect[] merely the disposition of a disciplinary case against an officer, without any specific details about the conduct underlying that disciplinary case," Petition ¶ 34, is both factually inaccurate and contrary to the established case law discussed above. As the Personnel Orders attached to the Petition clearly show, the Personnel Orders do include "specific details about the conduct underlying th[e] disciplinary case." See Personnel Orders attached to the Petition as Exhibit "D" (specifying, e.g., that a certain officer was charged for "wrongfully caus[ing] false entries to be made in department records by misclassifying a crime," and that another officer "while off-duty, did knowingly and unlawfully possess a controlled substance . . . [and] failed to immediately notify her arresting officer that she was a member of the [NYPD]"). That information is hardly "neutral" and "devoid of "invidious implications capable facially of harassment." Daily Gazette, 93 N.Y.2d at 158.

Petitioner's reliance on Matter of Luongo v. Records Access Officer, Civilian Complaint Review Board ("Luongo I"), 49 Misc. 3d 708 (Sup. Ct. N.Y. Cnty. 2015), appeal filed, No. 100250/2015 (sub judice), on this point is misplaced. That decision was wrongly decided and is currently on appeal, and, in any event, is unhelpful to Petitioner's argument here because it relies heavily on a factor not present in this case. Specifically, in Luongo I, Petitioner emphasized that she was seeking "'only a numerical report on how many prior substantiated CCRB complaints existed [for the officer] . . . plus any recommendations for administrative prosecution and/or penalty.'" See Luongo I, 49 Misc. 3d at 713 (quoting Petitioner's

argument). In agreeing with Petitioner's argument that the requested information was not protected by CRL § 50-a, the court likewise asserted that "[t]he [s]ummary, as requested, will provide only the most rudimentary of information: the number of substantiated complaints against [a single officer], and what was the follow up, if any, by CCRB to substantiated complaints." Id at 718. "Most importantly," the Court stressed, "the [s]ummary will not provide any details as to what the complaints pertain to, and/or what the underlying events which triggered such complaints even were." Id.

Here, as noted above, the Personnel Orders do provide "details as to what the complaints [against the officers] pertain to," and "what the underlying events [were] which triggered such complaints." Thus, it is simply inaccurate and far off-base for Petitioner now to cite Luongo I for the proposition that her request is analogous to the requests for "factual summaries" that courts "have routinely granted" in the past, see Petition ¶¶ 32-33. In fact, there is no "routine" practice of any sort of courts granting FOIL disclosure of records containing officer-specific police disciplinary information—the only two decisions to do so plainly broke from established precedent and are presently on appeal—and the court in Luongo I explicitly contrasted the records sought there from the type of records at issue here.

In short, records pertaining to misconduct or rules violations, and disciplinary actions taken thereon, like the Personnel Orders here, fall squarely within the broad rule of confidentiality established by CRL § 50-a, and thus are exempt from FOIL disclosure pursuant to POL § 87(2)(a). Accordingly, the NYPD has borne its burden of demonstrating that the Personnel Orders are exempt from disclosure under FOIL.

C. The Wisdom of the Legislature's Policy Choice in Enacting CRL § 50-a Is Not at Issue in This Litigation.

The Petitioner, and many others, have questioned the wisdom of the Legislature's choice to shield police officer, correction officer, and firefighter personnel records from disclosure statewide through CRL§ 50-a. The Legislature's policy choice may be controversial, and is subject to legitimate public debate, but as the Court of Appeals noted in Daily Gazette, that policy choice is the Legislature's to make and one that the executive and judicial branches "are constrained to respect." 93 N.Y.2d at 155.

At the present time, several bills have been introduced in the State Legislature to amend or repeal CRL § 50-a. However, as of now, the law prohibits FOIL disclosure of the type of records at issue in this proceeding. Whether the state statute should be changed is an important questions, but not one that this case presents.

POINT II

THE REQUESTED RECORDS ARE NOT SUBJECT TO DISCLOSURE BECAUSE PETITIONER HAS NEITHER JOINED THE OFFICERS WHO ARE THE SUBJECTS OF THE PERSONNEL ORDERS AS NECESSARY PARTIES TO THIS PROCEEDING, NOR PROVIDED THEM THE REQUISITE NOTICE THAT THEIR RECORDS ARE BEING SOUGHT

Where a petitioner may obtain documents under a statute which governs disclosure, "FOIL does not control by reason of section [87(2)(a)] of the Public Officers Law," Sam v Sanders, 80 A.D.2d 758, 758 (1st Dep't 1981), aff'd, 55 N.Y.2d 1008 (1982), and it is the petitioner's burden to demonstrate compliance with any strictures imposed by the applicable statute. Sam, 55 N.Y.2d at 1010. Thus, in order to overcome the confidentiality requirements applicable to the personnel records of police officers, Petitioner here must follow and

demonstrate compliance with the strictures imposed by CRL § 50-a. See, e.g., Matter of Crowe v. Kelly, 28 A.D.3d 435, 437 (1st Dep't 2007); see also Matter of Hughes Hubbard & Reed LLP v. Civilian Complaint Review Bd., 53 Misc. 3d 947, 963-65 (Sup. Ct. Kings Cnty. 2016).

Section 50-a's mandatory procedures for obtaining court-ordered disclosure of personnel records require that all affected officers be given an "opportunity to be heard" prior to the court ordering even in camera review, let alone disclosure, of the records. CRL § 50-a(2), (3). Those statutory procedures do not directly come into play here because court-ordered disclosure of covered records is available "only in the context of an ongoing litigation" to which the records are shown to be materially relevant, and Petitioner has never claimed there is any such ongoing litigation. Prisoners' Legal Services, 73 N.Y.2d at 33; CRL § 50-a(2), (3). But if the officers have a statutory right to be heard in a lawsuit that seeks court-ordered disclosure of their personnel records through proper channels, then a fortiori they have a right to be heard in a case that improperly seeks their personnel records outside of the process prescribed by the Legislature.

This result is mandated not only by CRL § 50-a, but by the CPLR, which provides that anyone who "might be inequitably affected by a judgment in the action" is a "necessary party." CPLR 1001. Accordingly, police officers are "necessary parties" to FOIL litigation seeking their personnel records, as this Court and others have held. See Telesford v. Patterson, 27 A.D.3d 328, 330 (1st Dep't 2006); Dunnigan v. Waverly Police Dep't, 279 A.D.2d 833, 834-35 (3d Dep't 2001), lv. Denied, 96 N.Y.2d 710. And even where it is disputed whether § 50-a applies to the requested records, the affected officer is a "necessary party" to the FOIL litigation because the officer "might be inequitably affected" by the outcome. See Hearst Corp. v. New York State Police, 109 A.D.3d 32, 36-37 (3d Dep't 2013).

Moreover, the officers' right to be heard is not lessened by the participation of the NYPD in this lawsuit. Rather, the officers are entitled to raise and advocate for CRL § 50-a's protections themselves. Section 50-a is "designed to protect the police officer." Molloy, 50 A.D.3d at 100. And even where the police officer and the agency both oppose disclosure, the officer has a separate, personal interest in the matter and a right to be heard. See Telesford, 27 A.D.3d at 330 (noting that there is no "unity of interest" between agency and officer in FOIL suit seeking disciplinary records). The officers are still necessary parties and they are entitled to an opportunity to be heard before any such decision to strip their CRL § 50-a protections is made. See CPLR 1001; Hearst, 109 A.D.3d at 36-37. Accordingly, as Petitioner has failed to join the officers as necessary parties, or provide notice that their records are being sought, the Petition must be dismissed

POINT III

IT IS PREMATURE TO ADDRESS THE ISSUE OF ATTORNEYS' FEES

Pursuant to FOIL's fee-shifting provision, a court may only award reasonable counsel fees and costs if certain statutory prerequisites are met. As a threshold matter, the Court must determine whether the party seeking fees has substantially prevailed. See Public Officers Law § 89(4)(c). If that finding is made, then other statutory prerequisites must be satisfied. It is only after these requirements are met that a court may determine whether a discretionary award of attorneys' fees and costs is appropriate. Id. Here, neither party has been adjudicated to be the substantially prevailing party, and it is Respondent's position, as set forth in Points I and II above, that the Petition should be denied. Accordingly, it is premature to address attorneys' fees and costs. See Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 441 (2005).

CONCLUSION

For the reasons set forth above, Respondent respectfully request that the Verified Petition be denied in its entirety, that Petitioner's requests for relief be denied in all respects, and that Respondent be granted such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 14, 2017

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Respondent
100 Church Street, Rm. 2-113
New York, New York 10007
(212) 356-0896
otuffaha@law.nyc.gov

By: s/ Omar Tuffaha
Omar Tuffaha
Assistant Corporation Counsel

To: Cynthia H. Conti-Cook, Esq.
The Legal Aid Society
Counsel for Petitioner

Roger A. Cooper, Esq.
Cleary Gottlieb Steen & Hamilton LLP
Of Counsel for Petitioner

(*Via NYSCEF*)

AFFIRMATION IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION, DATED MARCH 20, 2017
(pp. 124–26)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of JUSTINE LUONGO, Attorney In-Charge, Criminal Defense Practice, The Legal Aid Society, Petitioner, v. RECORDS ACCESS APPEALS OFFICER, New York City Police Department, Respondent.	**AFFIRMATION IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION** Index No. 160232/2016 I.A.S. Part 6 (Lobis, J.)

I, CYNTHIA CONTI-COOK, an attorney admitted to practice in the courts of this State, affirm under penalty of perjury the following pursuant to C.P.L.R. § 2106:

1. I am an attorney with The Legal Aid Society representing Petitioner Justine M. Luongo, Attorney-in-Chief of the Society's Criminal Defense Practice ("Petitioner").

2. This Affirmation is submitted in further support of Petitioner's Article 78 Proceeding to compel the New York Police Department ("NYPD") to produce requested documents containing NYPD Personnel Orders, in compliance with Public Officers Law § § 86-90, or the Freedom of Information Law.

3. Attached as Exhibit A to this Affirmation is a copy of the original legislative history of Civil Rights Law Section 50-a.

I hereby affirm under penalties of perjury that the within Affirmation is true and correct to the best of my knowledge.

Dated: New York, New York
March 20, 2017

CYNTHIA CONTI-COOK

EXHIBIT A – ANNEXED TO THE AFFIRMATION IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION

Legislative History of Civil Rights Law
Section 50-a
(pp. 127–58)

REPRODUCED FOLLOWING

EXHIBIT A

CHAPTER 413

S. 7635-B
Cal. No. 1114

A. 9640-B
Cal. No. 1238

SENATE-ASSEMBLY

February 5, 1976

IN SENATE—Introduced by Sen. PADAVAN—read twice and ordered printed, and when printed to be committed to the Committee on Codes—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee—reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

IN ASSEMBLY—Introduced by Mr. DeSALVIO—read once and referred to the Committee on Governmental Operations—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee—reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third readin

AN ACT

to amend the civil rights law, in relation to confidentiality of certain pers
records relating to performance of police officers

RECEIVED
EXECUTIVE CHAMBER
JUN 1 0 1976

APPROVED
JUN 21 1976

Compared by

EXPIRES
JUN 29 1976

Approved

Page 413

130

1976

SENATE

The Senate Bill
by Mr. PADAVAN
Entitled: "

Calendar No. 1114

Senate No. 7635-B
Assem. Rept. No.

S. 7635-B
Cal. No. 1114

A. 9640-B
Cal. No. 1238

AN ACT

to amend the civil rights law, in relation to confidentiality of certain personnel records relating to performance of police officers

" was read the third time DEBATE WAS HAD THEREON

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	47	Mr. Anderson			15	Mr. Knorr	
	49	Mr. Auer			29	Mr. Leichter	EXCUSED
	16	Mr. Babbush			8	Mr. Levy	
	45	Mr. Barclay			22	Mr. Lewis	
	18	Mr. Bartosiewicz	EXCUSED		50	Mr. Lombardi	
	23	Mr. Beatty			24	Mr. Marchi	
	25	Ms. Bellamy			5	Mr. Marino	
	33	Mr. Bernstein			48	Mr. Mason	
	19	Mr. Bloom			28	Mr. McCall	
	12	Mr. Bronston			59	Mr. McFarland	
	9	Ms. Burstein	EXCUSED		42	Mr. Nolan	
	7	Mr. Caemmerer	EXCUSED		27	Mr. Ohrenstein	
	34	Mr. Calandra			17	Mr. Owens	
	21	Mr. Conklin			11	Mr. Padavan	
	46	Mr. Donovan			60	Mr. Paterson	
	6	Mr. Dunne			53	Mr. Perry	
	54	Mr. Eckert	EXCUSED		36	Mr. Pisani	
	35	Mr. Flynn			57	Mr. Present	
	32	Mr. Gullo			39	Mr. Rolison	
	30	Mr. Garcia			31	Mr. Ruiz	
	14	Mr. Gazzara			10	Mr. Santucci	
	1	Mr. Giuffreda			40	Mr. Schermerhorn	
	13	Mr. Gold			2	Mr. Smith, B.C.	EXCUSED
	26	Mr. Goodman	EXCUSED		51	Mr. Smith, W.T.	
	37	Mr. Gordon			43	Mr. Stafford	
	56	Mr. Griffin			55	Mr. Tauriello	
	20	Mr. Halperin			3	Mr. Trunzo	
	41	Mr. Hudson			58	Mr. Volker	
	44	Mr. Isabella			52	Mr. Warder	
	4	Mr. Johnson			38	Mrs. Winikow	

AYES 48
NAYS 4

¶ Ordered, that the Secretary deliver said bill to the Assembly and request its concurrence therein.

A-7635-B
Re A-957

Chap 413
of 1976

No. 4 15 Resolution

(Republicans in Italics)

Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative
Mr. Abrams		Mr. Graber		*Mr. Molinari*	
Miss Amatucci		Mr. Grannis		Mr. Montano	
Mr. Barbaro		Mr. Greco		*Mr. Murphy (G.A.)*	
Mr. Betros		Mr. Griffin		Mr. Murphy (M.J.)	
Mr. Bianchi		Mr. Griffith		*Mr. Murphy (T.J.)*	
Mr. Blumenthal		*Miss Gunning*		Mr. Nicolosi	
Mr. Brewer		Mr. Haley		Mr. Nine	
Mr. Brown		*Mr. Hanna*		*Mr. O'Neil*	
Mr. Burns		Mr. Harenberg		Mr. Orazio	
Mr. Burrows		*Mr. Harris*		Mr. Passannante	
Mr. Butler		*Mr. Hawley*		Mr. Pesce	
Mr. Calogero		*Mr. Healey*		Mr. Posner	
Mr. Caputo		Mr. Hecht		*Mr. Rappleyea*	
Mr. Cincotta		*Mr. Henderson*		*Mr. Reilly*	
Mr. Cochrane		*Mr. Herbst*		*Mr. Riford*	
Mrs. Connelly		Mr. Hevesi		Mr. Robach	
Mr. Connor		Mr. Hinchey		*Mr. Roosa*	
Mr. Cook (C.D.)		Mr. Hochberg		*Mr. Ross*	
Mr. Cook (D.W.)		Mr. Hochbrueckner		Mrs. Runyon	
Mr. Cooperman		Mr. Hoyt		*Mr. Ryan*	
Mr. Culhane		*Mr. Hurley*		Mr. Schmidt	
Mr. Daly		Mr. Izard		Mr. Schumer	
Mr. D'Amato		*Mr. Jonas*		*Mr. Sears*	
Mr. D'Andrea		*Mr. Kelleher*		Mr. Serrano	
Mr. Dearie		Mr. Kidder		~~Mr. Sharaff~~	
Mr. DelliBovi		Mr. Koppell		Mr. Siegel	
Mr. Del Toro		Mr. Kremer		Mr. Silverman	
Mr. DeSalvio		Mr. Landes		*Mr. Solomon*	
Mr. DiCarlo		*Mr. Lane*		Mr. Stavisky	
Mr. DiFalco		Mr. Lasher		~~Mr. Stecher~~	
Mrs. Diggs		*Mr. Lee*		*Mr. Stephens*	
Mr. Dokuchitz		Mr. Lehner		~~Mr. Stott~~	
Mr. Duryea		Mr. Lentol		Mr. Strelzin	
Mr. Dwyer		*Mr. Levy*		*Mr. Suchin*	
Mr. Emery		Mr. Lewis		*Mr. Sullivan*	
Mr. Esposito		Mr. Lill		Mr. Tallon	
Mr. Eve		Mrs. Lipschutz		*Mr. Taylor*	
Mr. Farrell		Mr. Lisa		Mr. Thorp	
Mr. Ferris		*Mr. Lopresto*		*Mr. Tills*	
Mr. Field		*Mr. Mannix*		Mr. Vann	
Mr. Fink		Mr. Marchiselli		*Mr. Velella*	
Mr. Flack		*Mr. Margiotta*		Mr. Virgilio	
Mr. Flanagan		*Mr. Marshall*		Mr. Walsh	
Mr. Fortune		Mr. McCabe		*Mr. Wemple*	
Mr. Fremming		*Mr. Mega*		Mr. Weprin	
Mr. Frey		Mr. Miller (G.W.)		*Mr. Wertz*	
Miss Gadson		Mr. Miller (H.J.)		Mr. Yevoli	
Mrs. Goodhue		*Mr. Miller (H.M.)*		*Mr. Zagame*	
Mr. Gorski		Mr. Miller (M.H.)		Mr. Zimmer	
Mr. Gottfried		Mr. Mirto		~~Mr. Spencer~~	

AYES 122

NOES 24

Passed
6/1/76

CALENDAR NO. 1238

BILL NO. A. 9640-A INTRODUCED BY: Mr. DeSalvio

S.

AN ACT

to amend the civil rights law, in relation to confidentiality of certain personnel records relating to performance of police officers

SUMMARY OF PROVISIONS - The bill provides that police personnel records be declared confidential and subject to review only by court order on notice except review by police officials, grand juries, D.A.'s and special prosecutors are allowed without court order.

RATIONALE - To restrict the availability of personnel records of police officers.

LEGISLATIVE HISTORY -

PERTINENT CONSIDERATIONS - It is noted that personnel records of any employee in any business are confidential to his employer. It has become a matter of harrassment of police officers that personnel records be constantly requested, scrutinized, reviewed and commented upon, sometimes publicly.

The safeguards of the integrity of the police officer are protected with this legislation and yet, because of its various conditions, the safeguards of the citizenry of the State of New York are also protected in allowing such records to be available to necessary parties.

S-7635-B

133

Memorandum

STATE OF NEW YORK
EXECUTIVE CHAMBER

TO: Michael Nadel

FROM: John Graves

JUL 1 1976

This letter has been acknowledged by David Burke. However, my review leads me to conclude it may warrant a more detailed response by a member of your staff. Please forward it to them for action.

If they feel the acknowledgement is sufficient, they should mark NA on the blue slip and return it to the Files Unit within 4 days.

If they prepare a further response, it:

- should be completed in 4 days;
- should be signed by either Mr. Gribetz or a member of his staff; and,
- must indicate copies (2) of the further response to the Files Unit.

For this system to work, letters must be reviewed and decided upon within 4 days.

S- 7635-B

B-201

BUDGET REPORT ON BILLS

Session Year: 19 76

SENATE

No. 7635-B

Law: Civil Rights Law

Introduced by:

Sen. Padavan

Sections: §50-a

ASSEMBLY

No.

Bill jacket 6/21/76 m

Division of the Budget recommendation on the above bill: JUN 18 1976

Approve:_____ Veto: X No Objection:_____ No Recommendation:_____

1. Subject and Purpose: and 2. Summary of Provisions: This bill would amend the Civil Rights Law to provide that police personnel records will be considered confidential, not subject to disclosure except on written consent of the individual officer, or, where the courts are concerned, only after an in camera proceeding in which the judge shall determine which, if any, of subpoenaed personnel records are relevant to the action before him. The provisions of the bill would not apply to district attorneys, the attorney general, police agencies themselves, grand juries or other agencies of government. This bill would take effect immediately.

3. Prior Legislative History: In 1975, the Legislature passed Assembly bill 2175-B which was similar to the present bill except for the fact that it did not specifically exempt the attorney general, district attorneys, police agencies, or grand juries from its provisions. In veto memorandum #127, the Governor noted that the bill's wording was vague and it was uncertain that grand juries and law enforcement agencies would have access to police personnel records.

In 1974, S. 9448-B passed both houses in the Legislature and was vetoed by the Governor (Memo 152) because it did not permit other agencies of government to have access to police personnel records.

4. Statements in Support of Bill:

A. This bill would afford some protection to police officers who must testify in criminal proceedings. Increasingly, according to a spokesman for the Division of State Police, defense attorneys who wish to discredit police officer witnesses will subpoena personnel files in order to discover and confront the witness with allegations, complaints, disciplinary proceedings, or reprimands filed against them in the past. This presents special problems for the State Police since every public and private communication concerning an officer's behavior is entered into his personnel folder and may, therefore, be disclosed in the course of a defense counsel's attempt to discredit him.

B. This bill would preserve a defendant's right to obtain expulpatory information from a police officer's personnel

Date:_____ Examiner:_____

Disposition: Chapter No. Veto No.

history because the presiding judge, in his discretion, would be able to furnish official data to the defendant concerning that portion of an officer's past behavior which may relate to the case at hand.

C. There have been allegations of police officers and their families being harassed by individuals who, using personnel folder information, obtained their home addresses and the identities of family members.

5. Possible Objections:

A. This bill may introduce an unnecessary protective mechanism to govern the introduction of some types of evidence in legal actions.

-- Under our present system, the presiding judge himself must issue a subpoena for requested government records following a preliminary determination that the materials sought may be both relevant and admissible;

-- A police agency which receives a properly issued subpoena may contest the same in a motion to quash; at this time it is incumbent upon counsel for the party seeking such records to demonstrate the relevance and admissibility of the desired records;

-- Once the subpoenaed materials have been received, the presiding judge reviews them by himself in camera to determine which portions, if any, should be introduced at the proceeding;

-- In the course of the actual proceeding, legal counsel may again object to the introduction of record information which he feels is unwarranted and improper; the court must again decide the issue.

It may also be argued that through these processes the court can preserve the identity of the members of a police officer's family and their address without having to rely on the provisions of this bill.

B. This bill would introduce a procedural safeguard not enjoyed by other citizens or groups of citizens, in effect, establishing a separate judicial process to preview the introduction of evidence on the character of police officers and no others.

C. This bill extends protection to police officers that is not provided to other civil servants. It can be argued that the parties in a legal action should enjoy uniform access to all civil service personnel records without encountering special provisions established solely for policemen.

6. Other State Agencies Interested: The Division of State Police supported last year's bill and may reasonably be expected to support the current proposal.

7. Known Position of Others: None known.

8. Budgetary Implications: None.

9. Recommendation: This bill would restrict the use of police officer personnel records in the courts.

Although the bill would give some protection to police officers who must testify in court and although it would preserve defense counsel's right to obtain relevant data from a police officer's personnel history, other considerations outweigh these advantages. The bill would introduce yet another mechanism governing the introduction of evidence. It imposes an unnecessary requirement that would duplicate the present system whereby the court determines the relevance and admissibility of such information at several points during a court proceeding. The bill establishes a separate procedure to be observed when police officers testify in court that will not govern when other citizens or groups of citizens appear in court. Lastly, this proposal institutes a protection for police that does not apply to other civil servants.

For these reasons, we recommend disapproval of this bill.

DATE: June 8, 1976 EXAMINER: Kevin Dulin
Vincent E. LaFleche, Assistant Chief Budget Examiner (Management)

S 7635 B

STATE DEPARTMENT OF CIVIL SERVICE June 4, 1976

SENATE
7635-B

Introduced by Senator Padavan

RECOMMENDATION: See last paragraph

STATUTES INVOLVED: Civil Rights Law § 50-a (new)

JUN 9 1976

EFFECTIVE DATE: Immediately

DISCUSSION:

The bill would add a new section to the Civil Rights Law to provide that personnel records of Police Officers are confidential and not subject to inspection without the express written consent of the Police Officer or a court order. This bill is virtually identical to a bill, Assembly 2175-B, which was disapproved last year (veto memorandum #127) and is similar to another bill, Senate 9448-B, which was disapproved by Governor Wilson in 1974 (veto memorandum #52).

The main difference between Senate 7635-B and last year's bill, Assembly 2175-B, is that this year's measure specifically exempts "any district attorney or his assistants, the attorney general or his deputies or assistants, [and] a grand jury," in addition to any agency of government which requires these records in the furtherance of their official functions. Our views on this bill are basically the same as those we expressed last year concerning Assembly 2175-B. As we stated then, in so far as our direct civil service responsibilities are concerned, our objections were previously removed, but we continue to question the desirability of and the need for legislation of this sort.

Victor S. Bahon
President, Civil Service Commission

Attachment

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JUN 8 1976

FRANK PADAVAN
11TH DISTRICT

THE SENATE
STATE OF NEW YORK
ALBANY 12224

DISTRICT OFFICE
824-50 BRADDOCK AVENUE
QUEENS VILLAGE, NEW YORK 11428
468-9516

June 7, 1976

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York

Dear Mr. Gribetz:

With respect to Senate Bill 7635-B which I introduced and has passed both Houses of the Legislature. I have enclosed a copy of the supporting memorandum and a letter in support from the New York City Transit Police Department, Sanford D. Garelick, Chief.

I respectfully request that the Governor sign this bill into law. Thank you for your consideration to this request.

Sincerely,

Frank Padavan

FP:pd
Encl.

MEMORANDUM IN SUPPORT OF : SENATE # 7635B - Sen. Padavan
ASSEMBLY # 9640A - Assyman DeSalvio

AN ACT TO AMEND THE CIVIL RIGHTS LAW, IN RELATION TO CONFIDENTIALITY OF CERTAIN PERSONNEL RECORDS RELATING TO PERFORMANCE OF POLICE OFFICERS

This bill would amend the Civil Rights Law to provide that all personnel records used to evaluate the performance of police officers shall be CONFIDENTIAL and not subject to review or inspection without the written consent of the officer or by court order. It further provides no court order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review, and additionally, that if the judge signs an order he will review the file and determine whether to make the records or part of them available.

As with all citizens, the civil rights of police officers must be protected. These rights are sacred and must be given away only to the paramount interest of the public good.

In today's milieu police officers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack the officer's credibility a tactic that has lead to abuse and in some cases to the disclosure of unverified and unsubstantiated information that the records contain. It also has resulted in the disclosure of confidential information and privileged medical records.

These abuses can be stopped and the civil rights of police officers upheld by enactment of this bill. If the information in the personnel records is required in the public interest, the judge can release it. If it is not, he may withhold it. In either case, the police officer has been accorded due process and the rights of the public secured.

This bill passed both houses of the legislature last session and was vetoed by the Governor (Veto Memo #127) who in his judgment felt that the bill in its present form excluded certain officials and agencies in the exercise of their official functio The bill before you has been amended to remove the objections contained in the Governor's veto memorandum.

Memorandum

JUN 17 1976

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

TO: Judah Gribetz

FROM: Roger Hayes

DATE: June 16, 1976

RE: Ten-Day Bill S. 7635-B

Purpose

To add a new section 50-a to the Civil Rights Law restricting the accessibility of the personnel records of police officers.

Discussion

It is our understanding that this bill is directed at purported abuses involving the indiscriminate perusal of police officers' personnel records by defense counsel in cases wherein the police officer is a witness. It is claimed that many judges issue subpoenas for these records in pro forma fashion upon application by defense counsel.

Personnel records often contain raw, unverified information derogatory of the subject police officer, such as letters of complaint from members of the public. In the hands of some defense counsel the data is so used as to prejudice the officer in contexts irrelevant to the guilt or innocence of the defendant. If all judges carefully considered defense counsels' requests before issuing subpoenas for these records, this legislation would not be necessary. But, it is asserted, far too many judges routinely and without due consideration issue the subpoenas.

The bill proposes a procedure which, in effect, forces a judge to focus on each such request and substitutes a requirement for a court order in place of a subpoena. It would be virtually impossible to prove, one way or the other, whether the criticism of current practice inherent in this bill is merited or not. The bill, however, imposes no onerous burden either on the courts or on defense counsel. In those instances where examination of a police officer's personnel records are warranted, subdivisions 2 and 3 of the proposed section provide a reasonable procedure for doing so.

It should be noted that subdivision 4 provides the necessary exceptions that would obviate this statute being used to frustrate the legitimate and necessary reviews of personnel records by governmental agencies in the performance of their respective duties.

Recommendation

Approval.

NEW YORK STATE POLICE
STATE CAMPUS
ALBANY, N.Y. 12226

WILLIAM G. CONNELIE
SUPERINTENDENT

JUN 9 1976

June 8, 1976

SENATE	ASSEMBLY	INTRODUCED BY
7635-B		Sen. Padavan

RECOMMENDATION: Approval

STATUTE INVOLVED: Civil Rights Law, §50-a

EFFECTIVE DATE: Immediately

DISCUSSION:

1. Purpose of bill:

To amend the Civil Rights Law, in relation to confidentiality of certain personnel records relating to performance of police officers.

2. Summary of provisions of bill:

This bill amends the Civil Rights Law in relation to making personnel records of policemen confidential except when otherwise ordered by a lawful court order after a hearing or unless inspection thereof is authorized in writing by the police officer involved.

3. Prior legislative history of bill:

Similar bills which passed prior legislatures were vetoed by the Governor because they failed to exclude law enforcement agencies, prosecutors and grand juries from the prohibitions contained in the bill. This bill now satisfies all of the objections raised in the Governor's Veto Memorandum of August 12, 1975, numbered 127.

4. Known position of others respecting bill:

We understand the Police Conference of New York favors this bill.

5. Budget implications:

None known.

6. Arguments in support of bill:

We fully support the concept that the personnel records of police officers should be restricted for use only by the employing police agency in order to protect the integrity of such police officer in carrying out his law enforcement obligations.

At the present time the Division of State Police is responding to subpoenae duces tecum in civil actions as well as criminal actions for the production of the personnel records of members of this Division. While we have no objection to producing such records for in camera inspection by the Court, we find that the courts are not requiring such protection and that contents of the personnel files are being made available to plaintiffs' counsels. Since these files contain the personal history of every member's service, including confidential background material, it is absolutely necessary that these records be held in the highest of confidence subject only to appropriate court order on a showing of necessity.

7. Arguments in opposition to bill:

None.

8. Reasons for recommendation:

See six above.

William Sorrell

Superintendent

S- 7635-B

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Senate 7635-B

This bill would amend the Civil Rights Law by adding a new section 50-a to restrict disclosure of certain personnel records of police officers as defined by Criminal Procedure Law, § 1.20. Inspection of these records would be permitted only by lawful court order or with the permission of the police officer concerned. A hearing procedure is provided prior to the issuance of a court order permitting review.

A similar bill introduced in 1974 was vetoed by Governor Wilson by veto memorandum No. 152, and in 1975 a slightly amended version of the prior bill was vetoed by Your Excellency by veto memorandum No. 127.

The objections expressed in the 1975 veto memorandum are apparently corrected by paragraph 4 of the present proposed legislation, which now excepts from the provisions preventing disclosure the district attorney, the Attorney General, a grand jury or any agency of government requiring such records in the performance of its official duties.

This bill would take effect immediately, and I have no legal objection to it.

Dated: June 11, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

S 7635-B

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STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, NEW YORK 10007

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

JUN 10 1976

June 8, 1976

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
Albany, New York 12224

Re: Senate 7635-B

Dear Mr. Gribetz:

This will acknowledge your request for comment on the above-listed legislation.

This bill would amend the Civil Rights Law concerning the confidentiality of certain personnel records relating to the performance of police officers.

This measure would establish the personnel records of police officers as confidential documents, not subject to inspection or review without the officers' consent, except by court order or if the records are required by a district attorney, the attorney general or his deputy or assistant, a grand jury, or a governmental agency.

The requirement for a judicial hearing and determination where police personnel records are requested for inspection by a private person without the consent of the officer involved will undoubtedly place some additional burden on the courts, but this burden will not likely be substantial.

Since the proposal involves a substantive matter of legislative policy which will probably have a minimal effect upon court administration, this office takes no position on this measure.

Sincerely,

Michael R. Juviler

Michael R. Juviler

MRJ:bg

S 7635-B

STATE OF NEW YORK
DEPARTMENT OF LAW
NEW YORK STATE OFFICE BUILDING
VETERANS HIGHWAY
HAUPPAUGE, N.Y. 11787
TEL: (516) 979-5391

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

JOSEPH P. HOEY
SPECIAL DEPUTY ATTORNEY GENERAL
SPECIAL PROSECUTOR
SUFFOLK COUNTY

June 18, 1976

JUN 22 1976

Mr. Judah Gribetz
State of New York
Executive Offices
1350 Avenue of the Americas
New York, New York 10019

RE: Proposed Legislation S. 7635-B and A. 9640-B

Dear Mr. Gribetz:

I am writing you in reference to your request for comments on the proposed Section 50-A of the Civil Rights Law. While I appreciate that the bill provides that prosecutors are exempt from the operable provisions and that, therefore, the prosecutive function would in no way be impaired by the bill, I would suggest opposition to the bill for general policy reasons.

Presently, the need for public accountability of public servants is becoming painfully clear. On the Federal level, the movement towards increasing the public availability of secret law enforcement files has greatly accelerated in the past few years. The proposed legislation represents a significant step in the opposite direction.

I cannot believe that desireable potential police officers will be disuaded from public service merely because their employment records are available to the public at large. To the contrary, far too often today the opinion is expressed that police work is just another job. The making of personnel records confidential for law enforcement officers would just serve to further this unfortunate line of thinking. All the participants in the criminal justice system should constantly be reminded that their employment in this system is a privilege and that the greatest part of this privilege is being charged with the public trust of maintaining the public's right to justice. Therefore, the public and the members of the criminal justice system should both be aware that personnel records, which are the history, and frequently the basis for promotional decisions and the expansion of responsibilities, are open to public scrutiny. Likewise, the public should feel it has the opportunity to review the justification for continuing the employment of members of the criminal justice system.

I am not unaware of the fears expressed by some prosecutors that these records, if available, could be misused by defense counsel in criminal litigation, in order to muddy the issues at hand. However, those problems must be handled by the individual courts on case by case basis where proper decisions on relevancy and admissibility can and should be made. To attempt to cure those prospective problems with this legislation represents excessive and unwise use of the statutory process. It is analogous to a village placing a glass dome over Town Hall to keep the mosquitos out in the summertime, because the Mayor fears the custodian will forget to put up the screens in May.

The fear that police officer's homes and families could be exposed to threats by arrestees who learn of the officer's home address through the questioned records should not be minimized, but need not be addressed in the manner proposed by the Legislation. Specific information about a police officer's home address could be maintained in separate files.

The aforementioned arguments in favor of this legislation do not offset the benefits of assuring the availability to the public of the performance evaluation of its servants. Additionally, we should be mindful of the significant effect of the threat upon the contributor to these files. It serves the public interest to retain this avenue of accountability for the promotional decisions influenced by the questioned files.

Very truly yours,

Joseph P. Hoey

Joseph P. Hoey
Special Deputy Attorney General

JPH:as

S7635-B

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OFFICE OF THE
DISTRICT ATTORNEY
OF BRONX COUNTY

MARIO MEROLA
DISTRICT ATTORNEY

851 GRAND CONCOURSE
BRONX, N. Y. 10451
LU 8-9500

June 7, 1976

JUN 10 1976

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, N.Y. 12224

Re: Senate #7635-B
Assembly #9640-B

Dear Mr. Gribetz:

This Bill would amend the Civil Rights Law by making certain police personnel records confidential and immune to public scrutiny without a lawful court order.

It has been brought to my attention that, often simply as a harassment tactic, defense attorneys in criminal cases have been making an unrealistically high number of requests for the personnel files of police officers scheduled to testify against their clients. This Bill obviously would seriously discourage bad faith probing into police personnel records; yet, on the other hand, it would make such data available when required in the interests of justice.

For the reasons assigned, I strenuously urge enactment of this bill into law.

Very truly yours,

Mario Merola

MARIO MEROLA
District Attorney
Bronx County

MM:d

OFFICE OF THE DISTRICT ATTORNEY, Richmond County

Courthouse, St. George, Staten Island, N.Y. 10301
Telephone: 447-0049

THOMAS R. SULLIVAN
District Attorney

June 9, 1976

JUN 11 1976

Honcrable Judah Grivetz
Counsel to the Governor
Executive Chamber
State Capital
Albany, New York 12224

Re: S. 7635-B
A. 9640-B

Dear Mr. Grivetz:

We approve these bills and have no objection to the signing by the Governor. In the past, counsel has sought the personnel records of police officers for unwarranted fishing expeditions. While the weight of reason cases is against such a practice, unfortunately a few times it has been omitted.

There is adequate safeguard in this bill to permit Grand Jurys and other authorized investigative bodies with legislative access to these records to obtain them.

Very truly yours,

THOMAS R. SULLIVAN
Districr Attorney

TRS:fg

New York City Transit Authority

David L. Yunich
Chairman, Chief Executive Officer

John G. deRoos
Senior Executive Officer

NEW YORK CITY TRANSIT
POLICE DEPARTMENT
370 JAY STREET
BROOKLYN, N.Y. 11201
TEL. AREA CODE 212-330-3000

SANFORD D. GARELIK
Chief

April 20, 1976

Senator Frank Padavan
The State Senate Capitol
Albany, New York 12224

Dear Senator Padavan:

I have reviewed Bill #S.7635 which you introduced in the Senate. The Bill has the full support of the Transit Police Department.

On behalf of the members of this Department, and on a personal level as well, I wish to thank you for your much appreciated efforts.

Sincerely,

Sanford D. Garelik
Chief

130:SDG:in

From: 151

9683 would create a rebuttable presumption that all surviving spouses are dependent. This bill is opposed because most women workers would again lose benefits since their husbands are not in fact dependent. (The wife's income exceeds the husband's in only 7.4 percent of all families.) 9683, while neutral on its face, will perpetuate the current sex discriminatory scheme and should be rejected in favor of 9684.

JUN 3 1976

CAL. NO. 1209

BILL NO. 7523-A

SPONSOR Siegel

APPROVED. This bill would amend the public health law to assure that patients have the right to see their own medical records in every hospital or clinic in the state. NYCLU believes that the right to personal autonomy includes the right to control one's own body. In the context of medical treatment, this right implies the patient's right to give an informed consent before undergoing a particular treatment. Without knowledge, no meaningful consent is possible. Access by patients to medical records is a vital element of this process and should be guaranteed by law.

CAL. NO. 1230

BILL NO. 9640-A

SPONSOR DeSalvio

DISAPPROVED. This bill provides that a policeman's personnel records may not be reviewed by a court absent a prior showing of "facts sufficient to warrant the judge to request records for review." The purpose of this bill is to insulate policemen from meaningful cross-examination in cases in which they are witnesses. It seems clear that the personnel records of some policemen will contain information that could cast doubt on that policeman's testimony and perhaps even exculpate a defendant completely. To create this statutory impediment to permitting the court to review those records before a determination as to relevance and materiality is made seems a wholly unjustified attempt to protect those policemen at the expense both of the persons against whom they are testifying and of the truth.

CAL. NO. 1230
BILL NO. 9640-B
SPONSOR DeSalvio

DISAPPROVED. This bill provides that a policeman's personnel records may not be reviewed by a court absent a prior showing of "facts sufficient to warrant the judge to request records for review." The purpose of this bill is to insulate policemen from meaningful cross-examination in cases in which they are witnesses. It seems clear that the personnel records of some policemen will contain information that could cast doubt on that policeman's testimony and perhaps even exculpate a defendant completely. To create this statutory impediment to permitting the court to review those records before a determination as to relevance and materiality is made seems a wholly unjustified attempt to protect those policemen at the expense both of the persons against whom they are testifying and of the truth.

CAL. NO. 1367
BILL NO. 8607-A
SPONSOR McCabe

APPROVED. Requires the publication of a manual detailing the rights of mental patients to be made available to patients and those authorized to act in their behalf. This is a laudable attempt to bring critically important information about their rights to one of the most alienated, uninformed and abandoned groups in society.

CAL. NO. 1400
BILL NO. 11671
SPONSOR Yevoli

APPROVED. Amend the Workmen's Compensation Law to eliminate sex distinctions in granting death benefits to surviving spouses. Under current law all covered male workers earn automatic death benefits for surviving spouses. Female workers are only awarded death benefits if their husbands are in fact financially dependent. This bill would eliminate the dependency test for survivors of female workers and thus corrects an unconstitutionally discriminatory state benefit program. [See Weinberger v. Wiesenfeld, 95 S.Ct. 1225 (1975) and Frontiero v. Richardson, 411 U.S. 677 (1972)].

CAL. NO. 1488
BILL NO. 600-D
SPONSOR Culhane

APPROVED. Creates a state Fair Credit Reporting Act which is modeled after an analagous federal law and contains several reforms to protect consumers against inaccurate and improper consumer reporting practices.

Patrolmen's Benevolent Association
NEW YORK CITY TRANSIT POLICE DEPARTMENT
299 BROADWAY (ROOM 505) • NEW YORK, N.Y. 10007 • Telephone 964-6992 - 6993

June 18, 1976.

Hon. Hugh L. Carey
Governor of the State of New York
State Capitol
Albany, New York. 12224

Re: Senate 7635-B by Mr. Padavan

Dear Governor Carey:

The above bill which is now before you would amend the Civil Rights Law to provide that all personnel records used to evaluate the performance of police officers shall be confidential and not subject to review or inspection without the written consent of the officer or by order of the court.

It further provides no court order will issue except after hearing and a clear showing of relevancy and materiality, and additionally, that if the judge signs an order he will review the file and determine whether to make the records or part of them available.

As a result of your disapproval last year of a similar bill (Assembly 2175-B) -- Veto Memorandum No. 127 -- this year's measure has been amended to meet your objections. The bill specifically provides that the provisions do not apply to district attorneys, the attorney general, a grand jury, or any other governmental agency which requires the records in furtherance of their official function.

The Patrolmen's Benevolent Association, N.Y.C. Transit Police Department, which represents some 3000 members of the transit police force, endorses this measure and respectfully urges your approval.

As with all citizens the civil rights of police officers must be protected. These rights are sacred and must be given way only to the paramount interest of the public good.

Patrolmen's Benevolent Association
NEW YORK CITY TRANSIT POLICE DEPARTMENT
299 BROADWAY (ROOM 505) • NEW YORK, N.Y. 10007 • Telephone 964-6992 - 6993

JOHN MAYE
President
FLOYD HOLLOWAY
1st Vice-President
THOMAS GRASSO
2nd Vice-President
JULIO COSME JR.
Executive Secretary
JOSEPH CARNEY
Financial Secretary
AMADEO FASOLINO
Recording Secretary
JOHN McLOUGHLIN
Treasurer

Hon. Hugh L. Carey

June 18, 1976.

In today's milieu police officers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack officers' credibility, a tactic that has lead to abuse and in some cases to the disclosure of unverified and unsubstantiated information that the records contain. It also has resulted in the disclosure of confidential information and privileged medical records.

These abuses can be stopped and the civil rights of police officers upheld by enactment of this bill. If the information in the personnel records is required in the public interest, the judge can release it. If it is not, he may withhold it. In either case, the police officer has been accorded due process and the rights of the public secured.

Hopefully you will agree that the purpose of the bill, which last year you characterized as "commendable", can be achieved without expense to effective law enforcement.

For these reasons, your approval is respectfully requested.

Respectfully yours,

John Maye
President

Affiliated with { *Police Conference State of New York, Inc.*
International Conference of Police Ass'ns.
Metropolitan Police Conference Inc.

NYCLU

S 7635 1114

New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

Legislative Department
Barbara Shack, Director
Arthur Eisenberg, Staff Counsel
Kenneth P. Norwick, Counsel

State Legislative Office
90 State Street
Albany, N.Y. 12207
(518) 436-8594

1114 Amend 5/24 113

TO: New York State Senate

May 24, 1976

SUBJECT: Summary of Civil Liberties Bills on Senate Calendar

Several bills involving civil liberties concerns are presently on the Senate calendar. To assist you in considering these bills, we shall briefly summarize and set forth our position on each here. Where time permits, we shall issue more extensive memoranda on these bills for your consideration. For further information and assistance on these or any other civil liberties issues, please feel free to call our Albany office at (518) 436-8594.

CAL. NO.
1114

BILL NO.
7635-B

SPONSOR
Padavan

DISAPPROVED. This bill provides that a policeman's personnel records may not be reviewed by a court absent a prior showing of "facts sufficient to warrant the judge to request records for review." The purpose of this bill is to insulate policemen from meaningful cross-examination in cases in which they are witnesses. It seems clear that the personnel records of some policemen will contain information that could cast doubt on that policeman's testimony and perhaps even exculpate a defenaant completely. To create this statutory impediment to permitting the court to review those records before a determination as to relevance and materiality is made seems a wholly unjustified attempt to protect those policemen at the expense both of the persons against whom they are testifying and of the truth.

JUN 17 1976

POLICE CONFERENCE of New York, Inc.

Executive Offices: 112 State Street – Suite 1120, Albany, New York 12207
Tel 518-463-3283

Senate No. 7535-B Introduced by Senator Padavan

M E M O R A N D U M I N S U P P O R T

AN ACT to amend the Civil Rights Law in relation to confidentiality of certain personnel records relating to performance of police officers

SUMMARY OF PROVISIONS - Adds Section 55a to the Civil Rights Law.

PURPOSE - To restrict the availability of personnel records of police officers.

JUSTIFICATION - Personnel records of any employee in any business are confidential to his employer. It has become a matter of harrassment of police officers that personnel records be constantly requested, scrutinized, reviewed and commented upon, sometimes publicly. This statute would provide that authorities or agencies maintaining police forces consider confidential and not subject to inspection or review without the express written consent of the particular police officer, all personnel records in connection with his employment. The statute further provides exception to court order and, further, governmental agencies requiring access to such records in the exercise of their official functions, grand juries, district attorneys and special prosecutors. The safeguards of the integrity of the police officer are protected within this legislation and yet, because of its various conditions, the safeguards of the citizenry of the State of New York are also protected in allowing such records to be available to necessary parties.

FISCAL IMPLICATION - None

EFFECTIVE DATE - Immediately

June 14, 1976

SPECIAL PROSECUTOR

Memorandum

Bill jacket 6/22/76

To : HON. JUDAH GRIBETZ

From : CHARLES J. HYNES

Date : JUNE 17, 1976

Subject: S. 7635-B, A. 9640-B

JUN 21 1976

The purpose of the Act is to restrict a defendant's ability to subpoena the personnel files of prospective police officer/witnesses. Under current practice a defense attorney will normally submit a subpoena calling for the personnel file of a prospective police officer-witness to the judge presiding at trial (such a subpoena must be judicially ordered since it compels the production of records of a governmental agency). The judge would then usually sign the subpoena and direct that the material be furnished to him for in camera inspection in order to determine whether the file contains information which might be used to impeach the credibility of the prospective police officer-witness.

The Act requires a factual showing prior to the issuance of the court order compelling production of the records.

This requirement will preclude using subpoenas to fish for information and will thereby lessen the clerical burden on the police department of continually having to provide voluminous records of this sort in almost every criminal action.

The Act also creates a new method of obtaining the files. The subpoena process has been replaced by an application for a court order and if the material is ordered delivered, by an

accompanying directive to seal the files pending judicial examination.

It is recommended that the Act be signed since it has the beneficial effect of preventing abuse of the subpoena power while it authorizes the use of relevant information after judicial scrutiny has found the information is important for effective cross-examination.

REPLY MEMORADUM IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION, DATED MARCH 20, 2017
(pp. 159–75)

REPRODUCED FOLLOWING

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Index No. 160232/2016 (IAS Part 6) (Lobis, J.)

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY: CIVIL TERM

Application of Justine Luongo, Attorney-In-Charge, Criminal Defense Practice, The Legal Aid Society,

Petitioner,

-against-

Records Access Appeals Officer, New York Police Department,

Respondent.

REPLY MEMORANDUM IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION

THE LEGAL AID SOCIETY
Counsel for Petitioner
199 Water St. 6th Floor
New York, NY 10038
(212) 577-3265

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Of Counsel for Petitioner
One Liberty Plaza,
New York, NY 10006
(212) 225-2000

March 20, 2017

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TABLE OF AUTHORITIES

I. RESPONDENT HAS FAILED TO MEET ITS BURDEN OF PROVING THE ORDERS FALL "SQUARELY WITHIN" THE FOIL EXCEPTION CREATED BY SECTION 50-A

Respondent bases the entirety of its argument on an expansive interpretation of "personnel records" unsupported by Section 50-a, case law, and common sense. In order to resist a request under FOIL, the burden is on the government to demonstrate "in more than just a plausible fashion" that the records at issue "fall[] squarely within" a statutory exemption. *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-63 (2007) (internal quotations and citation omitted). With respect to a claimed exemption under Section 50-a, Respondent must demonstrate that records clearly are "used to evaluate performance toward continued employment or promotion." N.Y. Civ. Rights Law § 50-a (McKinney 2014) ("Section 50-a"). The Court of Appeals has stressed that the question of whether a particular document is a personnel record, "depends upon its nature and its use in evaluating an officer's performance." *Matter of Prisoners' Legal Servs. of N.Y. v. N.Y. State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 32 (1988). Disclosure of the requested records is warranted where, as here, the agency fails to provide any information regarding the actual use of the requested records—which it is required to do—and thus fails completely to demonstrate that any of the records are actually used in evaluating performance. *Matter of Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 15 N.Y.3d 759, 761 (2010). Instead, Respondent's approach is to misconstrue Petitioner's position and entirely misconstrue the governing law. None of its arguments have any merit.

First, rather than explain how the requested Personnel Orders ("Orders") are *actually used* in making personnel decisions, Respondent conjectures that the *information* summarized in the Orders "would" hypothetically be relevant to officer evaluation, but not that the *Orders themselves* (or any of the information *in the form in which it is embodied in the Orders*) *is in fact used* to evaluate officers. *See* Respondent's Memorandum of Law in Support of the Verified

Answer, dated March 15, 2017, Dkt. No. 29, at 6 ("Opp. Br.") (stating merely that "it cannot seriously be contested that the *information contained* in the requested Personnel Orders… would be used to evaluate officers' performance." (emphasis added)). This statement widely misses the mark. The law is clear that the government must demonstrate how the exact records at issue are actually used to evaluate individual officers' employment; hypothetical conjecture and conclusory assertions are plainly insufficient. *Capital Newspapers*, 15 N.Y.3d at 761 (conclusory affidavit by police chief stating that documents were used to evaluate performance insufficient to meet burden of demonstrating that documents were personnel records); *Matter of Dilworth v. Westchester Cty. Dep't of Corr.*, 93 A.D.3d 722, 724 (2d Dep't 2012) (conclusory assertions are insufficient to support a FOIL denial; actual evidence is needed); *cf. Matter of Gannett Co. v. James*, 86 A.D.2d 744, 745 (4th Dep't 1982) (upholding police department's assertion of Section 50-a where police commissioner submitted affidavit detailing how the specific records sought were used in making personnel decisions; case relied upon by Respondent, Opp. Br. at 5).

Second, ignoring this critical failure to meet its own burden, Respondent further misconstrues Petitioner's arguments. Petitioner does not argue that the status of the Orders under Section 50-a depends on their location, as Respondent contends, Opp. Br. at 6; rather, Petitioner merely noted that it was unlikely that NYPD supervisors would rely on the Orders to evaluate an individual's employment where they contain only bare summary information and concern multiple officers on a single page, and may not include the full summary of details otherwise contained in the official final decision of each disciplinary disposition. Presumably, the NYPD is in possession of far more detailed records regarding officer disciplinary actions that it would use in making personnel decisions. Petitioner's Verified CPLR Article 78 Petition,

dated December 6, 2016, Dkt. No. 1 ¶ 20 ("Petition") ("NYPD has not provided any explanation or evidence to show how the Orders are actually used").

Third, Respondent wrongly asserts—without any basis—that this action is "improperly brought." Opp. Br. at 13. The action is unequivocally proper; FOIL requests are a vital part of New York's democratic system, and "[a]ll records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant," *Matter of Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994). Respondent further misreads the applicable law in arguing that *Petitioner* carries the burden to "demonstrate compliance" with Section 50-a and to "overcome the confidentiality requirements applicable." Opp. Br. at 12. To the contrary, the law is clear that FOIL places the burden of proof squarely on the *agency seeking to withhold the records*. *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 158-59 (1999). The law is also clear that public disclosure of the Orders is not limited to "the context of an ongoing litigation," as Respondent contends by selectively quoting from *Prisoners' Legal*. *See* Opp. Br. at 13. Rather, *Prisoners' Legal* states that the court-ordered disclosure of personnel records "that have potential use in harassing and embarrassing officers in litigation—[is permissible] only in the context of an ongoing litigation" pursuant to a subpoena, where outside of litigation such potential would preclude the disclosure of the underlying records. *Prisoners' Legal*, 73 N.Y.2d at 33.

Fourth, Respondent's expansive interpretation of Section 50-a also contradicts the purpose behind the law. As Petitioner has demonstrated, the abuse that the legislature was concerned with in drafting the statute was "narrowly specific": the impeachment of officers on "irrelevant collateral matters in the context of a civil or criminal action." Petition ¶ 21 (quoting *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569 (1986)). And

the legislative history of Section 50-a shows that the specific "irrelevant collateral matters" the legislature was concerned with were "unverified and unsubstantiated information", "raw, unverified information derogatory of the subject police officer," and "fishing expeditions… [that lead to] the disclosure of unverified and unsubstantiated information." *See* Legislative History of Civil Rights Law Section 50-a, attached as Exhibit A to Affirmation of Cynthia Conti-Cook in Further Support of Verified CPLR Art. 78 Petition, dated March 20, 2017, at 11, 12, and 26, respectively. None of that type of information is contained in the requested Orders.

The limited description of the charges against each officer and final dispositions contained in the Orders at issue are far removed from the type of "raw, unverified" and "derogatory" information from civilian complaints often present in officer disciplinary files, with which the legislature was specifically concerned in drafting the statute. *See* Petition ¶ 21 (quoting Ex. I, Mem. Of Roger Hayes, State of New York Division of Criminal Justice Services, Bill Jacket L. 1976, Chapter 413); *see also id.* ¶¶ 22, 32-34. Moreover, the Orders sought here could not be used to impeach officers on irrelevant matters in court, and no litigant could obtain any of the substantive documents underlying the orders without the approval of a court following a judicial subpoena and *in camera* review. *See* Petition ¶ 34 (citing *People v. Smith*, 27 N.Y.3d 652, 661-62 (2016)).

Furthermore, if, as Respondent asserts, the legislature intended Section 50-a to shield *all information* concerning officer discipline from the public, that position cannot be reconciled with the laws mandating public access to officer disciplinary hearings. Respondent's contention that the open proceedings are "separate questions, governed by separate laws and regulations, and implicating separate policy considerations," Opp. Br. at 8, misses the point. The fact is that information available to the public at these open hearings is far *more* likely to be detrimental to

the officer than the mere final determination made by the police commissioner following such a hearing. The clear tension between Respondent's position and the open proceeding laws thus further demonstrates that the legislature did not intend the broad reading of Section 50-a that Respondent asserts. If, however, the legislature intended Section 50-a only to prevent fishing expeditions into raw, unsubstantiated allegations of officer misconduct—as the Court of Appeals has held and the legislative history makes clear—there is no conflict between these policies.

Against this background, the critical distinction between cases such as *Prisoners' Legal* or *Daily Gazette* (where petitioners sought access to detailed disciplinary files and unverified civilian/prisoner complaints), and this case (where the Orders sought contain no such information) could not be clearer. Respondent never addresses this distinction, and all of the cases it relies upon involve FOIL requests for the kind of detailed records *underlying officer disciplinary decisions* that is not sought in this case. *See* Opp. Br. at 5.

Respondent's discussion of *Matter of Luongo v. Records Access Officer*, 49 Misc. 3d 708 (Sup. Ct. N.Y. Cty. 2015) ("*Luongo I*") illustrates the unprecedented expansiveness of Respondent's interpretation of Section 50-a. Respondent attempts to distinguish that case, while also maintaining it was "wrongly decided." Opp. Br. at 10. Contrary to Respondent's characterization, *Luongo I* stands for the proposition that "limited records" and summary information relating to charges of officer misconduct are—unlike the "*complete*" disciplinary records sought in *Prisoners' Legal* and *Daily Gazette*—*not* personnel records pursuant to Section 50-a. 49 Misc. 3d at 718 (emphasis in original). To be sure, the facts of this case are not identical to those in *Luongo I*, but Respondent is entirely wrong about its applicability here to Orders that, in relevant part, merely summarize final administrative disciplinary actions taken by the Police Commissioner. For this Court to accept Respondent's position, it would have to

conclude that *Luongo I* was wrongly decided and that Section 50-a prevents disclosure of even bare summaries of information related to officer discipline. However, nothing in the statute, legislative history, or case law supports such a broad reading.

Finally, Respondent contends in an entirely conclusory fashion that, despite Petitioners' undisputed evidence of the 40-year history of public display of the Orders at issue, the Orders are "quintessential CRL § 50-a records" that must be kept confidential. Opp. Br. at 4. This argument ignores the critical question of how the NYPD could have misinterpreted Section 50-a for over 40 years in posting the Orders publicly if, as Respondent now contends, it is clear that they fall "squarely within" Section 50-a. Opp. Br. at 11. Indeed, the only reasonable inference that can be drawn from this long history of public disclosure is that the Orders *do not* "fall squarely within" the scope of Section 50-a—a conclusion further confirmed by the contradictory positions that various public officials and agencies have taken on the status of the records. *See* Petition ¶ 27; *see also* Affirmation of Counsel in Opposition to Respondent's Motion to Adjourn the Return Date, dated February 7, 2017, Dkt. No. 22 ¶¶ 11-13 ("Adjournment Opp.").

Respondent's only attempt to address this unexplained 40-year history of publishing the Orders is to assert that "estoppel may not be applied to preclude a… municipal agency from discharging its statutory responsibility." Opp. Br. at 8 (internal citations omitted). Not only has Petitioner not made an estoppel argument, but the response again begs the question as to what—if any—statutory responsibility Respondent has here under Section 50-a. As noted, the key issue is that the NYPD's own actions for over 40 years, coupled now with its complete failure to explain these actions, plainly contradict its new assertion that the Orders fall "squarely within" Section 50-a. If Respondent were right about the meaning of the law, Respondent would not have misread the law for over forty years. *See Luongo I*, 49 Misc. 3d at 718-19 (finding

persuasive that CCRB had "on prior occasions determined that the release of this type of summary would not run afoul of Civil Rights Law § 50-a."); s*ee also Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d 516, 519-20 (1985) (agency cannot change interpretation without providing explanation for why prior interpretation was incorrect). Indeed, while Respondent asserts that the NYPD is forbidden from producing the Orders, recent statements by the New York deputy commissioner state that the NYPD now intends to voluntarily disclose certain information about officer discipline, at least in some high profile cases. *See* Adjournment Opp. ¶¶ 1, 11-13. In fact, the NYPD has previously taken the view that it was not merely permissible to disclose the Orders to the media, but the NYPD was *required* to do so. *See* Petition ¶ 25 (citing Rocco Parascandola and Graham Rayman, *Fmr. Police Commissioner Raymond Kelly likes Bill Bratton's decision to keep NYPD disciplinary records secret*, New York Daily News, Aug. 27, 2016, http://www.nydailynews.com/news/politics/raymond-kellyagrees-bill-bratton-decision-nypd-secrecy-article-1.2768433 (former police commissioner Raymond Kelly stated he tried to cut off media access to the Orders, but was told by NYPD counsel that he could not end such access)).

Simply put, the New York legislature never intended to place all information about police misconduct out of public reach; rather, it appears to be the very recent decision of the NYPD to do so. But if the NYPD wants Section 50-a to cover all information reflecting officer disciplinary decisions in any context, as it contends the law does, it must go to the legislature to obtain that protection. Under the law as it now stands, the Court should hold that Respondent erred in its refusal of Petitioner's FOIL request.

II. RESPONDENT HAS FAILED TO MEET ITS BURDEN OF PROVING THE RECORDS CARRY A SUBSTANTIAL AND REALISTIC POTENTIAL FOR ABUSIVE USE

As Respondent acknowledges, Opp. Br. at 8, even officer personnel records that fall within the scope of Section 50-a must be released pursuant to FOIL unless the agency seeking to withhold the records meets its additional burden of "demonstrat[ing] a substantial and realistic potential" for abusive use against officers, *Daily Gazette*, 93 N.Y.2d at 159. Despite admitting the history of public availability of the Orders at both the NYPD Headquarters and the New York City Municipal Library, Verified Answer, dated March 15, 2017, Dkt. No. 28 ¶ 9 ("Answer"), Respondent has failed to identify a *single instance* in which these records have been used abusively against officers. Respondent's naked assertion that the potential for abuse of these records is "self-evident," Opp. Br. at 9, is simply insufficient to meet its burden to justify withholding the records—particularly given the 40-year history of public disclosure without incident.[1]

The NYPD also cannot shield all information regarding officer misconduct from the public simply by claiming—without providing any support—it has the *potential to embarrass or harass* officers. *See* Opp. Br. at 8-9 (arguing that all records pertaining to police misconduct must be confidential). That is not only not the law, it invokes precisely the type of "blanket exemption[]" that is "inimical to FOIL's policy of open government." *Matter of Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 275 (1996). It is also contrary to the text and legislative history of Section 50-a. *See Capital Newspapers*, 67 N.Y.2d at 569 (Section 50-a does not create a

[1] Nor did *Daily Gazette* and *Prisoners' Legal* hold, as Respondent contends, Opp. Br. at 9, that *all* records pertaining to officer misconduct are automatically barred from disclosure due to their potential for abuse. In both of those cases, petitioners sought comprehensive access to investigative and disciplinary files rather than limited summaries of charges and dispositions. *See supra* at 5.

"blanket exemption insulating police records from FOIL disclosure"). In any event, as already explained, the Orders are far closer in form to the summaries in *Capital Newspapers* and *Luongo I*, which the courts concluded could be disclosed, than the detailed disciplinary records requested in *Daily Gazette* and *Prisoners' Legal*. *See supra* at 5-6. Because Respondent has failed to proffer *any* evidence of past abuse of these long-public Orders to meet its burden—and because these Orders contain verified, summary information of public disciplinary proceedings and official final administrative actions—it cannot be said that the potential for abuse is more than "remote." *Prisoners' Legal*, 73 N.Y.2d at 33. For this reason, "FOIL compels disclosure, not concealment" of the Orders. *Data Tree,* 9 N.Y.3d at 463 (internal quotations and citation omitted); *see also* Petition ¶ 35.

III. RESPONDENT MISCONSTRUES THE APPLICABLE PROCEDURAL REQUIREMENTS

Respondent also seeks to prematurely invoke an inapposite procedural hurdle by arguing that the affected officers must be joined as necessary parties. Opp. Br. at 12. As an initial matter, this invocation of Section 50-a's notice requirements is premature: even if officer participation is required, it is only after the court has first determined that the records are protected by Section 50-a and prior to in-camera review. *See Telesford v. Patterson*, 27 A.D.3d 328 (1st Dep't 2006) (holding that officer had a right to notice under CPLR 1001 prior to the court's in camera review of his personnel records[2]); *see also* Section 50-a (requiring interested parties be given an opportunity to be heard prior to the issuance of an order releasing personnel

[2] Petitioner notes that *Telesford* was argued pro se and the court in *Telesford* assumed the records at issue were covered by Section 50-a without considering the important threshold question of whether the statute applies to the CCRB. Whether *Telesford* was or was not correct in its determination that the records in that matter were personnel records is not relevant to its application here.

records). Respondent cites no authority—because there is none—suggesting that officers must be included prior to a determination that the records in question qualify as personnel records under Section 50-a, nor does the statute suggest such a right. Moreover, such joinder has only been applied where a petitioner has sought detailed personnel records pertaining to a *specific officer*—a far higher individual interest than is present for the officers in the Orders. *See Telesford*, 27 A.D.3d 328; *Matter of Hearst Corp. v. N.Y. State Police*, 109 A.D.3d 32, 36-37 (3d Dep't 2013); *Matter of Dunnigan v. Waverly Police Dep't*, 279 A.D.2d 833, 834-35 (3d Dep't 2001), *lv. denied*, 96 N.Y.2d 710. In any event, even if the Respondent were correct in its concern, there should be no question that the interests of the officers are adequately represented here by Respondent, and Respondent provides no suggestion that its interests differ from those of the officers. *Cf. Telesford*, 27 A.D.3d at 330 (joinder was necessary because an action against the Civilian Complaint Review Board could not be said to provide notice to the officer or to represent his interests).

IV. THE COURT SHOULD RULE THAT RESPONDENT MAY LAWFULLY RELEASE THE REPORTS ON A VOLUNTARY BASIS EVEN IF THE REPORTS ARE PERSONNEL RECORDS

Respondent does not address, and apparently concedes, that Respondent is entitled to grant Petitioner's FOIL request if Respondent so desires. Petition ¶¶ 38-42. The Court should nevertheless clarify that regardless of whether the Orders are covered by Section 50-a, the NYPD Records Access Appeals Officer erred in concluding that the NYPD was *required* to deny the request, *see* Petition Ex. G, FOIL Appeal Denial (asserting that the NYPD cannot waive protections of Section 50-a).

Information on the proven misconduct of police officers is of vital public importance, and the law is clear that Section 50-a does nothing to prevent the voluntary disclosure of such

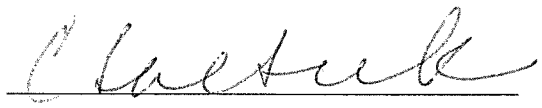
information by a police department. As the court explained in *Capital Newspapers*, "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses." 67 N.Y.2d at 567; *see also Poughkeepsie Police Benevolent Ass'n, Inc. v. City of Poughkeepsie*, 184 A.D.2d 501 (2d Dep't 1992). This court should therefore rule that, even if it were permissible for Respondent to resist disclosing the Orders under Section 50-a, Respondent is under no obligation to withhold them. Such a ruling correcting the NYPD's error may prevent future erroneous denials of FOIL requests as well as make clear that the electorate is entitled to weigh in on whether it agrees with Respondent's decision to prioritize secrecy over transparency.

V. CONCLUSION

As Respondent has failed to demonstrate the use of the Orders in the retention or promotion of officers, and for the many other reasons set forth above and in Petitioner's Verified CPLR Article 78 Petition, dated December 6, 2016, Dkt. No. 1, the Court should grant Petitioner's request for copies of the Orders from 2011 to present.

Respectfully Submitted,

THE LEGAL AID SOCIETY

By: 

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PETITIONER'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF VERIFIED CPLR ART. 78 PETITION, DATED APRIL 7, 2017
(pp. 176–86)

REPRODUCED FOLLOWING

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM

Application of Justine Luongo, Attorney-In-Charge, Criminal Defense Practice, Petitioner, -against- Records Access Appeals Officer, New York Police Department, Respondent.	Index No. 160232/2016 Lobis, J. IAS Pt. 6

PETITIONER'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF VERIFIED C.P.L.R. ARTICLE 78 PETITION

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April 7, 2017

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I. THE FIRST DEPARTMENT'S DECISION CONFIRMS THAT RESPONDENT'S DENIAL OF PETITIONER'S FOIL REQUEST WAS LEGALLY IN ERROR

Luongo v. Records Access Officer, Civilian Complaint Review Board, No. 100250/15, 2017 WL 1173617 (1st Dep't Mar. 30, 2017) ("*Luongo I*"), confirms that Respondent's assertion that it cannot choose to voluntarily waive the requirements of Section 50-a is an incorrect interpretation of the law.

Luongo I makes clear that "nothing in the Freedom of Information Law . . . restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions," *including Section 50-a. Luongo I*, 2017 WL 1173617, at *8 (quoting *Matter of Short v. Bd. of Mgrs. of Nassau Cty. Med. Ctr.*, 57 N.Y.2d 399, 404 (1982)); *see also* N.Y. Pub. Off. Law § 87(2) ("Each agency shall . . . make available for public inspection and copying all records, except that such agency *may* deny access to records or portions that . . . are specifically exempted from disclosure by state or federal statute" (emphasis added)). That is, "the language of the exemption provision contains permissive rather than mandatory language . . . ." *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986).

Here, the record is clear that Respondent, the Records Access Appeals Officer, New York Police Department ("NYPD") erred in denying Petitioner's Freedom of Information Law ("FOIL") request on the grounds that N.Y. Civil Rights Law Section 50-a ("Section 50-a") prohibited Respondent from providing the requested Personnel Orders (the "Orders") and "cannot be waived by any action of the NYPD." *See* Verified C.P.L.R. Article 78 Petition, dated December 6, 2016, Dkt. No. 1, ¶ 39 ("Petition") (quoting Petition Ex. G, FOIL Appeal Denial). Respondent has provided no authority stating that Section 50-a in any way restricts the use of information by a government agency such as the NYPD, and declined even to address this issue in its opposition brief. Thus, regardless of whether Petitioner can compel the production of the

Orders, *Luongo I* makes it clear that the NYPD is free to voluntarily disclose them. *See* Petition ¶¶ 38-42; Reply Memo. in Further Supp. of Verified C.P.L.R. Article 78 Petition, dated March 20, 2017, Dkt. No. 32, at 10-11 ("Reply Br.").

Respondent's continued position that it was compelled to reject Petitioner's request is thus "affected by an error of law." Petition ¶ 38 (quoting *Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 928 N.Y.S.2d 701, 702-03 (1st Dep't 2011)). Even after the *Luongo I* decision, Mayor Bill de Blasio has continued to take the erroneous position that the City is prohibited from releasing police records due to Section 50-a, despite his statements that releasing the records is otherwise the right the thing to do. *See, e.g.*, Stephen Rex Brown, *Court reverses decision to reveal records of Garner chokehold cop*, N.Y. Daily News (Mar. 30, 2017), http://www.nydailynews.com/new-york/garner-chokehold-discipline-record-sealed-leak-article-1.3013830 ("[T]oday's decisions make clear that we must adhere to the law as it currently exists"); Zolan Kanno-Youngs, *New York Police Union Amps Up Its Criticism of Watchdog Board*, Wall St. J. (Apr. 2, 2017), https://www.nycpba.org/news/wsj/wsj-170403-ccrb.html. The Court should correct this error.

II. THE FIRST DEPARTMENT'S DECISION HIGHLIGHTS THAT THE ORDERS ARE NOT PERSONNEL RECORDS

Not only is Respondent permitted to produce the requested records, but *Luongo I* makes clear that the records are not subject to Section 50-a in the first place. Critically, Respondent has failed to establish, as it must, that the Orders play any role whatsoever in the promotion or retention of officers. *Luongo I* reinforces this requirement by stressing the importance of tying the specific records sought to their role in the evaluation of officers. *See Luongo I*, 2017 WL 1173617, at *2-4; Reply Br. at 5-6. Without that showing, as is the case here, the Court must

conclude that the Orders are not subject to Section 50-a's protection of "personnel records used in to evaluate performance toward continued employment or promotion."

It is not disputed here that documents that contain information relevant to officer discipline and that are used in the promotion or retention of officers qualify as personnel records under Section 50-a and existing precedent. The denial of the petition in *Luongo I* is based on the factual finding that CCRB records are in fact actually used in officer promotion. According to the Court in *Luongo I*, "CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance" and there is "no question that the records sought [were] 'used to evaluate performance toward continued employment or promotion." 2017 WL 1173617, at *6; *see also id.* at *5 (collecting cases where documents that are actually used in the evaluation of potential misconduct are considered protected personnel records). This conclusion was further supported by the fact that all complaints against an officer filed with the CCRB—"regardless of the outcome"—are filed with and remain in an officer's CCRB history, *id.* at *6, an issue not present here.

In contrast to the circumstances in *Luongo I*, Petitioner here does not seek any records "used to evaluate performance toward continued employment or promotion" of police officers. The Orders sought are internal bulletins that describe personnel status changes—including department transfers, promotions, name changes, and disciplinary dispositions—that have no apparent use in officer promotion or retention. Importantly, Respondent does not even attempt to argue that the requested Orders themselves are used in promotion or retention decisions. Rather than provide any information on the use or origin of the Orders, Respondent has merely asserted that the Orders "are core personnel records covered by CRL § 50-a"; the only apparent support Respondent has provided for this claim is that "the information contained in the requested

Personnel Orders pertaining to officer misconduct and disciplinary action would be used to evaluate officers' performance . . . ." Respondent's Memo. of Law in Supp. of the Verified Answer, dated March 15, 2017, Dkt. No. 29, at 6 ("Opp. Br."). To merely argue that the "information" in the documents "would be used" is plainly not enough. It does not address the actual *use* of the Orders themselves, as required by the statute, or even whether the specific information contained in the Orders is actually relevant to or actually used in officer promotion or retention.[1] It also fails to address the fact that large portions of the Orders that have nothing to do with officer discipline and would plainly be irrelevant to promotion or retention decisions—a clear indication that the Orders simply are not used to make such decisions.

The principal issue in *Luongo I* was Petitioner's request for the Government to create a summary of personnel records. That issue is not present here.[2] Not only does Petitioner not seek to have any summaries generated of personnel records, but the Orders themselves—which may contain information that could also appear in some form in personnel records—are not mere

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[1] While it may be the case that the outcomes of officer disciplinary proceedings are relevant to promotion and retention, it also appears possible that some or all of these outcomes may be routinely expunged from officer's records. *See* Richard J. Davis et al., *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members who Engage in Serious Off-Duty Misconduct*, Commission to Combat Police Corruption, p. 11 n. 23 (Aug. 1998), http://web.archive.org/save/_embed/http://www1.nyc.gov/assets/ccpc/downloads/pdf/The-NYPDs-Disciplinary-System-How-Who-Engage-in-Serious-Off-Duty-Misconduct-August-1998.pdf. It is also possible that this summary information would be useless to an evaluating senior officer who would instead look to the more-detailed information contained in an individual officer's personnel file. Petitioner and the Court simply do not know how such summary information might relate to officer promotion or retention decisions, because, unlike in *Luongo I*, Respondent has provided no specific information on these documents. This is why the law requires Respondent to carry the burden of showing that the records fall "squarely within" a statutory exception. *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454,462-63 (2007) (internal quotations and citation omitted).

[2] The case *New York Civil Liberties Union v. New York City Police Department*, 2017 WL 1168318 (1st Dep't Mar. 30, 2017), decided at the same time as and cited in *Luongo I*, also does not support Respondent. That case holds that a petitioner may not compel the production of personnel records by requesting redacted copies of those records to remove information identifying the officers. Unlike here, the records in that case were the final written disciplinary decisions of disciplinary proceedings, which were undisputedly used in the evaluation of officers.

summaries of such records.[3] *Luongo I*'s conclusions with respect to the unique request there are thus simply not relevant here. And importantly, nothing in *Luongo I* supports the proposition that a respondent may invoke Section 50-a to withhold documents without demonstrating that those documents are actually (or even potentially) used in making personnel decisions.

III. RESPONDENT HAS NOT DEMONSTRATED A SUBSTANTIAL AND REALISTIC POTENTIAL FOR ABUSE OF THE RECORDS REQUESTED HERE

The decision in *Luongo I* was based on considerable evidence—including an affidavit by Daniel Pantaleo—that the First Department found met the burden of demonstrating "a substantial and realistic potential of the requested material for the abusive use against the officer," *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145,159 (1999). This stands in strong contrast to Respondent's failure to provide any evidence here to meet the *same* burden. The facts of *Luongo I* are also far removed from this case, in which Petitioner seeks administrative summaries of officer disciplinary dispositions that have been compiled and published for over 40 years.[4] *See* Petition ¶¶ 34-36; Reply. Br. at 8-9. Respondent does not identify even one incident of abuse from those 40 years of previously making the information available. The only reasonable inference is that there are none.

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[3] It is worth noting that the First Department's observation that "CRL § 50–a makes no distinction between a summary of the records sought and the records themselves," *Luongo I*, 2017 WL 1173617, at *7, is not relevant in this matter; there, the question was whether, if petitioner could not obtain personnel records, it could obtain a summary of those same records. Here, Petitioner does not seek a summary of anything. The statute clearly *does* distinguish between documents used in officer promotion and retention (which are covered by the statute), and those that are not so used (which are not covered by the statute).

[4] While Respondent may urge that *Luongo I* be read to stand for the proposition that *all* records in some way pertaining to police discipline should be barred from disclosure based on their potential for abuse, such a reading would create the type of "blanket exemption" that the Court of Appeals has explicitly rejected. *See Matter of Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 275 (1996); *accord Capital Newspapers*, 67 N.Y.2d at 569.

The records requested in *Luongo I* pertain to civilian complaints against Officer Daniel Pantaleo, who was shown choking Eric Garner to death in a widely-publicized video in July 2014. Officer Pantaleo, who intervened in the suit, provided evidence of death threats and a continued 24-hour security guard by the NYPD for himself and his family in support of his argument that "even the requested summaries of the CCRB records . . . would endanger his life and the lives of his family members." *Luongo I*, 2017 WL 1173617, at *1. In determining that the records relating to Office Pantaleo were barred from disclosure pursuant to Section 50-a, the First Department also relied heavily on a separate FOIL exemption: Public Officers Law § 87(2)(f), which "permits an agency to deny access to records that, if disclosed, would endanger the life or safety of any person." *Id.* at *8-9. The court concluded that "the gravity of the threats to Officer Pantaleo's safety . . . demonstrate that disclosure carries a 'substantial and realistic potential' for harm . . . ." *Id.* at *9 (quoting *Daily Gazette*, 93 N.Y.2d at 159).

Nothing like that has been established by Respondent here. In contrast to *Luongo I*, Respondent has not submitted any affidavits or asserted that any threats to Officer safety exist here, *see* Opp. Br. at 8-11. Indeed, given the long history of public disclosure of the Orders, if such a risk existed, Respondent could no doubt provide evidence of it. Nor has there been any evidence that these records have ever been used to harass any officer in any other way, despite these records including information on hundreds if not thousands of officers. Further, the City's continued stance that it would like to release the Orders if permitted to do so only reinforces the fact that the Orders do not carry any realistic potential for abuse. Because Respondent has failed to meet its burden of showing a realistic potential for abuse of the Personnel Orders, the Court should order them released.

IV. CONCLUSION

For the reasons set forth above, the First Department's decision in *Luongo I* is consistent with Petitioner's position in this case, and for these reasons and those set forth in the memoranda filed by Petitioner in this matter, the Court should hold that Respondent erred in its refusal of Petitioner's FOIL request because it incorrectly determined that it was incapable of granting the request, and also grant Petitioner's request for copies of the Orders from 2011 to present.

Dated: New York, New York
April 7, 2017

Respectfully submitted,

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RESPONDENT'S SUPPLEMENTAL LETTER BRIEF, DATED APRIL 7, 2017
(pp. 187–92)

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April 7, 2017

VIA NYSCEF
Honorable Joan B. Lobis
IAS Part 6
Supreme Court of the State of New York
New York County

Re: Application of Justine Luongo v. Records Access Appeals Officer, New York Police Department, Index No. 160232/2016 (IAS Part 6) (Lobis, J.)

Dear Judge Lobis:

I am an Assistant Corporation Counsel in the office of Corporation Counsel Zachary W. Carter, who represents the Respondent in the above-referenced proceeding. I write pursuant to the Court's request for supplemental briefing to address two decisions issued by the Appellate Division, First Department, after oral argument was held in the instant proceeding. As discussed below, in both decisions, the First Department once again affirmed that records pertaining to police officer misconduct or rules violations, like those sought here, are exempt from disclosure as they fall squarely within the purview of Section 50-a of the New York State Civil Rights Law ("CRL") as it has been interpreted by the Court of Appeals.

A. The First Department's Decisions in Luongo I and NYCLU.

On March 30, 2017, the First Department issued two separate decisions in cases involving Freedom of Information Law ("FOIL") requests for police disciplinary records. In both cases, the Supreme Court, New York County held that the respondent agencies erred in denying FOIL requests pursuant to CRL § 50-a and ordered disclosure of the records sought by the petitioners. On appeal, however, the First Department unanimously reversed in both cases, holding that CRL § 50-a, as interpreted by controlling Court of Appeals precedents, clearly exempts the requested records from disclosure.

In Matter of Luongo v. Records Access Officer, Civilian Complaint Review Board ("Luongo I"), No. 100250/15, 2017 N.Y. App. Div. LEXIS 2463 (1st Dep't March 30, 2017), rev'g 49 Misc. 3d 708 (Sup. Ct. N.Y. Cnty. 2015), the petitioner sought a numerical report indicating (a) the number of civilian complaints against a specific police officer that were

found to be substantiated by the Civilian Complaint Review Board ("CCRB"), and (b) a listing of the CCRB's disciplinary recommendations regarding those complaints. The Supreme Court found that this information was not exempt from disclosure by CRL § 50-a and ordered CCRB to disclose the requested information. Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *4-8.

CCRB's appeal to the First Department was still pending as of the time the instant matter was fully briefed and oral argument was held. However, in its Memorandum of Law in Support of the Verified Answer ("Respondent's Memo"), Respondent herein addressed the Supreme Court's decision, arguing that not only was it wrongly-decided, but also that Petitioner's reliance on the Supreme Court's decision was misplaced. See Respondent's Memo 10-11, NYSCEF Doc. No. 29. As noted in Respondent's Memo, the Supreme Court in Luongo I stressed that "the [s]ummary [sought by petitioner] will not provide the details as to what the complaints pertain to, and/or what the underlying events which triggered such complaints even were." Id. In contrast, the Personnel Orders sought in the instant proceeding do provide "details at to what the complaints [against the officers] pertain to," and "what the underlying events [were] which triggered such complaints." Id. Thus, even if the Supreme Court's decision had been upheld, it would not have supported Petitioner's request for the more expansive records sought here.

Regardless, the First Department did reverse the Supreme Court decision, holding that the information requested by the petitioner was protected from disclosure by CRL § 50-a and rejecting petitioner's argument that because only a limited summary was requested, it fell outside the statute's ambit. See Luongo I, 2017 N.Y. App. Div. LEXIS 2463.

In Matter of New York Civil Liberties Union v. New York City Police Dept. ("NYCLU"), No. 102436/12, 2017 N.Y. App. Div. LEXIS 2448 (1st Dep't March 30, 2017), the Supreme Court ordered NYPD to redact and disclose disciplinary decisions from NYPD administrative trials. The First Department unanimously reversed, holding that the disciplinary decisions are exempt from disclosure pursuant to CRL § 50-a. In making this finding, the Court held that "[t]he fact that NYPD disciplinary trials are open to the public . . . does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50-a," and that NYPD's previous disclosure of records did not waive their objections to providing redacted records in response to petitioner's FOIL request. NYCLU, 2017 N.Y. App. Div. LEXIS 2448, at *2-4.

B. Each of the Arguments Advanced by Petitioner in the Instant Proceeding was Rejected by the First Department.

Each of the arguments advanced by Petitioner in the instant proceeding were also raised by the petitioners in Luongo I and NYCLU. In its controlling decisions, the First Department specifically addressed and rejected each of these arguments.

First, contrary to Petitioner's argument that the statute is narrowly specific "to protect[ing] police officers from harassment in court," Verified Petition ¶¶ 21-23 (emphasis in original), NYSCEF Doc. No. 11, the First Department confirmed that such a construction of the statute has been rejected by the Court of Appeals. Referring to Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145 (1999), the First Department explained that the Court of Appeals

"rejected the petitioners' argument that the statutory exemption should be narrowly construed to apply only to parties likely to use the records in litigation, on the grounds that this interpretation 'conflicts with the plain wording of the statute, is contrary to its legislative history,' and 'would undermine the paramount objectives of the Legislature in enacting section 50-a.'" Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *12-13 (quoting Daily Gazette, 93 N.Y.2d at 153). Referring to legislative history, the Court of Appeals "refused to limit nondisclosure to litigation," holding instead that the statute protects police officers from the potential use of personnel records for embarrassment, harassment, or reprisals "outside of litigation" as well. Id. at *13-14, 21.

Moreover, the First Department stated, "[t]he Court of Appeals has emphasized that '[d]ocuments pertaining to misconduct or rules violations . . .—which could well be used in various ways against the officers—are the very sort of records which, the legislative history reveals, was intended to be kept confidential.'" Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *21 (second alteration in original) (quoting Matter of Prisoners' Legal Servs. v. N.Y.S. Dep't of Corr. Servs., 73 N.Y.2d 26, 31 (1988)); see also Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *14-15 ("Since the statute's enactment, each Judicial Department has had the occasion to address the issue of whether civilian complaints constitute 'personnel records' within the meaning of Civil Rights Law § 50-a(1), and each has held that information similar to that sought here falls squarely within the statutory exemption" (collecting cases)).

Second, whereas Petitioner relies on a purported "critical distinction" between cases involving FOIL requests for "detailed records underlying officer disciplinary decisions" and the Personnel Orders at issue here—which Petitioner contends "merely summarize final administrative disciplinary actions," Petitioner's Reply Mem. 5, NYSCEF Doc. No. 32—the First Department rejected any such distinction. Rather, the First Department affirmed what the Court of Appeals has already made clear, namely that "CRL § 50-a makes no distinction between a summary of the records sought and the records themselves." Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *18. The First Department stated that "[i]t is hard to imagine that . . . where the legislative intent is so clear, the simple expedient of releasing a summary of protected records concerning substantiated complaints against an identified police officer can be used to circumvent the statue's prohibition on disclosure." Id. (citing Daily Gazette, 93 N.Y.2d at 159; Prisoners' Legal Servs., 73 N.Y.2d at 31). However, this is precisely what Petitioner attempts to do here.

While not disputing that complaints of misconduct or rules violations against an officer would clearly be of significance in evaluating an officer's performance toward continued employment or promotion, Petitioner nonetheless argues that the requested Personnel Orders, which describe those complaints (and state whether or not the officer was found guilty, as well as the discipline imposed), should be disclosed. See Petitioner's Reply Memo 1-2, 5; Verified Petition ¶ 20. As stated by the First Department in Luongo I, quoting the Court of Appeals in Daily Gazette, "'such a facile means of totally undermining the statutory protection of section 50-a could not have been intended by the Legislature.'" Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *19 (quoting Daily Gazette, 93 N.Y.2d at 158).

Third, the First Department rejected the contention that the openness of NYPD disciplinary trials has any bearing on whether records are exempt from disclosure under CRL § 50-a. In NYCLU, the First Department stated explicitly that "[t]he fact that NYPD disciplinary trials are open to the public does not remove the resulting decisions from the protective cloak of" CRL § 50-a. NYCLU, 2017 N.Y. App. Div. LEXIS 2448, at *2. "Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential," the court explained, "are distinct questions governed by distinct statutes and regulations." Id.

Fourth, although Petitioner emphasizes Respondent's prior practices regarding the Personnel Orders, the First Department reaffirmed that prior disclosure of records does not affect the analysis as to whether records sought in a FOIL request are covered by CRL § 50-a. See NYCLU, 2017 N.Y. App. Div. LEXIS 2448, at *4 ("Respondents' previous disclosure of other redacted records did not waive their objections to redacting the disciplinary decisions at issue here"); Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *20 ("Respondents' prior disclosure of records concerning other officers cannot act as an estoppel against objections to releasing the records requested herein. Nor does the fact that the NYPD has released, in other matters, on prior occasions, results of disciplinary actions act as a waiver." (internal citations omitted)).

Finally, in both Luongo I and NYCLU, the First Department noted that the wisdom of the statute was not at issue. As the court stated in Luongo I, "[w]e are bound to apply the law as it exists, and as interpreted by controlling Court of Appeals precedents." Luongo I, 2017 N.Y. App. Div. LEXIS 2463, at *23-24. Likewise, in NYCLU, the court stated "[w]e appreciate the various policy arguments made by petitioner and amici curiae," however "[t]he remedy requested by petitioner must come not from this Court, but from the legislature or the Court of Appeals." NYCLU, 2017 N.Y. App. Div. LEXIS 2448, at *4-5.

Accordingly, for the reasons discussed above, and in Respondent's prior submissions and oral argument, this Court should uphold Respondent's denial of Petitioner's FOIL request and deny the Verified Petition.[1]

[1] Although Petitioner argues that Respondent could "voluntarily" disclose the Personnel Orders, the only question at issue in this case is whether Respondent properly denied a particular FOIL request seeking disclosure of records to the Legal Aid Society. See NYCLU, 2017 N.Y. App. Div. LEXIS 2448, at *1 n.1 ("The question of whether respondents may, in their discretion, turn over redacted decisions, is not before us.") (emphasis in original). Moreover, while it may be the case that "[n]othing in the Freedom of Information Law . . . restricts the right of the agency if it so chooses to grant access to records within any of [FOIL's] statutory exemptions," Matter of Short v. Bd. of Mgrs. of Nassau Cnty. Med. Ctr., 57 N.Y.2d 399, 404 (1982), this is not the case where the documents are exempt from disclosure pursuant to a specific state statute requiring confidentiality, like CRL § 50-a here. CRL § 50-a specifically states that officer personnel records can only be disclosed by court order or with the express written consent of the officer. Accordingly, because Petitioner's request for a court order must be rejected, as most recently made clear in Luongo I and NYCLU, the only way for the records to be disclosed is with written consent of the officers.

Respectfully submitted,

s/

Omar Tuffaha
Assistant Corporation Counsel

cc: Cynthia H. Conti-Cook, Esq.
Counsel for Petitioner

Roger A. Cooper, Esq.
Of Counsel for Petitioner

(*Via NYSCEF*)

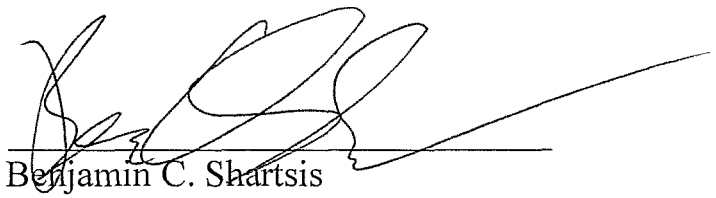
CERTIFICATION PURSUANT TO CPLR 2105
(pp. 193–94)

REPRODUCED FOLLOWING

CERTIFICATION PURSUANT TO CPLR 2105

I, BENJAMIN C. SHARTSIS, an attorney with the firm CLEARY GOTTLIEB STEEN & HAMILTON LLP, of counsel for the Petitioner-Appellant, do hereby certify, pursuant to CPLR 2105, that the foregoing reproduced Record on Appeal has been compared with the original papers on file in the office of the Clerk of the County of New York and has been found to be a true and complete copy thereof.

Dated: New York, New York
October 4, 2017

By: 
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