Patrolmen's Benevolent Association
Of The City Of New York, Incorporated

OFFICE OF THE PRESIDENT

May 1, 2018

BY ELECTRONIC MAIL AND HAND

Mr. John S. Kiernan
President, New York City Bar Association
c/o Debevoise & Plimpton
919 Third Avenue
New York, NY 10022

Re: City Bar Report on New York Civil Rights Law § 50-a

Dear Mr. Kiernan:

On behalf of all active and retired New York City police officers, we write to respectfully request that the New York City Bar Association (the "City Bar") immediately rescind its April 30, 2018 report relating to New York Civil Rights Law § 50-a ("CRL § 50-a"), which is in direct conflict with the City Bar's own standards governing committee reports (the "Report"). The Report was authored and/or approved by lawyers for the Legal Aid Society and the New York Civil Liberties Union, which have lawsuits challenging CRL § 50-a currently pending before the First Department and Court of Appeals, respectively. The Report plainly runs afoul of the City Bar's Handbook which mandates, *inter alia*, that those working on reports "take special care to safeguard the reputation of the City Bar and their committees for integrity and objectivity." Unfortunately, by issuing a report that is transparently intended to advance the litigation and other interests of two committee members (and their unnamed employers), the City Bar fell woefully short of satisfying its own ethical guidelines.

Given Their CRL § 50-a Lawsuits, the Drafters of the Report Are Plainly Not "Objective"

The Report was issued under the names of Civil Rights Committee Chair Philip Desgranges and Member Cynthia Conti-Cook. Ms. Conti-Cook is a senior attorney in Legal Aid's Special Litigation Unit and has personally represented Legal Aid in numerous recent legal challenges to CRL § 50-a. For example, Ms. Conti-Cook personally appeared as counsel in *Luongo v. CCRB*, in which the First Department rejected her argument that summaries of police personnel records are not protected by CRL § 50-a, finding that the release of such records would pose a "substantial and realistic potential for harm [to the police officer], particularly in the form of harassment and reprisals." 150 A.D.3d 13 (1st Dep't

2017).[1] Similarly, Ms. Conti-Cook is the counsel of record in *Luongo v. Records Access Appeals Officer, NYPD*, where she is currently appealing a separate New York Supreme Court ruling which rejected her argument that NYPD administrative summaries fall outside of CRL § 50-a. Index No. 160232/2016, Dkt No. 36 (June 1, 2017).[2] Moreover, Ms. Conti-Cook is regularly quoted in media articles relating to CRL § 50-a and police personnel records. For example, in connection with a CRL § 50-a lawsuit filed earlier this year, she denigrated the 24,000 police officers that keep her and this City safe as being nothing more than perpetrators of "abhorrent acts of abuse."[3] Suffice it to say that no one—surely not even Ms. Conti-Cook—could possibly claim that she was or could be "objective" or "well-balanced" with respect to the drafting of the Report, as the City Bar Handbook dictates.

Similarly, Mr. Desgranges is a Senior Staff Attorney at the NYCLU, which is the plaintiff in a CRL § 50-a case currently pending before the New York Court of Appeals. Specifically, the NYCLU is appealing the First Department's finding that redacted NYPD disciplinary decisions are protected by CRL § 50-a. *NYCLU v. NYPD*, 148 A.D.3d 642 (1st Dep't 2017). Mr. Desgranges' direct supervisors—Arthur Eisenberg and Chris Dunn—are representing the NYCLU in this ongoing litigation. Moreover, Mr. Dunn—who will be arguing the appeal—frequently joins Ms. Conti-Cook in providing CRL § 50-a commentary to the media. Indeed, Mr. Dunn was quoted in the very same article in which Ms. Conti-Cook described New York City police officers as "abhorrent." And Mr. Desgranges' ultimate boss, NYCLU Executive Director Donna Lieberman, was cited at length in the City Bar press release trumpeting the Report.

The City Bar Handbook Makes Clear That Interested Parties Cannot Draft Reports

The Report does not state the employers of Ms. Conti-Cook and Mr. Desgranges. It does not state that Ms. Conti-Cook's employer has a CRL § 50-a case currently pending before the First Department. It does not state that Mr. Desgranges's employer currently has a CRL § 50-a case pending before the Court of Appeals. It does not state that Ms. Conti-Cook is the lawyer personally handling numerous challenges to CRL § 50-a. It does not state that Ms. Conti-Cook and Mr. Desgranges' colleagues are the most outspoken critics of the statute. In short, the Report does not even hint at the obvious bias of its authors. Any lawyer or layperson reading the Report would reasonably assume that it was produced with the "objectivity" and "integrity" that the City Bar asserts its reputation relies upon.

Moreover, it appears that the failure to address these blatant conflicts was not some mere oversight. The City Bar's Handbook confirms that interested members like Ms. Conti-Cook and Mr. Desgranges have absolutely no business drafting or approving reports. Specifically, the Handbook states that:

> There may be occasions when a member has such an immediate, direct interest in a particular set of issues that the perception of his or her involvement in any committee

[1] Incredibly, the City Bar's April 30, 2018 press release announcing the Report extensively quoted the plaintiff in that case, Legal Aid's Criminal Practice Chief Tina Luongo.

[2] As but one example of Ms. Conti-Cook's integral role in prosecuting CRL § 50-a cases, please see the enclosed Article 78 petition she filed in the unsuccessful *Luongo v. NYPD* case. Not only did Ms. Conti-Cook sign the petition on behalf of Legal Aid, she even signed the verification form and confirmed that "I wrote the foregoing petition." *See* Petition at 24-25.

[3] *See* http://www.nydailynews.com/new-york/police-union-body-cam-video-shooting-private-article-1.3806838.

> report or action involving these issues will compromise the integrity of the process. Examples of such direct interest are involvement in litigation, a regulatory proceeding or a lobbying campaign that directly relates to the subject matter on which the committee is developing a position. In such instances, a member must always disclose his or her activity to the committee, and as appropriate, recuse himself or herself from discussion, research, drafting and/or approval of any report or statement touching these issues.[4]

We note that as your law firm is currently handling a matter involving CRL § 50-a, you personally recused yourself "from the review and approval of City Bar reports with any potential bearing on this case or any related litigation or legislation." Report at 1 n. 3. And we commend you for doing so. But, it cannot possibly be the case that you were appropriately recused from even ***reviewing the Report*** based on this more tangential CRL § 50-a connection, while committee members such as Ms. Conti-Cook who actively litigate CRL § 50-a cases—and have pending appeals—remain free to ***draft the Report***. Frankly, it is hard to imagine circumstances under which recusal would be more warranted. The City Bar's Handbook will be rendered meaningless unless the City Bar acts to remedy this egregious violation.

The Report is Plainly Biased and Appears to be an Attempt to Influence Pending Litigation

While we will largely resist the urge to address the substance of the Report, suffice it to say that it is riddled with material omissions and mischaracterizations, clearly suggesting that bias has infected the content of the Report. By way of example, and as a preliminary matter, page 2 of the Report only selectively quotes excerpts of the statute to suggest that there is somehow a "blanket protection" for police personnel records. That is simply not true. First, the Report conveniently fails to note that CRL § 50-a expressly states that police personnel records may be provided to those in government who are responsible for reviewing the actions of police officers including, *inter alia*, "any district attorney or his assistants," and "the attorney general or his assistants," and "a corporation counsel or his deputies," and "a grand jury," and "any agency of government . . . in the furtherance of their official functions." CRL § 50-a(4). Moreover, the statute lays out a framework for an unbiased judge to review and release police personnel records if appropriate. Specifically, CRL § 50-a requires a judge to consider "all such requests" for the disclosure of police personnel records, "give interested parties the opportunity to be heard" on the issue, conduct an *in camera* review of the records in question if necessary, and "make those parts of the record found to be relevant and material available to the persons so requesting." CRL § 50-a(2)-(3). The Report inexplicably fails to address this language, presumably because it does not fit the authors' narrative.

Similarly, the Report incorrectly suggests that "recent appellate decisions have broadened the protections of CRL 50-a." In fact, the First Department has simply applied decades-old appellate precedent and "the clear legislative purpose of the statute" to reject the specious CRL § 50-a arguments raised both by Ms. Conti-Cook and Mr. Desgranges' employer. For example, with respect to Ms. Conti-Cook's recent argument that she should be able to access police disciplinary summaries, the First Department noted that "[s]ince the statute's enactment, each Judicial Department . . . has held that information similar to that sought here falls squarely within the statutory exemption." 150 A.D.3d at 20

[4] *See* www2.nycbar.org/Committees/Handbook/#reports. In addition, as further explained in the City Bar Handbook, to the extent that Ms. Conti-Cook failed to disclose to the City Bar that her client—the Legal Aid Society—could materially benefit from the issuance of the Report, Ms. Conti-Cook may be in violation of New York Rule of Professional Conduct 6.4 (Law Reform Activities Affecting Client Interests).

(rejecting all of Ms. Conti-Cook's arguments because, *inter alia*, "such a facile means of totally undermining the statutory protection of section 50-a could not have been intended by the Legislature"). Similarly, with respect to the NYCLU's recent argument that it should be able to access redacted police personnel records, the First Department relied on two well-established Court of Appeals decisions that stand for the entirely uncontroversial proposition that where, as here, a statute precludes the disclosure of an individual's records, a government entity cannot avoid the statute by deleting, redacting, or otherwise "de-identifying" those records. 148 A.D.3d at 643 (relying on *Short v. Bd. of Mgrs. of Nassau Cnty. Med. Ctr.*, 57 N.Y.2d 399 (1982) and *Karlin v. McMahon*, 96 N.Y.2d 842 (2001)). In short, contrary to the Report there is nothing novel about the CRL § 50-a analyses performed by New York courts—the only new development is the creative efforts of Ms. Conti-Cook and others to try to make an end-run around the civil rights protections of CRL § 50-a.

Finally, and importantly, conspicuously absent from the Report is any mention of the fact that Assemblyman O'Donnell and others have introduced no less than eight bills seeking to amend CRL § 50-a since 2015. None of them has been enacted. And it has been widely reported that "legislators are keeping their distance from the bill" that Assemblyman O'Donnell introduced this year, which is the purported subject of the Report.[5] In light of the past legislative failures, and the seeming inability, after multiple attempts, to convince the legislature that a change to CRL § 50-a is necessary, one might reasonably question whether the real goal of the drafters is to influence cases pending in the various courts of the state, a serious concern that animates the "objectivity" and "integrity" standards imposed by the City Bar for the issuance of such reports.

* * *

Citizens of New York City and beyond should be able to rely on the City Bar's representation that in preparing its reports, "integrity" and "objectivity" are paramount. For the reasons set forth above, we believe those standards have not been met in the preparation and issuance of this Report and respectfully request that the City Bar immediately rescind the Report. We thank you for your attention to this important matter and look forward to hearing from you.

Sincerely,

Patrick ~~J.~~ Lynch

Enclosures

cc:

Ms. Sarah L. Cave, Chair of the City Bar Executive Committee (*by email and hand*)

[5] *See* https://www.timesunion.com/opinion/article/Editorial-Police-secrecy-must-end-12849543.php.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Luongo v. Records Access Officer, Civilian Complaint Review Bd., N.Y.A.D. 1 Dept., March 30, 2017

148 A.D.3d 642
Supreme Court, Appellate Division,
First Department, New York.

In re NEW YORK CIVIL LIBERTIES UNION, Petitioner–Respondent,
v.
NEW YORK CITY POLICE DEPARTMENT, et al., Respondents–Appellants.
The New York Times Company, Advance Publications, Inc., The Associated Press, Inc., Daily News L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Newsday LLC, News 12 Networks LLC and NYP Holdings, Inc., Amici Curiae.

March 30, 2017.

Synopsis

Background: Requestor commenced Article 78 proceeding to compel city police department to disclose records of its disciplinary decisions pursuant to Freedom of Information Law (FOIL). The Supreme Court, New York County, Shlomo Hagler, J., adhering to orders, same court, Geoffrey D. Wright, J., granted petition, and respondents appealed.

[Holding:] The Supreme Court, Appellate Division, held that police department's disciplinary decisions fell within scope of FOIL exception for records specifically exempted from disclosure.

Reversed.

West Headnotes (3)

[1] Records
Exemptions or prohibitions under other laws

City police department's disciplinary decisions were confidential police personnel records used to evaluate performance toward continued employment or promotion, and thus fell within scope of Freedom of Information Law (FOIL) exception for records specifically exempted from disclosure by state statute, even though disciplinary trials were open to public, where disposition of charges against officer and punishment imposed were not disclosed at public trial. McKinney's Civil Rights Law § 50–a; McKinney's Public Officers Law § 87(2)(a).

Cases that cite this headnote

[2] Records
In camera inspection;excision or deletion

Where there is specific exemption from disclosure by state statute, agency is not required to disclose records with identifying details redacted. McKinney's Public Officers Law § 87(2)(a).

Cases that cite this headnote

[3] Records
In camera inspection;excision or deletion

City police department's previous disclosure of other redacted records did not waive their objections to redacting police disciplinary decisions in subsequent action under Freedom of Information Law (FOIL). McKinney's Public Officers Law § 87.

Cases that cite this headnote

Attorneys and Law Firms

****366** Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Christopher Dunn of counsel), for respondent.

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Media Freedom & Information Access Clinic, Abrams Institute for Freedom of Expression, Yale Law School, New York (David A. Schulz of counsel), for The New York Times Company, Advance Publications, Inc., The Associated Press, Inc., Daily News L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, Newsday LLC, News 12 Networks LLC and NYP Holdings, Inc., amici curiae.

FRIEDMAN, J.P., RENWICK, RICHTER, MOSKOWITZ, KAPNICK, JJ.

Opinion

***642** Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered April 21, 2015, adhering to orders, same court (Geoffrey D. Wright, J.), entered October 16, 2012, July 29, 2014, and October 2, 2014, which, insofar as appealed from as limited by the briefs, granted, to a limited extent, the petition brought pursuant to CPLR article 78 seeking to compel respondents to disclose certain records pursuant to the Freedom of Information Law (FOIL), unanimously reversed, on the law, the petition denied, and the proceeding dismissed, without costs.

[1] Public Officers Law § 87(2)(a) provides that an agency "may deny access to records" that "are specifically exempted from disclosure by state ... statute." The NYPD disciplinary decisions sought here fall within Civil Rights Law § 50–a, which makes confidential police "personnel records used to evaluate performance toward continued employment or promotion" (*see* ***643** *Matter of* ****367** *Daily Gazette Co. v. City of Schenectady,* 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072 [1999]; *Matter of Prisoners' Legal Servs. of N. Y. v. New York State Dept. of Correctional Servs.,* 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243 [1988]).

The fact that NYPD disciplinary trials are open to the public (38 RCNY 15–04 [g]) does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50–a (*see Matter of Newsday, Inc. v. Sise,* 71 N.Y.2d 146, 153, 524 N.Y.S.2d 35, 518 N.E.2d 930 [1987], *cert. denied* 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 [1988]). Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential are distinct questions governed by distinct statutes and regulations (*see Matter of Doe v. City of Schenectady,* 84 A.D.3d 1455, 1459, 923 N.Y.S.2d 241 [3d Dept.2011]). Further, the disciplinary decisions include the disposition of the charges against the officer as well as the punishment imposed, neither of which is disclosed at the public trial.

[2] In *Matter of Short v. Board of Mgrs. of Nassau County Med. Ctr.,* 57 N.Y.2d 399, 401, 456 N.Y.S.2d 724, 442 N.E.2d 1235 (1982), the Court of Appeals held that where, as here, there is a "specific exemption from disclosure by State ... statute," an agency is not required to disclose records with identifying details redacted. The Court of Appeals subsequently reaffirmed this principle in *Karlin v. McMahon,* 96 N.Y.2d 842, 843, 729 N.Y.S.2d 435, 754 N.E.2d 194 (2001), where the agency responding to a FOIL request invoked the statutory exemption for documents that tend to identify the victim of a sex offense (Civil Rights § 50–b[1]). The Court of Appeals, citing *Short,* held that the agency was not obligated to provide the records "even though redaction might remove all details which tend to identify the victim" (*Karlin,* 96 N.Y.2d at 843, 729 N.Y.S.2d 435, 754 N.E.2d 194 [internal quotation marks omitted]). In view of this controlling precedent, this Court cannot order respondents to disclose redacted versions of the disciplinary decisions. [1]

[1] The question of whether respondents *may,* in their discretion, turn over redacted decisions, is not before us (*see e.g. Short,* 57 N.Y.2d at 404, 456 N.Y.S.2d 724, 442 N.E.2d 1235 ["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, with or without deletion of identifying details"]).

Petitioner's reliance on *Daily Gazette* in support of its request for redacted decisions is unavailing. In that case, the Court of Appeals concluded that Civil Rights Law § 50–a barred the disclosure of records regarding disciplinary action taken against 18 police officers. Although the Court made brief reference to the hypothetical possibility of redaction, it did so in dicta, and did not address whether ordering the redaction and disclosure of documents protected by section 50–a could be reconciled with the holding in *Short.* Further, despite having ***644** mentioned redaction, the Court in *Daily Gazette* dismissed the article 78 FOIL petitions in their entirety, and did not order disclosure of redacted records. There is no merit to petitioner's contention that the holding in *Short* was abrogated by *Daily Gazette.* As noted earlier, *Short* was reaffirmed by *Karlin,* which came down

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two years after *Daily Gazette,* and we have no choice but to follow *Short* and *Karlin.*

[3] Respondents' previous disclosure of other redacted records did not waive their objections to redacting the disciplinary decisions at issue here (*see Matter of City of New York v. City Civil Serv. Commn.,* 60 N.Y.2d 436, 449, 470 N.Y.S.2d 113, 458 N.E.2d 354 [1983] ["estoppel may not be ****368** applied to preclude a ... municipal agency from discharging its statutory responsibility"]; *Matter of Mazzone v. New York State Dept. of Transp.,* 95 A.D.3d 1423, 1424–1425, 943 N.Y.S.2d 648 [3d Dept.2012] [agency's right to claim FOIL exemption not waived where documents are inadvertently disclosed]).

Our decision in *Matter of New York Civ. Liberties Union v. New York City Police Dept.,* 74 A.D.3d 632, 902 N.Y.S.2d 356 (1st Dept.2010) does not require a different result because in that case, unlike here, the FOIL request was limited to one narrow category of statistical data. Because the only issue presented in this appeal is whether respondents are required to disclose the redacted written disciplinary decisions themselves, we make no determination as to whether any information contained in those decisions can, consistent with section 50–a, be disclosed in another format or by a different method.

We appreciate the various policy arguments made by petitioner and amici curiae, and agree that the public has a compelling interest in ensuring that respondents take effective steps to monitor and discipline police officers. Likewise, we recognize that the principles of confidentiality that underlie section 50–a may very well be protected by the redaction of identifying details from the disciplinary decisions sought here. However, as an intermediate appellate court, we cannot overrule the Court of Appeals' decisions in *Short* and *Karlin,* and are obligated to reverse based on this controlling precedent. The remedy requested by petitioner must come not from this Court, but from the legislature or the Court of Appeals.

All Citations

148 A.D.3d 642, 50 N.Y.S.3d 365, 2017 N.Y. Slip Op. 02506

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150 A.D.3d 13, 51 N.Y.S.3d 46, 45 Media L. Rep. 1902, 2017 N.Y. Slip Op. 02523

**1 In the Matter of Justine Luongo, Respondent,
v
Records Access Officer, Civilian Complaint Review Board, Appellant, and Daniel Pantaleo, Intervenor-Appellant.

Supreme Court, Appellate Division, First Department, New York
100250/15, 2979
March 30, 2017

CITE TITLE AS: Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.

SUMMARY

Appeal from an order and judgment (one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 27, 2015. The order and judgment directed respondent Records Access Officer, Civilian Complaint Review Board (CCRB) to produce to petitioner, pursuant to the Freedom of Information Law, a summary of its records indicating the number of substantiated complaints brought against intervenor-respondent police officer before the July 17, 2014, death of Eric Garner and any CCRB recommendations made to the police department based on such complaints.

Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 49 Misc 3d 708, reversed.

HEADNOTES

Records
Freedom of Information Law
Personnel Records of Police Officer—Summary of Civilian Complaint Review Board Records

([1]) A summary of respondent Civilian Complaint Review Board's records indicating the number of substantiated complaints brought against respondent police officer prior to a certain high-profile incident and any recommendations it made to the New York City Police Department based on those complaints were "personnel records" within the meaning of Civil Rights Law § 50-a (1) and thus protected from disclosure. Significantly, it is the document's nature and its use in evaluating an officer's performance—not its physical location or its particular custodian—that determines whether a particular document constitutes a personnel record. The threshold criterion is whether the document is of significance to a superior in considering continued employment or promotion. Here, there was no question that the summary sought involved one officer and was part and parcel of his personnel file, nor that the records sought were "used to evaluate performance toward continued employment or promotion" as required by the statute. Moreover, Civil Rights Law § 50-a makes no distinction between a summary of the records sought and the records themselves. Releasing a summary of protected records would serve to defeat the legislative intent of the statute in exempting those records from disclosure.

Civil Rights
Police Personnel Records
Nondisclosure—Substantial and Realistic Potential for Abusive Use against Police Officer

([2]) Personnel records of respondent police officer requested from respondent Civilian Complaint Review Board following a certain high-profile incident **14 were protected from disclosure under Civil Rights Law § 50-a and Public Officers Law § 87 (2) (a), where respondent Board demonstrated a substantial and realistic potential for the abusive use of the requested material against respondent officer. Where a document qualifies as a "personnel record," nondisclosure will be limited to the extent reasonably 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 the officer. Additionally, Civil Rights Law § 50-a also protects documents outside of litigation, in order to prevent harassment or reprisals against an officer or his or her family. Moreover, Public Officers Law § 87 (2) (f) permits an agency to deny access to records that, if disclosed, would endanger the life or safety of any person. The respondent need not demonstrate the existence of a specific threat or intimidation, but rather a showing must be made of a possibility of endangerment to invoke the exemption. In light of the widespread

notoriety of the incident and respondent officer's role therein, and the fact that hostility and threats against respondent officer had been significant enough to cause the police department to order around-the-clock police protection for him and his family, and notwithstanding the uncertainty of further harassment, the gravity of the threats to his safety nonetheless demonstrated that disclosure carried a substantial and realistic potential for harm, particularly in the form of harassment and reprisals.

RESEARCH REFERENCES

Am Jur 2d Depositions and Discovery § 275; Am Jur 2d Freedom of Information Acts §§ 2, 69, 246–252, 357, 370.

Carmody-Wait 2d Disclosure §§ 42:157–42:158; NY Jur 2d Proceeding Against a Body or Officer §§ 145:143, 145:637, 145:642, 145:644, 145:649, 145:664.

McKinney's, Civil Rights Law § 50–a (1); Public Officers Law § 87 (2) (a), (f).

NY Jur 2d Counties, Towns, and Municipal Corporations §§ 927, 930, 970; NY Jur 2d Disclosure § 139; NY Jur 2d Records and Recordings §§ 20, 32–33, 45–49, 52, 54, 70, 84.

ANNOTATION REFERENCE

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees. 165 ALR 1302.

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APPEARANCES OF COUNSEL

Zachary W. Carter, *Corporation Counsel*, New York City (*Aaron M. Bloom*, *Richard Dearing* and *Devin Slack* of counsel), ***15** for Records Access Officer, Civilian Complaint Review Board, appellant.
Worth, Longworth & London, New York City (*Mitchell Garber* of counsel), for Officer Daniel Pantaleo, appellant.
Seymour W. James, Jr., *The Legal Aid Society*, New York City (*Cynthia Conti-Cook* of counsel), and *Kramer Levin Naftalis & Frankel LLP*, New York City (*Jeffrey L. Braun* and *Anna K. Ostrom* of counsel), for respondent.
Rankin & Taylor, PLLC, New York City (*Jane L. Moisan*, *David B. Rankin* and *Vanessa Selbst* of counsel), for Communities United for Police Reform and others, amici curiae.
Cleary Gottlieb Steen & Hamilton LLP, New York City (*Avram E. Luft*, *Nefertiti J. Alexander*, *Mark E. McDonald* and *Grace J. Kurland* of counsel), for Progresive Caucus of the New York City Council and others, amici curiae.
Davis Wright Tremaine LLP, Washington, DC (*Alison Schary* of counsel), for The Reporters Committee for Freedom of the Press and others, amici curiae.

OPINION OF THE COURT

Sweeny, J.P.

The issues before us stem from the extensively publicized arrest and death of Eric Garner on July 17, 2014. Intervenor Police Officer Daniel Pantaleo was depicted in a bystander video applying a choke hold to Mr. Garner during the incident. An investigation followed, and on December 2, 2014, a grand jury declined to indict Officer Pantaleo in connection with Mr. Garner's death.

Petitioner submitted a Freedom of Information Law (FOIL) letter request to respondent Records Access Officer, Civilian Complaint Review Board (CCRB), dated December 18, 2014, seeking eight categories of records concerning Officer Pantaleo, dating from 2004 to the date of Mr. Garner's death. Petitioner sought: (1) the number of complaints filed against Officer Pantaleo; (2) the number of allegations contained within each complaint; (3) the outcome of CCRB's investigation of each allegation; (4) any prosecution by CCRB in response to such finding; (5) the outcome of any prosecution by CCRB; (6) any charges and specifications filed by ****2** the New York City Police Department's (NYPD) Department Advocate Office; (7) the outcome of any Department Advocate Office proceedings; and (8) any other agency actions in response to the above requests.

***16** On December 24, 2014, CCRB denied the request, citing the statutory exemption from disclosure provided for police personnel records contained in Public Officers Law § 87 (2) (a) and Civil Rights Law § 50-a. In addition to the statutory exemptions, CCRB noted that

the request for records relating to unsubstantiated matters would constitute "an unreasonable invasion of privacy." Finally, CCRB noted that it was not possible to redact any responsive records "in a way that will disassociate allegations against [Officer Pantaleo] given the nature of" petitioner's request. Petitioner appealed to the CCRB on December 29, 2014, but received no response.

This CPLR article 78 proceeding was commenced on February 17, 2015, and sought an order directing the CCRB to produce "a summary of the number of allegations, complaints and outcomes brought against" Officer Pantaleo. Much of petitioner's broader initial request was thus abandoned. During the proceedings, petitioner further narrowed its FOIL request, seeking only information as to "whether the CCRB substantiated complaints against Officer Pantaleo and, if so, whether there were any related administrative proceedings, and those outcomes, if any." Officer Pantaleo applied for and was granted intervenor status as a party respondent. His opposition papers alleged, among other things, that even the requested summary of the CCRB records was exempt from disclosure because it would endanger his life and the lives of his family members. In support, he referenced online, unsubstantiated reports of alleged misconduct on his part that resulted in the arrest of a Michigan man in February 2015 for posting Facebook death threats against him. Officer Pantaleo also stated that the NYPD's Threat Assessment Unit had assigned police officers to watch over him and his family 24 hours a day, 7 days a week, and implemented other security measures as well. He also agreed with the CCRB that the requested documents constituted "personnel records" within the meaning of Civil Rights Law § 50-a (1) and were therefore exempt from disclosure.

Supreme Court found, without conducting an in camera review of the requested information, that the summary sought by petitioners did not constitute a "personnel record" exempted from disclosure by Civil Rights Law § 50-a because the CCRB is "a city agency independent of the NYPD" (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 49 Misc 3d 708, 716 [2015]). The court further found that even if the summary constituted a "personnel record," nondisclosure ***17** would not be " 'reasonably 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 the officer' " (*id.* at 717, quoting *Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 157-158 [1999]). Finally, the court was "not convinced" that release of the records was likely to cause harm to Officer Pantaleo, finding that intervenor had not established a causal connection between the online, unsubstantiated reports and the Facebook death threats (*id.* at 719). The court opined that a backlash from the release of the summary, if any, would be directed at the NYPD and not Officer Pantaleo. The CCRB was directed to prepare the requested summary and release it to petitioner. We now reverse.

We begin our analysis by reviewing the regulatory and statutory framework applicable to this case.

The CCRB is the New York City agency that receives and investigates complaints made by a member of the public against an officer employed by the NYPD alleging misconduct of any of four specific categories: use of excessive force, abuse of authority, offensive language, or discourtesy (NY City Charter § 440 [c] [1]). After investigating the complaint, the CCRB determines whether the complaint is substantiated and, if so, it submits findings and disciplinary recommendations to NYPD's Commissioner (*id.*). These complaints, whether substantiated or not, and disciplinary recommendations, if any, "are recorded in [the] officers' personnel records ****3** and can affect assignments and promotions." [1]

The officer against whom the complaint is filed is entitled to a hearing before the NYPD's Deputy Commissioner of Trials or an Assistant Deputy Commissioner. This trial is open to the public (*see* 38 RCNY 15-03; 15-04 [g]; Administrative Code of City of NY § 14-115 [b]). Pursuant to a Memorandum of Understanding (MOU) dated April 2, 2012, between the CCRB and NYPD, in the event an officer requests a hearing, the CCRB is authorized to prosecute the complaint before the Deputy Commissioner of Trials or an Assistant Deputy Commissioner. Paragraph eight of the MOU provides that the Police Commissioner "shall retain in all respects the authority and discretion to make final disciplinary determinations."

***18** Paragraph 25 of the MOU provides, in pertinent part: "Documents provided to CCRB by NYPD or created by CCRB pursuant to this MOU that are by law police personnel records are therefore confidential

pursuant to NYS Civil Rights Law § 50-a. Such documents are also confidential information pursuant to NYC Charter § 2604 (b) (4).” Paragraph 26 further provides that any verbal information provided shall be treated as confidential and shall not be disclosed. While certainly not binding on this Court, the MOU, in substance, acknowledges the absence of a statutory definition of “personnel records” in Civil Rights Law § 50-a and attempts to fill that gap.

At the conclusion of the hearing, the Deputy Commissioner or Assistant Deputy Commissioner prepares a report and recommendation containing findings of fact and conclusions of law. If the NYPD Commissioner approves it, the report and recommendation is so marked and a separate document is prepared, containing the final disposition and penalty to be imposed (*see* 38 RCNY 15-08 [a]). These documents are thereafter placed in the officer's personnel file.

FOIL (Public Officers Law §§ 84-90) presumes that all agency records are available for public inspection and copying, unless an exemption expressly provides otherwise (*see* Public Officers Law §§ 84, 87 [2]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). An agency may withhold public documents requested pursuant to FOIL only if it “articulate[s] particularized and specific justification for not disclosing requested documents” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). The agency bears the burden of establishing that the requested material falls within one of the narrow exemptions to the general mandate of open access to government documents (*Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657 [2012]; *Data Tree*, 9 NY3d at 462).

FOIL further provides that agencies may deny access to records or portions thereof that are specifically exempted from disclosure by state or federal statute (Public Officers Law § 87 [2] [a]). Civil Rights Law § 50-a (1) contains one of those statutory exemptions. It provides, in pertinent part, that “[a]ll personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order.”

***19** We are called upon to determine whether the documents sought herein are the type of documents that fall within the parameters of “personnel records” and are thus protected from disclosure. Civil Rights Law § 50-a does not define “personnel records,” leaving it to the courts to determine the kinds of documents that qualify for this exemption.

Statutes should be interpreted in a manner designed to effectuate the legislature's intent, construing clear and unambiguous statutory language “so as to give effect to the plain meaning of ****4** the words used” (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 106-107 [1997]). In that regard, the text of the statute remains the best evidence of the legislature's intent (*Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54, 58 [2004]).

We are not without guidance with respect to the kinds of documents that constitute “personnel records.” The Court of Appeals has spoken several times on this issue, and we now turn to an analysis of the relevant cases.

There is “no definition or other language explaining or qualifying what is covered by the term ‘personnel records' except that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion” (*Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 31 [1988]). Significantly, it is the document's “nature and its use in evaluating an officer's performance—not its physical location or its particular custodian” that determines whether a particular document constitutes a personnel record (*id.* at 32). The threshold criterion, therefore, is whether the document is “of significance to a superior in considering continued employment or promotion” (*id.* at 32). The analysis of Civil Rights Law § 50-a and its legislative history in *Matter of Daily Gazette Co. v City of Schenectady* (93 NY2d 145 [1999], *supra*) is highly instructive. The petitioners in *Gazette* were two newspapers that sought “records regarding disciplinary action against 18 officers” of the Schenectady Police Department arising out of allegations that they were involved in throwing eggs at a civilian vehicle while off-duty (*id.* at 152). The petition alleged that the officers had disciplinary sanctions confidentially imposed upon them as a result of that incident (*id.*).

The Court rejected the petitioners' argument that the statutory exemption should be narrowly construed to apply only to ***20** parties likely to use the records in litigation, on the ground 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" (*id.* at 153). The plain text of the statute "unambiguously defines the records that are immune from indiscriminate disclosure" and establishes "a legal process whereby the confidentiality of the records may be lifted by a court, but only after an in camera inspection," with notice to the parties and an opportunity to be heard (*id.* at 154). The Court observed that "[a]s a policy choice, undisputably within its constitutional prerogatives which we are constrained to respect, the Legislature elected to shield the personnel records of these officers from disclosure upon request with only a strictly limited status/purpose exception" (*id.*).

In its review of the statute's legislative history, the Court noted that section 50-a "was first enacted into law (L 1976, ch 413) some two years after passage of the original FOIL legislation (L 1974, ch 578)," by which time the legislature "was well aware of the use of FOIL to obtain such records," and that the "statute was designed to prevent abusive exploitation of personally damaging information contained in officers' personnel records" (*id.* at 154). While acknowledging that such abuse would most often occur in the context of a criminal defense attorney's FOIL request for an officer's records to use on cross-examination of the officer, the Court, citing memoranda from the legislative record, nevertheless refused to limit nondisclosure to litigation, noting that the legislation "was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files" (*id.* at 155).

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. For example, in *Matter of Gannett Co. v James* (86 AD2d 744, 745 [4th Dept 1982], *lv denied* 56 NY2d 502 [1982]), the Court determined that ****5** records of complaints filed with the Internal Affairs Divisions of several police departments and documents reflecting the final disposition of hearings held with respect thereto "[c]learly . . . fall within the statutory exemption." The Court also noted that "the confidentiality ***21** afforded to those who wish it in reporting abuses is an important element in encouraging reports of possible misconduct which might not otherwise be made" (*id.*; *see also Matter of Hearst Corp. v New York State Police*, 132 AD3d 1128, 1129-1130 [3d Dept 2015] ["Proof that information was generated for the purpose of assessing an employee's alleged misconduct brings that information within the protection of Civil Rights Law § 50-a (1)" and need not actually be used in disciplinary proceedings to acquire protection from disclosure]; *Matter of Columbia-Greene Beauty Sch., Inc. v City of Albany*, 121 AD3d 1369, 1370 [3d Dept 2014] ["Personnel records include documents relating to misconduct or rule violations by police officers"]; *Matter of McGee v Johnson*, 86 AD3d 647 [2d Dept 2011], *lv denied* 19 NY3d 804 [2012] [affirming dismissal of petition to compel the disclosure of the Carmel Police Department's final determination of a "civilian complaint" made against police officers because the determination was a personnel record exempt under Public Officers Law § 87 (2) (a) and Civil Rights Law § 50-a]; *Espady v City of New York*, 40 AD3d 475, 476 [1st Dept 2007] [in an action to obtain misconduct complaints and records against police officers who executed a no-knock warrant, disclosure was denied since "any personnel or disciplinary records, reprimands, complaints and investigations of the police officers . . . involved in any manner with this matter are protected under Civil Rights Law § 50-a"]; *Matter of Argentieri v Goord*, 25 AD3d 830, 832 [3d Dept 2006] [a complaint against officers, whether substantiated or not, "subjects the officer to possible disciplinary sanctions and is thus an evaluative tool," bringing it within the ambit of Civil Rights Law § 50-a]; *Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of State Police*, 218 AD2d 494, 497 [3d Dept 1996] ["(I)t cannot seriously be argued that . . . any personnel or discrimination complaints filed against respondent's members( ) fail to qualify as 'personnel records' within the meaning of Civil Rights Law § 50-a (1) . . . (T)he records at issue here, particularly those relating to complaints of misconduct, are the very types of documents that the statute was designed to protect in the first instance"]; *Matter of Lyon v Dunne*, 180 AD2d 922, 923 [3d Dept 1992], *lv denied* 79 NY2d 758 [1992] [dismissing article 78 petition on the ground that "complaints, reprimands and incidents of misconduct

of three State Police officers . . . are used to evaluate performance toward continued employment of the three officers and are exempt pursuant to Public Officers Law § 87 (2) (a) and Civil Rights Law § 50-a"]).

***22** *Matter of Capital Newspapers Div. of the Hearst Corp. v City of Albany* (15 NY3d 759 [2010]) does not require a different result. That case involved FOIL requests seeking documents from the 1990s pertaining to the alleged use of official Albany Police Department channels to arrange for the purchase of assault-type rifles for personal, nonofficial use by several individual police officers. The documents in question in that case were 42 "gun tags," although the record, as the Appellate Division noted, "does not make clear exactly what these documents actually are" (63 AD3d 1336, 1337 n 1 [3d Dept 2009]). The parties agreed that the documents were "tags put on the guns returned to the police department by individuals who had the guns in their personal possession" and contained "an individual's name, a serial number and some sort of identification number" (*id.*). The Appellate Division determined that any "gun tags" containing the names of current or former police department employees were "personnel records" as envisioned by Civil Rights Law § 50-a (*id.* at 1338-1339). The Court stated that redaction of the names of those current or former members of the department would adequately protect the officers and directed that the records, as so redacted, be released.

The Court of Appeals modified that decision (15 NY3d 759 [2010]). The Court held that the City of Albany had failed to meet its burden of demonstrating that the "gun tags" were personnel records as envisioned by Civil Rights Law § 50-a (1) in that there was no evidence that ****6** "the documents were 'used to evaluate performance toward continued employment or promotion,' as required by that statute" (*id.* at 761). The Court of Appeals held that "the unredacted gun tags do not fall squarely within a statutory exemption and are subject to disclosure" under FOIL (*id.*).

([1]) Here, by contrast, there is no question that the summary sought involves one officer and are part and parcel of his personnel file. There is also no question that the records sought are "used to evaluate performance toward continued employment or promotion," as required by the statute. Unlike those at issue in *Capital Newspapers*, the requested documents here do "fall squarely within a statutory exemption" of Civil Rights Law § 50-a (1) and are thus not subject to disclosure, under applicable precedent.

CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance. As noted, all complaints filed with the CCRB, regardless of the ***23** outcome, are filed with and remain in an officer's CCRB history, which is part of his or her personnel record maintained by the NYPD.[2] We therefore hold that the CCRB met its burden of demonstrating that those documents constitute "personnel records" for purposes of Civil Rights Law § 50-a, and that they fall squarely within a statutory exemption of the statute (*see Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999], *supra*; *Matter of Prisoners' Legal Servs. of N. Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26 [1988], *supra*).

It bears noting that Civil Rights Law § 50-a makes no distinction between a summary of the records sought and the records themselves. Releasing a summary of protected records would serve to defeat the legislative intent of the statute in exempting those records from disclosure. It is hard to imagine that in a situation like this, 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 statute's prohibitions on disclosure. "Such a facile means of totally undermining the statutory protection of section 50-a could not have been intended by the Legislature" (*Matter of Daily Gazette*, 93 NY2d at 158; *see Prisoners' Legal Servs.*, 73 NY2d at 31). The requested information here is far different from the "neutral" information which "did not contain any invidious implications capable facially of harassment or degradation of the officer" (*Matter of Daily Gazette*, 93 NY2d at 158) as the information released in *Matter of Capital Newspapers Div. of Hearst Corp. v Burns* (67 NY2d 562 [1986] [affirming the disclosure of a redacted police officer's attendance record of absences from duty for a specific month]).

Petitioners attempt to distinguish *Prisoners' Legal Servs.* on the basis that the records in that case were maintained in the correctional facility itself, as part of the facility's prisoner grievance program, and not by a separate agency such as the CCRB. This is a distinction without a difference. The Court of Appeals addressed this issue head on by holding that

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> "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 ***24** custodian. Indeed, it has been held that applicability of the statute 'cannot be determined simply on the basis of where the information is stored' " (*Prisoners' Legal Servs.*, 73 NY2d at 32, quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 95 [3d Dept 1985], *affd* 67 NY2d 562 [1986]).

To hold otherwise would be to defeat the clear legislative purpose of the statute. In light of its not insignificant role in the police disciplinary process, the fact that CCRB is a separate agency from NYPD is of no moment, and its records are subject to the constraints of Civil Rights Law § 50-a (*see Prisoners' Legal Servs.*, 73 NY2d at 32; *Telesford v Patterson*, 27 AD3d 328 [1st Dept 2006]).

Respondents' prior disclosure of records concerning other officers cannot act as an estoppel against objections to releasing the records requested herein (*see Matter of New York Civ. Liberties Union v New York City Police Dept.*, 148 AD3d 642 [1st Dept 2017] [decided herewith], citing *Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d 436, 449 [1983]; *Matter of Mazzone v New York State Dept. of Transp.*, 95 AD3d 1423, 1424-1425 [3d Dept 2012]). Nor does the fact that the NYPD has released, in other matters on prior occasions, results of disciplinary actions act as a waiver. As stated in the context of other statutory exemptions: "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, with or without deletion of identifying details" (*Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399, 404 [1982]; *see also Matter of New York Civ. Liberties Union v New York City Police Dept.*, 148 AD3d 642 [1st Dept 2017]).

Respondents contend that the production of the requested summary has a sufficient potential for abusive use against Officer Pantaleo, and that is an additional reason to support CCRB's decision to withhold disclosure.

Where a document qualifies as a "personnel record," "nondisclosure will be limited to the extent reasonably 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 the officer" (*Daily Gazette*, 93 NY2d at 157-158). Additionally, Civil Rights Law § 50-a also protects documents outside of litigation, ***25** in order to prevent "harassment or reprisals against an officer or his/her family" (*id.* at 155 [citation and internal quotation marks omitted]). The 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 record which, the legislative history reveals, was intended to be kept confidential" (*Prisoners' Legal Servs.*, 73 NY2d at 31).

Thus, an "agency or other party opposing disclosure of officers' personnel records carries the burden of demonstrating that the requested information falls squarely within the exemption" by demonstrating "a substantial and realistic potential of the requested material for the abusive use against the officer" (*Daily Gazette*, 93 NY2d at 158-159).

Petitioner argues that there can be no potential for abusive use of these documents, since there has been no showing of any causal connection between leaks of CCRB documents that have already occurred and the death threat against Officer Pantaleo. This argument misses the mark.

While there may be no intent to embarrass or humiliate the officer in question by any of the parties or amici herein, there can be no question that once this information is released, it "will be fully available for all of the forms and practices of abusive exploitation that Civil Rights Law § 50-a was designed to suppress" (*Matter of Daily Gazette*, 93 NY2d at 158; *see Prisoners' Legal Servs.*, 73 NY2d at 31).

Where "a substantial and realistic potential" of endangerment or harassment to either public servants or potential witnesses resulting from disclosure has been shown, the appellate courts of this state have consistently denied disclosure under both Civil Rights Law § 50-a and Public Officers Law § 87 (2) (a). ****7**

"Public Officers Law § 87 (2) (f) permits an agency to deny access to records, that, if disclosed, would endanger the life or safety of any person. The agency in question need only demonstrate 'a possibility of endanger[ment]' in order to invoke this exemption" (*Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011],

quoting *Matter of Connolly v New York Guard*, 175 AD2d 372, 373 [3d Dept 1991], *affd* 20 NY3d 1028 [2013]; *see Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of State Police*, 218 AD2d 494, 499 [3d Dept 1996], *supra*). The respondent need not demonstrate the existence of a specific threat or intimidation, but rather a showing ***26** must be made of a "possibility of endanger[ment]" to invoke this exemption (*Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438 [1st Dept 2014] [internal quotation marks omitted]; *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 [1996], *supra*).

([2]) Here, in light of the widespread notoriety of Mr. Garner's death and Officer Pantaleo's role therein, and the fact that hostility and threats against Officer Pantaleo have been significant enough to cause NYPD's Threat Assessment Unit to order around-the-clock police protection for him and his family, and notwithstanding the uncertainty of further harassment, we find that the gravity of the threats to Officer Pantaleo's safety nonetheless demonstrate that disclosure carries a "substantial and realistic potential" for harm, particularly in the form of "harassment and reprisals," and that nondisclosure of the requested records under Civil Rights Law § 50-a is warranted (*see Daily Gazette*, 93 NY2d at 157, 159).

The points raised in the various amici briefs can be summarized, in the main, as raising various public policy concerns. However, with all due respect to the seriousness of those concerns, we take no position on whether the statute should be amended to address those concerns. We are bound to apply the law as it exists, and as interpreted by controlling Court of Appeals precedents (*Matter of New York Civil Liberties Union v New York City Police Dept.*, 148 AD3d 642 [1st Dept 2017]). Such policy and public interest arguments have been found to be inconsistent with the legislative history of Civil Rights Law § 50-a (*see Daily Gazette*, 93 NY2d at 154-155). Petitioner's remedies, under our tripartite system of government, rest with the legislature as the policy-making branch of government, not the courts, which are tasked with interpretation of the laws.

We have considered petitioner's remaining arguments and those of the amici curiae and find them unavailing.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 27, 2015, directing respondent to produce to petitioner, pursuant to the Freedom of Information Law, a summary of CCRB's records indicating (a) the number of substantiated complaints brought against intervenor before the July 17, 2014 death of Eric Garner and (b) any CCRB recommendations made to the Police ****8** Department based on such complaints, should be reversed, on the law, without costs, the judgment ***27** vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Acosta, Moskowitz, Kapnick and Kahn, JJ., concur.

Order and judgment (one paper), Supreme Court, New York County, entered July 27, 2015, reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

FOOTNOTES

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Footnotes

1 *See* CCRB website at http://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page.

2 *See* CCRB website, n 1, *supra*.

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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.

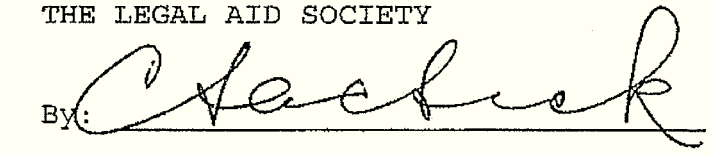
CONCLUSION

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,

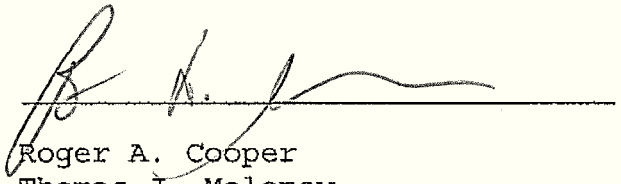
THE LEGAL AID SOCIETY

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

2017-18 Committee Handbook

The City Bar relies on its committee chairs, secretaries and committee members to be ambassadors of the bar. You are in the forefront of all we do, you are our voice and our representatives and we can't thank you enough for your time and commitment. Chairs play a key role in giving as many as possible an opportunity to serve on a committee, encouraging committee members take up drafting reports, planning programs, getting involved in public service opportunities and recruiting new members to the City Bar.

Committees are encouraged to undertake public service projects. A number of committees have prepared educational videos or booklets, conducted public information programs, trained lawyers or lay advocates, developed relationships with schools, or utilized their expertise to service a needy population. In addition the Public Service Committee of the New Lawyer Council is charged with creating opportuni¬ties for City Bar members to give back to the NYC community in ways beyond legal services and is interested in partnering with other committee on many of its projects. If your committee is interested, or would like to discuss ideas for public service projects, please contact Martha Harris (mharris@nycbar.org (mailto:mharris@nycbar.org) or 212-382-6607), who can help you plan your project or route you to the appropriate contact in the City Bar or the City Bar Fund.

Committee Reports, Policy Recommendations and Advocacy

The City Bar provides a professional home for the legal community that cultivates high ethical and professional standards, promotes reform of the law for the public good and the fair and effective administration of justice, and affords the public greater access to justice. One of the ways the City Bar accomplishes this mission is through the written work product of our committees, which we refer to as committee “reports” and which includes such things as comments on pending legislation, letters to public officials and amicus briefs.

To learn more about the process of developing and issuing a committee report, please review the following sections, visit our website (http://services.nycbar.org/Members/Upload_Report/Members/Committee_Reports/Submit_Report.aspx), or contact Maria Cilenti, Senior Policy Counsel at 212-382-6655 or mcilenti@nycbar.org (mailto:mcilenti@nycbar.org) or Martha Harris, Director of Committee Engagement at 212-382-6607 or mharris@nycbar.org (mailto:mharris@nycbar.org).

Drafting a Committee Report

Confidentiality of Committee Deliberations on Policy Issues

Reaching Decisions on Recommendations

It is generally undesirable for a committee to take any action of significance with only a small number of members present or by a vote that is closely divided (a quorum of the committee is one more than half its voting membership, including the chair). The Chair is expected to make efforts to avoid such a result whenever feasible, such as deferring final action or developing

alternative positions that may command greater support on the committee, without any suggestion, however, that a bare majority lacks power to take final action.

It is also acceptable to poll committee members not present at the meeting with regard to their views on a report. In using such a poll, however, please recognize that some of those responding may not have had the benefit of a committee discussion of the report; thus, such a poll should not be used to reverse a decision made at a committee meeting.

On occasion, in order to issue a position in a timely manner, the Chair may choose to solicit a vote by email. However, if there is significant dissent or concern raised, chairs should try not to rely on an email vote if the topic being voted on was not discussed at a committee meeting. Committees can also conduct meetings by conference call when necessary, and can poll by telephone rather than email.

Individual Conflicts on Substantive Issues Addressed by Committees

All members of the City Bar, particularly members of committees, should take special care to safeguard the reputation of the City Bar and their committees for integrity and objectivity. In general, it is assumed that all members leave their clients' hats at the door of the City Bar and engage in deliberation and debate as individual members of the bar.

However, there may be occasions when a member has such an immediate, direct interest in a particular set of issues that the perception of his or her involvement in any committee report or action involving these issues will compromise the integrity of the process. Examples of such direct interest are involvement in litigation, a regulatory proceeding or a lobbying campaign that directly relates to the subject matter on which the committee is developing a position. In such instances, a member must always disclose his or her activity to the committee, and as appropriate, recuse himself or herself from discussion, research, drafting and/or approval of any report or statement touching these issues. Questions regarding the application of this policy may be resolved by the Chair of the Committee or directed to the Policy Department.

Committees should be mindful of Rule 6.4 of the New York Rules of Professional Conduct:

> "A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly 1.7"

> [Note: Rule 1.7 addresses conflicts of interest involving current clients.]

Working With Other Organizations - Issuing Reports and Joining Coalitions

Finalizing and Required Pre-Publication Clearance of Reports

Report Distribution, Promotion and Advocacy

Publicity/Media Relations