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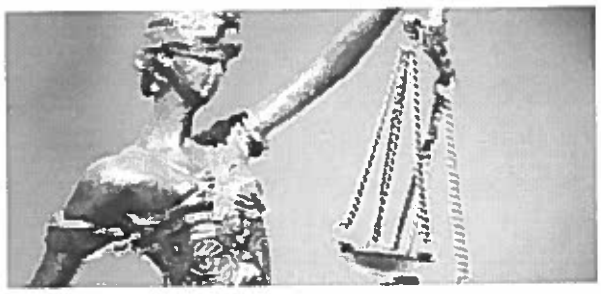

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October 10, 2017
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The Law Offices of Cory H. Morris

coryhmorris.com/longislandlawyer

Cory H. Morris, Attorney and Counselor at Law

Mr. Morris graduated Touro College at the top of his class, was a Dean's List recipient and received both the David A. Berg Public Interest Fellowship and the Howard Glickstein Public Interest Fellowship. He served as President of the American Civil Liberties Union student group, vice president of the criminal justice society at Touro College and was a member of Touro's International Law Review. He also participated in the Center for Restorative Practices, the Unemployment Action Center, and other student groups and public interest organizations. During his tenure at Touro College, he volunteered with both the Mississippi Center for Justice and with Malik Rahim's Common Ground organization in Louisiana. He successfully helped nearly a dozen unemployment claimants at administrative hearings, receiving an award for outstanding advocate, helped high school students facing school suspension hearings, and worked as a live chat operator to help low-income New Yorkers obtain free legal services and representation from pro bono attorneys. He is also the recipient of the Brian Lord Memorial Award for his demonstrated commitment to public interest.

Recently named a Superlawyer, Cory Morris is admitted to practice in New York State, the Eastern District of New York and the Southern District of New York. He is also admitted to practice law in Florida State. He was named top 40 under 40 by the Long Island Business News and named top 30 under 30 by the Huntington Chamber of Commerce. Mr. Morris is an advocate for equality, civil rights and social justice within the legal community. In recognition of this, Mr. Morris is the recipient of an Equality Award at the Suffolk County New York Civil Liberties Union 50th Anniversary Gala and the New York State Bar Empire Justice Award for Pro Bono work. He is focused on helping people charged with a crime, regardless of the allegations, and helping people vindicate their rights to be free from unreasonable government intrusion and excessive force. As a former associate at the Law Offices of Frederick K. Brewington, Mr. Morris was intimately involved in cases at various levels of litigation, from the filing of the complaint up and to the second-seating of several trials.

Mr. Morris is familiar with the issues surrounding Long Island. He attended college on Long Island, starting at Nassau Community College, obtaining his Bachelor's Degree in Criminal Justice from Adelphi University in 2008 and his Master's Degree from Adelphi's Derner Institute of Advanced Psychological Studies in 2010. During his graduate degree, his concentration was on forensic psychology, substance abuse, and impulsive disorders. He obtained an assistantship with Dr. Larry Josephs, was published in the Encyclopedia of the History of Psychological Theories and contributed to Adelphi's scholarship, working with a doctoral student and post-doctoral professor in developing his thesis titled "Impulsivity in the form of Suicidality in Borderline Personality Disorder."

ANTHONY J. FASANO, ESQ.

Anthony J. Fasano is an attorney with the Law Offices of Guercio & Guercio, LLP, where he practices School Law and Personal Injury Litigation. Mr. Fasano is counsel to a number of school districts on Long Island, wherein FOIL issues arise on an almost daily basis. Additionally, Mr. Fasano utilizes FOIL in furtherance of his representation of Personal Injury clients against municipalities. He has published several articles regarding FOIL. And he was named a Rising Star by Super Lawyers for 2016 and 2017.

Matter of New York Civ. Liberties Union v New York City Police Dept.

2017 NY Slip Op 02506 [148 AD3d 642]

March 30, 2017

Appellate Division, First Department

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As corrected through Wednesday, May 3, 2017

[*1]

In the Matter of New York Civil Liberties Union, Respondent,
v
New York City Police Department et al., Appellants.

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.

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.

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.

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 Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26 [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 NY2d 146, 153 [1987], *cert denied* 486 US 1056 [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 AD3d 1455, 1459 [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.

In *Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.* (57 NY2d 399, 401 [*2] [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 *Matter of Karlin v McMahon* (96 NY2d 842, 843 [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 Law § 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 NY2d at 843 [internal quotation marks omitted]). In view of this controlling precedent, this Court cannot order respondents to disclose redacted versions of the disciplinary decisions.[FN*]

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

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 Civ. Serv. Commn.*, 60 NY2d 436, 449 [1983] ["estoppel may not be applied to preclude a . . . municipal agency from discharging its statutory responsibility"]; *Matter of Mazzone v New York State Dept. of Transp.*, 95 AD3d 1423, 1424-1425 [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 AD3d 632 [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 [*3]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. Concur—Friedman, J.P., Renwick, Richter, Moskowitz and Kapnick, JJ.

Footnotes

Footnote *: The question of whether respondents *may*, in their discretion, turn over redacted decisions, is not before us (*see e.g. Short*, 57 NY2d at 404 ["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"]).

To be argued by:
JANE L. MOISAN

NEW YORK SUPREME COURT

Appellate Division-First Department

Index No. 100250/2015

JUSTINE LUONGO, ATTORNEY-IN-CHIEF, CRIMINAL DEFENSE PRACTICE, LEGAL AID SOCIETY,

Petitioner-Respondent,

-against-

RECORDS ACCESS OFFICER, CIVILIAN COMPLAINT REVIEW BOARD,

Respondent-Appellant,

-and-

OFFICER DANIEL PANTALEO,

Respondent-Intervenor-Appellant.

BRIEF OF *AMICI CURIAE* COMMUNITIES UNITED FOR POLICE REFORM AND 33 ORGANIZATIONS*IN SUPPORT OF PETITIONER-RESPONDENT

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September 6, 2016

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INTRODUCTION

Over the last several decades, New York, like the country at large, has experienced a cycle of unconstitutional police abuses and incidents of police violence, a systemic lack of meaningful and timely accountability for the perpetrators of police abuses, and resulting public outrage. The increased availability of video footage, often from bystanders and those who observe and document police misconduct, has made the public more aware of incidents of police abuse of authority, excessive force, and unjust killings by police nationally and locally. In the aftermath of the deaths of individuals like Ramarley Graham, Shantel Davis, Eric Garner, and many others, the systemic failures of the New York City Police Department ("NYPD") to hold officers accountable when they unjustly kill New Yorkers has become increasingly clear. The amici present this brief to emphasize the importance of transparency in promoting accountability and implementing appropriate reform.

STATEMENT OF INTEREST

Communities United for Police Reform ("CPR") is a campaign of community-based, policy advocacy, legal, and other organizations that represent a broad spectrum of New Yorkers, including those most directly impacted by discriminatory and abusive policing. CPR also coordinates broad coalitions for specific initiatives, such as the coalition of over one hundred organizations which supported the City Council's passage of the Community Safety Act in 2013, two laws that promoted increased NYPD accountability and transparency.

CPR has appeared on behalf of a coalition of organizations as amici in two other litigations involving the NYPD. On August 13, 2013, the Honorable Shira A. Scheindlin granted CPR leave to appear as amici in *Floyd, et al. v. City of New York*, 08-CV-1034 (AT), at Docket 377. Additionally, on December 18, 2013, Judge Anil C. Singh granted CPR leave to appear on

behalf of members of the Community Safety Act Coalition as amici in *Mayor, et. al v. Council of City of New York. See,* Index No. 451543/2013, Docket Nos. 61-62.

Thirty-three organizations, including legal organizations, policy advocacy organizations, research organizations, directly-affected communities, grassroots organizations, and faith-based organizations, now explicitly join this brief and urge the Court to reject the City's appeal. An accounting of these signatory organizations is included in the Addendum, along with the individual statements of each organization reflecting the impact this Court's decision poses to them.

The fairly recent change in this administration's policy and its resulting lack of transparency regarding public disclosure of substantiated complaints of excessive force, abuse, disrespect and other misconduct of officers is a serious obstacle to police accountability efforts. Many of our members and partners have experienced incidents of excessive force and police brutality personally, and too many New York City families that we and our members work with and support have lost loved ones in unjust police incidents.

Four years after the killing of Ramarley Graham, his family has still not been able to verify the names and badge numbers of all of the officers involved in killing Ramarley, abusing his family, or engaging in other contemporaneous misconduct. Like other families, they are forced to rely on media reports of whether a particular officer may or may not be facing internal charges, without confirmation of the substance of those charges or timeline for internal departmental trials.

Our members and other New Yorkers who have experienced police excessive force and abuse should be able to know the identity of officers and whether the officers involved have prior substantiated complaints. This is essential for trying to change a disciplinary system that is

fundamentally broken. Depriving New Yorkers of this information - particularly those directly impacted by such abuses on a regular basis - reinforces the unfortunate message that police officers are above the law and can act with impunity.

Further, the recent policy change is part of a larger systemic pattern that shields police officers and their supervisors who engage in misconduct from accountability. The overly broad misinterpretation of CRL § 50-a to diminish transparency has become a troubling and expanding pattern with this administration, including the recent reporting that the NYPD is instituting new rules to prevent disclosure of outcomes of internal disciplinary trials. If left to stand, this new internal rule would shield the officers involved in killing New Yorkers like Eric Garner or Ramarley Graham from public disclosure of whether they were disciplined or fired.[1]

CPR and the thirty-three signatories of this brief are the organizations for whom the information routinely being withheld by the CCRB is most critical in carrying out their organizational mandates to serve their communities and hold police accountable through policy advocacy, research, organizing, public education, and legal work; as well as organizations whose memberships and constituencies include those who have lost loved ones in NYPD incidents or have survived police brutality and are directly impacted when such information is denied to the public.

ARGUMENT

I. NEW YORK'S FREEDOM OF INFORMATION LAW PROTECTS THE PUBLIC'S RIGHT TO BE INFORMED OF AND REVIEW GOVERNMENTAL DECISION-MAKING.

A. Further Shielding of Police Officer Records Threatens to Corrode Community Faith in Government.

[1] Rocco Parascandola and Graham Rayman, "NYPD Won't Share Actions Against Disciplined Cops" Daily News, Aug. 24, 2016, *available at* http://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145 (last accessed on August 29, 2016).

Transparency is necessary for the proper functioning of any government institution. This principle is recognized by the plain text of New York's Freedom of Information Law ("FOIL"), Public Officers Law §§ 84 *et seq.*, which states that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society."

In 1976, the New York State Legislature passed New York Civil Rights Law ("CRL") § 50-a, which provides in relevant part, that "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state ... 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. CRL § 50-a(1). The purpose of the law was to protect police officers serving as witnesses in criminal proceedings from impeachment by attorneys who engaged in what they termed "fishing expeditions" of unsubstantiated complaints.

While the purpose of CRL § 50-a was to provide narrowly-tailored protection to officers in a specific situation, courts have granted police departments wide latitude in construing the exception more broadly than intended. According to the New York State Committee on Open Government's 2014 annual report, "[CRL § 50-a's] narrow exemption has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." New York State Department of State, Committee on Open Government, Annual Report to the Governor and State Legislature [Dec. 2014], at 3. ("Comm. on Open Gov't 2014 Report"). This runs counter to the central premise that "FOIL is generally liberally construed and its [statutory]

exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Washington Post Co. v. New York State Ins. Dep't.*, 61 N.Y.2d 557, 564 (1984).

Still, despite police departments' practice of using CRL § 50-a as a shield, the Civilian Complaint Review Board ("CCRB"), an agency made independent from the NYPD in a 1993 charter amendment, routinely released its records pursuant to FOIL requests as late as September 2014. In the last year and a half, however, following mounting criticism of police misconduct, and perhaps feeling empowered by the laissez-faire attitude of courts in limiting CRL § 50-a's application, the CCRB has begun denying FOIL requests, citing CRL § 50-a and misapplying the law. Now, the City and CCRB's overly broad interpretation of CRL §50-a, which serves to cloak all information about every officer's conduct, including the most basic summary information, provides a tremendous obstacle to transparency and only serves to corrode community faith in government.

Respondent-appellants in this case ask this Court to overturn the holding of the New York Supreme Court. Judge Schlesinger held that a summary record of substantiated CCRB complaints did not fall within the narrow exception to FOIL of police department "personnel records." In so doing, they are asking this Court not only to overturn a completely valid and reasoned ruling, but also to uphold a morally- and legally-indefensible *de facto* policy of absolute secrecy which the NYPD and CCRB have instituted through a perverse interpretation of CRL §50-a. This erroneous interpretation may be fueled by both agencies' representation by the New York City's Law Department

B. Access to Personnel Files Has Been A Critical Component of Community-Led Police Reforms Across the Country.

Only New York, California, and Delaware have laws that completely restrict public access to police officers' personnel records.[2] Of those three states, New York is functionally the most restrictive. *See*, Comm. on Open Gov't 2014 Report, at page 5 ("no other state provides the unique protection afforded [to police officers in New York] in § 50-a.").

Across the country, the public's ability know the contents of and review of police personnel files has been an important tool in police reform efforts. In Cleveland, after the shooting of Tamir Rice, a Freedom of Information request led to disclosure of Timothy Loehmann's personnel file, which showed that his abysmal performance in a different police department had led to his dismissal prior to the incident. As a result, the Cleveland police department amended its hiring policy to include a review of all public personnel files.[3] In Chicago, Freedom of Information Law litigation resulted in a judicial order compelling the release of the dash-cam video showing the police shooting of Laquan McDonald, previously withheld on the basis that it would jeopardize an ongoing investigation and the officers' right to a fair trial.[4] In Baltimore, after Freddie Gray's death, a Freedom of Information request uncovered information about a prior incident where Lieutenant Brian Rice was placed on administrative leave, which prompted public scrutiny into the Baltimore police department's disciplinary

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[2] "Is Police Misconduct a Secret in Your State?" The TakeAway, WNYC RADIO, Oct. 15, 2015, *available at* http://www.wnyc.org/story/does-public-have-right-police-personnel-records/ (Last visited Aug. 31, 2016).

[3] Ferrise, Adam "Cleveland Police Never Reviewed Independence Personnel File Before Hiring Officer Who Shot Tamir Rice" CLEVELAND.COM, Dec. 2014, *available at* http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_never_reviewe.html (Last visited August 11, 2016).

[4] Sam Levine "Chicago Police Really Didn't Want To Release Video of a Cop Shooting Laquan McDonald 16 Times" HUFFINGTON POST, Nov. 2015, *available at* http://www.huffingtonpost.com/entry/chicago-laquan-mcdonald-video_us_565603e0e4b079b2818a06f6 (Last visited August 31, 2016).

practices.[5] The Baltimore police department ultimately cooperated with the United States Department of Justice in a thorough investigation of its departmental practices and is expected to soon carry out major changes via a consent decree.

As a result of the denial of the FOIL request in this case, despite the two years that have passed since the tragic death of Eric Garner, his family, his community and the public at large are still being denied answers – about Officer Pantaleo's personnel history, about what the NYPD and CCRB might have known, and about what the NYPD could have done differently to prevent that tragedy from occurring. Meanwhile, a quick Google search reveals an extensive detailing of Eric Garner's history with the criminal justice system, despite the fact that witnesses have indicated Mr. Garner had just helped to break up a fight and was not committing a crime at the time that officers interacted with him, resulting in his death. The leaking of the histories (including sealed histories) of criminal justice interactions of police brutality victims by the NYPD and other departments is common-place, which effectively puts victims who are unable to defend themselves on trial in the press in order to justify incidents of police brutality.

There cannot be true accountability when publicly-available information is so one-sided. New Yorkers cannot move forward and improve the failed system of police accountability when the NYPD and CCRB continue to hide behind a cloak of secrecy, shielded by a faulty interpretation of CRL § 50-a.

[5] "Baltimore Police Officer in Freddie Gray Arrest Once Hospitalized Over Mental Health" DAILY NEWS, Apr. 30, 2015, *available at* http://www.nydailynews.com/news/crime/freddie-gray-arrest-mental-health-issues-article-1.2205747 (Last visited August 31, 2016).

II. EXTENDING CRL §50-a's PROTECTION TO INDEPENDENT AGENCY RECORDS WOULD BE CONTRARY TO THE PLAIN MEANING OF THE LAW.

The plain language of CRL § 50-a does not support denial of FOIL requests in cases where the documents are prepared and held by an independent agency, such as here, by the CCRB. Furthermore, the legislative intent of CRL § 50-a was to prevent broad "fishing expeditions," and as such, it does not support denial in cases where the request is limited in scope, such as here where Legal Aid has requested only a summary of *substantiated* complaints. Public access to records is an important principle of democracy, and FOIL's exceptions must be limited in scope. *Washington Post Co. v. New York State Ins. Dep't.*, 61 N.Y.2d at 564 ("FOIL is generally liberally construed and its [statutory] exemptions narrowly interpreted so that the public is granted maximum access to the records of government.")

Here, the City and CCRB's construal of CRL §50-a seeks to turn a narrow FOIL exemption into a blank check for NYPD secrecy. This construal is unsupported by the plain meaning of the statute, unsupported by legislative history, disfavored by relevant provisions of FOIL, and runs contrary to public policy in that it threatens the greatest and most basic underpinnings of our democracy – transparency and accountability. As such, this Court should affirm the holding of the New York Supreme Court.

A. Where the Plain Meaning of the Statute is Unambiguous, Statutory Interpretation is Outside the Scope of the Judicial Inquiry.

It is the most basic tenet of statutory interpretation that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations and quotations omitted).

CRL §50-a provides a special right of privacy to police officers by restricting public access under FOIL for a very specific category of records, namely "personnel records used to evaluate performance toward continued employment or promotion, *under the control of any police agency or department of the state*..." CRL § 50-a(1) (emphasis added). This law unequivocally limits the exception to records controlled by police agencies or departments of the state. The CCRB is an agency wholly independent of the NYPD. It is neither a police agency nor a department of the state. As such, CRL § 50-a simply cannot be read to include as "personnel records" any records created or controlled by the CCRB.

Judge Schlesinger correctly held that the CCRB's independent status meant that its records fell outside the scope of CRL § 50-a. *Matter of Luongo v. Records Access Officer*, 49 Misc. 3d 708, 716 (Sup. Ct. NY Co. 2015). Any argument offered by respondent-appellants to the contrary is not pertinent and refuted under the first and most basic canon of statutory interpretation which provides that a statute's unambiguous meaning ends judicial inquiry.

B. The Primary Goals of the CCRB's 1993 Move to Become an Independent Agency Were Increased Accountability and Transparency.

Respondent-appellant's argument that the independent nature of the CCRB should be ignored despite the plain text of the statute (*see* Records Access Officer Br. 10-18) is not only a thinly-veiled attempt to obfuscate CRL § 50-a's unambiguous and unequivocal meaning, but it also ignores the history of the CCRB and the intention of the 1993 city council. That City Council established the CCRB as an independent agency, specifically for the purpose of achieving increased accountability and transparency that was not possible without independence from the NYPD. Respondent-appellants' argument that because the CCRB used to operate within the NYPD, "previously confidential disciplinary records should ... [not lose] such protection" (*Id.* at 12) completely misses the point. That the CCRB's shift to independent agency

status means that its records now fall outside the scope of the police-agency-record FOIL exemption is *precisely* the sort of accountability and transparency that the shift was intended to cause.

As a matter of fact, public access to records was one of the primary goals of the CCRB. In 1968, President Johnson created the Kerber Commission, which released a landmark report that led to the creation of several cities' independent review boards, including New York City's. The commission set out a few necessary principles and procedures, one of which was that the "results of [an] investigation should be made public."[6] Similarly, the New York Civil Liberties Union's 1993 recommendations for the newly-created CCRB also included the directive to "[m]aximize openness in the civilian review process: Provide public access to complaint hearings and the review agency's findings, including discipline recommended and imposed."[7] So to the extent that increased transparency and accountability stem from the CCRB's 1993 establishment as an independent agency, that result was specifically considered and intended by the New York City Council.

C. An Overly Broad Interpretation of CRL § 50-a is Contrary to the Legislative History and Intent of the Law.

Even if, despite the statute's plain meaning, one found that CRL § 50-a could apply to CCRB records in some cases, the legislative history makes it clear that a summary of the type requested in this case would not fall within the scope of the statute, which must be narrowly construed.[8] CRL § 50-a was enacted to provide privacy protection to officers in order to prevent zealous attorneys from uncovering a wide swath of potentially baseless and unsubstantiated

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[6] The New York Civil Liberties Union Foundation, *Civilian Review of Policing: A Case Study Report* (1993), at page 20 (quoting Report of the National Advisory Committee on Civil Disorders (New York, Bantam Books, 1968)), *available at* http://www.nyclu.org/files/publications/NYCLU.CivilianReviewPolicing.CaseStudyRep.1993.pdf

[7] *Id.* at 128

[8] *Capital Newspapers v. Div'n of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986) ("[e]xemptions [to FOIL] are to be narrowly construed to provide maximum access.").

complaints that could be used to unfairly discredit police officers serving as witnesses in criminal proceedings.

In a memorandum in support of CRL § 50-a, Senator Padavan expressed the drafters' concern with police officers "bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack the officer's credibility." (R.109). Another memorandum to Governor's counsel stated the bill was "directed at purported abuses involving the indiscriminate perusal of police officers' personnel records by defense counsel in cases where the police officer is a witness." (R.110). Over time, the legislative purpose of CRL § 50-a has been lost, and the NYPD has been using it as a broad shield, "to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." Comm. on Open Gov't 2014 Report, at 3.

III. THE FACTORS OF THE REQUEST'S VERY LIMITED SCOPE AND THE TREMENDOUS PUBLIC INTEREST AT PLAY IN THIS CIVIL PROCEDING COUNSEL IN FAVOR OF PUBLIC DISCLOSURE.

There are fundamental differences between Legal Aid's request for a summary of CCRB records and the requests the drafters of CRL § 50-a hoped to curtail. Leaving aside the most obvious, that Officer Pantaleo is not a witness in a criminal proceeding, there are three main distinctions:

1.) A request for a summary rather than broad records is limited in scope;

2.) A request for only those complaints that were substantiated by the CCRB is limited and non-abusive; and

3.) The tremendous public interest in this information outweighs any small risk of harm.

A request for a summary report rather than a request for records does not fall within the definition of "personnel records" as contemplated by the legislature because the request is narrow, specific, and targeted in scope. CRL § 50-a was passed because "every public and private communication concerning an officer's behavior is entered into his personnel folder and may, therefore, be disclosed in the course of a defense counsel's attempt to discredit him." (R.104). By requesting access to a particularized set of information, Legal Aid is engaging in behavior very different than that which the legislature contemplated in enacting CRL § 50-a.

The fact that Legal Aid requested a summary of *substantiated* CCRB complaints only further underscores the wide gap between the facts of this case and the legislative intent of CRL § 50-a. The memorandum from Senator Padavan reveals that the supporters of the bill were especially concerned with "the disclosure of unverified and unsubstantiated information that the records contain." (R.109) That concern makes sense, because the disclosure of that sort of information was much more likely to lead to abuse and unjustified reputational damage if revealed. Here, Legal Aid has requested information only about those complaints that have been through the CCRB's extensive investigation process and which the CCRB has deemed to be meritorious, which does not happen in the case of the overwhelming majority of complaints. For instance, between 2009 and 2013, the CCRB received 1,022 complaints alleging chokeholds by NYPD officers. Of the 462 cases that CCRB investigated fully, it substantiated only nine complaints, which means that the CCRB substantiated less than 1% of complaints received, and less than 2% of complaints that led to investigations.[9] Clearly, a request for information on substantiated complaints is *extremely* limited in scope, and therefore, requesting information about only substantiated complaints is far afield from "engaging in a fishing expedition."

[9] The Office of the Inspector General for the NYPD (OIG-NYPD), New York City Department of Investigation, *Observations on Accountability and Transparency in Ten NYPD Chokehold Cases* (2015), 2, *available at* http://www.nyc.gov/html/oignypd/assets/downloads/pdf/chokehold_report_1-2015.pdf

Lastly, in enacting CRL § 50-a, the legislature was concerned about attorneys who posed a great risk of abuse and harassment of the police officers. Judge Schlesinger clearly laid out the case for why the risk of harm to Officer Pantaleo is minimal in this case, given his immense public exposure due to the public video of Eric Garner's death. *Matter of Luongo*, 49 Misc. 3d at 718-19. While it is certainly true that the release of Officer Pantaleo's records is permissible under this statute, the logic should extend to other cases where evidence has not necessarily already entered the public sphere. Risks are typically assessed in relation to reward. It can be inferred that the drafters of CRL § 50-a were concerned that in cases with a high risk of harassment or abuse, the reward (discrediting a witness) was too small to justify the risk. In this case, Legal Aid seeks answers to questions in the wake of a national tragedy, in the context of what many would argue is a moment of national crisis in systemic lack of transparency and accountability for police killings of unarmed Black and Latina/o people and serious public debate about the efficacy and adequacy of police department practices. The importance of public access to this information is far greater than in those cases CRL § 50-a sought to address, and as such, some hypothetical risk of potential reputational harm to an officer is a small price to pay for the public's access to information.

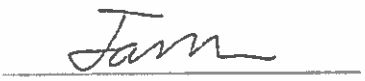
CONCLUSION

Given that no other jurisdiction interprets its laws in such an overly-broad manner as to cause police officers to be essentially exempt from accountability to the public, given that this interpretation by the CCRB is new and the practice of declining FOIL requests began after Daniel Pantaleo's actions resulted in Eric Garner's death, given that FOIL requires its exceptions to be construed narrowly, given that a broad interpretation would be unsupported by both the drafters of §50-a as well as the drafters of the independent CCRB charter amendment in 1993.

and given the tremendous importance of public access to CCRB records, the *amici* respectfully urge this Court to uphold the ruling of the New York Supreme Court that the CCRB summary requested by Legal Aid is not a "personnel record" under the meaning of CRL §50-a and that the CCRB must release the summary, pursuant to FOIL.

Dated: September 6, 2016
New York, New York

Respectfully submitted,

By: 

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APPENDIX

ADDENDUM

Statements of Interest from Signatory Organizations
Signing with Communities United for Police Reform

8/29/2016

Joo-Hyun Kang
Director
Communities United for Police Reform
520 Eighth Avenue, Suite 1800
New York, New York 10018
Phone: 212-695-0869

Date

Communities United for Police Reform ("CPR") has coordinated the filing of this brief, and hereby certifies a word count of under 7,000 words and certifies that all parties have consented to the filing of this Brief.

I. Legal Organizations, Policy Advocacy Organizations and Research Organizations

The Association of Muslim American Lawyers
233 Broadway, Suite 801, New York, New York 10279

Since its founding in 2005, the Association of Muslim American Lawyers (AMAL) has organized and participated in civil rights work on panel discussions and old-fashioned community activism to promote not only the administration of justice, but also an awareness of American and Islamic jurisprudence among minority and immigrant (and especially Muslim) communities -- all while emphasizing the highest standards of professionalism and integrity. AMAL endeavors to promote the human rights of all marginalized people. We support this important FOIL litigation and would like to be a part of the amicus brief efforts because they support AMAL's core mission as a civil rights organization. Not only does this case reinforce the problems highlighted by Plaintiffs in the pending FOIL case of *Abdur Rashid v. New York City Police Department*, implicating Muslim New Yorkers, but it impacts all New Yorkers, generally, who care about the rule of law and transparency.

Center for Constitutional Rights
666 Broadway, 7th Floor, New York, New York 10012

The Center for Constitutional Rights (CCR) is a non-profit legal, advocacy and educational institution committed to using the law as a tool for progressive social change and to advance the interests of communities most impacted by governmental and social injustice. As lead counsel in the landmark class action litigation, Floyd v. City of New York, which resulted in a judgment that the New York Police Department was engaged in a widespread practice of unconstitutional and racially discriminatory policing and which ordered broad reforms to ensure he NYPD respects the constitutional rights of New Yorkers, CCR has a strong interest in ensuring that the NYPD remains accountable to the law and the citizens it is supposed to serve. Disclosing records of substantiated CCRB complaints against Officer Pantaleo is another critical component in the broader effort to ensure transparency and accountability in a department that for too long has operated with impunity for its wrongdoing.

Center for Popular Democracy
449 Troutman Street, Suite A, Brooklyn, New York 11237

The Center for Popular Democracy (CPD) works to create equity, opportunity, and a dynamic democracy in partnership with over 50 high-impact base-building organizations, organizing alliances, and progressive unions. CPD strengthens our collective capacity to envision and win an innovative pro-worker, pro-immigrant, racial and economic justice agenda. Transparency and accountability are fundamental to ending the type of biased and dehumanizing policing that led to the death of Eric Garner, and the abuse of countless others. A commitment to transparency is key to any improvement in police and community relationships and sustainable reform.

JustLeadershipUSA
555 Lenox Avenue, Suite 4C, New York, New York 10037

JustLeadershipUSA (JLUSA) is a criminal justice advocacy organization committed to reducing the U.S. correctional population in half by 2030. JLUSA is also one of the co-founders of the #CLOSErikers campaign. Reducing the correctional population in the U.S., including the number of New Yorkers locked up at Rikers, requires accountable police departments that honor peoples' rights and do not improperly target communities.

Katal Center for Health, Equity, and Justice
201 Varick Street, Front 1, Box #11, New York, New York 10014

Katal is focused on ending mass criminalization, mass incarceration, and the war on drugs. We work with a broad constituency including those impacted by the criminal justice system and system actors. Katal believes that New Yorkers deserve to have a more transparent process around evaluating police practices and procedures in order to ensure the public safety of our communities.

LatinoJustice PRLDEF
99 Hudson Street, 14th Floor, New York, New York 10013

LATINOJUSTICE PRLDEF is a national not for profit civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. Our continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting & voting rights. During our 44-year history, LATINOJUSTICE has litigated numerous cases in both state and federal courts challenging multiple forms of discrimination including discriminatory policing and law enforcement practices. Most recently, we were co-counsel in *Ligon v. City of New York*, successfully challenging the NYPD's stop & frisk practices in residential apartment building areas. LATINOJUSTICE supports greater transparency and accountability of police officers who violate the civil rights of the constituents they are sworn to protect and serve. To expand NY Civil Rights Law §50-a's applicability to independent city agencies beyond the police department goes beyond the statute's express provisions, and would contravene the community's need for such information in order to determine necessary criminal justice reforms that are warranted to avoid further tragedies and unnecessary loss of life.

New York Civil Liberties Union
125 Broad Street, 19th Floor, New York, New York 10004

The New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with 8 offices across the state and nearly 80,000 members and supporters. The NYCLU defends and protects civil rights and civil liberties, as embodied in the United States Constitution, New York State Constitution, and state and federal law. Among these rights is the public's right to obtain information about its government, to engage in valuable public debate, and to make informed decisions about the

direction of law and policy, all of which weigh in favor of disclosure of the records sought in this case.

The Public Science Project
The Graduate Center, City University of New York, 365 Fifth Avenue, 6th Floor
New York, New York 10016

The Public Science Project (PSP), based at The Graduate Center, City University of New York, is dedicated to conducting research for a just world. For nearly 20 years we have been collaborating with communities to design and implement participatory action research that investigates, speaks back to, and reimagines structural injustice. Freedom of information is cornerstone of a fair and just democracy. It is imperative for the court to release a summary of substantiated complaints made to the CCRB and the NYPD against NYPD Officer Daniel Pantaleo, so that New Yorkers can fully understand the context within which Eric Gardner was killed.

Urban Justice Center
40 Rector Street, 9th Floor, New York, New York 10006

The Urban Justice Center serves New York City's most vulnerable residents through a combination of direct legal service, systemic advocacy, community education and political organizing. As many of UJC's clients are low-income and working-class people of color, immigrants, LGBTQI persons, and persons with disabilities, they are disproportionately impacted by illegal and abusive police practices. We believe that Judge Schlesinger's July 2015 decision should be upheld because our clients and their communities have a right to know the history of substantiated complaints made against NYPD police officers, especially when such findings reveal larger systemic failures by the City to address patterns of unlawful and oppressive police practices.

II. Directly-Affected Communities, Grassroots Organizations, and Faith-based Organizations

Alliance for Quality Education
94 Central Avenue, Albany, New York 12206

The Alliance for Quality Education is a coalition mobilizing communities across the state to keep New York true to its promise of ensuring a high-quality public school education to all students regardless of zip code. We see the effects of repeated legislative disdain for the outcries of constituents of communities of color in our education system and have seen this disdain across systems. All New Yorkers deserve transparency around the complaint records of any police officer actively serving their community, especially one whose policing has been a source of community concern.

Arab American Association of New York
7111 5th Avenue, Brooklyn, New York 11209

The Arab American Association is a multi-service and advocacy agency dedicated to empowering Arab immigrants and Arab Americans located in Bay Ridge, Brooklyn, home to the largest Arab American community in New York State. The vast majority of the people we serve are members of low-income families and recent arrivals to New York City. We serve 4,000 individuals per year through direct services and client advocacy. We support the effort of the Legal Aid Society and urge the to Court to ensure that their request for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo should be granted. As an agency that serves a multiracial and majority Muslim community, one third of whom identify as Black, our constituents have been targeted for surveillance and discrimination under the NYPD. We believe this effort will ensure more transparency of police practices on communities of color and provide a mechanism for communities to evaluate police disciplinary systems in order to create a healthy relationship of critique and reform between community organizations and the police department.

Bill of Rights Defense Committee/Defending Dissent Foundation
1100 G Street NW, Suite 500, Washington, DC 20005

The Bill of Rights Defense Committee/Defending Dissent Foundation is a national grassroots advocacy organization with over 27,000 supporters nationwide and 1,500 in New York City, that works to hold government accountable to *We the People* and create a nation where police and

intelligence agencies cannot be used as tools of repression or to silence dissent. The decision in this case is important to BORDC/DDF because our mission of transparency and accountability supports a strong FOIL and an independent Civil Complaint Review Board. The decision is important to BORDC/DDF's mission of transparency and accountability, as the NYPD is arguing for an overly broad exemption to state FOIL laws that essentially prevent the public from ever knowing anything about police misconduct, unless the NYPD elects to share it with them. It also runs the risk of undermining the independence of the Civilian Complaint Review Board, as the exemption in question only applies to records in custody of the NYPD and the CCRB was deliberately made independent from the NYPD in 1993. The New York Supreme Court correctly ruled that complaints substantiated by CCRB are subject to FOIL.

The Black Institute
39 Broadway, Suite 1740, New York, New York 10006

The Black Institute is an "action" think tank whose mission is to shape intellectual discourse and dialogue and impact public policy uniquely from a Black perspective in the U.S. and for people of color throughout the Diaspora. Representing the perspectives of Latino and Black New Yorkers who are amongst those most subject to violence by abusive NYPD officers, The Black Institute believes that transparency of substantiated CCRB complaints against officers should be a guaranteed right in a democratic society. Without such transparency, steps to address the systemic problems of lack of accountability for NYPD officers who unjustly kill or brutalize Black New Yorkers cannot be successful.

Brooklyn Movement Center
375 Stuyvesant Avenue, Brooklyn, New York 11233

Brooklyn Movement Center (BMC) is a Black-led community organizing group building power among the low- and moderate-income residents of Bedford Stuyvesant, Crown Heights, and the surrounding Central Brooklyn area. BMC maintains a vision of community safety in which residents and police officers alike engage in a culture of mutual respect, accountability, and equitable justice. The public release of substantiated CCRB complaints against Officer Daniel Pantaleo would uphold that vision and ensure that any police misconduct and civil rights violations are made subject to public scrutiny and discipline.

CAAAV Organizing Asian Communities
55 Hester Street, New York, New York 10002

CAAAV Organizing Asian Communities organizes low-income Asian immigrants to fight for systemic and institutional change towards racial, gender, and economic justice. With 450 members and a supporter base of 3,800, we organize low-income Asian and South Asian tenants and youth in Chinatown and New York City Housing Authority's Queensbridge Development. The court should grant Legal Aid Society's request for disclosure of CCRB complaints against NYPD Officer Daniel Pantaleo because our constituent base and our organization believe in and have always pushed for public information that improves the community and conditions for those most impacted by City policies and those who commit themselves to public service. Reviewing complaints made against Officer Daniel Pantaleo is critical to improving policing policies that have long physically hurt Black and Latino New Yorkers and communities.

Citizen Action of New York NYC Chapter
40 Worth Street, Suite 802, New York, New York 10013

Citizen Action of New York NYC Chapter is a members based organization that fights for Economic, Environmental, Social, and Racial Justice. We use our power in Albany to push progressive legislation in New York State. The Court should ensure that Legal Aid Society's request for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo should be granted. Citizen Action has long stood for transparency and justice for all. Our communities and constituents need honesty and openness, not secretive operations. We deserve transparency regarding past and future actions.

Equality for Flatbush
237 Flatbush Avenue, #193, Brooklyn, New York 11217

Equality for Flatbush (E4F) is a people of color-led, multi-national grassroots organization that does anti-police repression, affordable housing and anti-gentrification organizing in the Flatbush and East Flatbush communities of Brooklyn, New York. Roughly 500 -1000 people support our campaigns. East Flatbush communities have 3 open police murder cases (Shantel Davis, Kimani Gray, and Kyam Livingston) from 2012-2013 involving police officers who had prior complaints against them of violence use of excessive force against community members.

FIERCE
225 West 34th Street, New York, New York 10122

FIERCE is a membership-based organization that builds the leadership and power of lesbian, gay, bisexual, transgender, and queer (LGBTQ) youth of color in New York City and supports them to lead social justice campaigns to dismantle the everyday systemic oppression they face. We believe that the FOIL request submitted by the Legal Aid Society is a part of a larger movement demanding transparency and accountability for police officers. The release of this information is vital to ending the police practice of providing officers with a slap on the wrist (i.e training and desk duty) when a community member is unjustly killed by them.

Filipino American Democratic Club of NY
604 Riverside Drive, New York, New York 10031

Filipino American Democratic Club of NY (FADCNY) is a political club that organizes, educates, and leads the Filipino American electorate in New York City and New York State. We stand with Communities United for Police Reform in asking for transparency and accountability in the NYPD. To improve faith in our government agencies and move forward as a city, Filipino Americans and all our communities should have the right to access records of CCRB complaints in law enforcement.

The Gathering for Justice / Justice League NYC
310 West 43rd Street, 14th floor, New York, New York 10014

The Gathering for Justice is a non-profit social justice organization founded by Harry Belafonte in 2005 and led by Executive Director Carmen Perez since 2010. The Gathering for Justice's mission is to end child incarceration while working to eliminate the racial inequities in the criminal justice system that enlivens mass incarceration. Justice League NYC is an all-volunteer urgent response task force under the umbrella of The Gathering, which focuses on the front end of the system, especially in regards to police accountability. The Gathering operates with a full time staff of 2 people and a very small Board of Directors. Justice League NYC has 15 members, and we are in the process of building Justice League CA, which will launch this fall. In the wake of the non-indictment of Daniel Pantaleo, Justice League NYC released a set of 10 demands, the first being the immediate firing of Officer Pantaleo. The Legal Aid Society's request - we believe - is absolutely essential to providing additional evidence to support his dismissal AND regardless of whether or not such evidence of past bad acts exists, transparency must always be the aspiration.

Girls for Gender Equity
30 3rd Avenue, Suite 104, Brooklyn, New York 11217

Girls for Gender Equity (GGE) is an intergenerational grassroots organization committed to the physical, psychological, social, and economic development of girls and women. Through education, organizing and advocacy GGE works with 150 young people and the broader community to achieve racial, gender, and economic justice. Young people of color and in particular, cis and trans* girls of color and gender nonconforming young people are repeatedly stopped, harassed, and targeted by NYPD officers. Beyond this, many young girls of color in New York City are members in communities that are over-policed and impacted by the multiple traumas directly related to interactions with NYPD officers, including times of police misconduct. Legal Aid Society's request for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo sets an important precedent and will arch towards a reestablishment of the CCRB's intended mission of NYPD transparency and accountability.

Jews for Racial & Economic Justice
330 7th Avenue, Suite 1901, New York, New York 10001

Jews for Racial & Economic Justice (1800 members, New York Jewish Communities, including Jewish youth, Jewish elders, Rabbis, Jews of Color, Mizrahi, Sephardi, and Ashkenazi Jews). For 25 years, Jews For Racial & Economic Justice (JFREJ) has pursued racial and economic justice in New York City by advancing systemic changes that result in concrete improvements in people's everyday lives. We are inspired by Jewish tradition to fight for a sustainable world with an equitable distribution of economic and cultural resources and political power. JFREJ's constituency values transparency and accountability. Our members want to see an end to police killings, and a transparent mechanism to systemically evaluate police disciplinary systems would be a meaningful step in that direction.

Justice Committee
666 Broadway, Suite 500, New York, New York 10012

The Justice Committee (JC) is a grassroots organization dedicated to building a movement against police violence and systemic racism in New York City. Our membership of just over 100 is multi-racial, but majority Latino/a, and includes families who have lost loved ones to the police as well as other members of impacted communities. Due to our experience working with families who have lost loved ones to the police and survivors of police violence, we are keenly aware of the fact that officers who kill and brutalize are often repeat offenders, although there is

no transparency around this. Families of victims as well as the generally public are given little to no background information about the NYPD officers who perpetrate the worst violence in our communities.

Make the Road New York
301 Grove Street, Brooklyn, New York 11237

Make the Road New York (MRNY) builds the power of Latino and working class communities to achieve dignity and justice through organizing, policy innovation, transformative education, and survival services. We have 19,000+ members and operate five community centers in Bushwick, Brooklyn; Jackson Heights, Queens; Port Richmond, Staten Island; and Brentwood, Long Island. As a city, we have empowered the CCRB to both receive and investigate complaints against New York City police officers who may have abused their power. To create an agency to monitor police abuse, then suppress that agency from being able to share data publicly is problematic. Transparency is a good thing, and nationally, both community groups and law enforcement organizations have underscored the need to be transparent for the sake of establishing collaborative relationships.

Malcolm X Grassroots Movement
PO Box 471711, Brooklyn, New York 11247

The Malcolm X Grassroots Movement is an organization of Africans in America whose mission is to defend the human rights of our people and promote self-determination in our community. As co-residents and organizers of communities directly impacted by police violence, we believe that transparency and accountability is essential to building public safety. Ruling in favor of Legal Aid Society's request for a summary of substantiated CCRB companies against NYPD Officer Daniel Pantaleo is a crucial and necessary step in creating public safety and ending discriminatory and deadly practices perpetuated by NYPD.

NAACP New York State Conference
114 West 41st Street, 7th Floor, New York, New York 10036

We are a civil rights organization with 501c3 Status, with a membership base, with branches throughout New York State which include the fifteen branches located in the five boroughs. The membership is eighty thousand. We believe in transparency.

New York City Gay and Lesbian Anti-Violence Project
116 Nassau Street, 3rd Floor, New York, New York 10038

The New York City Gay and Lesbian Anti-Violence Project is the largest LGBTQ specific anti-violence organizations providing free and confidential clinical and legal services to LGBTQ survivor of all types of violence (hate, sexual, domestic, institution and police violence) as well as robust city, state, and national policy advocacy and educational efforts. We support Legal Aid Society's request for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo because we know this information often times goes unshared yet misconduct at the hands of officers remains an issue for all New Yorkers, especially LGBTQ New Yorkers. We have worked closely with non-LGBTQ New Yorkers over the past several years to ensure greater accountability of officers.

New York Communities for Change
Metrotech Center North, 11th Floor, Brooklyn, New York 11201

New York Communities for Change (NYCC) is a coalition of working families in low and moderate income communities fighting for social and economic justice throughout the State. There has been no accountability following the murder of Eric Garner, we need an NYPD that is transparent to ensure justice for the family of Eric Garner and for the communities that we represent.

The Peace Poets
133 West 70th Street, New York, New York 10023

The Peace Poets are a collective of artists, educators and organizers that celebrate, examine and advocate for life through music and poetry. We work in schools, streets, and community centers with thousands of young people from across the United States to build circles of creative expression where everyone is guaranteed love, respect, and affirmation. The Peace Poets and our constituents urgently and passionately demand that Legal Aid Society's request be granted (for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo) because this officer killed an innocent man. It is excruciatingly obvious that increasing accountability and transparency in the police force is imperative to our dignity and survival, and the dignity and survival of all people who live in criminalized and over-policed communities.

Picture the Homeless
104 East 126th Street, #1B, New York, New York 10035

Picture the Homeless is the only grass roots organization in NYC that organizes homeless (street homeless and those residing in shelters) New Yorkers to end discriminatory policing and for housing rights. Picture the Homeless urges the court to ensure that the Legal Aid Society's request for a summary of substantiated CCRB complaints against NYPD Officer Daniel Pantaleo be granted because for homeless New Yorkers, the majority of whom are people of color, the NYPD is too often not accountable for behaviors that if conducted by non-police, would constitute crimes. Police officers have a lot of discretion, which unfortunately too often leads to discrimination.

Queens Neighborhoods United
35-09 93rd Street, Jackson Heights, New York 11372

Queens Neighborhoods United builds power to fight criminalization and displacement at all the intersections of our communities. We are volunteers from all over Queens, but specifically building in Jackson Heights, Corona, and Elmhurst. We have about 20 active member-leaders and about 100 members including street vendors, business owners, undocumented folks, young people, and across all races. Broken Windows Policing made space for the death of Eric Garner at the hands of Daniel Pantaleo, and this is exactly the type of policing undocumented folks, street vendors, and young people of color experience every day in Queens. There are many more Pantaleos out there and we want to make sure there is a transparent system in place that will help our community protect itself.

T'ruah: The Rabbinic Call for Human Rights
226 West 37th Street, Suite 803, New York, New York 10018

T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism, together with all members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. Grounded in Torah and our Jewish historical experience and guided by the Universal Declaration of Human Rights, we call upon Jews to assert Jewish values by raising our voices and taking concrete steps to protect and expand human rights in North America, Israel, and the occupied Palestinian territories. Transparency is a hallmark of human rights, the actualization in law that all human beings are created in the image of God. In order to ensure greater police accountability, we as the public need to have access to information related to misconduct.

UPROSE
166A 22nd Street, Brooklyn, New York 11232

Based in Sunset Park, Brooklyn, UPROSE is a grassroots intergenerational community based organization dedicated to environmental and social justice. Our constituency is predominantly Latinx, Asian, and Middle Eastern - all most likely to be vulnerable to police abuse, an issue that UPROSE has organized against throughout the years in Sunset Park and as part of citywide efforts. A majority of the asthma discharges live along the Gowanus Expressway. We are joining this amicus because the combination of the health profile of our community, the demographics and the lack of safeguards against illegal chokeholds puts our community at a high level of risk.

Committee on Open Government, Freedom of Information Law

dos.ny.gov/coog/foil2.html

PUBLIC OFFICERS LAW, ARTICLE 6

SECTIONS 84-90
FREEDOM OF INFORMATION LAW

§84. Legislative declaration.
The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

§85. Short title. This article shall be known and may be cited as the "Freedom of Information Law."

§86. Definitions. As used in this article, unless the context requires otherwise.

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.
2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.
3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.
4. "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state

legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.
5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

§87. Access to agency records.
1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.
(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:
i. the times and places such records are available;
ii. the persons from whom such records may be obtained; and
iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

c. In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency`s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee`s time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;
(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;
ii. deprive a person of a right to a fair trial or impartial adjudication;
iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;
(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations; or
iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions; (i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
(j) [Deemed repealed Dec. 1, 2019, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.
(k) [Expires and deemed repealed Dec. 1, 2019, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 21, § 22; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.
(l) [Expires and deemed repealed Sept. 20, 2020, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.
(m) [Expires and deemed repealed Aug. 30, 2018, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.
(n) [Expires and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.
(n) [Expires and deemed repealed Aug. 21, 2019, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, §15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.
(o) [Expires and deemed repealed Sept. 12, 2020, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

3. Each agency shall maintain:
(a) a record of the final vote of each member in every agency proceeding in which the member votes;
(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and
(c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied

pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;
(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;
(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

5.(a) An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency`s records.

§88. Access to state legislative records.
1. The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

(a) the times and places such records are available;
(b) the persons from whom such records may be obtained;
(c) the fees for copies of such records, which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law.

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

(a) bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records;
(b) messages received from the governor or the other house of the legislature, and home rule messages;
(c) legislative notification of the proposed adoption of rules by an agency;
(d) transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;
(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;
(f) administrative staff manuals and instructions to staff that affect members of the public;
(g) final reports and formal opinions submitted to the legislature;
(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) any other files, records, papers or documents required by law to be made available for public inspection and copying.

3. Each house shall maintain and make available for public inspection and copying:

(a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;
(b) a record setting forth the name, public office address, title, and salary of every officer or employee; and
(c) a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section.

§89. General provisions relating to access to records; certain cases. The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the government for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;
ii. furnish to any person advisory opinions or other appropriate information regarding this article;
iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;
iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and
v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and
vi. report on its activities and findings regarding articles six and seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on open government may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.
(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising

purposes;
iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or
vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.
(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;
ii. when the person to whom a record pertains consents in writing to disclosure;
iii. when upon presenting reasonable proof of identity' a person seeks access to records pertaining to him or her; or
iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law".

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or

data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when:

i. the agency had no reasonable basis for denying access; or
ii. the agency failed to respond to a request or appeal within the statutory time.
*(d)(i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.
*(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:
*(A) shall be given preference;
*(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and
*(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or
unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

*Effective May 27, 2017

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-

seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.
(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.
(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;
(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;
(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on open government.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision.

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.
(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.
(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.
(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.
(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.
(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

§90. Severability.
If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

For further information, contact: Committee on Open Government, New York Department of State, One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231

New York Law Journal

Outside Counsel

Public Agency Privileges, FOIL, and the CPLR

Matthew T. McLaughlin, New York Law Journal

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Parties involved in disputes with public agencies generally know that those entities are subject to requests under the New York Freedom of Information Act (FOIL). It is also settled that public agencies involved in civil litigation likewise remain subject to CPLR requests. Litigants thus have an opportunity to bring a two-front attack when obtaining documents from a public agency. The CPLR and the FOIL statutes operate in tandem, and choosing one route to obtain documents from a public agency does not preclude use of the other. The tandem operation of these two statutes brings, however, an often unappreciated twist. Under FOIL, public agencies enjoy certain exceptions to the obligation to produce documents. Several courts, including three of the Appellate Division departments, hold that the exceptions to production found in the FOIL statute may be used defensively in civil litigation, thereby permitting a public agency to withhold documents for FOIL-based reasons.

Recent jurisprudence from the Appellate Division, Fourth Department has opened a chasm in the intersection between the CPLR discovery devices and the operation of FOIL. While the other Appellate Division departments hold that exceptions to production found in FOIL may be used in standard civil litigation, the Fourth Department disagrees. This tension in the departments is ripe for a Court of Appeals resolution. This article will discuss the conflict and suggest a resolution based on existing Court of Appeals authority.

FOIL and the CPLR

It all begins with the seminal decision *Farbman & Sons v. New York City Health and Hospitals*, 62 N.Y.2d 75 (1984). There, the Court of Appeals held that the production obligations of FOIL operate in tandem with the obligations of Article 31 of the CPLR. In *Farbman*, a construction contractor for the New York City Health and Hospitals Corporation (HHC) served a FOIL request on HHC for documents related to services rendered. While the FOIL request was pending, the contractor commenced litigation. Reviewing the policy underlying the FOIL statute beside that of the CPLR, the Court of Appeals held that the statutes operate jointly in that a party may pursue a FOIL request while a litigation progresses. Reasoning to this conclusion, the Court of Appeals noted that "[i]f the Legislature had intended to exempt agencies involved in litigation from FOIL, it certainly could have so provided." *Farbman*, 62 N.Y.2d at 81.

Against the backdrop of *Farbman*, Appellate Division authority has developed, establishing that public agencies involved in litigation are also entitled to the protections afforded by agency privileges, such as the deliberative process privilege protecting inter-/intra-agency communications from disclosure. The inter-/intra-agency deliberative process privilege is commonly applied in response to a FOIL request, and this exception to a FOIL production is codified in the FOIL statute. Public Officers Law §87(2)(g). Relying on *Farbman*, Appellate Division departments have reasoned that the protective

privileges embodied in FOIL should be available to a party in a civil litigation. Without this protection, the FOIL statute could be eviscerated by a FOIL requester simply filing a lawsuit and seeking disclosure under the CPLR.

The Second Department has been the most fertile ground for the flourishing of the deliberative process privilege in civil suits. In *Mecca v. Shang*, 55 A.D.3d 570 (2d Dept. 2008), plaintiff brought a legal malpractice action and sought discovery of documents from the Department of Health (DOH). The DOH withheld selected documents, claiming that they were exempt from discovery under agency privilege. The Second Department agreed that the documents were exempt from disclosure for various reasons, including the "deliberative process privilege." *Mecca*, 55 A.D.3d at 571. Significantly, *Mecca* was decided in the context of a litigation and did not involve a FOIL request.

Similarly, in *New York Telephone v. Nassau County*, 54 A.D.3d 368 (2d Dept. 2008), water and telephone utilities brought suit relating to property assessment values. In the dispute, a non-FOIL proceeding, the utilities sought disclosure of communications between Nassau County officials regarding the review of Nassau County's finances. The Second Department held that the communications sought were insulated because "[t]he communications at issue are protected from disclosure by the deliberative process privilege." *New York Telephone*, 54 A.D.3d at 370.

The First Department also holds that a "public interest privilege" protects certain government documents from public disclosure. In *One Beekman Place v. City of New York*, 169 A.D.2d 492 (1st Dept. 1991), Manhattan property owners challenged a re-zoning plan and sought in litigation production of documents prepared by the Department of City Planning. These documents contained staff members' analyses, opinions, and recommendations. The First Department began its analysis by noting that "[i]t has long been recognized that the public interest is served by keeping certain government documents privileged from disclosure." Id. at 170. Surveying the law in the area, the First Department referenced the FOIL statute as protecting government interests and then noted that "[i]t is, for example, in the public interest to encourage candid discussion and representation of views among government employees involved in the development of policy." *One Beekman Place*, 169 A.D.2d at 493.

Providing guidance in assessing whether the public interest privilege is applicable, the First Department cautioned: "a court must weigh the encouragement of candor in the development of policy against the degree to which the public interest may be served by disclosing information which elucidates the governmental action taken." *One Beekman Place*, 169 A.D.2d at 493. Conducting that analysis on the City Planning documents, the First Department concluded that they fell within the privilege afforded to confidential communications among public officers and held that the documents should have been withheld.

Other Appellate Division decisions also apply agency privileges in non-FOIL, standard litigation, contexts. For example, in *Flores v. City of New York*, 207 A.D.2d 302 (1st Dept. 1994) the court denied a request for production of documents in a civil rights lawsuit on the grounds that the requested documents were pre-decisional intra-agency materials. In the last two years, the Third Department likewise held that documents should be withheld from a litigation production because of the deliberative process privilege. *Entergy Nuclear Indian Point 2 v. NYS Dept. of State*, 130 A.D.3d 1190 (3rd Dept. 2015).

Fourth Department Differs

Two recent Fourth Department decisions break from the interpretation of *Farbman* adopted by the other departments. In *Abate v. County of Erie*, 152 A.D.3d 177 (4th Dept. 2017) the Fourth Department rejected the notion that privileges afforded by FOIL would apply in a CPLR document production. Citing *Farbman*, the Fourth Department opined that the "discovery provisions of CPLR article 31 operate independently of the Freedom of Information Law and a litigant's entitlement to any

particular evidentiary item under article 31 is not affected by the disclosability of that item under FOIL." *Abate*, 152 A.D.3d at 181.

Likewise, the Fourth Department, in *Mosey v. County of Erie*, 148 A.D.3d 1572 (4th Dept. 2017), also held that documents protected by inter-/intra-agency deliberative process privilege must be produced in civil litigation. Critical of decisions that "all too casually" mention the deliberative process privilege and "purport to apply it outside the context of a FOIL proceeding," *Mosey*, 148 A.D.3d at 1575, the Fourth Department held that the Court of Appeals case law should not be construed as having created a distinct "deliberate process privilege" that should apply outside the context of a FOIL proceeding. The court therefore ordered the production of documents that would have otherwise been protected under the deliberative process privilege.

Conclusion, Recommendation

The Appellate Division disagreement regarding the overlap between FOIL and the CPLR began with *Farbman*. The tension will be resolved with a revisitation of that decision by the Court of Appeals. *Farbman* made explicit that FOIL and the CPLR can be used offensively in tandem: a civil litigant may still serve a valid FOIL request. The decision neglected to explicitly address the converse question of whether FOIL defenses may be used by a public agency to withhold a document in civil litigation.

In the search for a solution, it bears noting that the lower courts interpreting *Farbman* have each missed an implicit point in the decision. *Farbman* concluded with a direction that the lower court conduct an in camera inspection of the documents considered for production. The Court of Appeals, having decided that a litigant is entitled to make a FOIL request, nevertheless held that the documents need to be reviewed by a judge to discern whether they contain intra-/inter-agency deliberative materials. In the thicket of proceedings involving a FOIL request and CPLR document demands, *Farbman* noted that the agency privileges needed guarding. This significant coda to *Farbman* has gone unrecognized, particularly by the Fourth Department and other courts that have concluded that FOIL protections should not be afforded in civil litigation. While *Farbman* could have been more explicit, it remains clear enough that the Court of Appeals has already held that the agency privileges found in FOIL should operate to allow parties in civil litigation to withhold documents containing information protected by public agency privileges.

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Matter of T.P. (Tony G.)

[*1] Matter of T.P. (Tony G.) 2016 NY Slip Op 26048 Decided on January 29, 2016 Family Court, Kings County Deane, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on January 29, 2016
Family Court, Kings County

In the Matter of T.P. U.P. C.P., Children Under Eighteen Years of Age Alleged to be Neglected by Tony G., Respondent.

NN-XXXXX/14
Jacqueline B. Deane, J.

In this neglect proceeding pursuant to Article 10 of the Family Court Act, the Respondent is alleged to have perpetrated acts of domestic violence against the subject children's mother in their presence and used excessive corporal punishment on the child T.P. on December 18, 2014, which placed the children at risk of physical and emotional harm. ACS also charged the Respondent with misuse of alcoholic beverages. In addition to this Family Court proceeding, the Respondent was arrested and prosecuted in the criminal justice system for the same acts. This related criminal case was dismissed and sealed on June 10, 2015. Respondent has argued that documents from that sealed criminal case should not have been used by the arresting officer to refresh his recollection of the relevant events prior to his testimony at this neglect fact-finding hearing, and that as a result his testimony should be stricken.

On cross examination, the arresting officer, Officer Cochran, testified that, before coming to court to testify at

the neglect fact finding hearing on January 6, 2015, he reviewed his criminal court paperwork, including the complaint and arrest reports, the Domestic Incident Report ("DIR") and his memo book to refresh his memory of the events leading up to his arrest of the Respondent over one year prior.

The first issue this Court must address is which of these documents, if any, were legally "sealed" pursuant to the operation of CPL §160.50(1)(c), which states in pertinent part, "all official records or papers relating to the arrest or prosecution including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency." The Court finds that all of the documents reviewed by the police officer in this case, with the exception of his memo book, are covered by the plain language of the sealing statute.

While ACS argues that DIRs are different because they are required by law in cases where no arrest occurs, that distinction does not change the importance of enforcing the public policy behind the sealing statute in a case where an arrest does occur and the case is terminated favorably to the accused. The Court of Appeals has found that the legislature's "purpose in adding these provisions to the Criminal Procedure Law and the Human Rights Law was to ensure that the protections provided to exonerated accuseds be consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law.'" Matter of Joseph M. (New York City Bd. of Educ.), 82 NY2d 128, 131 [1993] (quoting Governor's Approval Mem, 1976 McKinney's Session Laws of NY, at 2451).

This policy is encapsulated in the language of CPL 160.60 which states that an arrest terminated in favor of an accused "shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution." There are at least two Family Court decisions that have reached the conclusion that DIRs come under the purview of the sealing statute. See, Matter of B/L Children, Fam Ct, Kings County, Feb. 22, 2011, Gruebel, J., docket No. NN-30879-80/10; In re J G, 2009 WL 7292304, Bronx Fam Ct, Drinane, J. While both of these cases dealt with the issue of whether sealed documents may be admitted into evidence in Family Court proceedings, this Court sees no distinction between the question of the sealed DIRs' direct admissibility and the question of whether the sealed documents may be used to form the basis for the officer's recollections of the events for which he is called to testify.

However, the Court finds that an officer's memo book is not a document intended to be sealed pursuant to CPL § 160.50(1)(c). The purpose of memo books, also referred to as "activity logs," is to record limited information about an officer's daily activities. Since memo books are required to be kept in the possession of the individual police officer either on their person or in their locker, See Gould v NYC Police Dept, 89 NY2d 267, 278 (1996) and City of New York Police Dept Patrol Guide, Procedure 212-08 [FN1] , this Court finds that they do not constitute "records...relating to the arrest or prosecution on file with the division of criminal justice services, any court, police agency or prosecutor's office." CPL § 160.50(1)(c). However, since this officer reviewed three other much more detailed and comprehensive documents [*2]simultaneously which this Court has found were legally sealed at the time, the officer cannot now recreate what his refreshed memory would have been if it had been based solely on the memo book.

Contrary to ACS's contention, this ruling will not hinder child protective cases from proceeding, even when the corresponding criminal case is sealed. The sealing statute does not prevent the officer from testifying from his independent memory of the events if he has one, or from attempting to refresh that memory through a review of documents that were not sealed, which might include ACS case notes of an interview with the police officer, the officer's own memo book, or other records regarding the relevant events. See, 53rd St. Rest. Corp. v New York State Liq. Auth., 220 AD2d 588 [2d Dept 1995]; Prop. Clerk of New York City Police Dept. v Taylor, 237 AD2d 119, 120 [1st Dept 1997]. This ruling will require ACS attorneys to monitor the status of the corresponding criminal case, which is the best practice in any event given the overlapping issues involved, and, upon learning that a sealing order has been issued, instruct any police witnesses not to review any sealed documents before giving testimony in Family Court.

Petitioner has cited People v Patterson, 78 NY2d 711, 713 [1991] and In re Quadon H., 55 AD3d 834, 834 [2d

Dept 2008] as support for their argument that the police officer may use sealed documents to prepare for his testimony in Family Court. However, the Court finds that these decisions involve very different factual scenarios than the one currently before this Court. In both Patterson and Quadon H., the sealed items (a photograph and fingerprints, respectively) were used to locate the person ultimately arrested for a separate crime. The issues in those criminal cases were whether the evidence obtained separate and apart from the sealed item — namely an in-court identification in Patterson and a statement made by the Respondent in Quadon H. — had to be suppressed because of taint from the improper use of the respective sealed items in obtaining them. The Second Department in Quadon H. held that the violation of the sealing provision "[did] not, without more, justify suppressing of evidence to which the violation leads." 55 AD3d at 835. The instant case is distinguishable because it involves a witness's direct use of the actual sealed evidence at the fact-finding hearing. If sealed evidence is permitted to be used in this way, there will be no practical effect of, consequence to, or enforcement of the sealing law in contravention of both the plain meaning of and the legislative intent behind the statute.

For the reasons stated, the Court strikes the testimony of Officer Cochran given on January 6th. ACS has requested that, should Officer Cochran's testimony be stricken, the Court give ACS the opportunity to recall the officer to conduct a further voir dire as to his independent recollection of the events to which he testified. ACS's application is denied. Given that the officer reviewed multiple sealed criminal records prior to his testimony on January 6th, he cannot be expected to recreate what, if any, memory he had prior to that date, nor would his testimony regarding an independent recollection, or one refreshed solely with the unsealed memo book, be credible to the Court. As ACS has not rested its case, it is free to proceed with other witnesses or evidence.

Dated:Brooklyn, New York

January 29, 2016

ENTER:

_____

Hon. Jacqueline B. Deane, J.F.C.

Footnotes

Footnote 1: In fact, the Patrol Guide even requires that, upon the retirement of a police officer, activity logs are to be maintained by the officer as they "are frequently needed for purposes of criminal prosecution AND civil litigation." (emphasis added).

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- Employment
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S T A T E O F N E W Y O R K

2392--A

2017-2018 Regular Sessions

I N S E N A T E

January 13, 2017

Introduced by Sen. GALLIVAN -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public officers law, in relation to freedom of information requests and attorney's fees

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (c) of subdivision 4 of section 89 of the public officers law, as amended by chapter 492 of the laws of 2006, is amended to read as follows:

(c) The court in such a proceeding: (I) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, [when:

i. the agency had no reasonable basis for denying access; or

ii.] AND WHEN the agency failed to respond to a request or appeal within the statutory time; AND (II) SHALL ASSESS, AGAINST SUCH AGENCY INVOLVED, REASONABLE ATTORNEY'S FEES AND OTHER LITIGATION COSTS REASONABLY INCURRED BY SUCH PERSON IN ANY CASE UNDER THE PROVISIONS OF THIS SECTION IN WHICH SUCH PERSON HAS SUBSTANTIALLY PREVAILED AND THE COURT FINDS THAT THE AGENCY HAD NO REASONABLE BASIS FOR DENYING ACCESS.

S 2. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD06775-03-7

"Your Right to Know" / Your Right to Know

The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law §§ 84-90) and the Open Meetings Law (Public Officers Law §§ 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The Committee also oversees the Personal Privacy Protection Law.

The Committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law ("FOIL") directs the Committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information or the Open Meetings Law, the Committee staff can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, more than 24,000 written advisory opinions have been prepared by the Committee at the request of government, the public and the news media. In addition, hundreds of thousands of verbal opinions have been provided by telephone. Staff also provides training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law.

FOIL Advisory Opinions OML Advisory Opinions

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:
The text of the Freedom of Information Law;
Rules and Regulations of the Committee on Open Government (21 NYCRR Part 1401);
Model Rules for Agencies;
Sample Request for Records;
Sample Request for Records via Email;
Sample Appeal;

Sample Appeal When Agency Fails to Respond in a Timely Manner;
FOIL Case Law Summary;
Frequently Asked Questions regarding FOIL;
The text of the Open Meetings Law;
Model Rules for Public Bodies;
An Article on Boards of Ethics;
OML Case Law Summary;
Frequently Asked Questions regarding OML;
The text of the Personal Privacy Protection Law (only applies to State Agencies);
You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to contact:

Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave
Albany, NY 12231
(518) 474-2518 Tel
(518) 474-1927 Fax
coog@dos.ny.gov

Freedom of Information

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law
All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (§86(3)).

The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?
All records are subject to the FOIL, and the law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency... in any physical form whatsoever. . ." (§86(4)). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so.
For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of eleven categories of deniable records (§87(2)).

Deniable records include records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;
(b) would if disclosed result in an unwarranted invasion of personal privacy;
(c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;
(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
(e) are compiled for law enforcement purposes and which if disclosed would:
    i. interfere with law enforcement investigations or judicial proceedings;
    ii. deprive a person of a right to a fair trial or impartial adjudication;
    iii. identify a confi dential source or disclose confi dential information relative to a criminal investigation; or
    iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
(f) could if disclosed endanger the life or safety of any person;
(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:
    i. statistical or factual tabulations or data;
    ii. instructions to staff that affect the public;
    iii. fi nal agency policy or determinations; or
    iv. external audits, including but not limited to audits performed by the comptroller and the federal government;
(h) are examination questions or answers that are requested prior to the fi nal administration of such questions; or
(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
* (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffi c law.
* NB Repealed December 1, 2014
* (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffi c law.
* NB Repealed December 1, 2014
* (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffi c law.
* NB Repealed September 20, 2015

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (§87(2)(b)). Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

When a request is made for records that constitute a list of names and home addresses or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes (§89(3)(a)).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public (§96-

a).

How to Obtain Records

Subject matter list
As noted earlier, each agency must maintain a "subject matter list" (§87(3)(c)). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services.

Regulations
Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee's regulations and a model designed to enable agencies to easily comply are available on the Committee's website. See Regulations of the Committee on Open Government and Model Rules for Agencies.

Designation of records access officer
Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot
be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records
An agency may ask you to make your request in writing. See Sample Request for Records. The law requires you to "reasonably describe" the record in which you are interested (§ 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency's fi ling or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, fi le designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to fi nd out how an agency keeps the records of your interest (i.e., alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. See Sample Request for Records via Email. Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of

attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If it is determined that more than 20 business days will be needed to grant a request in whole or in part, the agency's acknowledgment must explain the reason and provide a specifi c date within which it will grant a request in whole or in part. When a response is delayed beyond 20 business days, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see Explanation of Time Limits for Responding to Requests.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data.

For more information see 2008 News/Fees for Electronic Information.

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the exception (§89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed", and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

(a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;

(b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect the public;

(g) final reports and formal opinions submitted to the Legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and

(i) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

(a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records (Sample)

Records Access Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Request
Records Access Officer:

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____ .

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of $____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,
Signature
Name
Address

City, State, ZIP code

***Requesting Records via Email** (Sample)*

(It has been suggested that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer.)
(The subject line of your request should be "FOIL Request".)

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.):

OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.):

OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.).

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested ($0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name)
(Address, if records are to be mailed).

***Appeal A Written Denial** (Sample)*

Name of Agency Official
Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code
Re: Freedom of Information Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include:_____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

***Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner** (Sample)*

FOIL Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Appeal

Dear _____:

I requested (describe the records) by written request made on _____ (date). More than five business days have passed since the receipt of the request without having received a response… or… Although the receipt of the request was acknowledged and I was informed that a response would be given by _____ (date), no response has been given. Consequently, I consider the request to have been denied, and I am appealing on that basis.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

The Open Meetings Law, often known as the "Sunshine Law", went into effect in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective in 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision making process in action. It requires public bodies to provide notice of the times and places of meetings, and keep minutes of all action taken.

As stated in the legislative declaration in the Open Meetings Law (§100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

"Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business" (§102(1)), and has been expansively interpreted by the courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference. A meeting cannot validly be held by telephone or through the use of email.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit the public to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public corporations, including cities, counties, towns, villages and school districts (§102(2)). In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law. Citizens advisory bodies and similar advisory groups that are not created by law are not required to comply with the Open Meetings Law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting (§104).

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations and, when possible, online.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting in designated locations and online.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

Records to be discussed

If records that are scheduled to be discussed during an open meeting are available under FOIL or consist of a proposed resolution, law, rule, regulation, policy or any amendment thereto, the record is required to be made

available "to the extent practicable" online and in response to a request to inspect or copy prior to or during the meeting.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded (§105).

To hold an executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

A public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight areas that may be discussed behind closed doors include:

(a) matters which will imperil the public safety if disclosed;
(b) any matter which may disclose the identity of a law enforcement agency or informer;
(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
(d) discussions regarding proposed, pending or current litigation;
(e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);
(f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
(g) the preparation, grading or administration of examinations; and
(h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Note that item (f) is often referenced as "personnel," even though that term does not appear in the grounds for holding executive sessions. Only when the discussion focuses on "a particular person or corporation" in relation to one or more of the topics listed in that provision is an executive session permitted.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and executive sessions must be compiled and made available (§106).

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled; however, if action is taken, minutes of the action taken must be compiled

and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against. The law does not require the approval of minutes, but directs that minutes of open meetings be prepared and disclosed within two weeks.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision in private that should have been made in public? Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, a person may be aggrieved if improperly excluded from a meeting or if an executive session was improperly held.

Upon a judicial challenge, a court has the power to declare either that the public body violated the Open Meetings Law and/or declare the action taken void (§107). If the court determines that a public body has violated the law, it has the authority to require the members of the public body to receive training given by staff of the Committee. A court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees. If, on the other hand, the court found that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court would be required to award costs and attorney's fees to the successful party. A mandatory award of attorney's fees would apply only when secrecy is the issue.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. The law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons, and that meetings are held in rooms that can "adequately accommodate" the volume of members of the public who wish to attend (§103).

Exemptions from the law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
(2) deliberations of political committees, conferences and caucuses; or
(3) matters made confidential by federal or state law (§108).

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board identifiable to a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Public Participation and recording meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

Public bodies are required to allow meetings to be photographed, broadcast, webcast or otherwise recorded as long as the equipment used to do so is not disruptive or obtrusive. If the public body adopts rules regarding such activities, they must be reasonable and conspicuously posted, and provided to those in attendance upon request

(§103(d)).

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N.Y. / REGION

New York Police Agree to Take Public Records Requests by Email

By COLIN MOYNIHAN JUNE 29, 2017

The Police Department has settled a lawsuit over its compliance with the state Freedom of Information law by agreeing to accept and handle record requests by email and to create a written description of its procedures for doing so.

The department's approach to transparency has been under public scrutiny, and the settlement ends a suit filed last year in State Supreme Court by a man who had made a half-dozen requests for police records related to the use of a powerful sound cannon known as a Long Range Acoustic Device.

The man, Keegan Stephan, said in the suit that the department failed to justify withholding the records he requested and that a "policy and practice" not to accept or respond to Freedom of Information requests by email violated a 2006 provision of New York State law. Mr. Stephan also argued that by not allowing email requests, the police had increased "the time, effort, and expense involved" in obtaining records.

Under the terms of the settlement, which was approved by a judge on Thursday, the Police Department denied any "liability or wrongdoing" but agreed to turn over to Mr. Stephan, a Cardozo Law School student, material it had previously withheld. That includes an instructor guide, lesson plan and training document related to the sound cannons; charts listing times when the devices were deployed or requested from 2011 to 2014; and email communications regarding the devices.

The department also agreed to accept Freedom of Information requests sent to a designated email address, accept follow-up correspondence sent to the same address, provide requested information by email, when possible, or compact disc, include in communications an email address for an appeals officer and handle appeals by email.

The department will also revise its website to include a list of records it maintains and links to the state Committee on Open Government website and relevant provisions of the state Public Officers Law, and will produce a memorandum to "set forth procedures for receiving and responding" to Freedom of Information requests and appeals and providing electronic versions of records.

The department has already instituted one measure listed in the agreement, adding an email address for Freedom of Information requests to its website after settlement talks began, said Gideon O. Oliver, a lawyer for Mr. Stephan.

Mr. Oliver, in a statement with another lawyer for Mr. Stephan, Elena L. Cohen, said the settlement would ensure that public records are more accessible.

"We have an explicit agreement in the form of a judicial order, so if it is violated we can go back to the court," the lawyers said. "We hope this will be a real tool for increased transparency."

The Police Department did not respond to a request for comment. A spokesman for the city Law Department declined to comment.

There has long been a vigorous debate about how much control the Police Department exercises over information that could reveal its inner workings. Last year, after the Legal Aid Society made a Freedom of Information request for disciplinary records, police officials stopped making the information available to reporters, saying that state privacy law prohibited its distribution.

The Police Department also appealed a judge's order to release a summary of misconduct findings against Daniel Pantaleo, the officer who used a chokehold during a 2014 encounter on Staten Island that resulted in the death of Eric Garner. In May, the New York Civil Liberties Union sued the department after it responded

to a Freedom of Information request by saying it could "neither confirm nor deny the existence of records" related to the monitoring of protesters or interference with their phones.

Robert Freeman, the executive director of the Committee on Open Government, said he had received "numerous complaints" over the years about the Police Department refusing to accept information requests by email. He called the settlement a "significant step," adding that it provided "recognition that the Freedom of Information law is important and a tool that can be used by anybody."

Mr. Stephan made a request in 2014 for information on the sound cannons days after one was used during a protest in Midtown Manhattan over a grand jury's decision not to indict Officer Pantaleo in Mr. Garner's death. The Police Department eventually provided some pages from its Patrol Guide, but denied most of the request, Mr. Stephan said in his lawsuit. He responded by filing five administrative appeals in a year, repeating his initial request, challenging the decision to withhold information and saying that the department's refusal to accept and respond to the request by email violated the law.

"FOIL is a mechanism the public can use to hold the N.Y.P.D. accountable to their own policies," Mr. Stephan said in a telephone interview on Thursday, "We realized the police were not abiding by the Freedom of Information law as it stood."

A version of this article appears in print on June 30, 2017, on Page A24 of the New York edition with the headline: New York Police Agree to Take Public Records Requests by Email, Settling Lawsuit.

Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.

2017 NY Slip Op 02523 [150 AD3d 13]

March 30, 2017

Sweeny, J.P.

Appellate Division, First Department

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As corrected through Wednesday, June 7, 2017

[*1]

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

First Department, March 30, 2017

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

APPEARANCES OF COUNSEL

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{**150 AD3d at 15} 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.{**150 AD3d at 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 {**150 AD3d at 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."[FN1]

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."

{**150 AD3d at 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."

{**150 AD3d at 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{**150 AD3d at 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 {**150 AD3d at 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"]).

*{**150 AD3d at 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{**150 AD3d at 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.[FN2] 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

> "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 {**150 AD3d at 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, {**150 AD3d at 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{**150 AD3d at 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{**150 AD3d at 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

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

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

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

---X

TRIAL/IAS PART 13

ROBERT O. RIPP,

Petitioner(s),

For a Judgment, Emergency Preliminary Injunction and a Declaratory Judgment Pursuant to Article 78, Sections 6311 and 3001 of the Civil Practice Law and Rules,

INDEX # 1834/17
Motion Seq. 1, 2
Motion Date 4.10.17
Submit Date 5.1.17

-against-

THE TOWN OF OYSTER BAY, THE TOWN BOARD OF THE TOWN OF OYSTER BAY, JOSEPH S. SALADINO, as Interim Supervisor of the Town of Oyster Bay and Member of the Town Board of Oyster Bay, Gregory Carman, as Deputy Interim Supervisor Town of Oyster Bay, Joseph Nocella, as Town Attorney of the Town of Oyster Bay, Thomas Subellico, as Special Counsel Office of the Town Attorney Town of Oyster Bay, Joseph Muscarella, Rebecca Libert Alesia, Chris Coschignano, Anthony Macagnone, Louis Imbroto and Michelle Johnson, as Councilpersons for the Town Board of Oyster Bay, James Altadonna, as Town Clerk Town of Oyster Bay,

Respondents(s).

---X

The following papers were read on this motion:	Papers Numbered MS 1	MS 2
Order to Show Cause, Notice of Motion, Affidavits (Affirmations)	1	3, 4
Exhibits Annexed	2	5
Answering Affidavit		

Petitioner *pro se*, Robert O. Ripp, is a resident of the Town of Oyster Bay (the Town) who states that he regularly attends town hall meetings, questions the Town Board at these meetings, and is well known by all Board members. Petitioner brings this Article 78 proceeding on three grounds. First, petitioner asserts that the Town violated the New York Open Meetings Law in the adoption of two Town resolutions at its March 21, 2017 Town Board meeting, namely Resolution 94-2017 and Resolution 152-2017. Second, petitioner contends that the Town has improperly failed to issue code enforcement citations for building code violations to Interim Town Supervisor Joseph Saladino and former Department of Public Works Commissioner Frank Antetomaso for construction work performed at their residences, and has thereby failed to equally enforce the Town building code on these officials. Third, petitioner contends that the Town has failed to comply with several Freedom of Information Law (FOIL) requests that he duly submitted to the Town.

In particular, the petitioner seeks an order granting the following relief:

(A) Pursuant to New York State Open Meetings Law § 103(e), immediately nullifying, reversing, staying and/or otherwise modifying the vote and adoption of Resolutions 94-2017 and 152-2017 by the Town Board and all subsequent actions occurring as a result of the adoption of these resolutions;

(B) Pursuant to CPLR 6311, immediately preliminarily enjoining respondents and any other person acting in concert with them from, *inter alia*, making any payment, encumbering any funds or in any other manner acting as if Resolutions 94-2017 and 152-2017 were legally voted on and adopted by the Board on March 21, 2017;

(C) Pursuant to Town Code Chapters 93 and 246-14, ordering the Town to immediately issue summons to Mr. Saladino and Mr. Antetomaso;

(D) Ordering a separate, independent investigation conducted by an agency other than the Town into the building code violations alleged against Mr. Saladino and Mr. Antetomaso;

(E) Ordering the Town to immediately produce the records requested in the multiple Freedom of Information requests as requested in the petition;

(F) Rendering a declaratory judgment instructing the Town to adhere to New York Open Meetings Law Article Three, § 103(e) in all further open Town meetings; and

(G) Issuing orders on the petitioner's causes of action and granting further relief as the court deems just, proper, equitable and appropriate.

On April 3, 2017, Special Term endorsed the petition's order to show cause and included a temporary restraint ordering that "pending further order of this Court, except in the case [of] emergencies, the Town shall not make any payments to Laser Industries pursuant to Resolution 94-2[0]17."

Rather than filing an answer to the petition, the Town moved to dismiss. By its motion, the Town asserts that the first cause of action should be dismissed because: (1) the Petitioner lacks standing to bring an Open Meetings Law claim; (2) because there was no violation of the Open Meetings Law; and (3) because the Petitioner had failed to join necessary parties to this proceeding. If not dismissed, the Town asserts that the petitioner should be required to post an undertaking in the amount of $297,428.96. The Town moves to dismiss the second cause of action on the grounds that mandamus to compel cannot attach to a discretionary act, such as code enforcement. Finally, the Town contends that the third cause of action is without merit because the Town has either made its records available or has asserted a valid basis supported in the law to withhold the records.

A primary difference between CPLR Article 78 proceedings and declaratory judgment actions is the presence or absence of a judicially-imposed remedial order. In a declaratory judgment action, the court does not direct a party to do an act or refrain from doing an act but merely declares the prevailing party's rights with respect to the matter in controversy for the purpose of guiding future conduct, and then, as explained by Professor David Siegel, "let[s] things go at that" (Siegel, N.Y. Prac. § 436, at 738 [4th ed.]; CPLR 3001). By contrast, in a CPLR Article 78 proceeding, the court affirmatively directs a party, if unsuccessful, to perform an act or refrain from doing so (*see Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83 [2d Dept 2011]). Here, the petition seeks hybrid relief.

(A) Adoption of Resolutions 94-2017 and 152-2017

The petitioner's first cause of action arises from his contention that two resolutions were improperly adopted at the Town Board meeting on March 21, 2017. It is undisputed that at this meeting, the Town Board voted in favor of adopting Resolutions 94-2017 and 152-2017. Petitioner contends that the Town has a long-standing history of allowing residents to speak and be heard in regards to proposed resolutions prior to a vote being taken on any such resolution and has enacted a procedure to make the proposed resolutions public prior to the meeting at which a resolution will be discussed.

Petitioner contends that on March 16, 2017, the respondents published the Action Calendar for the March 21, 2017 meeting. It is undisputed that Resolution 94-2017 appeared on the Action Calendar for the meeting as being re-tabled from an earlier meeting in February but Resolution 152-2017 did not appear at all. Petitioner states that the respondents did not publish the draft resolutions 94-2017 or 152-2017 even though they "had obvious knowledge and information prior to the March 21, 2017 town meeting . . . [and] had a legal obligation pursuant to New York State Open Meetings Law Article 3 Section 103(c) to publish for resident's review

prior to the vote to adopt such resolutions." According to the petitioner, these two resolutions approve millions of dollars in payments to contractors "for reasons still not clear to the residents of the Town of Oyster Bay."

Thus, the petitioner contends that by failing to publish the proposed resolutions and supporting information in advance of the meeting, the Town violated Public Officers Law § 103(e) (known as the Open Meetings Law). This section provides that:

> Agency records available to the public pursuant to article six of this chapter, ***as well as any proposed resolution***, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, ***to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed***. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records ***shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting***. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

As an initial matter, the Town contends that the petitioner is without standing to bring an action concerning the two disputed Resolutions because he was not "aggrieved" by the Town Board's actions, and any injury he may have suffered is indistinguishable from the "injury" sustained by the general public. The court disagrees.

Public Officer's Law § 107(1), relevant in all aspects to this petition, provides that:

> Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.

Courts have found, in light of the purpose of the Open Meetings Law, that standing enures to "the class aggrieved by the . . . lapse in [the] decision-making process (i.e. the citizenry)." (*Sanna v. Lindenhurst Bd. of Ed.*, 85 A.D.2d [2d Dept 1982], *see also New York State Nurses Ass'n v. State University of New York*, 39 Misc. 3d 588 [Sup. Ct., Kings County 2013] ["The instant case was commenced under the Open Meetings Law which is intended to protect the public from government secrecy and to foster transparency in the decision-making process of governmental entities. This Court does not believe there is any question that petitioners have standing to assert the claims herein, both as members of the public and as parties who will be affected by the decisions made by the [Board of Trustees]."]). Accordingly, the court finds that the petitioner has standing to challenge Resolutions 94-2017 and 152-2017 under the Open Meetings Law. Likewise, as the petition does not contest the right of any law firm to be paid their earned fees, the petition is not defective for a failure to join necessary parties.

The Town next contends that this cause of action should be dismissed because there has been no violation of the Open Meetings Law. As the essential facts surrounding the pre-meeting publication of the two Resolutions are not in dispute, the court deems the Town's motion to be its answer on this issue and decides the matters raised by the petition as follows.

The Second Department has explained that "[t]he Open Meetings Law was enacted in 1976 (L. 1976, ch 511) in an attempt to overcome the 'crisis of confidence in American politics occasioned by Watergate' (*Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124, 126-127 [1995]). It is this State's version of laws adopted nationwide, most commonly known as 'Sunshine Laws' (*id.* at 127 n) which were intended to restore the public's faith in governmental bodies by encouraging them to conduct business in a public manner. New York's Open Meetings Law is to be liberally construed to effectuate the legislative purpose (*see, Matter of Gordon v. Village of Monticello, supra; see also, Matter of Smith v. City Univ. of N.Y.*, 92 N.Y.2d 707 [1999]; *Matter of Goetschius v. Board of Educ. of Greenburgh Eleven Union Free School Dist.*, 244 A.D.2d 552 [1997])." (*Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 305 A.D.2d 83, 88 [2d Dept 2003]).

In essence, "[t]he purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public (*see, Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124, 126–127; *Matter of Sciolino v. Ryan*, 81 A.D.2d 475). Courts are empowered, 'in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the mandate of this legislation' (*Matter of New York Univ. v. Whalen*, 46 N.Y.2d 734, 735 [emphasis in original]; *see*, Public Officers Law § 107 [1]). It is the challenger's burden to show good cause warranting judicial relief (*Matter of New York Univ. v. Whalen*, 46 N.Y.2d, at 735, *supra*)." (*Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 686 [1996]).

"Although 'courts are empowered, in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the [the Open Meetings Law],' 'not every breach of the [Open Meetings Law] automatically triggers its enforcement sanctions'

(*Matter of New York Univ. v. Whalen*, 46 N.Y.2d 734, 735 [emphasis omitted])." (*Peehl v. Vill of Cold Spring*, 129 A.D.3d 844, 845 [2d Dept 2015]). Nullification may be appropriate, for example, where a meeting is convened with insufficient notice, at unreasonable starting times, or with improper exclusion of the public or the media. (*See Goetschius*, 244 A.D.2d 552, *Mitchell v. Board of Educ. of Garden City Union Free School Dist.*, 113 A.D.2d 924 [2d Dept 1985]).

Resolution 94-2017 is directed toward the award of a concrete replacement contract to a successful contract bidder. Petitioner contends that although the Action Calendar for the March 21, 2017 meeting listed this Resolution as having been "re-tabled" from the February meeting, no motion was made at the February meeting to table the resolution. Further, and more significantly, the petitioner states that the Town violated its obligations by failing to publish any supporting information regarding Resolution 94-2017, including the draft resolution document itself, or any of the "memorandum docket information" prior to the March 21, 2017 meeting.

A review of the transcript of the February 14, 2017 meeting indicates that Resolution 94-2017 was, in fact, tabled at that meeting. The Town does not dispute petitioner's assertion that neither the draft resolution nor any other documentation associated with Resolution 94-2017 were published at any time before its adoption. Nor does the Town explain why it was not practicable to publish the draft resolution or supporting documentation prior to the meeting, especially in light of the fact that the draft resolution was apparently prepared in advance of the February meeting. This sequence of events does constitute a violation of the Open Meetings Law. (*See Ballard v. New York Safety Track LLC*, 126 A.D.3d 1073 [3d Dept 2015]). Nonetheless, as the resolution had been opened and tabled at a previous meeting and appeared on the Action Calendar for the March 21, 2017 meeting, thus notifying residents that the item would be taken up for a vote, the petitioner has not established good cause to void Resolution 94-2017. With its appearance on the Action Calendar, petitioner or any other interested persons could have requested documentation associated with the Resolution. Moreover, the court notes that nullification at this point would be of no real effect as the parties have, appropriately, made the court aware that the Town Board recently duly passed Resolution 251-2017, which is, in its substance, identical to Resolution 94-2017. (*See Town of Moriah v. Cole-Layer-Trumble*, 200 A.D.2d 879 [3d Dept 1994]).

Resolution 152-2017 deals with approving payment of attorneys' fees to outside counsel for the Town. Petitioner states that this Resolution was introduced during the March meeting as a "Suspend the Rules," "Walk on Resolution." Again, the petitioner contends that the Town violated the Open Meetings Law by failing to publish in advance any information associated with the Resolution, including by failing to publish the actual draft resolution itself. In addition, petitioner asserts that based on a presentation provided at the meeting by the Town of Oyster Bay Town Attorney, the respondents had enough information and understanding of their intent to introduce and vote to adopt Resolution 152-2017 to provide the required information to the Town residents "so that they may intelligently understand and question their local government in regards to proposed and adopted resolutions."

The Town argues that in order to take advantage of a negotiated discount in legal fees for two of the Town's outside law firms, the Town Board adopted Resolution 152-2017 at its March 21, 2017 meeting. The Town asserts that negotiations with the two firms occurred over the weekend immediately preceding the March 21, 2017 meeting and that the resolution, together with its backup, was not finalized until the morning of the meeting. In addition, the Town asserts that prior to these negotiations, the Town owed $985,996.69 to one law firm, Covington & Burling LLP, and $601,304.06 to the other. According to the Town, the negotiations resulted in a savings of some $297,428.96. In addition, the Town asserts that the reductions were contingent on payment prior to April 30, 2017 and that delaying a vote until the next scheduled meeting on April 4, 2017, would have left payment "dangerously close" to that deadline. Further, the Town points out that the entire text of the resolution was read into the record and the floor was opened for comment prior to the vote. This last point is supported by the transcript of the meeting.

The Town's actions with respect to Resolution 152-2017 violated the spirit, if not the letter, of the Open Meetings Law. (*Goetschius*, 244 A.D.2d 552 ["The provisions of the Open Meetings Law . . . are to be liberally construed in accordance with the statute's purposes . . . ."]). In particular, it is not clear to the court, even accepting the Town's explanation, why after completion of negotiations just days before the March 21, 2017 meeting, the resolution could not have been put on for the early April meeting so that the appropriate notifications to the public could have been made. This is compounded by the issue that the previously adopted resolution to retain the law firm of Covington & Burling authorized far more limited fees (*see*, Respondents' Exhibit N, Resolution 786-2013). Although reading of the text into the record and taking comments at that point was some mitigation, the failure to advise the public in advance may have deprived those present of a better understanding of the resolution and/or kept away those who would have otherwise appeared. Nevertheless, as this Resolution was adopted to allow payment at a significant savings to the Town, the court does not find good cause to void the resolution. (*Goetschius*, 244 A.D.2d 552 ["Fixing the appropriate remedy . . . is expressly a matter of judicial discretion."]).

Despite the ruling today that the Resolutions should not be voided, because these violations suggest a pattern of behavior that undermines the purpose and function of the Open Meetings Law, and the court is unaware if the members of current Town Board have yet been trained, the court finds it appropriate that all members of the Town Board be required to participate in a training session on Open Meetings Law conducted by the New York State Committee on Open Government. In this regard, the court notes that counsel for the respondents has not addressed whether and when training was previously attended.

(B) Building Code Enforcement

By his second cause of action, the petitioner seeks an order directing the Town (or the relevant code compliance bureau officials) to immediately issue summonses to Mr. Saladino and Mr. Antetomaso for violation of Town Code Chapters 93 (Building Construction) and 246-14

(Zoning Enforcement). Petitioner alleges that he has submitted to the Town the appropriate code enforcement Requests for Investigation, with regard to a property owned and occupied by Mr. Saladino and a property owned and occupied by Mr. Antetomaso. Petitioner states that prior to submitting these investigation requests, he met with public officials, including the Deputy Commissioner of Planning and Development to review Mr. Antetomaso's building file and found no building permits or other required building documents indicative of any of the construction performed on Mr. Antetomaso's property after Super Storm Sandy in 2012. Similarly, petitioner made a FOIL request for the building file on the property owned by Mr. Saladino. The petitioner states that he "found no evidence to support any of the massive reconstructive construction performed at the residence of the Interim Supervisor" and that the building file contained "zero documentation regarding any construction or electrical work" done at the premises. Petitioner alleges that "Mr. Saladino and Mr. Antetomaso have admitted they are in violation of town building codes." Petitioner further states that the Town has not fully responded to his request for investigation and has taken no corrective action with respect to these violations.

Petitioner's requested relief is in the nature of mandamus to compel, which does not lie for a discretionary act. (*See Kroll v. Vill. of E. Hampton*, 293 A.D.2d 614, 615–16 [2d Dept 2002] ["[T]o the extent that the petition seeks to have the Village Code Enforcement Officer enforce the Village's zoning ordinances, it is in essence a request for relief in the nature of mandamus . . . which does not lie to compel the performance of a discretionary act."]; *see also Cooney v. Town of Wilmington Zoning Bd. of Appeals*, 140 A.D.3d 1350 [3d Dept 2016]; *Church of the Chosen v. City of Elmira*, 18 A.D.3d 978 [3d Dept 2005]).

Likewise, the court is without authority to order a state or local administrative or law enforcement agency to institute an investigation of petitioner's allegations. Nor is the court aware of any statutory authority empowering it to conduct a summary judicial inquiry in this context. (*See, e.g. James v. Farina*, 53 Misc. 3d 704 [Sup. Ct. N.Y. County 2016] [explaining that Section 1109 of the New York City Charter authorizes judicial inquiry upon application by certain enumerated individuals, including a group of taxpayers, into any alleged violation or neglect of a duty in relation to the property, government or affairs of the City of New York]; *Riches v. New York City Council*, 75 A.D.3d 33 [1st Dept 2010]). Accordingly, the second cause of action must be dismissed because it fails to state a claim upon which the court can grant relief.

(C) Petitioner's FOIL Requests

The standards governing New York's Freedom of Information Law are well known.

> The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230 [2005] [internal quotation marks and citation omitted]). An agency's records "are presumptively open to public inspection, without regard to need or purpose of the

applicant" (*Matter of Buffalo News v. Buffalo Enter. Dev. Corp*., 84 N.Y.2d 488, 492 [1994]). When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search (*see*, Public Officers Law § 87 [2]; § 89 [3]; *Matter of Corvetti v. Town of Lake Pleasant*, 239 A.D.2d 841, 843 [3d Dept 1997]).

(*Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 440-441 [2005]).

> [W]hile the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government to keep some matters confidential. To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, § 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure (*see, Church of Scientology of N.Y. v. State of New York*, 46 N.Y.2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.

(*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 [1979]).

Without doubt, the FOIL exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of the government." (*Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 [2007]). Accordingly, the government entity seeking to deny disclosure "must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." (*Id.* at 462-463).

Although the Public Officers Law does not mandate a specific time period in which the responding agency must grant access to records, upon receipt of a request, an agency has five business days in which it must either grant access to the records, deny access or furnish a written acknowledgment of the receipt of such request including a statement of the approximate date on which the request will be granted or denied. (*Id.* at 465).

The parties dispute, as a matter of fact, whether the petitioner's various FOIL requests have been complied with. Less controversial is the petition's timeliness or the petitioner's entitlement to the requested records, with the exception of petitioner's request concerning applications for the position of Public Safety Commissioner – Request No. 27869. On May 23, 2017, the court attempted to have a conference to ascertain which requests may have been satisfied, and which were outstanding. This attempt was to no avail and the court remains without facts sufficient to ascertain whether any requests have been fully satisfied. Accordingly, the court makes the following determinations as to the petitioner's FOIL requests.

Request number 28147:

This request seeks certified copies of the monthly financial statements prepared by the Supervisor for the Town Board and filed with the Town Clerk for the period of January 2016 through December 2016.

The Town does not dispute the petitioner's entitlement to these financial statements and contends that it made copies of 5,562 pages of records available to the petitioner on March 16, 2017. The Town states that the Petitioner paid $1,390.50 for the records. The Town notes that if certification was inadvertently omitted, the Town will provide the same to the petitioner.

Petitioner states that this is false and that he was told the documentation was ready but the requested materials were never provided. In addition, petitioner states that he never paid for the records as the Town asserts he did.

These materials must be produced. The Town shall make the requested financial statements available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 28148:

This request seeks billing documents submitted by the law firm of Foley Griffin, LLP.

The Town does not dispute the petitioner's entitlement to these billing documents. Instead, the Town contends that it made certified copies of the requested records available on or about March 16, 2017 and thus has satisfied its FOIL obligations.

Petitioner asserts that the Town refused to provide stamped, certified original copies of these documents.

These materials must be produced. The Town shall make the requested billing documents available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 28149:

This request seeks certified copies of all email activity– both sent and received emails by James Altadonna in his capacity as TOB Town Clerk from January 1, 2016 through December 31, 2016.

The Town does not dispute the petitioner's entitlement to these records. Instead, the Town states that it is still processing the request and informed the petitioner that the records would be available on or about May 3, 2017. Thus, according to the Town, the branch of the petition concerning request 28149 is premature.

Petitioner questions why the Town could not provide the requested email materials on a rolling basis as they are collected rather than delaying production until all emails have been collected.

These materials must be produced to the extent that they are not protected by a privilege. The Town shall make all requested non-privileged emails available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 28150:

This request seeks certified copies of all email activity both sent and received emails by the Town's Freedom of Information Office for the time period of January 1, 2016 through December 31, 2016.

The Town does not dispute the petitioner's entitlement to these records. Instead, the Town states that it is still processing the request but does not provide a date by which the documents will be available. Thus, according to the Town, the branch of the petition concerning request 28150 is premature.

As is the case with request number 28149, petitioner states that the Town is delaying its response and questions why the Town could not provide the requested email materials on a rolling basis as collected.

These materials must be produced to the extent that they are not protected by a privilege. The Town shall make all requested non-privileged emails available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 28383:

This request seeks certified copies of TOB Work Claim forms submitted by Andrew Mel Kenny to the Town for the entire period of time Andrew Mel Kenny has been employed and compensated as a consultant for the Town.

The Town does not dispute petitioner's entitlement to these records. Instead, the Town contends that the petitioner reviewed and paid for 104 of 149 responsive pages but refused to review or pay for the balance. According to the Town, it has fully complied with its obligations concerning this request.

Petitioner contends that the Town Clerk tried to substitute non-relevant documents instead of the records sought and he therefore refused to proceed with the transaction.

These materials must be produced. The Town shall make all requested Work Claim forms available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 27869:

This request seeks certified copies of the following documents related to the hiring of the Town's Commissioner of Public Safety:

1. The resolution which approved the Town Clerk's required notifications that the Town was accepting applications for the position of Commissioner of Public Safety.

2. The notification published by the Town Clerk in association with the announcement.

3. The canvas letter that was sent to police organizations and posted on the ASIS web site.

4. The 26 applications received in response to the notice.

5. The complete application documents and interview records submitted by the twelve people who were interviewed for the position by the selection committee.

6. All documents including emails forwarded by the Selection Committee to the Interim Supervisor and Town Board prior to the vote to pass Resolution 93 on February 14, 2017, which were not previously provided in the memorandum docket material published on the Town Clerk's web page.

The Town contends that on or about March 22, 2017, the Town Clerk sent a detailed letter to the petitioner, in which he indicated that some of the records were available for review, while others, including applications, were being withheld from production. In particular, the Town's letter stated that copies of the canvas letters and posting to the ASIS website, as well as Commissioner's McCaffrey's resume were available for the petitioner's review.

The letter further stated that following diligent search, no records were found constituting a "resolution which approved the Town Clerk's required notifications that the Town was accepting applications for the position of Commissioner of Public Safety," a "notification published by the Town Clerk in association with the announcement," or "correspondence or emails forwarded by the evaluation committee to Acting Supervisor Muscarella and members of the Town Board prior to the adoption of Resolution 93-2017."

In addition, the Town stated that the scoring sheets used by the evaluation committee were not subject to disclosure because they do not contain factual data, but rather contain opinions, ideas, or advice exchanged as a part of the deliberative process. In addition, the Town stated that the resumes of the 26 applicants who indicated interest in the position were not subject to disclosure because such disclosure would constitute an unwarranted invasion of personal privacy. The petitioner contends that the Town should have provided him with as much information as possible after redacting any identifying portions of the documents sought.

In this proceeding, the Town maintains its position that the resumes of the 26 applicants for Public Safety Commissioner are exempt from disclosure under §§ 89(2)(b) and (7) of the Public Officers Law. This exemption provides, in essence, that "an unwarranted invasion of personal privacy includes . . . disclosure of employment . . . histories or personal references of applicants for employment" and that nothing in Article 89 shall "require the disclosure of the name or home address of . . . an applicant for appointment to public employment . . . ."

The Town contends that the petitioner did not exhaust the administrative remedies available to him by filing an appeal with the Town and is thus barred in this proceeding. This argument is unavailing because the Town's March 22, 2017 response letter did not advise the petitioner of his right to take an appeal. (*See Purcell v. Jefferson County District Attorney*, 77 A.D.3d 1328 [4th Dept. 2010]; *Carnevale v. City of Albany*, 68 A.D.3d 1290, 1291 [3d Dept. 2009]; *Matter of Cullum v. Goord*, 45 A.D.3d 1212 [3d Dept. 2007]; *Pennington v. Clark*, 307 A.D.2d 756, 757 [4th Dept. 2003]).

Significantly, Public Officers Law 89(c)(i) provides that disclosure shall not constitute an unwarranted invasion of personal privacy when identifying details can be deleted. Furthermore, previous public employment may be subject to disclosure because "public employment is, by dint of FOIL itself, a matter of public record." (*See Kwasnik v. City New York*, 262 A.D.2d 171 [1st Dept 1999]). In this regard, the court finds instructive *Matter of Police Benevolent Assn. of N.Y. State, Inc. v. State of New York*, 145 A.D.3d 1391 [3d Dept 2016], a case cited by the respondents. In that case, the petitioner requested all resumes, applications, and/or correspondence submitted by unsuccessful job applicants for high ranking positions at SUNY police departments. The court explained that § 87(2)(b) "does not . . . categorically exempt such documents from disclosure. To the contrary, Public Officers Law § 89 expressly permits an agency to delete 'identifying details' from records that it makes available to the public (Public Officers Law § 89 [2] [a]), and provides that 'disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when [such] identifying details are deleted.'" (*In*

re Police Benevolent Assn., 145 A.D.3d at 1392). There, as here, the respondents argued that given the "prominent nature of the positions and the limited number of applicants, disclosure of the requested documents, even with appropriate redactions, could lead to the identification of the unsuccessful applicants." Nonetheless, the Third Department determined that "[s]uch speculation . . . does not rise to the level of a particularized and specific justification for denying access to the entirety of the requested" and the respondents did not "demonstrate any factual basis for their assertion that the requested documents cannot be redacted in such a manner as to protect the identity of the individual applicants." (*Id.* at 1393). The court remitted the matter to the trial court for an *in camera* inspection of the requested documents to determine the extent to which they contain information exempt from disclosure and the extent to which such information could be redacted. (*Id.*; *see also Data Tree*, 9 N.Y.3d at 463-464). Here, too, the Town shall submit to the court by June 30, 2017 the requested applications for an *in camera* inspection, along with proposed redactions, so that the court can determine whether information exempt from disclosure can be redacted while still protecting the personal privacy of the applicants. The parties will be advised of the status of the court's determination during the conference on July 18, 2017.

Request number 27871:

This request seeks a ***complete*** certified copy of the complete May 10, 2016 transcripts/notes from the May 10, 2016 Town Meeting.

The Town contends that a certified copy of the records has been provided to the Petitioner and that it has satisfied its FOIL obligations.

Petitioner asserts that the Town refused to provide stamped, certified original copies of these pages. He states that the letter certifying the records is not sufficient.

These materials must be produced. The Town shall make a complete copy of the requested transcripts/notes from the May 10, 2016 Town Meeting available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

Request number 28471:

This request seeks to review any and all documents and records such as work claims, money transfer records or any other documents which substantiate the total amount paid to Steven Leventhal or his firm Leventhal, Mullaney & Blinkoff, LLP by the Town for any and all services rendered in their capacity as ethics counsel or for any other services in which they received monetary or other compensation from the Town from 2010 through the date of the request.

The Town does not dispute that the petitioner is entitled to these records. Rather, the Town contends that on March 23, 2017, the petitioner was advised that the records were available for his review.

Petitioner states that the Town has provided none of the requested records.

These materials must be produced. The Town shall make the requested materials available to the petitioner in certified form, subject to the cost provisions of FOIL, within 30 days of service of a copy of this order with notice of entry upon counsel for the respondents. The parties are directed to appear before this part on July 18, 2017 for a conference to confirm that this request has been satisfied.

For the foregoing reasons, it is hereby:

ORDERED, that with respect to the first cause of action, the Oyster Bay Town Board shall report to the New York State Committee on Open Government for a training session and a copy of this order shall be served on both the Town Board and the New York State Committee on Open Government; and it is further

ORDERED, that the second cause of action is dismissed; and it is further

ORDERED, that with respect to the third cause of action, the Town is directed to comply with the petitioner's FOIL requests as herein provided.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 2, 2017

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

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APPLICATION FOR PUBLIC ACCESS TO RECORDS
TOWN OF RIVERHEAD

F#06-_____

Section 1: TO BE COMPLETED BY APPLICANT

Department: _____
(Department from which record is sought)

I hereby apply to inspect the following record. (Please specifically describe the record sought. If possible, supply a date, a file title, tax map number (where applicable) and other information that will help locate the record desired).

_____

_____

_____

Suffolk County Tax Map No. (if applicable): 0600 - _____- _____- _____

Documents to be reviewed? Yes _____ No _____

Documents to be copied? Yes _____ No _____

Date of Application: _____

Print name and mailing address of applicant: _____

_____

_____

Telephone #: _____

Signature of Applicant: _____

Please remit this Application to the Town Clerk's Office.

A letter will be mailed to you indicating your request is being processed within 5 business days of receipt.

Section 2: NOTICE TO DEPARTMENT SUPERVISORS
Please return a completed copy of this form to the Records Access Officer by _____.

Section 3: FOR USE BY DEPARTMENT SUPERVISORS ONLY
**Please note: requests can be denied in part, and granted in part.

____ Records located (please specify details below)
If copies are requested, please specify ____ pages and/or ____ maps
If redactions are necessary, please specify the type of information to be redacted:
_____

____ Denied: Reason for denial: ____ (Insert # corresponding to applicable reason for denial as listed on second page of this form)

____ Need additional time to process request
Number of days: ____
Reason for delay: _____

____ Records cannot be found after diligent search
Please specify what steps were taken to locate documents and by whom (please include dates of each step taken):
_____
_____
_____
_____

_____ _____ _____ _____
Name Signature Title Date

REASONS FOR DENIAL

1. Record(s) specifically exempted from disclosure by state or federal statute: _____(provide applicable state or federal statute section).

2. Disclosure would constitute an unwarranted invasion of personal privacy as follows:
   (a) disclosure of employment, medical or credit histories or personal references to applicants for employment;

   (b) sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

   (c) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

   (d) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

   (e) release of names and addresses of those persons filing complaints.

3. Disclosure would impair present imminent contract awards or collective bargaining agreements.

4. Records are trade secrets or are maintained for the regulation of commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise.

5. Records are compiled for law enforcement purposes and, if disclosed, would:
   (a) interfere with law enforcement investigations or judicial proceedings;

   (b) identify a confidential source or disclose confidential information relating to a criminal investigation;

   (c) reveal criminal investigative techniques or procedures, except routine techniques and procedures.

6. Disclosure would endanger the life or safety of a person or persons.

7. Record(s) are inter-agency or intra-agency materials which are not:
   (a) factual or statistical tabulations or data;

   (b) instructions to staff that affect the public;

   (c) <u>final</u> agency policy or determinations.

<u>EXPLANATIONS OF REASONS FOR DENIAL:</u>