

Monroe County Clerk's Index Number E2020009879
Appellate Division Fourth Department Index Number CA 21-01191

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of
NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

-against-

CITY OF ROCHESTER and ROCHESTER POLICE DEPARTMENT

Respondents-Respondents,

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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COURT OF APPEALS
OF THE STATE OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

v.

Petitioner-Appellant

CITY OF ROCHESTER and THE ROCHESTER
POLICE DEPARTMENT

Respondents-Respondents.

NOTICE OF MOTION
FOR PERMISSION TO
APPEAL TO THE NEW
YORK COURT OF
APPEALS PURSUANT
TO CPLR 5602(a)(1)(i)

COURT:

PLEASE TAKE NOTICE, that Respondents-Respondents, City of Rochester and the Rochester Police Department (hereinafter “the City”) will move this Court, pursuant to CPLR 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, Fourth Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on Tuesday, December 27, 2022 for an order granting permission to appeal to this Court from a Decision and Order of the Appellate Division, Fourth Department, entered on November 15, 2022 (“Decision and Order”).

DATED: December 14, 2022
Rochester, New York

LINDA S. KINGSLEY, CORPORATION COUNSEL

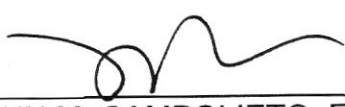

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PROCEDURAL HISTORY SUMMARY

This matter started with the New York Civil Liberties Union (hereinafter “Appellant”) submitting a Freedom of Information Law request dated September 15, 2020 (“FOIL Request”), which sought a great number of documents related to Rochester Police Department (hereinafter “RPD”) disciplinary records. *See Record pg. 21 (hereinafter R. pg. 21)*. The FOIL request was accompanied by a letter detailing Appellant’s request. *See R. pgs. 76-84*. The City of Rochester Department of Communications, which handled all FOIL requests at that time, received Appellant’s Request on September 15, 2020, and assigned FOIL # RR20-04503 as the identifying number for that request. *See R. pg. 86*.

The request dealt generally with police disciplinary records, information previously protected by the Civil Rights Law §50-a, until the New York State Legislature repealed that law on June 12, 2020. The City of Rochester (hereinafter “City”) set a date of March 31, 2021 as the anticipated date by which the FOIL Request would be responded to. The reason for the extended date was because the FOIL Request requested a great volume of police records, which needed to be reviewed and prepared for disclosure. *See R. pgs. 127-129*.

On November 10, 2020 Appellant sent a letter to the City stating that they were confused with how the City handled their FOIL request and that they were

appealing the “constructive denial” of their request as the anticipated March 31, 2021 date was not reasonable. *See R. pg. 96.* There was no further correspondence between the parties until the first Article 78 was filed on December 14, 2020.

In part, because of the scope of the FOIL request of the Appellant, and a desire to provide open access to the public, the City created a public database of all sustained police discipline of all active officers of the Rochester Police Department.

After the City submitted its FOIL production on March 9, 2021, it continued to work with Appellant to clarify and provide any document which may not have been sent to the Appellant in response to its FOIL request. On May 17, 2021 the Petitioner filed a supplemental memorandum of law and attorney affirmation. *See R. pgs. 139-140.* The City continued to supply documents and submitted its response to the trial court in opposition to the Appellant’s Article 78 Petition and supplemental memorandum. *See R. pgs. 175-179.* The Article 78 proceeding ultimately focused on the production of internal police complaints and investigative files that were unsubstantiated or that predated the repeal of Civil Rights Law §50-a.

The trial court issued a decision on August 10, 2021 dismissing the Article 78 Petition. (*R. pgs 11-13*). A Notice of Appeal was filed by the Appellant on August

23, 2021 (*R. pg. 4*) and this Appeal was perfected on February 22, 2022 in the Fourth Department.

The City submitted Responsive papers on June 16, 2022 and argument was heard on September 12, 2022. The Appellate Division, Fourth Department issued a final decision on November 10, 2022. Fourth Department Appellate Division Decision attached as Exhibit A. The Notice Entry of the Decision and Order was filed with the New York State Court's Electronic Court Filing System on November 15, 2022 but not otherwise served on Respondents.

PRELIMINARY STATEMENT

Having reviewed the pleadings and the evidence made part of the record, Respondents/Respondents, City of Rochester and the City of Rochester Police Department (hereinafter “the City”), are moving this Court for leave to appeal to the Court of Appeals. See Exhibit A.

The City appeals from the Decision and Order the Appellate Division, Fourth Department. The aforementioned decision, a final order, initially brought as a challenge to a public office or body (the City) by way of an Article 78 proceeding filed in Monroe County Supreme Court.

The case presents substantial issues regarding FOIL procedure and Public Officers Law which will resonate throughout the entirety of the State of New York. This matter deals directly with the application of FOIL to law enforcement internal investigation and disciplinary records since the revocation of §50-a of the New York Civil Rights Law by the New York State Legislature.

Revocation of Civil Rights Law

On June 12, 2020 the New York State Legislature repealed Civil Rights Law §50-a (“§50-a”), which had previously barred disclosure on personal privacy grounds of police officers’ personnel records, including unsubstantiated complaints of misconduct. The intention of § 50-a was to prevent harassment and reprisals against police officers and limit improper cross-examination in criminal and civil

matters. Following the repeal of §50-a, a flood of requests were made throughout the state for access to police internal investigation and disciplinary records, irrespective of the reason therefor. This case is one of the first cases to be decided at the appellate court level dealing with the production of records of unsubstantiated complaints against a police officer and if the repeal of Civil Rights Law 50-a is to be applied retroactively. The other matter that has been decided at the appellate court level is the companion case to the City of Rochester which is *New York Civil Liberties Union v. the City of Syracuse* (CA 21-00796, AD 4).

This case presents substantial questions of New York Law applicable to municipalities across the entire State of New York. Though there is no Court of Appeals ruling or other appellate level decisions on this application of the law, because of the recentness of the repeal of §50-a there are conflicting decisions at the trial court and agency level.

While municipal and government employees have long had their their personnel files and work disciplinary history protected from public disclosure on privacy grounds, following repeal of §50-a, arguments are now being made that police officers should not have the same privacy protections as other public employees. Notwithstanding the repeal of §50-a, police officers should not have to be subjected to public scrutiny over complaints that are not found to be meritorious.

This is an issue of state-wide significance; as such, this motion for leave to appeal to the Court of Appeals should be granted.

TIMING

Appellants filed the Notice of Entry of the Appellate Division's Decision on November 15, 2022 with no other additional service of the Notice of Entry. Thus service of this Motion for Leave to Appeal is timely when filed on or before December 15, 2022

JURISDICTIONAL STATEMENT

This action originated in the Supreme Court Monroe County by way of an CPLR Article 78 proceeding demanding that the City act in a manner consistent with Petitioner's FOIL request. See the original FOIL request by Petitioner-Appellant attached hereto as Exhibit B. The trial court issued a judgment which dismissed the Article 78 proceeding. On appeal, the Fourth Department issued a final decision which modified the judgment so appealed from by granting the claim seeking law enforcement disciplinary records dated on or before June 12, 20220 and law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law §87(2), and otherwise affirmed the judgment below. See Fourth Department Appellate Division Decision attached as Exhibit A. Accordingly, this

Court has jurisdiction over the City's leave to appeal and its proposed appeal pursuant to CPLR §5602(a)(1)(i) and Rule 500.22 of the Rules of the Court of Appeals.

STATEMENT OF QUESTIONS PRESERVED FOR REVIEW

A. Should all unsubstantiated police complaints and disciplinary records be turned over based on a FOIL request? The Court determined that Respondents were to provide all police disciplinary records including records, termed by the Appellant and the Court as “unsubstantiated”, in regards to citizen complaints or internal investigations against police officers. Respondents argue that the revisions to the FOIL law itself define a law enforcement disciplinary record narrowly, as one created in furtherance of a disciplinary proceeding, and that unsubstantiated investigations do not fall within this definition because they do not result in service of any disciplinary charges or the institution of a disciplinary hearing. Further, respondents maintain that production of unsubstantiated investigations would constitute an unwarranted invasion of privacy, which disclosure is exempted by Public Officer’s Law §87(b)(2).

ARGUMENT AS TO WHY LEAVE SHOULD BE GRANTED

A. RECORDS OF UNFOUNDED, EXONERATED AND UNSUBSTANTIATED INVESTIGATION ARE NOT LAW ENFORCEMENT RECORDS UNDER THE FOIL LAW

Public Officers Law § 86 define a Law Enforcement Disciplinary Record as any record created in furtherance of a law enforcement disciplinary proceeding. A law enforcement disciplinary proceeding is defined as “the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law

enforcement agency.” Thus, a disciplinary proceeding is defined conjunctively as both the commencement of an investigation and a subsequent hearing or disciplinary action. Where an investigation is unfounded, exonerated or unsubstantiated, finding no misconduct, there is neither a hearing or disciplinary action and, accordingly, an unsubstantiated investigation does not meet the definition of a record created in furtherance of a disciplinary proceeding. In short, following an unsubstantiated investigation, no charges are served, no process is issued nor is any proceeding commenced. Accordingly, such records cannot be considered to have been created in furtherance of any disciplinary proceeding.

This is consistent with the general legal definition of a proceeding, which requires not merely an investigation and findings, but the commencement of legal or administrative process. For instance, Black’s Law Dictionary, 9th Ed., defines a “proceeding” as: “(1) The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. (2) Any procedural means for seeking redress from a tribunal or agency. (3) An act or step that is part of a larger action. (4) The business conducted by a court or other official body; a hearing.” Thus, where an investigation does not find misconduct and no disciplinary proceeding is commenced, it cannot be said that the investigative file is created in furtherance of a disciplinary proceeding and, thus, an unsubstantiated investigation (and, likewise, an exonerated or unfounded

investigation) is not a law enforcement disciplinary record subject to disclosure under the plain language of the Public Officers Law.

B. UNFOUNDED, UNPROVEN AND UNSUBSTANTIATED ALLEGATIONS ARE EXEMPT FROM DISCLOSURE PURSUANT TO STATUTORY EXEMPTIONS

The revocation of §50-a, in combination with the Fourth Department's decision, would require municipal entities to turn over all unsubstantiated disciplinary/personnel information, subject to redaction of any information that would operate as an unwarranted invasion of personal privacy. It is respondent's position that disclosure, even in redacted form, of unsubstantiated records risks an unwarranted invasion of privacy of the subject and witness officers involved in the investigation, as there may be details of any particular incident that, when made known to the public, have a tendency to reveal the identities of the officers involved in the underlying unproven (or unfounded or exonerated) incident.

The Committee on Open Government has long opined that unsubstantiated internal investigations and complaints could be withheld from disclosure under Public Officers Law § 87(2) as an unwarranted invasion of privacy. And the repeal of former Civil Rights Law § 50-a does not require documents related to unsubstantiated claims against police officers be released. The Court in *Gannett v. Herkimer* stated—examining the intent of the repeal of Civil Rights Law §50-a and the statutory exemptions in the FOIL law--- that disclosure of records related to

unsubstantiated complaints would constitute an unwarranted invasion of privacy. See also *NYCLU v. City of Syracuse*, 72 Misc. 3d 458 [NY Sup Ct 2021].

The revocation of New York State Civil Rights Law §50-a on June 12, 2020 did not change privacy protections afforded by Public Officers Law to the documents sought or the officers to which they pertain, prior to the repeal of §50-a. *Brighton Police Patrolman Association, et al. v. Brighton Police Chief David Catholdi, et al.*, Index Number I2020002814, No. 2021-37978 [N.Y, Sup. Ct. Apr. 16, 2021]. *People v. Francis*, 164 N.Y.S. 3d 358. Privacy of those officers would be greatly impacted and must continue to be protected by FOIL exemptions included in Public Officer's Law §87. See *Comm. On Open Govt. FOIL AO 19775 (July 27, 2020)* which states clearly, after the repeal of Civil Rights Law § 50-a and in a manner worthy of judicial consideration:

[I]n the absence of judicial precedent or legislative direction, that the law does not require a law enforcement agency to disclose “unsubstantiated and unfounded complaints against an officer” where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2)(a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in


disciplinary action, the records relating to such allegations may in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy. *Comm. On Open Govt. FOIL AO 19775 (July 27, 2020).*

The repeal of § 50-a did not strip police officers of the privacy protections that the Committee on Open Government has long opined to be held by other public employees. Where an internal investigation does not sustain an allegation of misconduct, the municipality should be able to withhold those documents in ensure that the individual police officer's privacy interests are adequately protected. *Matter of N.Y. Civ. Liberties Union v. City of Syracuse*, 2021 N.Y. Misc. LEXIS 2210. *See also Comm. On Open Govt. FOIL AO 19775 (July 27, 2020).*

CONCLUSION

For the foregoing reasons, the City of Rochester and City of Rochester, Respondents-Respondents, request that this Court grant them leave to appeal.

Dated: Rochester, New York
December 14, 2022



JOHN M. CAMPOLIETO

EXHIBIT A

Appellate Division, Fourth Judicial Department

685

CA 21-01191

PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT J. HODGSON OF COUNSEL), AND SHEARMAN & STERLING LLP, WASHINGTON, DC, FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 10, 2021 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking disclosure of law enforcement disciplinary records dated on or before June 12, 2020 and seeking disclosure of law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Rochester (City) and Rochester Police Department (RPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 et seq.), certain law enforcement disciplinary records. Petitioner appeals from a judgment that granted the petition in part and ordered the City and RPD to produce certain police disciplinary records under FOIL, but denied the petition with respect to the production of records from proceedings conducted on or before June 12, 2020 and with respect to records related to unsubstantiated claims or complaints.

Initially, we agree with petitioner that, as respondents correctly concede, respondents did not deny petitioner's FOIL request on the ground that the legislation repealing former Civil Rights Law § 50-a and amending FOIL concerning disciplinary records of law

enforcement agencies (see L 2020, ch 96, §§ 1-4 [effective June 12, 2020]) should not be applied retroactively, and thus Supreme Court erred in relying on that theory as a ground for denying the petition in part (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]).

We conclude—for the reasons stated in *Matter of New York Civ. Liberties Union v City of Syracuse* (— AD3d —, — [Nov. 10, 2022] [4th Dept 2022] [decided herewith])—that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87 (2) (b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue. Further, for the reasons stated in *New York Civ. Liberties Union* (— AD3d at —), we reject petitioner's contention that it should be awarded attorneys' fees and costs.

We therefore modify the judgment by granting those parts of the petition seeking law enforcement records dated on or before June 12, 2020 and seeking law enforcement disciplinary records concerning unsubstantiated claims of RPD officer misconduct, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2). Respondents are directed to review the requested law enforcement disciplinary records, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any records or portions thereof that are redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (see *Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], lv denied 31 NY3d 904 [2018]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

EXHIBIT B

SHEARMAN & STERLING LLP

401 9th Street, NW
Washington, DC 20004-2128
+1.202.508.8000

September 15, 2020

VIA ONLINE SUBMISSION

The Communications Bureau
Rochester City Hall
Room 202A
30 Church Street
Rochester, NY 14614

Re: Request Under Freedom of Information Law for Public Access to Records

Dear Records Access Officer:

On behalf of the New York Civil Liberties Union (“NYCLU”), I respectfully request that copies of the following Rochester Police Department (“RPD”) records be provided to the NYCLU pursuant to the New York Freedom of Information Law (“FOIL”), N.Y. Pub. Off Law § 85, *et seq.* The NYCLU is deeply concerned about the death of Daniel Prude, a Black man who reportedly died of asphyxiation after RPD officers pinned him to the ground while restraining him. Similar allegations of racially-biased policing are pervasive throughout the state. For decades, documents bearing on these practices have been hidden behind N.Y. Civil Rights Law Section 50-a, a state law that the legislature recently repealed to encourage transparency and police accountability. The NYCLU now is moving forward with a project to identify potential patterns of discriminatory policing that had previously been kept secret under Section 50-a. To this end, we submit this FOIL request for the records requested below.

Unless otherwise indicated, the time period for all documents requested below is January 1, 2000 to the Present (the “Relevant Time Period”). If records from January 1, 2000 are not available, please provide records from the earliest date after January 1, 2000 that such records are available.

Law Enforcement Disciplinary Records¹

1. All disciplinary records of all law enforcement officers employed by the RPD during the Relevant Time Period, including without limitation, for civilian complaints that were substantiated, unsubstantiated, or open, all materials regarding corrective and disciplinary

¹ As used herein, the term “law enforcement disciplinary records” has the same meaning as provided in N.Y. Pub. Off Law § 86(6).

measures, if any, taken against law enforcement officers. This Request includes, but is not limited to, all law enforcement officers and other RPD employees involved with the March 22, 2020 incident involving Daniel Prude.

Use of Force

2. All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning officers' use of force,² including without limitation:
 - a. All policies and guidelines concerning record-keeping requirements associated with the use of force, including the length of time these records must be retained; and
 - b. Examples of all forms or reports (*i.e.*, blank forms or reports) used to document uses of force.
3. All records regarding uses of force, including without limitation, analyses, statistics, memoranda and reports (including with respect to both specific incidents and aggregate analyses).

Stops/Temporary Detentions/Field Interviews

4. All records documenting stops³ and field interviews, including but not limited to, records sufficient to identify the race, gender, and location of any person stopped, detained, or interviewed.
5. All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning stops and field interviews, including without limitation:
 - a. All policies and guidelines concerning record-keeping requirements for stops and field interviews, including the length of time these records must be retained; and
 - b. Examples of all forms or reports (*i.e.*, blank forms or reports) that officers are required to complete to document stops and field interviews.

² As used herein, the term "use of force" means: (a) the use of weapons, including, but not limited to, firearms, tasers, nightsticks, tactical batons, or the use of a chemical agent (*e.g.*, mace, pepper spray) capable of causing discomfort or pain; and (b) the use of bodily force that includes a degree of physical contact, including, but not limited to, striking, kicking, pushing, punching, biting, choking, the use of pressure point controls and physical restraints, or the use of bicycles or other vehicles to physically control people's movement.

³ As used herein, the term "stops" means temporary detentions of either, or both, pedestrian stops or vehicle traffic stops by police officers employed by the RPD.

Civilian Complaints

6. All civilian complaints against law enforcement officers.
7. All records regarding the manner in which civilian complaints against law enforcement officers are investigated, including:
 - a. The number, qualifications, and affiliation or assigned division of investigators assigned to investigate complaints;
 - b. The process, policies, and procedures for recording witness accounts;
 - c. Policies regarding the referral of complaints to the RPD Professional Standards Section office (“RPD PSS”); and
 - d. The process, policies, and procedures by which the RPD PSS determines whether a complaint has been substantiated or corroborated.
8. All current directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning civilian complaints against law enforcement officers, including without limitation:
 - a. The receipt, intake, investigation, and adjudication of complaints alleging misconduct by the RPD or officers employed by the RPD; and
 - b. Disciplinary and civilian complaint monitoring systems for police officers.
9. All current materials produced for the purpose of educating the public on the RPD’s complaint process, including, but not limited to:
 - a. Examples of all forms made available to members of the public to file a complaint against the RPD or specific officers.
10. All records sufficient to identify, per calendar year, organized on a precinct, ward, township, or zone basis if possible and, if not, on a department-wide basis, the average, minimum, and maximum number of days to investigate:
 - a. All civilian complaints against law enforcement officers;
 - b. All civilian complaints against law enforcement officers deemed unsubstantiated; and
 - c. All civilian complaints against law enforcement officers deemed substantiated.

11. All records sufficient to identify, per calendar year, the number of days that open complaints have been or were pending organized on a department-wide and precinct, ward, township, or zone basis.
12. Records sufficient to identify the total number of civilian complaints per calendar year, broken down by the subject of the complaint (the categories used internally to categorize complaints are sufficient for the purposes of this request), including without limitation, complaints about bias-based policing⁴, racial profiling⁵, the use of force, and vehicle traffic stops, pedestrian stops or temporary detentions.
 - a. All policies, procedures, and guidelines concerning the investigation of civilian complaints;
 - b. For each category of complaints, please also provide the data broken down by the outcome (*e.g.*, substantiated, unsubstantiated, or open) of the complaints, and broken down by the race and gender of the complainant;
 - c. For each category of complaints, please also provide the data broken down by precinct, ward, township, or zone basis; and
 - d. For substantiated complaints in each category, please identify what disciplinary action was taken, if any.

RPD Professional Standards Section

13. All directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning the RPD PSS, including without limitation:
 - a. All policies and guidelines concerning record-keeping requirements associated with the RPD PSS, including the length of time these records must be retained by the RPD in an electronic database or in any other format. This includes policies and procedures concerning reporting and review that occurs both on-scene and after the incident.
 - b. Examples of all forms or reports (*i.e.*, blank forms or reports) used to document use of force.

⁴ Bias-based policing includes, but is not limited to, the intentional or unconscious use of race, ethnicity, national origin, gender, gender expression, sexual orientation, or religion in initiating and carrying out law enforcement action, whether actual or perceived by the complainant.

⁵ Racial profiling includes, but is not limited to, the intentional or unconscious use of race, ethnicity, or national origin as grounds for suspecting a person of having committed a crime, whether actual or perceived by the complainant.

14. All records regarding the structure, composition, and staffing of the RPD PSS, including the race and gender of RPD PSS members; how members are selected for the RPD PSS; and the necessary qualifications to become a member of the RPD PSS.
15. All records regarding disciplinary records of RPD PSS members;
16. All records of audits and performance evaluations related to the RPD PSS as a unit.

Investigative Reports

17. All records sufficient to identify, by name and rank, every officer involved in a police-involved death⁶ of a civilian and all investigative reports about the incident.
18. All records concerning the death of Daniel Prude, including but not limited to, all communications among RPD officials and all communications between RPD and other government officials.
19. All investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints.
 - a. Records sufficient to identify the total number of internal investigations concerning alleged misconduct by police officers opened by the RPD per calendar year, broken down by the subject of the investigation (the categories used internally to categorize complaints are sufficient for the purposes of this request). For each category of investigations, please also provide the data broken down by the outcome (*e.g.*, substantiated, unsubstantiated, or open) of the investigation; and
 - b. For substantiated allegations in each category, identify what disciplinary action was taken, if any.

Diversity in the Ranks

20. Records sufficient to identify the total numbers of department personnel broken down by race and gender for the following ranks:
 - a. Cadet;
 - b. Police officer;
 - c. Detective;

⁶ As used herein, the term "police-involved death" includes, but is not limited to: (1) any civilian death that is related to, or occurs during, the course of police use of force (as defined herein) -- or threatened use of force; (2) any civilian death that occurs in the custody of the police; or (3) any civilian death that is related to, or occurs during, the course of a "stop" (as defined herein), a field interview, or when fleeing from the police.

- d. Sergeant;
- e. Lieutenant;
- f. Captain; and
- g. All ranks above captain.

Policies

21. All current policies⁷ governing officer conduct, including but not limited to all directives, orders, guidance, procedures, memoranda, rules, regulations, forms, and other statements of policy concerning:
- a. Bias-based policing and racial profiling;
 - b. Asset forfeiture and property seizures;
 - c. The use of spit hoods, spit masks, mesh hoods, spit guards, or any similar restraint devices;
 - d. Mental health, including all RPD interactions with individuals experiencing a psychological emergency or otherwise demonstrating signs of emotional distress;
 - e. Interactions with protesters, including any policies related to the use of pepper spray, tear gas, and drones;
 - f. Equal employment opportunity; and
 - g. Strip searches and body searches.

Trainings

22. All training materials⁸ used by the RPD, including but not limited to all training materials concerning:
- a. Investigation of civilian complaints;
 - b. Use of force, including but not limited to materials that address the circumstances under which the use of force is permitted and training materials that address how to document incidents when force is used;

⁷ To the extent that the Department does not maintain policies concerning any of these subjects, please indicate that in writing.

⁸ To the extent that the Department does not conduct trainings on any of these subjects, please indicate that in writing

- c. De-escalation strategies and tactics;
 - d. The use of spit hoods, spit masks, mesh hoods, spit guards, or any similar restraint devices;
 - e. Mental health, including all RPD interactions with individuals experiencing a psychological emergency or otherwise demonstrating signs of emotional distress;
 - f. Interactions with protesters, including any training related to the use of pepper spray, tear gas, and drones;
 - g. Conducting pedestrian stops, vehicle traffic stops, and field interviews; and
 - h. Cultural diversity, procedural justice, and cross-cultural awareness and cross-cultural competency based on race, ethnicity, immigration status, LGBT status, and disability.
23. For each training program on the topics listed in Request 22, records sufficient to identify the following information:
- a. The total number of training programs that have been held on each topic during the Relevant Time Period;
 - b. The frequency with which training programs have been held on each topic during the Relevant Time Period;
 - c. Policies and procedures indicating the frequency with which cadets, police officers, detectives, sergeants, lieutenants, captains, and all ranks above captain were/are required to participate in and re-attend training programs on each topic during the Relevant Time Period; and
 - d. The number of cadets, police officers, detectives, sergeants, lieutenants, captains, and all ranks above captain who attended each training program on each topic each time such training program took place during the Relevant Time Period.

Collective Bargaining Agreements

24. All collective bargaining agreements to which the RPD was a party during this request's time period, including any supplemental agreements, addendums, annexes, memoranda of understanding, or any other written document reflecting modification or clarification of the collective bargaining agreements.

I respectfully request that you conduct searches of all electronic and paper/manual indices, filing systems, and physical locations for all records relating to the subject of the request.

With respect to any records stored electronically, I request disclosure of all accompanying metadata. *See Irwin v. Onondaga*, 72 A.D. 3 14 (4th Dep't 2010) (metadata is subject to disclosure under FOIL).

I request that you provide records to me via e-mail, although I would also accept a flash drive, CD-ROM, or a cloud storage link. With respect to the form of production, I request that responsive electronic records be provided electronically in their native file formats wherever possible. *See* N.Y. Pub. Off. Law § 87(5)(a). Please provide all data in electronic spreadsheet format (.xls or .csv format where possible). If disclosure of some or all records in native file formats is impossible—or of if the native file formats cannot be opened using commercial software available to the public—then I request that the records be provided electronically in PDF format, in the best image quality in the agency's possession. In the event certain responsive records are unavailable in electronic format, please provide hard copies. We agree to compensate the RPD for the cost of duplicating and providing paper copies of any responsive records that cannot be produced electronically, as provided by law.

Except where explicitly noted, we expressly exclude from these requests individually identifiable information or other private individual information. *See* N.Y. Pub. Off Law § 89(2-b).

If a record contains material deemed exempt pursuant to a FOIL exemption, please redact only the exempt portions and release all non-exempt portions, as required by FOIL. *See Xerox Corp. v. Th. of Webster*, 65 N.Y.2d 131, 133 (1985) (non-exempt material “should be redacted and made available”).

If the Request is denied in whole or in part, please justify all denials in writing by reference to specific FOIL exceptions and provide detailed explanations for why such exemptions apply. *See* N.Y. Pub. Off. Law § 87(2); *Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 275 (1996) (“[T]o invoke one of the exemptions of section 87(2), the agency must articulate particularized and specific justification for not disclosing requested documents.”) (internal quotation omitted). Additionally, please provide the name and address of the person or body to whom an appeal should be directed.

Pursuant to N.Y. Pub. Off Law § 89(3)(a), your response is respectfully requested within five (5) business days of receipt of this request, including a clear statement as to whether the RPD intends to reject any request. Please furnish any responsive, non-exempt records at that time, or within a reasonable period thereafter to the undersigned.

Thank you in advance for your cooperation.

September 15, 2020

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Sincerely,

/s/ Philip Urofsky

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